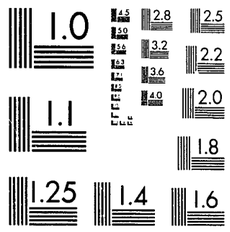

DEALING WITH DANGEROUS OFFENDERS

VOLUME I

FINAL REPORT

February, 1983

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PREFACE AND ACKNOWLEDGEMENTS

We began work on this project with markedly different perspectives on the subject of "dangerous offenders." These were based at least partly in our different academic training. Estrich is a lawyer; McGillis a psychologist; and Moore a policy analyst. But we also probably differed in our basic ideological orientation. What united us was a general interest in imagining plausibly just and effective responses to the public concern about crime, and a special curiosity about the potential of proposals designed to focus the attention of the criminal justice system on "dangerous" offenders. What surprised us was that, over the course of 18 months of observation, reading and deliberation, we were able to work out a shared conception of how much potential policies focusing attention on "dangerous offenders" contained, and where in the operations of the criminal justice system the potential was the greatest. This report is a reflection of that shared conception.

In reading the views contained in this report, we had the benefit of advice, information and counsel from an exceptionally wise, well-informed and talented group of collaborators. Philip B. Heymann and Lloyd Ohlin of the Harvard Law School and Cheryl Martorana and Robert Burkhart of the National Institute of Justice created the opportunity for us to do the work, and continued to provide support and encouragement. Phil Heymann, in particular, lent the great weight of his wisdom, charm and intelligence at the early stages of the

project where the problems were being defined, and the personal relations developed. The ultimate success of the project owes much to his careful nurturing.

In addition, we benefited enormously from the counsel of our Steering Committee which met three times with us over the course of the project. This group included Superintendent Richard Brzeczek of the Chicago Police Department, Professor Alfred Blumstein, Professor Alan Dershowitz, Dr. Peter Greenwood, Assistant Attorney General D. Lowell Jensen, Professor John Monahan, Professor Lloyd Ohlin, Assistant Attorney General Jonathan C. Rose, Professor Alan Stone, Professor James Q. Wilson and Professor Marvin Wolfgang. Some special consultants were also willing to attend these meetings and give us the benefit of their knowledge and advice. These included Shirley Melnicoe of the National Institute of Justice on "Policing," Dan Freed on "Bail," Park E. Dietz and Robert Fein on the Mental Health system, Alden Miller on the Juvenile Justice system, Edward Rendell and John Rieck on Prosecutorial policies, and Robert Mostoeller on legal defense of career criminals.

The report also drew heavily on papers prepared for the conference of academics and practitioners, and on the discussion that took place at that conferece. Those who preparerd papers were: Alfred Blumstein, Barbara Boland, Ken Carlson, Jacqueline Cohen, John Eck, Floyd Feeney, Ken Feinberg, Brian Forst, William Gay, John Goldkamp, Peter Greenwood, John Monahan, Lloyd Ohlin, Michael Sherman, Michael Smith, Mary Toborg, Paul Tracy, and Marvin Wolfgang. In

addition, David Nemecek, Director of the F.B.I.'s National Crime Information Center gave a lucid account of the national state of crinminal justice records. Other attendees and active discussants included: Thomas Atkins, the Honorable Richard Banks, the Honorable William B. Bryant, Zachary Carter, the Honorable Julian Houston, Dennis Nowicki, David Nurco, the Honorable Rudolph Pierce, Walter Prince, Oliver Revell, Harry Tischler, John Rieck, Dr. Henry Steadman, and William Weld.

We also benefited from enormously competent and resourceful administrative assistance. Anita B. Moulton, administrative officer of the Program in Criminal Justice at the Kennedy School of Government, kept all of the various aspects of the project moving smoothly: she arranged meetings, kept track of the accounts, made sure that people got paid, and managed the typing and preparation of the manuscripts. She was the true manager of the project. She was assisted by the cheerful competence of Diana Murray and Nancy Sawdon who assumed most of the burden of typing, and by Natalie Burnett who assisted Susan Estrich.

Finally, we owe a special debt to William Spelman. He was an outstanding "research assistant" who performed all the myriad, thankless tasks of this job exceptionally well. Indeed, it was his energy that often got us over tough spots as our energy flagged. But he was a great deal more than a tireless aide. His independent intellectual contributions had a great impact on our conception of the problem and our conclusions. In addition, our report is suffused with

his precise editorial and substantive judgments. He has been more a professional colleague than an assistant.

To all of these people, we are extremely grateful. But we also accept full responsibility for any errors or failures of judgment in our report.

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Ideas that shape public policy fit the temper of their times. Otherwise, they lack the currency necessary to legitimate and guide governmental action.[1] The idea that crime could be effectively attacked by incapacitating dangerous offenders has this quality.

One reason is that the idea addresses an important public concern. Americans are sufficiently afraid of crime to keep ranking it among the most urgent of social concerns. Whether this fear is rational or not is, of course, an important question.[2] But even if the fear is irrational, it nonetheless gives impetus to collective action and therefore currency to proposals that plausibly address the problem.

The idea also has broad philosophical appeal. To conservatives, the appeal is evident. It reestablishes the idea that individuals should be held responsible for their acts, recognizes the incorrigible wickedness of some individuals, and emphasizes the community affirming dignity (rather than the potential viciousness) of socially sanctioned punishment. To liberals, grudging tolerance of the idea is understandable only against the background of frustration with the liberal programs to control crime -- juvenile delinquency programs, rehabilitation in prisons, and broad social programs to promote economic and social justice. Given the alleged failures of these programs to control crime, and an enduring liberal commitment to the idea that many people who commit crimes are innocent victims of

circumstances susceptible to rehabilitation if circumstances change, it is tempting to diagnose the difficulty in terms of a small number of truly incorrigible people.[3] Besides, it is hard to oppose the idea that frequent violent offenders should be punished harshly and insulated from the rest of society. Both liberals and conservatives can agree, then, that the best use of prisons is to incapacitate dangerous offenders.

It also helps that recent social science "discoveries" provide a "scientific" basis for believing that a narrowed focus on dangerous offenders could work to control crime. Specifically, persuasive evidence has accumulated indicating that criminal offending is highly concentrated, with the worst 5 percent of criminal offenders accounting for half of the serious violent crime.[4] It is also important that the worst 1 percent of offenders commit crimes at such a high rate (20 or 30 serious offenses per year) that simply "incapacitating" such offenders would be worth the enormous cost of imprisonment even if no compelling interest in justice required their imprisonment, and no important deterrent or rehabilitative effects resulted. This finding would not be practically significant if it were impossible to distinguish the high rate offenders from low rate offenders. But recent social science has made advances in this area as well. On the basis of personal characteristics such as prior criminal conduct, drug abuse history, and employment history, offenders can be separated into groups that have dramatically different average rates of offending.[5] Moreover, while the assignment

of offenders to high and low rate groups necessarily involves errors (that is, low rate offenders are erroneously assigned to the high offending group, and high rate offenders to the low offending group), these errors are much smaller than they once were. So, the idea of focusing attention on dangerous offenders assumes a freshness and a technical aura that add to its appeal.

Finally, the idea has the proper relationship to existing institutional capabilities: it is neither so far from current practice as to be utopian, nor so close as to offer no hope for dramatic improvements. Indeed, the current situation with regard to prison capacity and sentencing policies make the whole idea of a selective focus nearly inevitable. In many states -- including those where crime is the greatest problem -- not enough jail capacity exists to produce currently mandated punishments: like social security, the social obligation to punish is underfunded. In such states, it is inevitable that judges, prison administrators, and parole boards will focus prison capacity on those they reckon to be not only most deserving of punishment, but also on those they judge to be most dangerous. While such a focus is less inevitable at the "front end" of the criminal justice system (among police and prosecutors), it is feasible and potentially significant in determining which offenders will spend how long in prison.

It is not surprising, then, that throughout the country, judges, district attorneys, and police executives are using their discretion to focus the attention of their agencies on "career criminals."

Judges are urged to shift from a philosophy of "just deserts" or "rehabilitative sentencing" to one of "selective incapacitation".[6] Prosecutors develop special units to assure that "repeat offenders" will be prosecuted quickly and to the full measure of the law: plea bargaining is restricted or dispensed with entirely, and special measures are taken to assure that cases against dangerous offenders remain strong.[7] The police experiment with "perpetrator oriented patrols" which follow suspected high rate offenders, "felony augmentation" programs which provide special investigative efforts for cases involving "chronic recidivists," and "robbery enhancement" programs designed to crack down on the offense that is committed disproportionately by "violent predators".[8] And conferences are held to build commitment to and share information about managing these programs.[9]

To those who think that social policies should be built on a base of confident knowledge and a shared deliberation of their broadest implications, the fact that the criminal justice system is apparently rushing headlong to create a special focus on dangerous offenders is anathema. After all, there are important reasons to doubt the justice and effectiveness of a selection focus on dangerous offenders. Indeed, viewed from some perspectives, sharpening the focus of the criminal justice system on dangerous offenders is a shocking idea. As a philosophy of sentencing, it attacks the principle of "just deserts": offenders will be punished for having a bad character and presenting future risks to the society as well as for past acts. As a

strategy for prosecutors and police, it risks the presumption of innocence and creates a license within which ad hominem motivations might grow to corrupt investigative and prosecuting agencies. And there are lots of reasons to suspect that the crime reduction benefits of a sharpened focus on dangerous offenders will be marginal at best. Perhaps offending is less concentrated than it now appears. Perhaps our discriminating capabilities are weaker than they now appear. Perhaps incapacitated dangerous offenders will be replaced by other equally dangerous offenders. And perhaps all along our institutions have been succeeding in focusing attention on dangerous offenders, so little more can be gained by simply labeling our implicit policy. The risks of injustice and corruption on one hand, balanced against marginal crime control benefits on the other, do not add up to a strong argument for sharpening the focus of the system. And, in the absence of a full debate and much more information, this view of the likely consequences of developing a selective focus on dangerous offenders must be taken seriously. From the point of view of those who aspire to rational policy-making, then, the society, and particularly those who are leading the charge for a selective focus on dangerous offenders, seem irresponsible.

To those who understand that public policy in a democracy is generally shaped by some combination of circumstance and fashion -- occasionally informed by facts, reason and a sense of proportion -- the current situation is quite endurable. In fact, the situation creates important responsibilities and opportunities. The

responsibilities are to play catch-up in working out the important implications of proposals and programs designed to sharpen the focus of the criminal justice system on dangerous offenders -- to locate the social values at stake in the evolving policy, to imagine the many different ways that the operations of the system could be adjusted to give the system a more discriminating focus, and to identify the key uncertainties that must be resolved (or simply tolerated) in deciding whether and exactly how to build a sharpened focus. The opportunity is to use our developing experience as an experiment to guide the development of the policy. Like most social policies, then, the policy of focusing special attention on dangerous offenders is happening too fast to allow us to answer all questions in advance, but slowly enough to allow us to learn from our experience and make adjustments as we go along. The intellectual and social challenge, then, is to develop a framework within which that experience can be evaluated, and to make systematic preparations for using current and future experience to guide the evolution of the policy.[10] That is the purpose of our report.

In Part I, we locate the idea of dangerous offenses and dangerous offenders in the context of a more general understanding of the "crime problem" and the "criminal justice system." Our aim is to see exactly how much of the problem can usefully be attacked by focusing on dangerous offenses and dangerous offenders, and what would remain even if the society were brilliantly successful in sharpening the focus of its criminal justice system. We will begin with an analysis of crimes

and fear, then turn to our understanding of how crimes occur, what role dangerous offenders play in causing them, and what other sorts of offenses and offenders will also inevitably be swept into the criminal justice system. We conclude by considering "threshhold objections" to the general idea as a way of developing clear conceptions of the social values at stake in focusing attention on dangerous offenders.

In Part II, we will look more closely at policies and programs designed to sharpen the focus of the criminal justice system on dangerous offenders. We examine proposals for enhancing the selectivity at four stages of criminal justice system processing: at sentencing, at pretrial detention hearings, at prosecution, and at investigation. We will also analyze the record keeping necessary to support the enhanced focus.

Finally, in Part III, we will offer our conclusions about the overall attractiveness of encouraging selectivity in the criminal justice system, including an assessment of the major risks and opportunities. In addition, we develop an agenda of research that can usefully guide the development of a selective focus in the criminal justice system -- building momentum where that seems warranted, and slowing things down with cautions when worrisome results appear.

Notes

1. See, for example Laurence E. Lynn, Jr., Knowledge and Policy: The Uncertain Connection (Washington, D.C.: National Academy of Sciences, 1978).

2. We consider the bases and the effects of public fear in Chapter 1, "Public Danger and the Fear of Crime."

3. See Jan M. Chaiken and Marcia R. Chaiken with Joyce C. Peterson, Varieties of Criminal Behavior: Summary and Policy Implications (Santa Monica: Rand, August 1982) for an exposition of the view that different kinds of offenders should receive different kinds of treatment from the criminal justice system.

4. This is suggested by distributional parameters for the Rand Second Inmate Study, given in John E. Rolph, Jan M. Chaiken, and Robert L. Houchens, Methods for Estimating the Crime Rates of Individuals (Santa Monica: Rand, 1981) and developed in the Appendix to Chapter 3, below.

5. Peter Greenwood (with Allan Abrahamse) demonstrates this in Selective Incapacitation (Santa Monica: Rand, 1982), pp. 47-66.

6. Peter Greenwood, in Selective Incapacitation, his paper for our Conference, and numerous other publications, has led the charge for selective sentencing policies.

7. The nationwide movement to establish career criminal units began in the mid-1970's and continues to this day. A history of this movement, and an evaluation of the usefulness of these units in ensuring the conviction of the worst offenders, may be found in Eleanor Chelimsky and Judith Dahmann, Career Criminal Program National Evaluation: Final Report (Washington, D.C.: U.S. Government Printing Office, 1981).

8. Police experiments began at a local level with "location-oriented" and "perpetrator-oriented" patrols, and other Serious Habitual Offender (SHO) programs; see Tony Pate, Robert A. Bowers, and Ron Parks, Three Approaches to Criminal Apprehension in Kansas City: An Evaluation Report (Washington, D.C.: Police Foundation, 1976). They became the vogue when Federal funding began with the Integrated Criminal Apprehension Program (ICAP); see for example, Thomas Beall, A Case Study Evaluation of the Implementation of the Integrated Criminal Apprehension Program in Stockton, California (Washington, D.C.: University City Science Center, 1981).

9. For example, LEAA sponsored a conference for project directors of police ICAP and prosecutor's Career Criminal Programs in 1977, going so far as to publish an integrated Program Guide for the benefit of jurisdictions involved in both efforts. Program Guide, Integrated Criminal Apprehension Program and Career Criminal Program (Washington, D.C.: Law Enforcement Assistance Admnistration, 1977).

10. For two accounts of this information-integration process see Charles Lindblom, The Intelligence of Democracy: Decision Making through Natural Adjustments (New York: Free Press, 1965) and Donald T. Campbell, "Reforms as Experiments," in Elmer L. Struening and Marcia Guttentag, eds., Handbook of Evaluation Research, volume I (Beverly Hills: Sage, 1975).

PART I

BASIC PREMISES OF "DANGEROUS OFFENDER" PROGRAMS

Chapter 1

PUBLIC DANGER: CRIME AND THE FEAR OF CRIME

America is assailed by crime. In 1980, three out of ten American households claimed to be victimized at least once by criminal offenses.[1] Perhaps not suprisingly, Americans are also afraid of crime. One half the people living in large cities report that they are afraid to go out alone at night.[2] In short, a palpable sense of public danger infects American communities -- particularly large cities.

This sense of danger is the starting point for our analysis of proposals to sharpen the focus of the criminal justice system on dangerous offenders for three reasons. First, it is the magnitude of the public danger associated with crime and the fear of crime that gives impetus to, and is the ultimate aim of, such policies. Without the imminent sense of public danger, there would be little interest in such proposals. Without hopes for lessening public danger, there is nothing to balance against the substantial risks to justice that such policies might entail. So, a clear-eyed sense of the magnitude of the crime problem is essential to any responsible appraisal of such policies.

Second, the concept of public danger is crucial to the definition of "dangerous offenders." Presumably, dangerous offenders are those who commit the sorts of offenses that result in violence and fear, and do so often and persistently. Without knowing what sorts of offenses

create the sense of public danger, it is difficult to know which offenders should be considered "dangerous".

Third, much of the difficulty of defining "dangerous offenders" begins with ambiguities in the concept of public danger. As we will see, the link between actual violence, risks of violence, and fear is a complex one. Real violence among strangers may form the core of the crime problem. But it is a small core, and there is much else that creates palpable losses to victims, fear among the citizenry, and work for the criminal justice system. Violence among intimates, for example, looms large in our crime statistics.[3] Justice (and the relative ease of solving such crimes) may require the criminal justice system to give close attention to such offenses. But the significance of such offenses in stimulating a sense of public danger is uncertain. On the other hand, many offenses that do not result in serious physical injury nonetheless create palpable fears.[4] This is true not only for robberies that involve only threats of force, but also for burglary that holds the potential for violence and leaves victims feeling violated, for "purse snatchings" that are classified as larcenies from the person, and even for public drunkenness and disorderliness. If we were to define dangerous offenders stringently, we would give heavy weight to actual violence among strangers, and treat other offenses less seriously.[5] When this definition is used to define dangerous offenders, a relatively small group of offenders would be singled out, and they would fit the imagery of "violent

predators," "criminal recidivists," "repeat offenders," and so on. But they might not account for all that much violence and fear since a wide variety of offenses and even non-criminal conduct go into producing a sense of public danger. On the other hand, if one were to embrace a definition of dangerous offenses that included the many sorts of acts that sustain fear, a large number of people for whom the designation "violent predator" or "dangerous offender" would be inappropriate would nonetheless be included.

Right at the start of the analysis, then, a difficulty appears. Because the link between real violence and the sense of public danger is tenuous, to the extent that we define <u>dangerous</u> offenders as <u>violent</u> offenders, focusing on them will do less to reduce the sense of public danger than we might imagine.[6] The alternative, which is to define dangerous offenders in terms that are closer to the activities that sustain a sense of public danger, would broaden the definition of dangerous offenders beyond recognition and drag into the net so many offenders that the practical virtues of the proposal, to say nothing of its justice, would disappear. To see exactly how great this problem is, and how significant "violent predators" might be in creating a perception of public danger, it is necessary to look closely at current patterns of victimization, and sources of public fear and indignation.

A. <u>How Dangerous is America</u>?

In 1980, the murder rate, according to the UCR, was 10.2 per

100,000 inhabitants over 12. The rate has been relatively stable since 1970, fluctuating between 7.8 and 9.8 in the last ten years, with 1974 as the high point and 1970 the low point. The 1980 rate is a 5.2 percent increase over 1979. 77 percent of the victims were male; 23 percent female; 53 percent white; and 42 percent black.

In murder cases, the UCR provides information as to victim-offender relations. In 1980, the breakdown was as follows:

TABLE 1: Victim-Offender Relationships in Murder Cases

Family (including 8.3% spouse)	16.1%
Acquaintance/Friends	34.8%
Stranger	13.3%
Unknown	35.8%

From the above, it follows that only 20 percent of all known relations in murder are stranger-to-stranger. If the same percentages held true for cases in which the relation was unknown, then only 2.1 people in 100,000 were murdered in 1980 by a stranger. And even if all cases in which the relationship was unknown were stranger-to-stranger murders, there would still have been only 4.6 such murders per 100,000 inhabitants in 1980.

The UCR figures on murder suggest that the risk of dying at the hands of a stranger is quite small. Rates of victimization for other crimes of violence are higher. With the exception of 1976, when the violent crime rate, according to the UCR, dropped slightly, the rate of violent crimes (murder, rape, robbery and aggravated assault) had

been increasing at small and steady increments throughout the decade.

TABLE 2: Crimes of Violence, per 100,000 Inhabitants

Rape	36.4
Robbery	243.5
Aggravated Assault	290.6

All told, the UCR rate of rape, robbery, and aggravated assault combined amount to 570.5 per 100,000, which means that roughly 1 in 200 Americans was victimized by a crime of violence in 1980. Adding in burglary certainly ups the odds: the rate for 1980 was 1,668 per 100,000, which means that roughly 1 in 50 Americans was victimized either by a crime of violence or by burglary that was reported to the police.[7]

Virtually every robbery or assault carries with it the potential of some injury to the victim, and the same may be true of many burglaries. In this sense, they are dangerous. But how often do they in fact result in injury? According to the National Crime Survey, "victims of violent attack were frequently injured, but relatively few were hurt seriously enough to require hospitalization."[8] Of the 5,941,000 victimizations reported in the NCS from the crimes of rape, robbery, aggravated assault and simple assault in 1978, 1,663,000 were accompanied by injury. This does not include a figure for injuries received by victims in rape, for which the report gives no figure. We will assume all rapes to involve injury.

Table 3, which we have constructed from the NCS data, is instructive. Overall, the NCS data suggest about a 1 in 100 chance of being injured in a crime of violence. With the exception of simple assault, every one of these injury-producing offenses is more likely to be committed by a stranger than by a nonstranger; in the case of both rape and robbery with injury, it is substantially more likely.

TABLE 3: Injury-Producing Crimes per 1,000 Inhabitants

Crime	Per 1,000 over 12	Stranger	Nonstranger
Rape	1.0	0.7 (70%)	0.3 (30%)
Robbery with Injury	1.9	1.4 (74%)	0.5 (26%)
Aggravated Assault with Injury	3.3	1.9 (58%)	1.4 (42%)
Simple Assault with Injury	4.3	2.0 (47%)	2.3 (53%)
Total	10.5	6.0 (57%)	4.5 (43%)

It is also possible, from the NCS data, to determine the relative likelihood, within each category of crime, that a stranger or a nonstranger will injure the victim (Table 4).

TABLE 4: Injuries per 10,000--Stranger v. Nonstranger

Crime	Stranger	Nonstranger
Robbery		
Total	4.5	1.4
With Injury	1.4	0.5
% w/ injury	31%	36%
Aggravated Assault		
Total	6.2	3.5
With Injury	1.9	1.4
% w/ injury	31%	40%
Simple Assault		
Total	9.8	7.4
With Injury	2.0	2.3
% w/ injury	20%	31%

From these data, it is clear that the risk that injury will result from a violent victimization is substantially greater when the offender is a nonstranger to the victim than when the offender is a stranger. Within the stranger-to-stranger category, 31 percent of all robberies, 31 percent of all aggravated assaults, and 20 percent of all simple assaults result in injury. In short, while both robberies and assaults are more likely to be committed by a stranger, they are more injurious when committed by a nonstranger.

Further, one can assess from the NCS data the relative risks of injury, based on demographic factors, for robberies and assaults.

Notably, the elderly are the group most likely to be injured in robberies, but among the least likely to be injured in assaults. And there is little difference between the injury rates for men and women who are victimized (Table 5).

Even these figures may overestimate the real risks faced by individuals in stranger-on-stranger crimes. For it seems that the overwhelming majority of injuries which are suffered, in the minority of cases which do result in injury, may not be serious ones.

In 1978, according to the NCS data, only 7.5 percent of the victims of crimes of violence received hospital care for their injuries. And 82 percent of those who did receive hospital care received their care only in the emergency room; only 14.9 percent were required to receive inpatient care. In other words, only 1.2 percent of all victims of violent crimes were actually hospitalized as a result of their injuries.

These figures confirm earlier work on the severity of the injuries resulting from crimes on violence.

Using the 1972 NCS study of eight major American cities in conjunction with the UCR categories, Hindelang and his associates found that only 12 percent of all robberies, 18 percent of all aggravated assaults, and 5 percent of all simple assaults resulted in injuries serious enough to require any medical attention.[9] In most crimes resulting in injury, they found, the overwhelming number of injuries fell into the category of bruises, black eyes, cuts or scratches.

TABLE 5: Percent of Victimizations Resulting in Injury

Characteristic	Robbery	Assault
Sex		
Both sexes	31.8	28.2
Male	31.1	27.7
Female	33.4	28.8
Age		
12-15	18.3	37.9
16-19	24.8	30.3
20-24	36.5	25.2
25-34	33.0	27.3
35-49	39.1	25.8
50-64	37.7	18.8
65 and over	40.0	20.6
Race		
White	33.1	28.0
Black	26.7	30.8
Victim-offender relationship		
Involving strangers	31.0	24.7
Involving nonstrangers	34.7	33.3
Annual family income		
Less than $3,000	27.5	33.9
$3,000-$7,499	32.5	32.2
$7,500-$9,999	30.3	28.2
$10,000-$14,999	42.6	25.7
$15,000-$24,999	30.1	27.2
$25,000 or more	16.0	21.2
Not available	28.6	32.4

Risks of victimization are not evenly spread among the population. Victimization rates vary tremendously -- although it is not always clear whether the differences reflect different risks, or different precautions taken, or, as is most likely, both.

According to the NCS data, females over 65 have the lowest victimization rate for crimes of violence (all rapes, robberies and assaults) of any age/sex group (6.4 per 1,000); the rate for males 16-19 years old (86.4) is nearly 14 times as great, and for males 22-34 years of age (54.7) 8 times as great.

As family income increases, victimization decreases. Those earning under $3,000 have a rate of 56.3 per 1,000; the rate falls, steadily with each category, to 30.5 for those whose family income exceeds $25,000.

Metropolitan areas are more dangerous than nonmetropolitan areas (21.6 per 1,000), and center cities are the most dangerous. In the center city of metropolitan areas of 1,000,000 or more the rate for crimes of violence is 49.5 in small central cities (metropolitan population of 50,000 to 249,000) the rate is 42.3. Notably, intermediate size cities are not appreciably less dangerous than the largest ones: the rate for central cities in the 500,000 to 1,000,000 category is 48.3, and in the 250,000 to 500,000 category it is 43.8.

If the crime statistics are relied upon, it would appear that America is simply not that dangerous -- particularly for middle-class white Americans living outside the center cities. Yet that picture

may be somewhat deceptive for three reasons. First, we have been measuring only the annual risks; odds do add up over the course of a lifetime. Second, rates of household victimization may be more important for many Americans than individual rates; most of us are concerned not only with our own personal security but equally with the security of our families. Third, rates of victimization for crimes of violence -- whether personal or household, annual or lifetime -- measure, by definition, only crimes of violence; they exclude crimes, notably armed burglaries, which not only may be very costly for the victim (both financially and emotionally), but also carry with them, at least at the outset, the risk of personal injury had someone been at home. Indeed, one recent survey reported that in 1980, three in ten households were estimated to have experienced one or more victimizations by crimes against one or more of their members or their common property.[10]

B. Fear of Crime

Fear is the subjective counterpart of dangerousness. It is a function of an individual's perception of the risk he faces and his valuation of the harm involved. As with dangerousness, as perception of risk increases, or as the valuation of the potential harm grows, fear becomes greater.

This definition itself suggests certain initial answers as to why even individuals who face relatively low objective risks are nonetheless highly fearful. Part of the answer certainly lies in

their valuation of the harm involved, a valuation which may well include not only measures of the actual harm to be suffered (broken bones, bruises, lost property, sexual abuse) but also its affront to social order, particularly where injury is inflicted intentionally by another person. This, in turn, suggests certain limits on our ability to reduce fear -- even if we could succeed in reducing somewhat the actual and perceived risks.

1. WHAT FRIGHTENS AMERICANS?

"The Figgie Report on Fear of Crime", released in September 1980, reported that 40 percent of all Americans are highly fearful that they will become victims of violent crime.[11] While that report was the subject of methodological attacks, there is little debate about the general proposition. An eight-city victimization survey, for instance, found that 45 percent of all respondents limited their personal activity because of their fear of crime.[12] A statewide study in Michigan found that 66 percent of all respondents said there were some places they would not go because of crimes;[13] in Kansas City, 67 percent of those surveyed avoided some parts of the city because of fear of victimization.[14] Similarly, 28 percent of all men and 61 percent of the women in a national Gallup sample in 1977 said that they would be afraid to walk at night; those figures were up 12 percent in the case of men and 17 percent in the case of women from 1968, when the same question had been asked.

A number of studies have been conducted in recent years seeking

to isolate who is afraid of crime and what they are afraid of. These studies, point to a number of conclusions.[15]

(a) Who is Afraid. Sex and age strongly correlate with fear of crime. Elderly women are the most afraid, followed by young women, elderly men and young men. The order for actual victimization is exactly the opposite.[16]

It does not necessarily follow that the fear felt by women and the elderly is irrational; it may be that the lower victimization rates for these groups are the products of their fear, and of the limitations on exposure which fear generates. It may also be that young men are at some level more fearful than they admit, or that their lack of fear is more a product of social conditioning than anything else.

Other demographic variables present a murkier picture. Some studies have found blacks to be more afraid than whites; indeed, one study found race an even stronger predictor than sex.[17] The eight-city victimization survey found that poor people tend to limit their activity out of fear more frequently than those of higher income groups, and the uneducated more than the educated.[18] To the extent that such variables serve as indicators of residency in high crime central cities, the fears are understandable.

Surprisingly, past victimization bears only a modest relationship, if any, to fear. Researchers have found that victims of

contact and violent crimes were more likely than those who had never been victimized to be afraid.[19] But with the exception of the elderly, most of these differences between victims and non-victims, are not particularly strong.

(b) What They Fear. A number of studies have found that people are more fearful of crimes of violence than of property crimes. This is attested to not only by the answers they volunteer, but also by the actions they take. In studying burglary, for instance, John Conklin concluded that "(j)udging by the types of precautions that people take, they seem to fear personal attacks more than loss of property through theft."[20]

"Strangers" are the most feared. People don't expect their would-be attackers to look like them or to come from their neighborhoods. One study concluded that many mugging victims in New York did not believe at first that they were being robbed because their assailants were better-dressed and better-mannered than they expected.[21]

The fear of strangers may in fact be a surrogate for distrust of those of a different race, ethnic background or economic class. The proportion of crime people believe is interracial, inter-class, or inter-ethnic tends to be much higher than the statistics in either official or victimization studies report.[22]

Youths are feared as well, particularly by adults and the elderly. In four areas of Portland, 75 percent said that they

crossed the street when they saw a gang of teenagers;[23] a survey in Baltimore found 48 percent of the sample crossed the street to avoid even a single strange youth while walking.[24]

Sally Merry asked residents of an urban housing project what they thought was the most dangerous spot in the area of the project. Their answer was an area where youths tended to congregate and to drink beer and play music. In fact, according to a victimization survey conducted at the same time, not a single crime had taken place in that area.[25]

(c) Scary Circumstances. Virtually every study that has addressed the question has found people more fearful at night than during the day. In the eight-city victimization survey, for example, 53 percent of the respondents said that they felt "very safe" when out alone in their neighborhoods during the day; at night, only 18 percent felt very safe.[26]

Moreover, most people -- no matter where they live -- tend to view their own neighborhoods as safer than "other places," a conclusion which seems entirely consistent with the fear of strangers. As Hindelang suggested after reviewing the victimization data, crime is perceived primarily as a "nonlocal" problem.[27] When asked whether crime was increasing nationally in the eight-city survey, 82 percent of the respondents answered affirmatively; when asked whether it was increasing in their neighborhoods, affirmative responses dropped to 40 percent.[28]

Subways, downtown areas, and parks have been singled out by studies as places perceived to be particularly dangerous. In Philadelphia, 77 percent of the black adults in households with 17 year old boys said that they were making more efforts than before to avoid the subways; the teenage sons agreed that the subways were the most dangerous places.[29] In Detroit, 52 percent of the respondents told researchers that they avoided going downtown.[30] In a middle class Seattle community, residents rated a local park as one of the most dangerous places; police, comparing the park with other parts of the metropolitan community viewed it as relatively safe.[31]

(d) Triggering Fear: the Role of Incivilities. Most people have little first-hand experience with violent crime. But they are frequently exposed to disorder in their surroundings and in the behavior of others. Such disorder may become associated with unseen violence, and served as a trigger for fear of violent crimes.

For example, Nathan Glazer has pointed to the ability of the graffiti on New York City subway cars to produce anxiety and fear in the rider.

> He is assaulted continuously, not only be evidence that every subway car has been vandalized, but by the inescapable knowledge that the environment he must endure for an hour or more a day is uncontrolled and uncontrollable, and that anyone can invade it to do whatever damage and mischief the mind suggest...(W)hile I do not find myself consciously making the connection between the graffitti makers and the criminals who occasionally rob, rape, assault and murder passengers, the sense that all are part of one world of uncontrollable predators seems inescapable. Even if the graffitists are the least dangerous of these, their ever present markings serve to persuade the passenger that, indeed, the subway is a dangerous place...[32]

For those who don't ride the subways of New York, other small disturbances suggest a dangerous environment: unruly youngsters, dilapidated buildings, loud music, conspicuous alcohol and drug use. Conditions and disturbances of this nature were terms "incivilities" by a research group which studied fear and crime in Boston public housing projects.[33] The results of the study were striking. The researchers found that the level of fear in most of the housing projects was more a function of the level of incivilities present than of the level of crime. In ten of the fifteen projects, the level of fear (low, medium, or high) matched the level of incivility (for example, medium fear -- medium level of incivility). When a similar comparison was done for levels of fear and crime, no pattern emerged. Only six of the projects showed a match between levels of fear and crime, and four of the projects showed an inverse type relationships (low fear -- high crime, high fear -- low crime), something not found when comparing fear with incivilities. Given these relationships and the fact that the tenants considered vandalism, teen gangs, and harassments as among the biggest crime problems in the project, the report concluded that minor offenses were the most significant factor in resident fear levels.[34] The offenses may not be serious by

themselves, but the fear they generate is. Like the New York subway rider, the project resident is constantly reminded of a world of disorder behind which she pictures violence.

This phenomenon of minor incidents triggering fear of serious crime is not confined to urban areas. Small towns and suburbs may be even more likely to react to instances of disorders. An incident such as a marijuana arrest at a local school may set off a small scale panic over the rampant crime in the streets. Such were the events in a small California town which suddenly became alarmed over its crime problem. An examination of the residents' complaints revealed that their concern with crime in the streets stemmed from the events at the high school and local teenage activity such as cruising and hanging out.[35] These are hardly serious crimes, but they are disorderly enough incidents to disturb the residents and eventually lead them to conclude that there was a serious crime problem.

2. WHY AMERICANS ARE AFRAID OF CRIME

What explains the fear among Americans of violent crime? Riding in an automobile is objectively more dangerous, and yet one sees few surveys suggesting a steadily mounting fear of cars and the widespread adoption of self-protective measures against automobiles accidents. By the same token, other areas -- investment in medical care and emergency treatment, for example -- may well provide clearer opportunities to reduce harms through resource investment;

nonetheless, the polls suggest that Americans view crime as a much higher priority for policy-makers. Indeed, one recent survey even found that close to half of all taxpayers would be willing to pay more taxes for crime prevention -- a striking suggestion not only of the priority of crime as an issue of public concern, but also of the fear which people seem to be feeling.

Why?

A number of explanations suggest themselves to us.

(a) The Risk Involved. The most common explanations for fear is quite simply, that crime rates -- at least in some areas -- are high, and people know it. A number of studies provide limited confirmation of this explanation.[36] In Portland, for example, Yaden found that whites who lived in high crime areas showed higher levels of fear than those who lived in low crime areas.[37] Similarly, Boggs found that center city residents were more likely to perceive high crime rates and feel danger than those who lived in rural or suburban neighborhoods.[38] Fear was also correlated with crime rates in Hartford and Minnesota.[39]

But the correlation does not always hold. Boggs found rural residents to have higher perceptions of risk than suburban ones, although statistics suggested the opposite. In Toronto, Waller and Okihiro found a level of fear typical of a city with a much higher crime rate.[40] And Biderman and Skogan have separately argued that

correlations which are found between fear and reported crime may have more to do with the way public perceptions are formed by police reports than with actual risks in the community.[41]

Factors other than the actual crime rate also seem to enter into the public perception of risk. Changes in rates -- particularly increases -- have been shown to have an impact in raising fear; decreases, on the other hands, have shown less impact in reducing fear.[42] Moreover, absolute levels of crime may be more important than crime rates in shaping perceptions of risk. Cities such as Portland, Oregon, Albuquerque, New Mexico, and Phoenix, Arizona, according to recent UCRs, have crime rates as high or higher than New York or Philadelphia; nonetheless, they tend not to be perceived as "high crime" areas.[43]

Even if citizens have a relatively accurate picture of the overall crime rate in their community, they may still err in assessing the relative frequency of different types of crimes. In one study, Mark Warr found that those surveyed tended to overestimate the frequency of the most serious crimes and underestimate the frequency of the less serious.[44]

(b) The Threat to Social Values. Violent crime, like automobile accidents, plane crashes, and serious illnesses, presents a risk of serious injury to the individual. Those risks, however, are in some respects inherent in our society. Violent crime, on the other hand, "should" be controllable. And its existence poses a threat to

the basic values of our society.

An act of violent crime, particularly against a vulnerable or defenseless person, seems to signal a rejection of the commonly shared values and preferences which allow us to live together in civilized communities. It is a rejection of the basic respect for the life and physical well-being of others, that in Hobbes' view was the most important function of government to secure. It suggests a refusal to accept our shared sense of obligation to defend -- or at least not to exploit -- the frail and vulnerable. It signals a willingness, rejected by the majority, to express anger physically and to seek and enjoy power through the suffering of others.

In this sense, the harm of violent crime may be valued much more seriously than equivalent injuries from other sources. It is the sense that society, or at least some of the people in it, is "out of control," as much as actual injuries suffered, that may affect our valuation of crime. Even low levels of crime may be considered unacceptable, and may produce fear, both because they "should" be controllable, and because they signal a continuing rejection of the basic values that allow us to live freely together in communities.

Indeed, a number of studies have found that decreasing crime rates have been associated with increased concern and fear of crime. In a 100-year study of Boston, for example, Lane found that a steady decrease in crime was accompanied by growing concern and worry about crime and pressure to increase law enforcement efforts, which he

explained by a heightened intolerance and sensitivity to crime, even as it became less commonplace.[45] Similarly, Wolin has suggested that "(t)he more successful a society is in restricting both public and private forms of violence, the more difficulty it has in coping with or enduring violence when it does crop up."[46]

(c) Vulnerability and Loss of Freedom. Violent crime, as a source of injury, is unique in another respect as well. We are always vulnerable, no matter what we do, and the steps we do take at least to limit our vulnerability also tend to limit our freedom to work, to travel, and to live fully in our communities.

The risks of car accidents at least appear to be limited to when one is riding in a car or walking on the street. The risks of violent crime are always present, even if low: in one's home, on the street, at work, in a store. There is, quite simply, no way one can eliminate vulnerability. In this sense, violent crime resembles the rare disease which does not depend upon habits or heredity, but could strike at any time.

Most of us, though, don't spend too much time worrying about rare diseases. There's nothing we can do to prevent them, so we might as well forget about them and get along with living. But few of us can do that with the risk of violent crime. For while it is true that we are always vulnerable to a random violent assault, it is also true that we can take steps daily which may at least limit our vulnerability.

Recent surveys have shown that growing numbers of people are changing their lifestyles -- in large ways and small -- in an effort to limit their risks of criminal victimization. Crime is the second most frequent reason cited in national surveys by those seeking to move out of central cities. Because of crime, people are avoiding subways (77 percent, Philadelphia black adults with teenagers); staying home more at night (80 percent, Philadelphia black adults with teenagers);[47] and avoiding parts of the city (67 percent, 15 police beats in Kansas City).[48] Such steps serve as constant reminders of the presence of violent crime. The risks of violent crime are thus reinforced by the individual himself every day; the result may well be fear. Moreover, such steps necessarily result in an unwanted loss of freedom, and for some, particularly women, a loss of economic opportunities which cannot help but translate itself into anger, or at least concern, about crime. In this view, violent crime is valued more negatively than other injuries not only because of the actual injury or even because of the threat to social values, but also because of its impact on everyday life.

3. DEALING WITH FEAR

Some have argued that fear itself should be a major focus of the criminal justice system. Because of the high costs of fear, efforts which reduce fear are valuable in and of themselves, regardless of whether they also reduce crime. Indeed, it can be argued that while it may not be practically possible to reduce crime significantly, it

is practically possible to reduce fear; therefore, the latter should be our prime focus.

Clearly, there are steps we can take if our goal is reducing fear. We can deploy police in a way that focuses upon, and limits, the kinds of "incivilities" that have been found to trigger fear of violent crime.[49] We can take steps that at least make our neighborhoods "seem" safer; street lighting is a clear example. We can make efforts to correct what appear to be exaggerated misperceptions of actual risk, by seeking to make clear -- at least in some communities -- that levels and rates of victimization are lower than people think.

All of the steps listed above are directed at reducing perceptions of risk. To the extent that fear is based on valuations of the harm of violent crime rather than perceptions of the risk, these steps may have little impact on fear. And the documented existence of fear even in low-crime areas suggests that this second variable is at least a significant one.

Nonetheless, the fact that we may not be able to eliminate fear completely is not really an argument that we should not try, particularly if the reduction of fear will have other benefits. Will it? Arguably, what makes nights or subways or parks dangerous is that people are afraid and stay away -- which increases the risks for the few who are there. Increasing the number of people in the parks or subways will not only reduce the social costs of fear, but may also

actually reduce victimization. The studies are inconclusive.

In some communities, and for some groups, however, it may be that fear itself reduces victimization. The elderly are a clear example: their victimization rate is the lowest, and their fear rate is the highest. Is their fear irrational, or is their low victimization rate the result of protective steps taken out of fear? The same question might be asked of youthful black males, whose fear is the lowest and victimization the highest. In either case, it is difficult to characterize fear as "rational" or "irrational" based solely on actual victimization rates.

The long and short-term must be distinguished as well. Steps which reduce fear in the short-run, at least in high crime communities, without also reducing crime may end up increasing fear in the long run. If we effectively encourage elderly center city residents to walk the streets at night -- and any signficant number of them are then victimized -- we may find more fear in the long-run than we had before we intervened. In sum, at least in some areas, a critical response to fear -- let alone to public concern with crime itself -- must be based in efforts to reduce victimization. If we can make the streets objectively less dangerous, then there will be less reason for fear and perhaps they will be subjectively less dangerous as well.

Notes

1) U.S. Department of Commerce, Bureau of The Census, Criminal Victimization in the United States, 1980, annual (Washington, D.C.: U.S. Government Printing Office, 1982).

2) Charles E. Silberman, Criminal Violence, Criminal Justice (New York, Random House, 1978), p. 3.

3) U.S. Department of Justice, Bureau of Justice Statistics, Intimate Victims: A Study of Violence among Friends and Relatives (Washington, D.C.: U.S. Government Printing Office, 1980).

4) There is considerable evidence that "incivilities," affronts to public order such as loitering and drunkenness, are more responsible than serious crimes for the high levels of fear most Americans experience. See, for example, James Q. Wilson's discussion of "urban unease" in "The Urban Unease: Community vs. City," The Public Interest 12 (1968) 25-39, or Wilson and George L. Kelling, "Broken Windows: The Police and Neighborhood Safety," Atlantic (March, 1982), 29-38.

5) This was the consensus of the members of our Steering Commitee at its first meeting, on October 30, 1981 at Harvard.

6) In the short run, it is possible that a focus on dangerous offenders would have no effect on levels of fear, even if it caused victimization and reported crime rates to drop. This is evidenced by the fact that, although increases in levels of crime are accompanied by increases in fear, decreases in crime levels have not been accompanied by decreases in fear. See, for instance, Market Opinion Research, The Michigan Public Speaks out on Crime (Detroit: Market Opinion Research, 1977). Probably fear levels do ultimately depend on victimization rates, but the prospects for controlling fear by cutting crime levels appear slim.

7) All figures for Tables 1 and 2, and the accompanying text, were taken from U.S. Department of Justice, Federal Bureau of Investigation, Crime in the United States: 1980, annual (Washington, D.C.: U.S. Government Printing Office, 1981).

8) Census Bureau, Criminal Victimization in the United States, 1978, p. 10.

9) Michael Hindelang, Michael R. Gottfredson, and James Garofalo, Victims of Personal Crime: An Empirical Foundation of a Theory of Personal Victimization (Cambridge: Ballinger, 1978).

10) U.S. Department of Justice, Bureau of Justice Statistics, Bulletin, The Prevalence of Crime (1981), p. 1.

11) A-T-O Incorporated, The Figgie Report on Fear of Crime: America Afraid, Part I: The General Public (New York: A-T-O, 1980).

12) James Garofalo, Public Opinion About Crime: The Attitudes of Victims and Non-Victims in Selected Cities, (Washington, D.C.: U.S. Government Printing Office, 1977).

13) Market Opinion Research, The Michigan Public Speaks Out.

14) George L. Kelling, Tony Pate, Duane Dieckman and Charles Brown, The Kansas City Preventive Patrol Experiment: A Technical Report, (Washington, D.C.: The Police Foundation, 1974).

15) See Fred DuBow, Edward McCabe and Gail Kaplan, Reactions to Crime: A Critical Review of the Literature, (Washington, D.C.: National Institute of Law Enforcement and Criminal Justice, 1979), pp. 14-15.

16) Garofalo, Public Opinion about Crime.

17) Phillip H. Ennis, Criminal Victimization in the United States: A Report of a National Survey (Chicago: National Opinion Research Center, 1967).

18) Garofalo, Public Opinion about Crime.

19) John Conklin, The Impact of Crime (New York: MacMillan, 1975). See Arthur L. Stinchcombe, and others, Crime and Punishment: Changing Attitudes in America (San Francisco: Jossey-Bass, 1980).

20) Conklin, Impact of Crime, quoted in DuBow, McCabe, and Kaplan, Reactions to Crime, p. 7.

21) Robert Lejeune and Nicholas Alex, "On Being Mugged: The Event and Its Aftermath," Urban Life and Culture, 2 (1973) 259-287.

22) DuBow, McCabe and Kaplan, Reactions to Crime, p. 8.

23) David Yaden, Susan Folkestad, and Peter Glazer, The Impact of Crime in Selected Neighborhoods: A Study of Public Attitudes in Four Portland, Oregon Census Tracts (Portland: Campaign Information Consultants, 1973).

24) Richard Harris, Fear of Crime (New York: Praeger, 1969).

25) Sally Engle Merry, Urban Danger: Life in a Neighborhood of Strangers, (Philadelphia: Temple University Press, 1981). This result -- that people associate dangerousness with places frequented by teenagers, even when they are the most crime-free areas of all -- was first reported by Jane Jacobs, The Death and Life of Great American Cities (New York: Vintage, 1961), and has been replicated many times since. See, for example, note 31, below.

26) Garofalo, Public Opinion about Crime.

27) Hindelang, Gottfredson, and Garofalo, Victims of Personal Crime.

28) Garofalo, Public Opinion about Crime.

29) Leonard D. Savitz, Michael Lalli and Lawrence Rosen, City Life and Delinquency: Victimization, Fear of Crime, and Gang Membership (Washington, D.C.: U.S. Government Printing Office, 1977).

30) Institute for Social Research, Public Safety: Quality of Life in the Detroit Metropolitan Area (Ann Arbor: University of Michigan, Survey Research Center, 1975).

31) Larry Springer, Crime Perception and Response Behavior (Ph.D. dissertation, Pennsylvania State University, 1974).

32) Nathan Glazer, "On Subway Graffiti in New York," The Public Interest 54 (1979) 3-11.

33) Robert Wasserman, and others, Security in Public Housing: A Report to the Boston Housing Authority (Boston: Wasserman Associates, 1980). See also Wilson, "Urban Unease"; Wilson and Kelling, "Broken Windows."

34) Dan A. Lewis and Michael G. Maxfield, "Fear in The Neighborhoods: An Investigation of the Impact of Crime," Journal of Research in Crime and Delinquency 17 (1980) 160-189; James Garofalo, "The Fear of Crime: Broadening Our Perspective," Victimology 3 (1978) 242.

35) Tony G. Poveda, "The Fear of Crime in a Small Town," Crime and Delinquency 18 (1972) 147-153.

36) DuBow, McCabe and Kaplan, Reactions to Crime, p. 11.

37) Yaden, Folkestad, and Glazer, The Impact of Crime.

38) Sarah L. Boggs, "Formal and Informal Crime Control: An Exploratory Study of Urban, Suburban, and Rural Orientations," Sociological Quarterly 12 (1971) 319-327.

39) Floyd J. Fowler and Thomas W. Mangione, "The Nature of Fear," Mimeographed, (Cambridge: Joint Center for Urban Studies of M.I.T. and Harvard University, September 1974). See also Marlys McPherson, "Realities and Perceptions of Crime at the Neighborhood Level" (Minneapolis: Minnesota Crime Prevention Center, 1978).

40) Irwin Waller and Norman Okihiro, Burglary: The Victim and The Public (Toronto: University of Toronto Press, 1978).

41) Albert D. Biderman and others, Report on a Pilot Study in the District of Columbia on Victimization and Attitudes Toward Law Enforcement, (Washington D.C.: U.S. Government Printing Office, 1967); Wesley G. Skogan, "Citizen Reporting of Crime: Some National Crime Panel Data," Criminology 13 (1976) 535-549.

42) DuBow, McCabe and Kaplan, Reactions to Crime, p. 12.

43) DuBow, McCabe and Kaplan, Reactions to Crime, p. 12.

44) Mark Warr, "The Accuracy of Public Beliefs About Crime," Social Forces, (December, 1980). It has also been argued by some that a dramatic and well-publicized crime will increase perceived risk even in a low-risk community. See, for example, Truman Capote's best-selling In Cold Blood: A True Account of a Multiple Murder and Its Consequences (New York: Random House, 1965). Little in the way of systematic data exists, however, on the actual effect, particularly in the long-term, of such incidents. See DuBow, McCabe, and Kaplan, Reactions to Crime, pp. 21-24.

45) Roger Lane, "Urbanization and Criminal Violence in the 19th Century: A Massachusetts Case," in Hugh Davis Graham and Ted Robert Gurr, eds., Violence in America: Historical and Comparative Perspectives (New York: Bantam, 1969).

46) Sheldon Wolin, "Violence and the Western Political Tradition," American Journal of Orthopsychiatry 23 (1963).

47) Savitz, Lalli and Rosen, City Life and Delinquency.

48) Kelling, Pate, Dieckman and Brown, Kansas City Preventive Patrol Experiment.

49) Wilson and Kelling, "Broken Windows."

Chapter 2

DANGEROUS OFFENDERS AND INCAPACITATION POLICIES

To many, the crime problem is easily understood: it is created by "dangerous" people who scorn the rights of fellow citizens, and neither respect nor fear the law. The solution seems equally clear: imprison the dangerous people until they are no longer a threat.[1]

The sheer crudity of this view offends others. For one thing, the words are ominously ambiguous. Who, for example, will be considered dangerous? Those who commit violent crimes against strangers at very high rates, or those who commit other fear-producing offenses persistently over long "criminal careers"? How will we recognize such people? And for how long will they be imprisoned?[2] In addition, confidence that criminal offenses are always created solely by the evil intentions of offenders rather than by circumstances, and indifference to the role that broad (and unjust) social processes might play in producing dangerous offenders, signals naivete about the social misery that is swept into the criminal justice system.[3] Finally, the casual turn to long imprisonment as the obvious solution ignores the economic and social cost of creating vast buildings and complex bureaucracies whose sole purpose is to idle criminal offenders.[4]

Yet, for all its crudity, and for all its potential for political and rhetorical excess, the notion that some portion of the crime problem might be justly and effectively handled by concentrating

imprisonment on dangerous offenders may reflect some important truths about the crime problem and some wisdom in thinking about how best to deal with it. In fact, the major error in viewing the crime problem as one caused by dangerous offenders is probably in seeing crime exclusively in these terms. It is easy for us all to imagine crimes that are tragic precisely because no one seemed to intend them.[5] Moreover, despite disappointments, the hope survives that currently dangerous offenders may be persuaded (through rehabilitation or deterrence) to abandon their apparent determination to continue committing offenses.[6] Thus, any claim that crime is exclusively (or perhaps even primarily) a problem of dangerous offenders to be dealt with through imprisonment or other forms of incapacitation is subject to immediate rebuttal.

But it might be equally in error to assume that all offenders are equally deserving of compassion and equally responsive to rehabilitation (or deterrence) efforts; for, to miss the dangerous offenders (those who committed serious offenses at high rates and were unusually resistant to both deterrence and rehabilitation) among all offenders would be to treat them more leniently and with greater hope than they deserve, and to treat the less serious offenders more harshly and with less hope than is merited.[7] To the extent that this occurs, the criminal justice system will operate less justly and less economically than it otherwise could.

The general purpose of this chapter is to place the idea of

sharpening the focus of the criminal justice system on unusually dangerous offenders in the context of a broader, more systematic view of criminal offending and crime control policies. The specific purpose is to build a conception of "dangerous offenders" from both a theoretical view of crime causation, and empirical evidence about the distribution of rates of offending. In developing this conception, we have two aims in mind: first, to develop the idea in a way that relates the concept of "dangerous offenders" to interests in justice and effective crime control; and second, to highlight what part of the crime problem is included in our concept of "dangerous offenders" and what part is left out. This will set the stage for objections to the idea that we should give special attention to dangerous offenders in Chapter 3.

A. Crime Causation and Criminal Liability

Theories of the "causes" of crime have more than academic importance: they guide social conceptions of just and effective responses to crime. If we think that crime is caused by desperate poverty, unequal economic opportunity, drug abuse, or even by unusally provocative circumstances, then it seems not only less effective but less just to focus our attention on individual offenders. After all, they are nothing more than the victims of circumstances. If, on the other hand, we locate the engine of criminal offenses in the minds and characters of offenders (and temporarily ignore the question of what shapes mind and character as either practically or morally

irrelevant), then it makes much more sense, and feels more just, to focus responses to crime on individual criminal offenders.

By describing these differing views as theories of crime causation, we imply that a proper basis for choosing among them is available empirical evidence. The fact of the matter, however, is that we typically endorse one or another view of crime causation not on the basis of empirical evidence, but instead on broad ideological views of human nature, and the proper relationship of individuals to the state and other institutions of the society. Those who think crime is caused by social conditions think of individuals as powerfully influenced by social forces, and judge that the aims of governmental and social action should be to set people free to pursue their interests and fully develop their individual potential: restraint of institutions on behalf of individual freedom is a central purpose. Those who think of crimes as the willful choices of individuals believe that individuals are largely autonomous, and think that society's main purpose is to structure networks of individual obligation as well as privilege, and that the obligations must be enforced by social action: the promotion of a sense of individual responsibility to social institutions is a key aim. Moreover, people may hold these views either because they judge them to be empirically true characteristics of human nature, or because they think of them as a proper moral basis for a society, or because they think that by insisting on these views, they can influence individual

and social behavior. So, there is a good deal more involved in embracing a theory of crime causation than mere facts.

We rehearse these general observations to remind ourselves that ideology, theory, and facts are intimately entwined in talking about criminal justice policy. This is particularly true for any discussion that puts offenders (and even more significantly, <u>differences</u> among offenders) near the center of its concerns. The very formulation of the notion of "dangerous offenders" and a "selective focus" in the criminal justice system strikes at central tenets of liberal ideology. Specifically, it seems to assume: 1) that individuals cause crimes -- not circumstances; 2) that individuals differ greatly in terms of their willingness to commit offenses, and that the differences are large enough and permanent enough to be worth reflecting in decisions about whom to investigate, prosecute, detain before trial, and sentence to extended jail terms; 3) that the role of broad social processes in shaping these differential motivations to commit offenses is causally insignificant or morally irrelevant, and should therefore be ignored as factors mitigating guilt or offering an alternative route to controlling crime; and 4) that the risks to due process and fairness associated with focusing attention on those who seem to be unusually dangerous are non-existent, easily controlled, or small enough to be compensated for by other possible benefits.

We cannot wholly escape the bias that comes from our interest in investigating the concept of dangerous offenders and the potential of

a sharpened focus on them in the criminal justice system. But we can develop a theory of crime causation that allows us to talk about "dangerous offenders," while retaining a lively sense that other factors such as social circumstance might play a role in determining not only aggregate levels of crime, but also the pattern of offending we observe among individual offenders. We will call our conception of criminal offending a "micro-conception" to distinguish it from other theories that would put the broader social structure at their centers.[8] We hypothesize that individual criminal offenses are caused by 1) the motivation, willingness, or propensity of a potential offender to commit an offense; 2) the capacity of the offender to commit an offense successfully; and 3) the available opportunities for criminal offending. It follows, then, that aggregate levels of crime are determined by the aggregate distribution of these things in the general society.

Note that an important implication of this view is that "opportunities" can cause crime as well as offenders. Indeed, in some situations where an offender's motivation to commit an offense is weak -- no more than the level of an average citizen's -- an unusually tempting opportunity may cause an offense to occur. In these situations, it may be appropriate to see the opportunity as the "primary" cause and the guilt of the offender may be correspondingly reduced. In other situations, of course, when very determined offenders equip themselves to overcome various obstacles (like

acquiring a gun, practicing their techniques, casing possible victims, and so on), offender motivation seems to play the major role and the guilt of the offender seems clear. So, one crucial distinction among factors causing crime is the distinction between the circumstance in which the crime was committed, and the motivation of the offender to commit the offense.

1. THE MOTIVATION OF CRIMINAL OFFENDERS

When we think about offender motivation to commit offenses, we are apt to think of it as a relatively durable individual orientation produced by social forces operating on individuals over a long period of time. Of course, liberals and conservatives differ over how malleable individual orientations are, character is, and the sources from which they are derived. Liberals tend to see individual propensities for offending as less permanent than conservatives and more likely to be the product of restricted legitimate opportunities in education, employment, and so on (hence their belief in rehabilitation). Conservatives think of "character" as more permanent, and the product of more intimate social institutions such as family and religion, or even the product of heredity (hence their distrust of socially sponsored rehabilitation). But they are united in thinking of individual propensities for criminal offending as fairly durable and linked to some combination of accumulated individual experience, and broad social proceses that shape the possibilities for accumulating individual experience.

These views about the factors that lie behind the long term component of individual willingness and capacity for offending suggest avenues for social intervention in the control of crime. In fact, they provide part of the justification for the familiar liberal proposal that the best way to control crime is through jobs, equality of opportunity, and so on.[9] There is a conservative prescription here as well: namely, that strengthening the intimate institutions that profoundly shape character and give people a sense of obligation and virtue (for example, family, church, perhaps even participation in local civic activities) could also control crime.[10]

While the long term aspects of individual motivation are most prominent, it doesn't take much thought to see that there could be relatively short-run factors influencing motivation as well. Anger and frustration associated with months of unemployment could increase the motivation to (or decrease inhibition against) crimes. A tempting group of friends with an interest in crime could also elevate a teenager's motivations for and capacities to commit offenses as long as he stays with the group.[11] Other factors can alter motivation for even briefer periods. Drugs, alcohol, or unusually provocative situations may all momentarily disinhibit otherwise responsible people.[12] Of course, drugs, alcohol, and provocative situations can act durably on offender motivation as well as occasionally.[13] But the point is that we can imagine short-term influences on individuals' motivations as well as long term.

Thus, the motivation to commit offenses may be thought of in terms of: 1) long-term factors operating to shape the "character" of the potential offenders (such as heredity; family environment; the long term effects of public institutions like schools, social work, the various arms of the criminal justice system; and the accumulated effects of individual experience with criminal offending); and 2) short-term factors that temporarily alter a person's willingness to commit offenses (such as the stimulation or disinhibition associated with drugs and alcohol; the provocativeness of a particular situation in which a victim seems to stimulate or license an attack; a short-term financial crisis; or even the rage and indignation that comes from losing a job, getting a divorce, or losing a child). All of these factors are conceivably within reach of public policy instruments, though some are closer than others.

2. OPPORTUNITIES TO COMMIT OFFENSES

With respect to opportunities to commit offenses, one can again imagine broad social factors operating to create opportunities for both instrumental and expressive crimes. Indeed, much depends on the social, economic and physical environments in which we live. Branch banks, convenience stores, all-night gas stations, and houses emptied during the day by working women, all increase the supply of opportunities for robbery and burglary. The replacement of local pubs (in which neighborhood regulars kept the peace) by more anonymous bars (in which the bartender's sawed-off shotgun is the major instrument of

social control), and the increasing combat within marriages about rights to children and joint property may increase the opportunities for "expressive" violence. The emergence of high-rise apartment buildings which make hallways the equivalent of streets but frustrate traditional patrolling by police officers who regard these spaces as private rather than public may also increase opportunities for criminal attacks. Given a constant distribution of motivations to commit offenses, these social changes which expand opportunities to commit offenses could lead one to predict increases in the number of offenses.

Overlaid on the broad social trends expanding and shrinking opportunities to commit offenses, however, are off-setting investments designed explicitly to restrict opportunities. Many of these are privately supported. People buy locks, burglar alarms, and guns to protect their homes and businesses from crime.[14] They elect to stay off the streets, out of bars, or move from cities to keep themselves safe from muggings. They organize in "block watch" groups, or pool their economic resources to hire private security guards to minimize their vulnerability.[15] Others, however, are publicly supported. Streetlights are installed to make it harder for muggers to operate without being caught. Police are deployed in automobiles connected through radio dispatching to special telephone numbers to insure rapid responses to crime calls.[16] A variety of regulations governing bars, public drunkenness, noise, and vandalism are created and enforced not

only to protect public decorum, but also to manage situations that have the potential for becoming criminal offenses (drunks are easy victims for muggers; vandalism can easily become larceny).[17] In thinking about factors shaping opportunities for offenses, then, we should imagine not only general social trends that operate independently of concerns about crime, but also in terms of private and public efforts to reduce opportunities for offenses by making it harder for offenses to be committed with impunity.

3. CAPACITIES TO COMMIT OFFENSES

Perhaps the most unfamiliar factor in the "micro-conception" of crime is the "capacity" of the offender to accomplish a criminal attack. This factor is obscured because it is close to both the idea of "motivation" and the idea of "opportunity". Given a strong enough motivation and a tempting enough opportunity, capacity simply disappears from the analysis. Moreover, given time, a strong motivation will create capacity. And a tempting opportunity minimizes the need for any special capacity. Still, one can think of the capacity to commit offenses as being a seperate factor distributed in the general population as a function of four different kinds of factors. One concerns the individual endowments of people. Some people are large and strong, others small and weak. Some are accustomed to violence, others are not.[18] Some are capable of conceiving and carrying out a complicated plan; others are uninterested or unable to do so. As in the case of motivation, the

traits or endowments can themselves be created by many different factors, and can be more or less permanent.

A second factor is personal investment in general capacities to commit offenses. This may be the implicit result of experience, or it may be consciously directed. People can learn how to become skilled offenders, and develop those parts of themselves that are necessary or valuable in committing offenses. They can learn how to "case" targets; they can buy a gun; they can learn how to pick locks, jimmy windows, or cut through glass; they can learn the best way to deploy a "stall" and a "dip" to pick pockets effectively in a crowded bus.

A third factor shaping the distribution of capacities to commit offenses concerns the general availability of equipment and other resources necessary to commit offenses. Of course, many offenses require little equipment. Other offenses require equipment that is so valuable in other legitimate uses that it is inconceivable that we would try to restrict its general availability. Cars, butcher knives, screwdrivers, all fit in this category. But some equipment has so few legitimate uses and is so devastating in criminal use that restrictions on availability are conceivable.[17] Examples include machine guns, explosives, exotic oriental weapons, and so on.

A different kind of resource used in criminal offenses and whose availability is -- to a degree -- regulated by public action is criminal collaborators. Many offenses require several people to succeed, and most offenses become easier if several people are

involved. This is partly a technical feature of criminal offenses, but collaborators also have effects on motivation, on knowledge and so on.[20] For all these reasons, the supply of potential colleagues affects the general distribution of offending capacities. To a degree the supply of collaborators is implicitly "regulated" by the government as an unintended result of their investigative methods. Many crimes are solved by exploiting the fact that collaborators were used. An offender can bring suspicion on himself by using as a collaborator someone whom the police already know and suspect. Similarly, he can find himself with a strong evidentiary case against him if the police succeeded in "turning" one of his collaborators. Finally, collaborators may be informants or undercover police. For all of these reasons, the supply of sincere or entirely reliable collaborators is lower than it otherwise would be, and the total capacity to commit offenses that require many offenders is also lower.[21]

The last factor influencing the level of capacities to commit offenses is the specific investments that offenders make to execute specific crimes. This includes special efforts to gather knowledge about the target, or to acquire equipment that will be abandoned once the crime is over. These differ from the general investment they make in themselves because much of the value of these special investment will be lost once the specific crime is committed. Knowledge of the layout of a particular bank or routines of a specific household may be

useless once the bank has been robbed and the household burglarized.[22]

4. SUMMARY AND IMPLICATIONS

In sum, the micro-conception of criminal offending is based on the idea that offenses emerge from confluences of individuals with motivations and capacities to commit offenses, and opportunities to do so. Behind individual motivations and capacities are broad social processes operating through long- and short-term effects, and accumulated individual experience. Behind opportunities are also broad social factors simultaneously expanding and contracting available opportunities. At any given moment, and to an even greater degree over time, these variables influence one another. If a person is consistently exposed to tempting criminal opportunities and denied legitimate opportunities, his initial determination to resist the opportunities may crumble. If he is sufficiently motivated to commit an offense (whether for instrumental or expressive purposes), he will make investments in his capacity to commit the offense. And if the offender begins with a mild predisposition (or at least willingness) to commit offenses, and is confronted by an attractive set of criminal possibilities and few opportunities for legitimate activity, he may end up committing enough offenses that he becomes experienced and professional in his approach without explicitly intending to develop his capabilities in this direction.

This theory of criminal offending has broad implications for the location of criminal liability, and plausibly just and effective

methods on crime control. On one hand, this theory suggests that crime is produced by many things other than bad people. Easy opportunities, provocative victims, episodic motivations associated with drugs, family tension, or alcohol, and broad social factors shaping individual character may all play significant roles. This perspective, in turn, suggests that for some offenses, the guilt or blameworthiness of the offender must be qualified, and further, that crime can plausibly be attacked along many different avenues. Table 6 shows the variety of policy approaches suggested by the "micro-conception" of criminal offending.

On the other hand, there is room in this theory for "dangerous offenders" to appear as one part of the problem. In terms of our theory, dangerous offenders are people who are strongly motivated towards (or weakly inhibited against) committing offenses. This could be because they value the instrumental or expressive purposes of criminal offending unusually highly, or because they feel little obligation to honor social injunctions against criminal conduct, or because, over time, they have honed their skills as offenders to high levels of competence and sophistication. Whatever the reasons, dangerous offenders are by definition unusual people: confronted by similar opportunities for offending, they commit offenses more often (at higher rates) because their motivations and capacities orient them towards criminal offending more than other people. Moreover, because of their unusual motivations and capacities, they will commit

Table 6

Effect of Various Policy Instruments on Motivations, Capacities, & Opportunities

Causal Variables / Policy Instruments	Motivations and Propensities of offenders				Capacities for offending					Opportunities to Commit offenses					Accumulated Individual Experience
	Long Term		Short Term		Individual Endowments	General Investments in Offending Capacity	Availabilities of Resources		Specific Investments	General Social & Economic Trends	Private Security		Public Security Expanditures		
	Environment		Intoxication	Victim Provocation			Equipment	Collaborators			Individual	Collective	Physical Environment(e.g., Police, Streetlights)	Deterrence	Incapacitation	
	Private	Public														
1.0 General Social Policies																
1.1 Macro-economic/ Employment Policies	•					•				•						•
1.2 Welfare Policies		•				•										•
1.3 Childhood Development Policies	•	•			•	•										•
1.4 Educational Policies	•	•			•	•										•
1.5 Juvenile Delinquency Prevention	•	•				•									•	•
1.6 Sheltered Workshops		•													•	•
2.0 Mental Health Policies																
2.1 Community Mental Health	•	•	•	•		•										•
2.2 Civil Commitment		•													•	
2.3 Drug Abuse																
2.3.1 Treatment		•	•												•	•
2.3.2 Supply Control			•				•									•
2.4 Alcoholism																
2.4.1 Treatment		•	•	•											•	•
2.4.2 Supply Control			•	•			•									•
3.0 Criminal Justice Policies																
3.1 Encourage Private Security											•	•		•		
3.2 Public Opportunity Restricting Efforts													•	•		
3.3 Criminal Justice System																
3.3.1 Deterrence/ Policing														•		
3.3.2 Apprehension								•						•	•	
3.3.3 Imprisonment															•	
3.3.4 Rehabilitation		•				•									•	
3.4 Gun Control Policies							•									

far more than their proportional share of criminal offenses. Thus, they become particularly interesting targets of crime control policies. Exactly how significant "dangerous offenders" are in the overall crime problem can only be answered by empirical data on the structure of offending. It is to this subject that we next turn.

B. The Structure of Criminal Offending

Our conventional view of crime allows some heterogeneity in images of criminal offenders. The most obvious division is between "honest citizens" who never commit serious offenses and "criminals" who do.[23] But we also make some distinctions among "criminals." We distinguish those who commit violence in the context of intimate relationships (with all the special provocations and licenses that such relations provide) from those who commit violence against strangers. Among those attacking strangers, we distinguish a small group of the "criminally insane" from those such as robbers and professional killers whose motivations are more instrumental. We also acknowledge that most expressive violent offenders (such as rapists and some murders) are not so irrational as to be considered insane. And we also distinguish between those who persist in criminal offending -- becoming "criminal recidivists," or "professionals" or "career criminals" -- from those whose commitment to criminal offending seems less permanent.

Recently, as the problem of controlling crime has become more urgent, and the shortage of prison capacity has forced the society to

allocate prison cells to the "worst" or "most dangerous" offenders, we have begun to describe these different patterns of offending in quantitative detail. Specifically, we are beginning to learn about: 1) the average rate of offending among offenders; 2) the distribution of rates of offending among criminal offenders; 3) the sorts of offenses commited by different kinds of offenders; and 4) how rates and patterns of offending change over an individual's criminal career. We may even be able to talk about how the aggregate structure of offending is changing over time as new cohorts of people reach the ages in which offending rates are high. Before presenting this evidence, however, it is important to clarify the definition and measurement of rates of offending since many decisions of crucial normative significance are made in this apparently technical area.

1. DEFINING AND MEASURING THE PATTERN OF OFFENDING

An important characteristic of offenders is their estimated rate of offending. In the conventions of those analyzing the potential benefits of incapacitation strategies, this characteristic is denoted λ.[24] Now, λ is a rate: its numerator is an estimate of offenses committed, and its denominator is an estimate of the time during which the offender is "active" and "free" to commit offenses. Defined in these terms, it may be considered an estimate of a person's "propensity to offend." To produce actual estimates of λ, one must make a series of practical decisions about how these variables will be measured, and for what population. The crucial choices are: 1) which

offenses will be counted in the numerator (for example, any violent offense, any index crime, any offense including misdemeanors and violations, or some weighted count of these offenses); 2) how offenses will be measured (by convictions, indictments, cleared offenses, or self-reports by offenders); and 3) what population will be studied (the prison population, the arrested population, a specific cohort within the general population, or the general population). Many practical considerations enter into these decisions, as well as those related to the ultimate usefulness and validity of the resulting estimates.[25] But there is a conceptual problem as well, and it is worth describing that problem before we plunge into the practical business of producing useful estimates of λ.

The conceptual problem concerns the definition of "an active criminal population." As a practical matter, to develop an estimate of λ we must define a denominator -- a conception of how much time was available to offenders for the commission of criminal offenses. To do this, we must define a group of people as "criminal offenders"; estimate when they became "active" as offenders (and when they stopped); and determine the fraction of their active career that was spent "on the street" (as opposed to in jail or otherwise incapacitated). But both the notion of "criminal offender" and "an active career" create conceptual as well as empirical difficulties. The fundamental conceptual problem is that if one imagines that criminal offenses may sometimes be caused by opportunities, and that

it is possible for high rates of offending to be generated in the short run by a confluence of unlucky circumstances (or a powerful but temporary external motivation operating on the consciousness of an offender), then the imagery of becoming a "criminal offender" and being "active over a career" of a certain length seems awkward. When did an "accidental" or "temporarily deranged" offender become an active offender? How long was his career?

It is much more natural and analytically sensible to think of a distribution of motivations and capacities to offend within the general population. This distribution ranges from very low (but never zero) to unusually high. Moreover, for an individual over time, motivations and capacities may change as a function of natural processes of aging, changing social position, and experience in committing offenses. In this sense, offenders may have "careers". But the observed rate of offending, the ages at which offending will occur, and the period of time betwen the first and last offenses will be importantly influenced by opportunities and temporary motivational factors as well as by underlying dispositions. In an important sense, then, the line between the general population and the offending population is less distinct than we imagine.

It is equally difficult to define a "criminal career" since it is hard to say when an offender is "active" (that is, has a propensity to commit crimes greater than zero, or greater than some arbitrary cutoff point), and when he is "inactive". Again, as a practical matter one

can define an offender's "active" period as the entire length of time between his first and last offense. But if the propensity to commit offenses is distributed fairly continuously with many people at low but non-zero levels, then one will observe very unusual patterns of offending among those committing two or more offenses: some people may never commit an offense until they are over 40; others may commit three offenses distributed over a 30 year period; and still others may commit five offenses within a month and never commit another offense. Such patterns are very unlikely, but there so many people in the population that the absolute number of such offenders could turn out to be fairly large relative to the number of more determined offenders. Included in the population of offenders, then, will be many people whose "offender" status and "career patterns" will be badly defined.[26] To the extent such people are included in estimate of λ, we will end up with low estimates of λ because we will over-estimate the denominator.

What these observations suggest is that the notions of "active offender" and "career length" may be appropriate for only a portion of the offending population -- namely those who have high propensities for crime and who commit offenses at a high enough rate to give meaning to the notion of "active offender" and "career length". The patterns of offending that emerge from the large population of low propensity offenders make it difficult to describe such people as "active offenders" who have well defined "careers". In estimating

λ, then, we have a choice: we can estimate λ for a portion of the offending population for which these parameters can be relatively well-defined (leaving open the question of what proportion of total crime and all criminal offenders such offenders represent); or we can estimate λ for "all" criminal offenders (understanding that the estimate will be badly defined, but confident that we have accounted for all crimes).

For both practical and conceptual purposes, it seems best to adopt the first strategy: that is, to estimate λ's and "career length" for a limited portion of the offending population. That allows us to focus attention on recidivist offenders whom we are likely to see in the criminal justice system, and to use the terms for a population for which they seem well suited. But it is important to keep in mind that these offenders will account for but a portion of all offenders and offenses that we observe, and that a substantial part of the crime problem will be generated by accidental, opportunistic and temporary offenders. Such offenders will occasionally produce high rates of offending, and they will certainly often appear in the criminal justice system, but when they show up in samples of offenders for which estimates of λ and career lengths are being calculated, they will distort our understanding of the population we are observing.

a. Estimating the Numerator of λ

Based on our discussion so far, it is possible to outline some

criteria for choosing among current estimates of λ, and some guidelines for making future estimates. The issue of which offenses should be included in estimating λ draws heavily on Chapter 1. The argument there was that we should focus our attention on "serious" offenses -- primarily violent offenses among strangers -- on the grounds that losses to victims in such offenses were very large, they were particularly likely to generate fear, and they were the sorts of offenses for which private citizens expected public protection. It follows naturally that useful estimates of λ should reflect the interest in "serious" offenses.[27]

Basically, there are two different ways to reflect or accommodate the special interest in serious offenses. One way is to exclude from any estimate of λ "minor" offenses such as misdemeanors or violations. The most restrictive definition would include only those offenses that typically involved violence among strangers (predominantly robbery, but some portion of homicides, rapes, and aggravated assaults, and perhaps even some unusually frightening larcenies such as "purse snatchings" or ripping gold necklaces from peoples' necks as well). A slightly less restrictive definition would embrace all violent offenses even if they involved acquaintances, relatives and intimates (including all homicides, rapes, and aggravated assaults). An even less restrictive definition would accept offenses that posed a risk of violence, but rarely produced real violence (weapons and burglary, for example). Perhaps at the

limit of interest would be a definition that included all "index offenses" (which includes property crimes such as theft and larceny as well as violent or potentially violent offenses).[28] Obviously, as one moves to less restrictive definitions of offenses to be included, one generates higher estimates of λ. In fact, estimates of λ can easily change by an order of magnitude as we moved from the most restrictive to least restrictive definition.

A second, more satisfactory way of reflecting our interest in the seriousness of offenses in estimates of λ is not simply to exclude some categories of offenses and then count all included offenses as equally serious, but, instead, to "weight" the seriousness of different offenses and estimate the numerator of λ as a weighted index of serious offenses. In shifting to such an index, some concreteness is lost (λ can no longer be interpreted as a certain number of offenses), but precision in calibrating seriousness is gained. The weighting scheme can be based on legal categories, the sentence imposed, or specially constructed measures such as the Sellin-Wolfgang measures.[29] Among these, the Sellin-Wolfgang index is the best since it reflects the seriousness of the victims' losses. Perhaps improvements in the index could be made by incorporating information about the relationship between the offender and the victim and the location of the offense as well as losses to the victims.[30]

Once settled on a definition of λ's numerator, one must choose a strategy for measuring offenses. Broadly speaking, three options

exist: one can rely on convictions, arrest, or self-report data. In principle, reliance on convictions may seem the most appropriate since convictions are the only offenses which we can be relatively sure were committed by the offender. This argument has great force when we are confronting specific individuals in the criminal justice system and making choices about the disposition of their case. It has less force, however, when we are trying to develop a general sense of how active offenders are. For this purpose, convictions are inadequate because they cannot account for all the crimes that are committed; in fact they account for less than 10 percent of reported crimes.[31]

The most common strategy for measuring offenses is to rely on arrests -- typically, adult arrests. Like convictions, arrests will understate the actual level of criminal offending because only a fraction of total crimes are cleared by arrests. Moreover, because we cannot be certain that an arrested suspect committed the offense for which he was arrested, we will inevitably introduce some errors into estimates of the rates at which individual offenders commit offenses. Still, one can argue that since arrests are closer to the actual number of offenses committed, and since the police have some basis for judging it likely that an individual committed the offense, arrests are superior to convictions as a basis for estimating levels of criminal activity. In the end, however, arrest data have an overwhelming virtue to researchers: they are available in large quantities and in relatively standard forms.[32]

Probably the best way of measuring rates of offending activity is to rely on self-reports. While self-reports are vulnerable to many unpredictable sources of error (lapses in memory, exaggeration and minimization of certain kinds of offenses, telescoping of events, and so on), they have the great virtue of accounting for a reasonable fraction of the offenses that occur.[33] This technique has been used successfully with imprisoned populations,[34] with addicts in treatment programs,[35] and with the general population,[36] but has not yet been used with the arrested population -- no doubt because people facing criminal charges are least likely to be candid about their offending activity.[37]

b. Measuring the Denominator of λ

The measurement of the denominator of λ is equally problematic. As we have seen, one can choose to look at the entire population of offenders (and potential offenders) and make some doubtful estimates about when people become "active offenders" and how long their careers endured. Or, one can look at a narrower population of criminal recidivists for whom the concepts of active offending and career length are better defined. Beyond this conceptual problem, however, researchers face an additional practical problem: namely the problem of accounting for time spent under state supervision and "off the streets". This is simply a problem of inadequate records, but it is no less troubling for its simplicity.

2. CURRENT ESTIMATES OF THE AVERAGE RATE OF OFFENDING

Working with different operational definitions of these variables, different methods of measuring the variables, and different data sources, researchers have produced estimates of the average rate of offending in the criminal population. Table 7 presents these estimates, adjusted to make them as consistent with one another as possible. (The mechanisms of this process are described in Appendix 2). The estimates are given in terms of rates for violent, property and index offenses rather than weighted measures of seriousness. Inspection of this table yields two important conclusions.

First, the fact that average rates of offending are much higher for twice-arrested populations than for once-arrested populations is consistent with the hypothesis of a continuously distributed propensity to commit offenses that includes many people with low propensities and a few with high. This distribution, in turn, implies both: 1) substantial variation in rates of offending among criminal offenders; and 2) a noticeable role for low rate offenders in producing the overall volume of crime.

Second, while overall rates of offending seem fairly high in the "recidivist" (twice-arrested) population, the average rate of violent offending seems very low. While one can reasonably view 2 or 3 violent offenses per year as significant deviance deserving punishment, it is a little worrisome to realize that the violence-reducing benefits of holding a recidivist offender in prison for a

Table 7

Consistent Estimates of Rates of Offending

	Index Offenses	Property Offenses	Violent Offenses
I. Mean Annual Offense Rates for Offenders Arrested Once or More			
Wolfgang, Figlio, & Sellin (1972)	4.2 5.6	3.6 4.8	0.6 0.8
Greenberg (1975)	4.0 5.4		
Shinnar & Shinnar (1975)	5.0 11.0		
Williams (1979)	3.0 4.4	1.0 3.4	0.4 1.0
APPROX RANGE	3 to 6	1 to 5	.5 to 1.0
II. Mean Annual Offense Rate for Offenders Arrested Twice or More			
Boland & Wilson (1978)	9.2 12.2		
Collins (1977)	12.6		
Blumstein & Cohen (1979)	10.2 13.6	7.9 10.5	2.4 3.2
Peterson & Braiker (1980)	~13	~11	2.1
APPROX RANGE	9 to 14	8 to 11	2 to 3

year are so low: we pay a high price to forestall violence because violence is fairly infrequent -- even among a twice-arrested population.

3. THE DISTRIBUTION OF RATES OF OFFENDING

The analysis of average rates of offending in the criminal population suggests the crime reduction potential of general incapacitation policies.[38] Table 7 suggests that these benefits could be large if one were interested in controlling property as well as violent offenses, and if one could focus imprisonment on those who were arrested twice or more for index offenses. The benefits are less impressive if one is interested primarily in violent offenses. Both our theoretical discussions, and the observed differences in λ for once-arrested and twice-arrested offenders suggest another more interesting possibility, however. It is possible that criminal offending, and particularly violent criminal offending, is concentrated among the high rate offending population. In fact, the common wisdom among criminal justice officials is precisely this: that most crimes are committed by a relatively small number of hard-core offenders.

Two important pieces of empirical information confirm this view. The first is based on an examination of criminal records for the "birth cohorts" in Philadelphia.[39] In the first pioneering study that tracked the criminal records of youth born in Philadelphia in 1945, Marvin Wolfgang and his colleagues found that 6 percent of this cohort

had five or more criminal offenses, and that these offenders accounted for 52 percent of all offenses committed by the cohort. Moreover, if we take account of the seriousness of specific offenses, the importance of the few "chronic recidivists" is even more important: They 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.[40] This same concentration of offending was observed in examining arrests in a second cohort born in Philadelphia in 1958. In Cohort 8 percent of the youths were arrested 5 or more times, and these accounted for 61 percent of total offenses by the cohort.[41] Similarly, when we look at serious offenses, than chronic offenders (8 percent of the sample) accounted for 73 percent of the robberies, 61 percent of the murders, 76 percent of the rapes, 65 percent of aggravated assaults, and 68 percent of the index offenses.[42] Thus, serious offending seems concentrated in a relatively small portion of the general population (but it is by no means absent from the more general population).

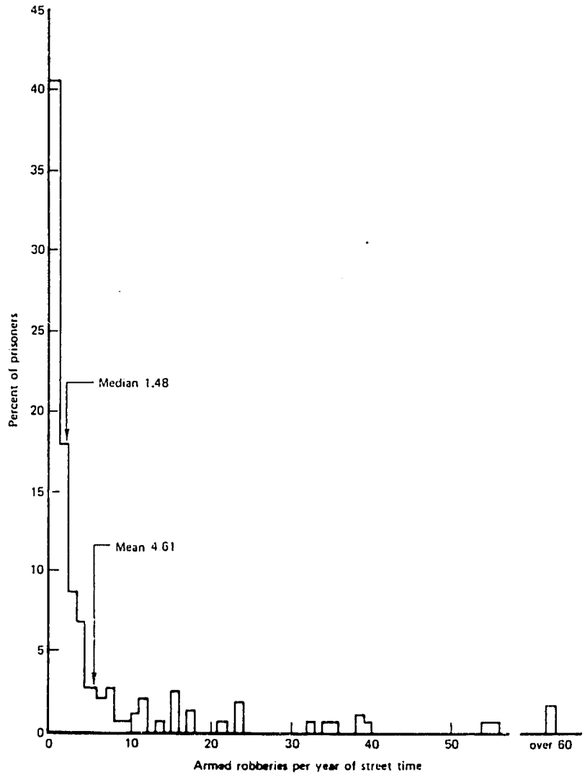
The second piece of information is based on surveys of the prison populations in California, Michigan, and Texas conducted by the Rand Corporation.[43] The information about the distribution of rates of offenses from their prison surveys is a useful complement to the cohort studies for two different reasons. First, the surveys develop self-report information rather than arrest information. As discussed above, this implies that the information about individual rates of

offending will be closer to actual rates of offending and therefore allow better calculations about how much crime can be avoided through effective incapacitation. Second, by focusing on an imprisoned population, the prison surveys allow a very close look at the behavior of the chronic recidivists (who are likely to be disproportionately represented in the prison population). In effect, we get a relatively close look at the "right tail" of the distribution of offenders in the general population. What these surveys show is that the distribution of offending is heavily concentrated even among those who commit offenses that are serious enough to put them in prison. Figure 1 shows the distribution of rates of robbery offending for the California sample. Table 8 presents information on the difference betwen the median rate of offending and the rate of offending for the top 10 percent of offenders for a variety of offenses. What these data reveal is that rates of offending vary remarkably even among a hard core offending population. In effect, there is a "right tail" in the distribution of offending even when we are looking at the right tail of the distribution of offending in the general population. Moreover, these surveys show rates of violent offending that are very high (20 or 30 robberies per year, for example), so high, in fact, that the benefits of incapacitating these offenders are clearly large enough to outweigh the great economic costs of imprisonment.

Taken together, these offenses suggest significant differences among offenders with respect to rates of offending. The differences,

Figure 1

The Distribution of Armed Robbery Rates



Source: Peterson, Braiker with Polich, Who Commits Crimes, p. 23.

Table 8

Median and Mean Annual Offense Rates
among California Prisoners
for All Those Committing the Offense

Offense	Median	Mean
Armed robbery	1.46	5.16
Cons	2.83	11.44
Burglary	2.74	14.15
Forgery	1.54	4.87
Auto theft	1.07	3.90
Drug sales	19.00	115.00
Shot/cut	.86	2.04
Threat	1.37	3.19
Aggravated assault	.84	2.81
Attempted murder	.86	1.60
Forcible Rape	.72	2.89

Source: Mark A. Peterson and Harriet B. Braiker with Suzanne M. Polich, Who Commits Crimes (Cambridge, England: Oelgeschlager, Gunn and Hain, 1981).

in turn, have important implications for both our theoretical understandings about the "causes" of crime, and the design of crime control policies.

In terms of our theoretical understanding of crime, the fact that a few offenders commit crimes at very high rates suggests that, for these offenders at least, unusually tempting or provocative opportunities probably have little influence on their offending. While we are perfectly willing to assume that unusual circumstances may have played an important role in generating the first, or second, or third offense, when we confront someone who commits 10 to 20 robberies a year it strains our credulity to believe that he was simply "unlucky." It seems much more likely that this offender is different from others in terms of his motivation, willingness and capacity to commit robberies -- therefore, more dangerous than others. Of course, these differences in motivation and capacity may be the result of accumulated experience in an unjust social process, and may (with some level of effort) be reversible. But if things remain as they are, the unusual willingness to offend will continue to be reflected in high rates of offending regardless of what happens to opportunities.

In terms of the design of crime control strategies, this fact suggests that a useful strategy would be to focus attention on the unusually dangerous offenders. Clearly, a utiiitarian interest in controlling crime would encourage a policy of "selective

incapacitation" or "focused imprisonment" which allocated scarce prison and jail capacity to the most active and dangerous offenders.[44] But a similar focus could also be motivated by an interest in justice or retribution. In fact, a system of punishment that was strictly proportional to acts would naturally produce heavy punishment for the unusually dangerous offenders. In addition, however, one can argue that the unusually dangerous and active offender "deserve" harsher punishment because they have revealed through their activities a kind of indifference to (or even contempt of) shared obligations to one another and to the law that makes such offenders seem unusually wicked and deserving of punishment.[45]

These issues will be taken up again later, but the link between the fact of an unequal distribution of rates of offending and the idea that the criminal justice system should become selective in focusing its attention on offenders is so direct that it would be foolish to ignore these implications. There are, of course, difficulties with such an approach as well as obvious advantages. And these, too, will be discussed. But before turning directly to these issues, it is useful to consider two additional questions about the structure of offending: the extent to which offenders seem to specialize in violent offenses; and the degree to which the structure of offending seems to be changing over time.

4. TYPES OF OFFENDERS

The general idea that criminal offending is concentrated within

the offending population suggests that the criminal justice system could focus selectively on dangerous offenders when dangerousness was defined in terms of high rates of offending. A different principle, though, would be to focus on offenders who were particularly likely to commit violent offenses. In effect, we would use the sort of offense a person committed as the discriminating principle rather than (or in addition to) the rate of offending. This would be consistent with the special interest in violent offenses (particularly among strangers).

In the past few years, criminological research has produced results that were pessimistic about the feasibility of doing this. Several researchers have examined criminal records to determine if offenders "specialized" in particular kinds of criminal offenses.[46] Specifically, they have looked at "crime switch matrices" that displayed the probability that arrest for one offense would be followed by arrest for another offense of the same type. To the extent that those arrested for robbery were re-arrested for robbery (rather than burglary, or car theft, or pick-pocketing), crime specialization would be demonstrated. These analyses have consistently shown that subsequent arrests bear little relationship to the original arrest. Table 9 presents a typical example of a "crime-switch matrix" and reveals little consistency from one offense to another. These findings have led researchers to conclude that offenders did not specialize, and therefore, that a strategy focusing special attention on violent offenses would be unlikely to control

Table 9

Transition Matrix of Crime Type Switches between Consecutive Arrests -- All Cohorts Combined

Last arrest	Probability that next arrest is for crime type: Robbery	Aggravated Assault	Burglary	Larceny	Auto Theft	All Others
Robbery	.301	.132	.098	.098	.037	.334
Aggravated assault	.131	.211	.080	.084	.038	.456
Burglary	.090	.082	.333	.149	.039	.305
Larceny	.080	.083	.100	.286	.037	.415
Auto theft	.112	.119	.052	.104	.261	.351
Others	.109	.078	.081	.103	.035	.591

Source: Alfred Blumstein and Jacqueline Cohen, "Estimation of Individual Crime Rates from Arrest Records," Journal of Criminal Law and Criminology 70 (1979) 561-585.

CONTINUED

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violence since a great deal of violence was generated by property offenders, and those with no prior arrests.

In the last year, however, research based on the Rand prison surveys has given new life to the idea that there might be distinct types of offenders -- some of whom represented a greater potential for violence among strangers than other sorts of offenders.[47] This result is based on both an empirical result, and a theory of criminal development. The empirical result is the simple observation that not all possible combinations of offense types were represented in the careers of the prison inmates. The survey asked about 8 different offenses (assault, robbery, burglary, drug deals, theft, auto theft, fraud, and forgery or credit card swindles). In principle, the prisoners could have committed 256 combinations of offenses. In fact, 61 percent of the offenders could be classified in one of only ten patterns. So, some internal structure existed the empirically observed pattern of offending.[48]

The theory of criminal offending involves a notion that criminal offenders develop their skills, and advance through different levels of deviance. This hypothesis was suggested by the observation that offenders who committed the "worst" offenses had also committed the less serious offenses; while those offenders who committed the less serious offenses had not necessarily committed the most serious offenses. In effect, it looked as though offenses were ordered hierarchically, and that offenders had to advance through minor

offenses to reach serious offenses. These results were similar to empirical observations of patterns of drug use and other forms of social deviance.[49] Thus, the authors were motivated to determine to what extent they could describe unique patterns of offending in the prison propulation they observed.

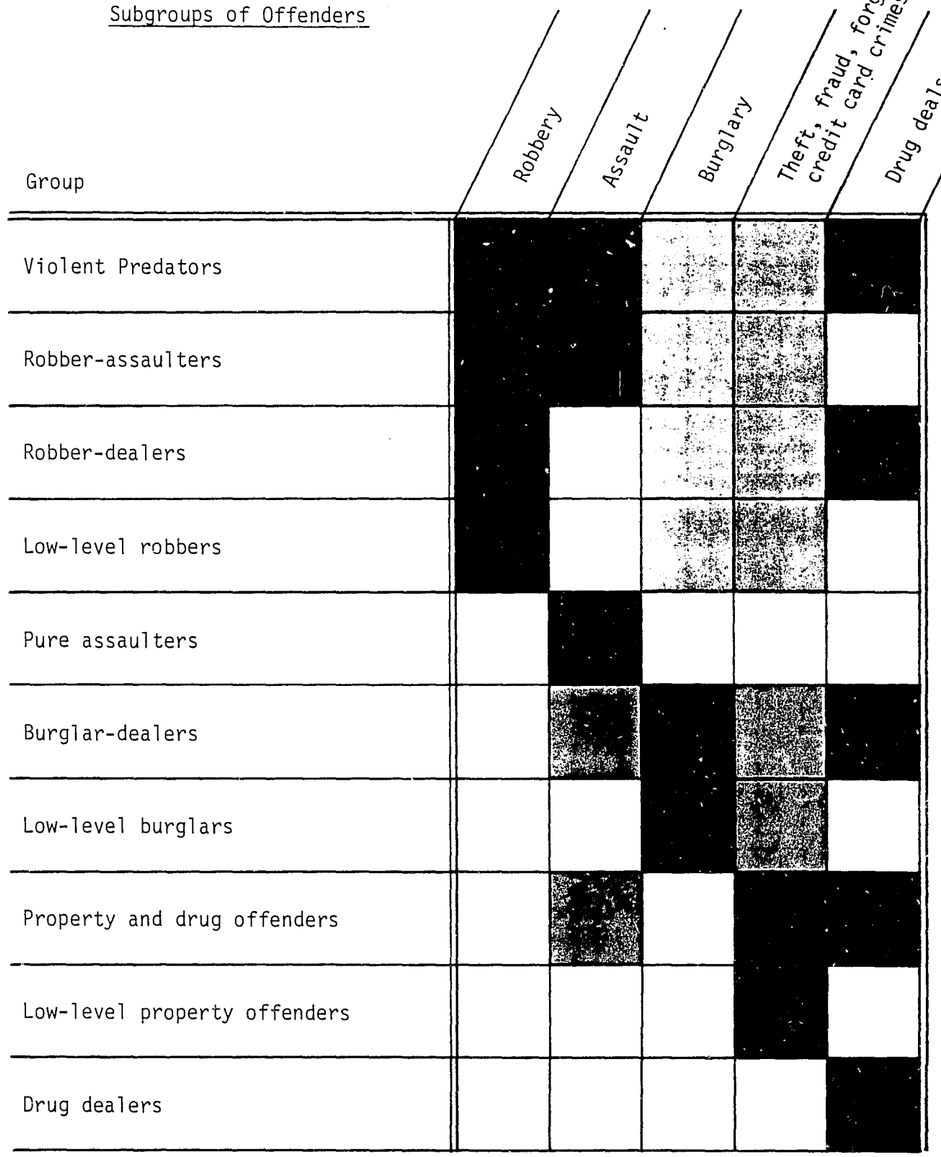
They began by defining the ten different patterns of offending that accounted for most offenders: Table 10 presents these categories and their defining elements. They then calculated rates of offending for the different types of offenders. Table 11 presents these results. They also checked the stability of these patterns by examinining the probability that an offender in a given pattern in one period would remain in that pattern (or move to a higher pattern) in the next period. Table 12 presents these results.

Taken together, these results lend substantial support to the notion that distinct types of offenders do exist. The patterns are stable; and, if they change, they tend to escalate rather than decline (at least until aging takes over). More importantly, they suggest there is a hard core of offenders (the "violent predators") who commit <u>all</u> offenses at much higher rates than other sorts of offenders, and who loom particularly large among all violent offenders.

In fact, the existence of this group may explain why the patterns observed in arrest reports seemed so random. Since this group of offenders is very active, they account for a large number of arrests. Since they commit both violent and property crimes, they could easily

Table 10

Definition of Hierarchical Subgroups of Offenders



Source: Chaiken and Chaiken, Varieties of Criminal Behavior.

Group member does this crime

Group member may do this crime

Group member does not do this crime

Table 11

Comparison of High-Rate Offenders among Crime Complexes

Annualized Crime Rate, 90th Percentile[a]

Variety of Criminal Behavior	Robbery			Assault	Burglary	Theft	Forgery & Credit Cards	Fraud	Drug Dealing
	All[b]	Business	Person						
Violent predators	135	96	82	18	516	517	200	278	4088
Robber-assaulters	65	46	38	14	315	726	27	293	--
Robber-dealers	41	60	32	--	377	407	255	106	2931
Low-level robbers	10	15	9	--	206	189	78	811	--
Mere assaulters	--	--	--	3.5	--	--	--	--	--
Burglar-dealers	--	--	--	6	113	406	274	64	2890
Low-level burglars	--	--	--	--	105	97	62	36	--
Property & drug offenders	--	--	--	9	--	663	283	264	3302
Low-level property offenders	--	--	--	--	--	560	486	1160	--
Drug dealers	--	--	--	--	--	--	--	--	3035
Significant difference across varieties? (all crime rates considered)[c]	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes

[a]Ten percent of the respondents in the crime variety who commit the crime commit it at or above the rate indicated in the table (a different 10 percent for each crime). Table 2.6 shows the percentage who commit the crime. Further information about these distributions is in Table A.19 at the end of App. A.

[b]"All" robbery is not the sum of business and person robbery. It includes also robberies that were reported as outgrowths of burglary and could not be classified as either business or person robbery.

[c]Significance test is by grouped χ^2 at the .01 level. The test does not refer to the 90th percentiles. Respondents who did not commit the crime are excluded in the test.

Source: Chaiken and Chaiken, Varieties of Criminal Behavior, p. 56.

Table 12

Forward Transition Matrix

Percent of Original Category Entering Final Category
(Respondents not doing these crimes in measurement period excluded)

Variety of Criminal Behavior Three and Four Years Prior to Measurement Period (Window 1)	Variety of Criminal Behavior During Two Years Preceding the Measurement Period (Window 2)											
	Violent Predators	Robber-Assaulters	Robber-Dealers	Low-Level Robbers	Mere Assaulters	Burglar-Dealers	Low-Level Burglars	Property & Drug Offenders	Low-Level Property Offenders	Drug Dealers	Locked Up	Not Doing These Crimes
Violent predators	[68]	2	7	2	0	3	0	0	0	0	5	13
Robber-assaulters	20	[49]	0	13	2	2	0	2	4	0	0	7
Robber-dealers	13	2	[53]	2	0	3	0	8	5	5	0	10
Low-level robbers	12	8	11	[49]	0	3	4	0	1	1	0	11
Mere assaulters	0	0	0	6	[56]	6	6	0	0	6	0	22
Burglar-dealers	14	2	7	0	0	[64]	2	2	1	3	0	4
Low-level burglars	3	1	3	5	1	16	[55]	1	3	1	0	14
Property & drug offenders	8	2	12	0	0	16	0	[45]	2	8	0	6
Low-level property offenders	3	2	1	4	1	6	15	4	[49]	1	0	15
Drug dealers	1	0	7	0	0	12	1	6	3	[68]	0	4
Locked up	0	0	0	0	0	1	0	17	0	33	17	17
Not doing these crimes	1	1	2	5	2	4	9	2	8	6	0	61

Source: Chaiken and Chaiken, Varieties of Criminal Behavior, p. 38.

be arrested for both kinds of offenses. Thus, if we looked at the patterns of arrest, it would be importantly influenced by the arrest patterns of "violent predators" who were sometimes arrested for one sort of offense and sometimes for another. As long as they remain in the analysis, the picture of offending is quite confused. Once they are set aside as a special group that commits all offenses at high rates, however, one can begin to see some specialists in the offending population. There are "occasional robbers", "pure assaulters", "burglars", and "property offenders" as well as "violent predators". Interestingly, none of these "specialists" seem to commit offenses with anything like the frequency of "violent predators." So, there is a quantitative aspect to the increasing deviance, as well as a qualitative aspect.

The "developmental" hypothesis is an intriguing explanation of the patterns of offending (and is quite consistent with the theoretical view of offending presented here). But there is another explanation of the observed patterns that makes more of the special capacity for violence. In this view, offenders have two different kinds of propensities -- one for violence (whether expressive or instrumental) and one for property offenses (largely instrumental, though occasionally expressive, particularly in juvenile offenses). Some offenders have a propensity for violence, and some for property offenses, and some for both. When the offender has both, there is a "potentiating" effect: both propensities become stronger then they

otherwise would. This is a hypothesis that is also consistent with the observed data. Moreover, it is slightly more consistent with the reported finding that the violent predators are young -- averaging 23 years old. If high-rate offending were the result of a developmental process, one might expect the violent predators to be older. Alternatively, one could argue that 23 years is certainly old enough to have completed a deviant developmental process.

At any rate, if it is true that a group of violent predators exists within the offending population (the right tail of the right tail of the distribution of offenders) it is possible to focus rather sharply on violent offenders leaving "property-only" offenders with less attention. The effect of focusing on the violent predators will be to make a deep cut in violent crime. But it will also make a deep cut in property offending. In fact, if one made a concerted effort against very high-rate property offenders, one would also be attacking primarily "violent predators". In short, the implication of this line of research is that if one focused on high rate violent offenders -- a goal that could command widespread support -- one could do a great deal to control both violent and property offenses.

5. THE DYNAMICS OF THE OFFENDING POPULATION

The structure of offending sketched above (relatively low average rates of offending even within the recidivist population, a large variance in rates of offending within the criminal population, and a group of violent predators who commmit all sorts of offenses at much

higher rates than other offenders) need not be a social constant. Conceivably, the structure of offending can be affected by criminal justice policies. In this regard, it is significant that the Texas prison population shows much lower overall rates of offending than the Michigan and California samples, and contains fewer very high rate offenders.[50] It is possible that the high conviction rates and stiff sentences meted out in Texas alter the structure of offending there. It is also conceivable that the the structure of offending changes over time as a result of broad social processes operating on the adolescent or early adult experience of young men in urban areas. The existence of some early results from a study of young men born in Philadelphia in 1958 allows us to investigate the extent to which the population of offenders seems to be changing over time.[51]

Table 13 presents data comparing the prevalence of delinquent patterns between Cohort I (boys who were born in 1945 and were 16 in 1961) and Cohort II (boys who were born in 1958 and were 16 in 1974). Table 13 also presents data on rates of arrests for specific offenses (over comparable periods) for the two cohorts. A review of these data suggests that the prevalence of delinquent patterns has not changed much over the decade dividing these two cohorts: the population is distributed about equally across patterns of delinquency. (This apparent stability could be the result of the police changing their practices over this period and ignoring minor offenses in 1974 that would have generated an arrest in 1961.) What has changed, though, is

Table 13
A Comparison of Levels of Offending
between Two Birth Cohorts.

	1945 Cohort	1958 Cohort
I. Distribution of Offending		
One Time Offenders	16.2%	13.7%
Non-Chronic Recidivists	12.4%	11.4%
Chronic Recidivists	6.3%	7.5%
II. Rate of Offending (offenses per hundred people)		
Homicide	.14	.41
Rape	.44	.76
Robbery	1.94	9.6
Aggravated Assault	2.21	4.17
Weapons	2.71	3.44
Bourglary	6.46	13.0
Larceny	11.96	12.74
Auto Theft	4.28	4.82

Source: Wolfgang and Tracy, "The 1945 and 1958 Birth Cohorts."

the rate of serious offending. The boys born in 1958 were two to three times more likely to be arrested for homicide, rape, aggravated assault and burglary, and almost five times more likely to be arrested for robbery. As Wolfgang and Tracy conclude:

> Cohort II -- 13 years later than Cohort I -- does not have more persons with a delinquency record than Cohort I. But Cohort II, growing up in the late 60's and early 70's, committed more crimes and much more serious crimes . . . Cohort II is an escalation of violent criminality.[52]

The observed differences between Cohort I and Cohort II create a worry: do the differences indicate a trend towards greater violence among juvenile offenders that will continue in the future? Or, is the violence of Cohort II a social aberration that will soon disappear? Plausible arguments could be made for both hypotheses. Those who judge Cohort II to be a temporary aberration would point to the fact that this cohort lived its early adolescent years in a period of great social upheaval (1970-1974). Those who judge Cohort II to be indicative of a general trend would argue that the social disciplines breached in the early '70's are not easily repaired, and that future youth cohorts in central cities will look more like Cohort II than Cohort I. When asked to reflect on this question, Wolfgang and Tracy said the following:

> Will Cohort III born, for example, in 1970 be as violent in their juvenile careers? We do not know . . . Cohort II may be an aberrant display of violence. Cohort III may be less violent . . . But the social policy of today can affect the behavior of juveniles of tomorrow . . . Current juveniles are violent . . . Our social reaction to such

> criminality should be related to our knowledge that offenders who are young begin their violent harm early in life and should be socially controlled equally early in life . . . We should react strongly to that small cadre of violent people and react softly to non-serious offenders. Cohort III could be less violent if we had a more stern reaction to Cohort II or Cohort III may, sui generis, be less violent.[53]

In sum, what seems to be a constant in the social world is a skewed distribution of deviance: a minority generally accounts for a substantial majority of deviant conduct.[54] What seems less constant is both the average level of "deviance", and particularly the level of deviance by the most deviant members of the community. These parameters -- crucial in determining how much "trouble" occurs in the society -- seem to be influenced by broad social trends; perhaps even by social policy of both "opportunity expanding" and "social control" types.

C. The Concept and Definition of "Dangerous Offenders"

The theoretical perspective and empirical evidence presented in this chapter accommodates -- even accentuates -- the role of dangerous offenders in the overall crime problem. By identifying offenders' motivations as an important causal variable, and by highlighting the very high offense rates of "violent predators," attention is naturally drawn towards the idea of incapacitating these unusually dangerous offenders.

At the same time, however, our discussion hints at the unexpected complexities of this common-sense idea. What sorts of offenses should

be counted in making determinations of "dangerousness"? Should we limit our attention to violence among strangers, or include property crimes as well? How many offenses, over what period of time, should be required to persuade us that a given offender is unusually dangerous rather than unusually unlucky? To what extent should we think of "dangerousness" as a permanent individual characteristic rather than as something shaped by social forces and individual experience, and therefore malleable?

Such questions, and the problems they create in giving an operational definition of "dangerous offenders," may seem like mere technicalities. But they are not. They are of the essence. Indeed, in reviewing a century of British experience in focusing on "dangerous offenders," Radzinowicz and Hood found the definitional problem to be the central explanation for the failure of such policies.

> "Inherent in all these schemes was a common fault. They were framed as if to apply to any felony, whatever its degree of seriousness, and they ignored altogether the problems posed by persistent minor misdemeanants."[55]

This fault caused the policies to miss their target. Norval Morris found that betwen 1928 and 1945, only 7 of the 325 prisoners committed to long term incarceration under a British habitual offender statute were sentenced for violence, threat of violence, or danger to the person.[56] The remainder were persistent but minor property offenders. The confusion in defining "dangerous offenders" is also apparent in the U.S. Table 14 offers a sampling of definitions now in use in

different parts of the criminal justice system.

This confusion should not be surprising. Nor should we expect a quick resolution. For, in giving an operational definition of "dangerous offenders," one implicitly joins and resolves a host of issues that have exacting normative, practical, and technical implications. Specifically, one must finally determine: 1) which offenses should be included in definitions of "dangerous offenders"; 2) whether "dangerousness" is indicated by characteristics of specific offenses (such as gratuitous violence or use of a weapon), frequent offending over a short period of time, or persistence in offending over a long period of time; 3) whether, in general, we should err on the side of "inclusiveness" or exclusiveness in giving a characterization of "dangerous offenders; and 4) whether our interest in "dangerous offenders" is primarily backward-looking and retributivist or forward-looking and utilitarian. Because these issues have normative implications, we cannot offer a technical conclusion. They deserve political and legislative debate. What we can do, however, is to offer some conceptual guidance in thinking through the issues, present our own views about the limits of suitable definitions, and assess current definitions in light of our thinking.

1. DEFINING "DANGEROUSNESS" THROUGH PATTERNS OF OFFENDING

As noted in Chapter 1, we can think of "dangerous conduct" in three different ways: violent acts; acts that contain a significant, imminent risk of violence; or acts that create a perception of risk

Table 14

How Dangerousness is Defined in Different Jurisdictions

POLICE	
New York City	1 prior robbery arrest AND 1 other violent prior arrest within last 3 years AND between 16 and 35 years old.
Memphis, TN	5 prior felony arrests AND high score on a points system that includes: • prior adult and juvenile convictions • years since last arrest • seriousness of present offense.
Stockton, CA	3 pending felony arrests OR 1 pending felony arrest and 2 prior felony convictions.
PROSECUTOR	
San Diego County, CA	1 prior robbery conviction OR 1 prior personal felony conviction and 1 other felony conviction OR 3 pending robbery arrests OR high score on a points system that includes subjective assessments and unofficial information.
Orleans Parish, LA	2 prior felony convictions OR 5 prior felony arrests.
Kalamazoo County, MI	EITHER 2 prior convictions, or 5 prior felony arrests, or bail status, or 1 prior armed robbery, rape, or drug sales arrest AND high score on a points system that includes • prior felony and misdemeanor arrests and convictions • Sellin-Wolfgang seriousness of pending offense • bail or parole status • other pending cases.
JUDICIARY	
Texas	1 prior felony conviction.
California	pending violent felony conviction AND 2 prior violent felony convictions.
Nebraska	2 prior felony convictions AND sentence of 1 year or longer to jail or prison.
Kentucky	2 prior felony convictions AND imprisonment of 1 year or longer in jail or prison.

among others. Correspondingly, we can think of "dangerous offenders" as those who engage in such conduct willfully, often and persistently.

This formulation clearly allows a very large number of offenders to be considered "dangerous." Indeed, if we allow all the conduct that stimulates fear (and is covered by a statute) to be included, and if we require nothing more from the offender than willfulness in a single act, then the definition of dangerousness is identical with the broad notice of criminal offending and would include virtually all offenders who come into the criminal justice system -- vandals as well as robbers, disorderly persons as well as rapists. That one could define "dangerousness" so broadly should, perhaps, not be too surprising, for one can argue that "danger to the community" is precisely what the criminal law as a whole is designed to manage. In the context of today's overburdened system, however, such a formulation is clearly inappropriate because the whole ideal of focusing on "unusually dangerous offenders" is to define a sub-population of criminal offenders who represent unusually great risks to the society.

One way to narrow the definition is to place restrictions on qualifying offenses. Felonies should be taken more seriously than misdeameanors, violent felonies more seriously than ordinary felonies, violence among strangers more seriously than violence among intimates, and gratuitous or sex-related violence more seriously than instrumental or accidental violence. In effect, we look for

"dangerousness" in the character of the acts committed. Again, while this narrows the definition of dangerous offenders, the concept remains very broad. Moreover, the criminal justice system is already organized to act on precisely this distinction: courts are commonly divided between those that deal with felonies and those that deal with misdemeanors (with the felony courts being much better financed); and judges, prosecutors and police quite naturally give much greater attention to crimes involving violence among strangers (or great risks of violence) than to property offenses or disorderly conduct.[57] So, the system already responds to the dangerousness suggested by the characteristics of a given offense.

What seems new and distinctive in the concept of dangerous offenders is an interest in the character of the offender. In effect, to be identified as a "dangerous offender" it is not enough to have willfully committed a violent offense: there must be some additional evidence to indicate that the person commits offenses often (at a high rate while free), persistently (maintains a high rate over a long period of time), or both. This idea that the offender must have shown a history of criminal offending seems much closer to the basic idea of a "dangerous offender" then the looser definitions above. A persistent, high rate of offending is consistent with a utilitarian interest in focusing on dangerous offenders because it implies that imprisonment of such people will eliminate crimes.[58] Moreover, it seems consistent with some notions of justice, since the

persistence and high rate of offending make it very likely that it was the intentions of the offender that caused the offenses rather than an unlucky confluence of circumstances, and further that the offender is not likely to rehabilitate himself soon. In effect, the offender reveals his character as a "dangerous offender" by repeating criminal acts -- thereby inviting stern punishment for both utilitarian and retributivist reasons.

Indeed, the nature of "high rate" and "persistent" are so closely linked to justification for punishment that we sometimes use these characteristics alone as the defining characteristics of "dangerous offenders" and forget entirely about the character of the offenses they commit. The formulation of the problem as one of "habitual offenders," or "career criminals," or "criminal recidivists," emphasizes the persistence of criminal conduct over both the nature of the offenses committed, and the rate of which they are committed. There is some justice in this concern with "persistence" and "rate" precisely because such patterns of offending indicate determination, even defiance, in rejecting social obligations. But it should also be clear that focusing on persistence or rates of offending alone could lead to unjust results. Habitual offender statutes, for example, are often based only on the absolute number of offenses.[59] This could lead to an aging man, convicted of three widely separated instances of check forging, being given additional prison time for his offenses. While such an offender is clearly persistent, he seems

far from "dangerous" and it would be hard to find a justification for extra time. Similarly, a focus only on the rate of offending could lead to situations where a person charged with crimes stemming from a single incident, or from a relatively short-lived period of anger and desperation, could be considered a "dangerous offender" even though he would soon stop committing crimes, and his current offenses could better understood as to product of unusual circumstances.

These observations suggest that a proper definition of "dangerous offenders" must incorporate three characteristics: the nature of the offenses, rates of offending, and persistence in offending. It is the combination of these characteristics that could justify a special focus on dangerous offenders. The most narrow definition of "dangerous offenders" would thus require an offender to commit violence among strangers, do so persistently, and at high rates. That such offenders exist is suggested by the Rand findings: the "violent predators" identified by Jan and Marcia Chaiken fit this definition.[60] If the criminal justice system solved every offense, then criminal justice records would reflect the underlying rate of offending, and picking out the "dangerous offenders" or "violent predators" would be fairly easy. The problem, of course, is that the criminal justice system solves only a small proportion of all crimes. Moreover, violence among strangers is both a relatively rare crime, and among the most difficult for the criminal justice system to solve. This means that the record of solved violent crimes -- for example,

convictions for robbery -- is a quite limited and imperfect reflection of the real underlying rate and persistence of violent offending. Those who commit many such offenses and those who commit only a few will look similar in terms of their criminal justice records. Consequently, looking only at the record of conclusively resolved violent crimes will fail to identify the violent predators.

An alternative approach would be to require clear evidence of violent conduct in a person's record as a necessary condition for identification as a "dangerous offender," but to allow examination of other offenses as well to indicate both the rate of offending and the persistence as well as to the seriousness of the crimes. The data from the Rand study suggests that this approach might be successful in identifying dangerous offenders because the violent predators commit property crimes at very high rates as well as violent crimes. Moreover, given some convictions for violent offense, we might be willing to use additional arrests for violent crimes as indicators of rate and persistence in offending as well.

Thus, in thinking about which offenses should be included in definitions of "dangerous offenders," it is tempting to limit our attention to convictions for violent crimes. But the fact that we solve such crimes rarely, and that we have an interest in the rate and persistence of dangerous offending as well, suggest that it might be appropriate to use convictions for property offenses or arrests for violent crimes in our definitions of dangerous offenders as well.

Perhaps a definition that required convictions on two or more violent offenses within three years of "street time," and two or more additional arrests for violent crimes or two convictions for serious property crimes within the same period would be a suitably stringent definition that focused primarily on the "violent predators."

This particular definition has little basis other than our intuitive notions. Consequently, we feel relatively little attachment to it. What we do think important, however, is that the definition includes at least one and preferably two convictions for violent crimes within a relatively short period of time. The reason for insisting on two convictions for violent crime is that the empirical evidence suggests that those who commit violence repeatedly are very different from other offenders in terms of seriousness of offending, rates of offending, and persistence in offending. The reason to insist that the offenses be committed within a given time period is to define a rate of offending and eliminate the possibility that very low rate offenders could be caught in the net by committing two widely seperated offenses. The reason to use additional offenses in our definition is to help to estimate the offender's rate and persistence in offending. These basic principles seem more important than the particular definition.

2. THE SIZE OF THE NET

No doubt, the definition proposed above will seem too stringent to some and too tolerant to others. Such views could be based on two

slightly different considerations. One concerns the notion of individual justice: how much crime does an offender have to commit before we can justifiably (and usefully) decide that he should be given special treatment as a dangerous offender? It is these concerns that were most prominent in the discussion above. The other view is concerned with more aggregate considerations: how many people, or what fraction of the existing caseload of the criminal justice will be exposed to this special treatment? It is these questions that will concern us briefly here.

In thinking about how broad the definition of "dangerous offenders" should be, it is sometimes tempting to let our indignation about repeated criminal offending, and our suspicions that many unsolved crimes lie behind the arrest records of offenders determine our response. When one is in this mood, it is tempting to let the definition of "dangerous offenders" expand to include nearly everyone convicted of a serious crime. The problem with this view, of course, is that the whole reason for talking about "dangerous offenders" is to make a just and useful distinction among all criminal offenders so that a few can be singled out for stiffer punishment, and more intensive, sustained supervision. The thing that justifies this special attention is that such people are different: they feel less obligation to respect other lives and property. We know this is true because they keep committing offenses. Moreover, they commit offenses at a high enough rate that special attention paid to them,

will return significant crime reduction benefits. Obviously, the greater the differences among all criminal offenders, the more just and effective it will be to focus narrowly on the most dangerous offenders. Since current evidence indicates rather great differences among offenders -- even among those who now end up in prison -- it is valuable to have the narrow, tightly focused definition. The broader the definition becomes, the less justice and utilitarian value is associated with having created the distinction in the first place. Give the empirical facts and the purposes of focusing on "unusually dangerous offenders," then, it is probably desirable to err on the side of narrowness in giving a definition of "dangerous offenders." Thus, our proposed definition would pick out a small fraction of the criminal justice caseload -- probably less than 5 percent.[61] Any definition much broader than that would risk the very gains that justified the narrow focus.

While the question of how many will be drawn into this net is an important one, an even more important question is how soon in an offender's career he will be identified as a "dangerous offender." Obviously, these are related: the broader the definition, the earlier people will be identified (correctly or incorrectly) as "dangerous offenders." But when the question is posed in terms of when in an individual's offending career he is identified, some special considerations come into play. On one hand, offenses committed as juveniles seem both more forgiveable and less powerful indicators of

determined criminality than similar offenses committed later. We have this view because we think of juveniles as less responsible, more vulnerable to outside influences, and more likely to change in the future. Consequently, their acts offer a less reliable guide to their characters than older offenders. And besides, there is evidence to indicate that many juvenile offenders do stop their criminal activity.[62] On the other hand, criminal careers wane as offenders get older.[63] Moreover, we solve very few crimes conclusively. Taken together, these observations suggest that unless we include serious juvenile offenses in our definition of "dangerous offenders," by the time an offender accumulated a record that would identify him as a "dangerous offender", he might well be reducing his criminal activity. In short, because offenders seem to have careers that peak (in terms of rates of offending) fairly early (between 16 and 25), there is a strong utiliarian interest in identifying the dangerous offenders early; but this conflicts with a concept of justice that requires us to be sure that a person is a very determined offender before giving him whatever treatments is reserved for very serious offenders.

The problem of "career trajectories" for criminal offenders drives a wedge between utilitarian and retributivist justifications for focusing on dangerous offenders. When we think about the problem in terms of "how many" or "what fraction" of offenders should be considered dangerous, utilitarian and retributivist concepts of justice push us in the same direction -- towards a very narrow

definition. When we think about the question in terms of how early (and for how long) we consider some dangerous, the justifications push in opposite directions. The utilitarian concept pushes towards an early identification of dangerous offenders, and an eventual decision to disqualify an aging offender as "dangerous." The retributivist concept pushes towards waiting until enough acts accumulate to justify the designation of dangerous offender, and then not relinquishing the characterization as long as past acts reveal determined, willful "wickedness."

That there is an important difference between backward-looking retributivist and forward-looking utilitarian concepts of dangerous offenders should not be suprising. Indeed, the concept of "dangerousness" is typically treated as a wholly utilitarian concept fundamentally opposed by retributivist notions of justice. What we have argued, however, is that there is a retributivist notion of "dangerousness" that has to do with the increasing power of accumulated criminal acts in establishing clear evidence of the "wickedness" of an offender. Thus, a repeat offender is both more evil, and more clearly evil, than a non-repeat offender, and thereby deserving of more punishment for a similar act than a non-repeat offender. Having established this retributivist notion of dangerous offender to stand alongside the utilitarian notion, what becomes surprising is not that there is a difference between the two, but that the concepts are so similar. Indeed, the only way one could tell if

he was using a utilitarian or retributivist notion of dangerous offendings is by observing decisions made for offenders who were so old that their future criminality seemed very unlikely: a utilitarian would not waste scarce prison space on such people, while a retributivst would feel bound to administer the punishment. For all other decisions (which would include the vast majority made in the criminal justice sytem), the retributivist and utilitarian decisions about dangerous offenders would be broadly comparable.

In sum, then, when thinking of how we want the definition of "dangerous offenders" to perform in the context of the criminal justice system, a few principles stand out. First, we would like the definition to be very narrow lest the original justification for a selective focus be sacrificed in an emotional response to lash out at criminals. Indeed, if the definition ever included more than 5 percent of the offenders in the criminal justice system, it seems clear that we would have defined the population too broadly: we would not be focusing on the few "violent predators" of the right tail of the distribution and would be sacrificing both the justice and the practical benefits that come from a sharp focus.

Second, the definition should allow offenders to be identified early in their careers, but should not be drawn so loosely as to broaden the net very widely. This implies that instead of relaxing our definition of dangerous offenders, we should allow juvenile offenses to be included in the definition of dangerous offenders.

Third, we should think of the concept of "dangerous offenders" primarily as a "backward-looking retributivist" idea, rather than a "forward-looking utilitarian" concept. The specific idea is that offenders reveal character and wickedness by their pattern of offending: as they continue, we become more sure that they are the sorts of people who willfully commit offenses rather than victims of circumstances. As such, they deserve harsher punishment. This notion is consistent with basing the definition on past convictions for criminal conduct. That the use of the concept happens to produce utilitarian benefits is a happy coincidence. Indeed, at the margin, these utilitarian interests may properly influence the definition of "dangerous offenders."[64] But we should think of the notion primarily as a retributivist concept.

Fourth, the definition of "dangerous offenders" must be based on a rate of offending rather than a total number of offenses; and must include concerns about the persistence of the rate of offending as well as the rate. Neither the person who accumulates three minor felonies over 50 years, nor the person who commits seven offenses arising from the same incident should be thought of as "dangerous offenders."

Fifth, the concept should be based primarily on violent offenses. Indeed, prior convictions for violent offenses should be a necessary condition in the definition. Additional offenses may be used to help estimate "rates of offending" and "persistence." But such

characteristics without a link to violence should not be sufficient to define "dangerousness."

While these principles do not establish a unique definition of dangerous offenders, they do bound the discussion. It is interesting, then, to notice that many of the definitions currently being used fail when compared to these standards. Most definitions are not concerned with "rate", but only with total number of offenses. Most definitions are much broader than we would recommend, and therefore risk injustice, and the practical benefits of sharp selectivity. Consequently, we think useful conceptual and empirical work can be done in designing and evaluating alternative operational definitions of "dangerous offenders" as a guide to political and legislative debates.

D. Summary and Conclusions

The purpose of this chapter was to place the concept of "dangerous offenders" and "selective incapacitation" in a broader context of understanding about criminal offending and crime control policies. To a great extent, this chapter presents a powerful justification for sharpening the focus on "dangerous offenders." The concept of "dangerous offenders" can be given a theoretical basis, empirical support, and a practical, operational definition. Moreover, arguments can be made that a sharpened criminal justice focus on "dangerous offenders" would be both just and effective. To the extent punishment was enhanced for those offenders who had clearly shown

themselves to be "dangerous," and mitigated for those whose continued commitment to violent offending was in doubt, the justice of the system may be enhanced. To the extent that imprisonment reduced crime by incapacitating offenders, and to the extent scarce prison capacity was allocated to those who committed violent offenses at the highest rates, the overall crime control effectiveness of the system would be increased: we could have less crime and fewer people in jail.

At the same time, our discussion makes clear exactly what is left out of the concepts of "dangerous offenders" and "selective incapacitation" as well. In thinking about the concept of "dangerous offenders," for example, while it is clear that we can describe such people as unusually determined and persistent in violent criminal offending, what is left in the background is the fact that such people could be the product of broad and unjust social processes as well as simply evil. Moreover, temporary influences on motivation, and the effects of opportunities leave their traces on the observed patterns of offending. This means not only that a great deal of crime (including violence) will be committed by "non-dangerous offenders," but also that some of those who commit offenses in patterns that indicate "dangerousness" will be quite ordinary people. Chance alone guarantees that some ordinary people will end up committing a number of offenses. So the aggregate and individual patterns of offending bear the traces of broad social trends, and short term effects on motivation and opportunities, as well as the prevalence of wickedness

in the society.

Our discussion also indicates the wide variety of policies that could influence rates of offending beyond the incapacitative effects of imprisonment. Macroeconomic policies, welfare programs, mental health and drug abuse programs, schools, short-term job creation and recreational programs for youth, private security investments, and public expenditures to deter and apprehend criminal offenders all represent plausible alternative approaches to controlling crime. In fact, many of these approaches might be considered broadly "preventive" approaches because they reduce the chance that individuals in the society will accumulate experiences as criminal offenders, and develop a commitment to criminal activities. But these approaches might also be broadly "rehabilitative" in the sense that they make it easier for crimnal offenders to develop a commitment to legitimate activities, and harder to continue in these dangerous pursuits. So, the attack on crime can be organized on a broad front.

Still, as one piece of that attack, a policy of "focused imprisonment" or "selective incapacitation" has some appeal. Given the evidence about the distribution of the rates of offending, a policy of focused imprisonment is in the interests of the economical and just use of punishment. In the remainder of this report, we will take a close look at how a policy of "selective incapacitation" or "focused imprisonment" would operate. Our look will be deliberately skeptical for two reasons. First, we want to see whether the policy

idea can stand up against a skeptical examination. Second, we want the "soft spots" in the arguments about "selective incapacitation" to set the research agenda for a more complete investigation of the policy. Towards this end, Chapter 3 will present the major objectives to a policy of "selective incapacitation."

Appendix 2

Reconciling Differing Estimates of Lambda

By far the biggest problem in obtaining consistent estimates of lambda -- the average rate of offending -- is that some estimates were determined through official records, and some from self-report surveys. For our purposes, the relevant estimates concern serious, index offenses only. Since most of the self-report research focused on less serious delinquent behavior that is far more broadly based throughout the population,[65] most of these surveys will not help much. With the exception of Collins, who surveyed members of the Philadelphia birth cohort as to their serious delinquent activity,[66] the only surveys focusing on serious offenses were conducted of prison inmates. Even a nondiscriminating criminal justice system would include more active offenders in prison simply by chance, so we are essentially confined to use of arrest and conviction records for lambda estimates for less active offenders who are less likely to be sent to prison.

The police do not clear a very large proportion of crimes by arrest. Although rates vary from one jurisdiction to another, a reasonable estimate is that an offender will be arrested in about 5 percent of index crimes. Thus an offender who has been arrested five times has almost certainly committed more than five crimes. If he or

she is neither more nor less likely to be arrested than the average criminal, this offender has committed roughly

5 arrests x (1 / .05) crimes/arrest = 100 crimes.

This is only the most likely value. If the distribution of offense rates were known, then this figure would represent the mean of the a posteriori distribution of offenses, given that five arrests have been made.

It is relatively easy to obtain arrest records; many authors have examined the FBI career criminal file, for example, which includes a record of each arrest made in Washington, D.C. in recent years.[67] If one can determine the rate at which offenders are arrested during the period in which they are active, and divide by the clearance rate, the result will be an unbiased estimate of lambda. Thus the reciprocal of the clearance rate may be thought of as an "arrest multiplier".

Boland and Wilson[68] used an arrest multiplier of five (1/.20), which they obtained by dividing the number of reported crimes by the number of arrests in Washington, D.C. Unfortunately, many crimes are committed by more than one person, thus the probability that any of the people involved in a given crime would be arrested is less than one in five. Probably more important, many (if not most) serious crimes are not reported to the police. If victimization surveys are to be relied upon, only 30 to 35 percent of crimes are reported. Thus the actual arrest multiplier must be greater than five.

Blumstein and Cohen[69] broke down clearance rates by crime type,

while correcting for the fact that many crimes are not reported to the police and that several offenders are involved in many crimes. Their basic result: an offender was caught about once every 22 times he or she committed a crime. Thus each arrest represented roughly 22 different offenses. Many have speculated that these victimization survey data are inflated, however. Some respondents "telescope" events into the survey window that in fact happened before the time period in question, while others inflate the seriousness of offenses committed against them. Thus the Blumstein and Cohen multipliers probably result in estimates for lambda that are too high, because they take victimization data at face value.

In constructing Table 7, we used two values for arrest multipliers:

- A lower-bound multiplier, which assumes that all crimes are reported to the police, but corrects for multiple-offender crimes;
- An upper-bound multiplier, identical to that computed by Blumstein and Cohen.

Because victimization surveys indicate that about one half of index crimes are reported, the upper bound of lambda will be roughly twice the size of the lower bound. The size of the difference will depend slightly on the mix of crimes committed by the population in question, since some populations are more likely to commit violent crimes. Victimization surveys suggest that these crimes are reported at higher rates than nonviolent offenses.

Other corrections and additions made to the values of lambda

shown in Table 7 are detailed below.

Studies of People Arrested One or More Times

Delinquency in a Birth Cohort.[70] Career length is assumed to be the entire period between the first arrest (the "age of onset") and the offender's eighteenth birthday. We assume that the mix of nonviolent and violent crimes committed by these juveniles is the same as the mix of these crimes committed by people arrested two or more times (for example, assume that the proportion of all nonviolent crimes that are larcenies is the same for the two populations). Then violent and nonviolent arrest rates may be multiplied by the upper and lower bound multipliers for violent and nonviolent offenses.

Scope and Prediction of Recidivism.[71] The PROMIS data set includes information on 72,510 arrests of 45,575 offenders, made over a 56-month period. Thus the number of arrests per year for this once-arrested population is .341. Greenberg (1975) suggests that five years is a reasonable approximation for the average career length, so we assumed that the 56-month period encompassed the offender's entire career. Some 46.9 percent of these arrests are for index offenses, so the simplest measure of lambda would be

lambda = (.469) (.3410) M

where M is the arrest multiplier. This assumes that all offenders committed index offenses at an identical rate, however, and Williams gives evidence that many offenders commit mostly index offenses, while others commit almost entirely nonindex crimes. The practical

significance of this is that, in theory, index offenders might comprise 46.9 percent of the criminal population, but commit index crimes at the same rate as nonindex offenders commit nonindex crimes. This could not be true in practice, of course, since people who commit index offenses also commit some nonindex crimes.

The arrest rate was defined as the long run equilibrium rate consistent with the crime switch matrix Williams gives in Table 7 (p. 43). This is equal to

rate = lambda x q = (.341) (.566) = .193

where .566 is the likelihood that the next crime committed will be an index crime, given that the offender commits some index crimes. This estimate assumes that the chances of arrest are no different, on average, for index and nonindex offenses.

The Incapacitative Effect of Imprisonment: Some Estimates.[72] Greenberg's method is an attempt to correct FBI arrest rates that are known for people with two or more arrests by adding expected arrest rates for people with only one arrest. The problem is to estimate the proportion of all arrests that are made of people who have not been arrested before. Greenberg brings evidence to suggest that the upper limit of this proportion is roughly .30; he shows that lambda is roughly 3.3 for a "reasonable" proportion of .25. As Cohen[73] shows, however, lambda varies greatly with small changes in this proportion: expected lambda is nearly six if the proportion of "virgin" arrests is as small as .15.

For the figure shown in Table 7, we set the lower bound for lambda as follows:

- Reporting rate is 1.0;
- Virgin arrest rate is .30;
- Virgin index arrest rate is .25.

For the upper bound of lambda, the following parameters are used:

- Reporting rate is .50;
- Virgin arrest rate is .15;
- Virgin index arrest rate is .10.

Neither estimate accounts for time incapacitated, so they are both biased high.

Studies of People Arrested Two or More Times

Offenders Careers and Restrairts.[74] This study includes both arrest and self-report data. Eighteen offenders said they committed more than 100 crimes, and are not included in Collins's estimates, since they made mean lambdas between small categories incomparable. Since we are interested only in the aggregate lambda, offenders committing more than 100 crimes were assumed to have committed exactly 100, and included in the figures in Table 7. The exact number of crimes reported by these offenders is unavailable.

Estimation of Individual Crime Rates.[75] Although the expected lambda for people who committed crimes of all crime types was 24.7 (adding up the diagonal numbers of Table 19, p. 582), a number of index offenders committed only a few of these crime types during the

study period. Thus the appropriate lambda for offenders who committed one or more index crimes of any type is the lambda for each crime type i, given that an offender committed that crime type, multiplied by the probability that an offender in the sample was arrested for that crime. That is,

$$\sum_i \lambda(i) \cdot p(i)$$

where the $\lambda(i)$ matrix is given as Table 19, and the p(i) matrix is derived from Table 18, p. 582.

Doing Crime. This is self-report information from prison inmates. Inmates would have higher offense rates than the twice-arrested population even if incarceration rates were constant for all crimes committed, so these lambdas need to be adjusted to reflect the filtering of the system. If the rate at which people in prison commit each crime type i, the rates of arrest, conviction and incarceration, and the average sentence length are all known, it is possible to work backwards by assuming that all people who commit crime type i are equally likely to be incarcerated for each offense they commit. (That is, high rate offenders are no more and no less likely to be caught and imprisoned than low rate offenders. A similar assumption is necessary when lambda is based on arrest records--that the arrest rate is unrelated to lambda. Although there is little reliable information as to how well either assumption fits reality, the incarceration/lambda relationship is likely to be the stronger of the two--and thus the bias larger--if only because prosecutors and judges

are likely to concentrate on the same offenders as the police.)

Peterson and Braiker did not obtain self-report information on offense rates for larcenies. We have assumed that, for this sample, larcenies are committed in the same proportions relative to burglaries and auto thefts as they were for the offenders sampled by Blumstein and Cohen.[77]

Studies of the Incarcerated Population

Doing Crime. Here, again, we have assumed that larcenies are committed in the sample proportion relative to other nonviolent crimes as that reported in Blumstein and Cohen.

Selective Incapacitation.[78] These are trimmed means of self-reported offense rates, in which the offense rates of the 10 percent of offenders reporting the highest offense rates have been truncated to the figure for the 10th percentile. The figures were derived by weighting lambda for each of the three offense rate groups in Table i-1 (page xii) by the proportion of offenders in each.

Notes

1) This idea seems to appear naturally and inevitably whenever public concern about crime reaches a certain level. For an outstanding account of the form it has taken in England, see Leon Radzinowicz and Roger Hood, "Incapacitating the Habitual Criminal: The English Experience" Michigan Law Review, 78 (August, 1980), 1305-1389. For a recent exposition, see Peter W. Greenwood with Allan Abrahamse, Selective Incapacitation (Santa Monica: Rand Corporation, 1982).

2) For a penetrating analysis raising these basic questions, see Alan Dershowitz, "The Origins of Preventive Confinement in Anglo American Law," University of Cincinnati Law Review, 43 (1974), pp. 1-60, pp. 781-846.

3) In searching for explanations for the fact that many felony arrests in New York City never reached felony convictions, the Vera Institute of Justice found that the fact situations that lay behind "felony arrests" were often ambiguous. Many robberies, felonious assaults and so on seemed to be the product of disputes in which it was hard to see who was at fault. Only a few of the felonies resembled our image of a violent, unprovoked attitude by one stranger against another. See Vera Institute of Justice, Felony Arrests: Their Prosecution and Disposition in New York City Courts (New York: Vera Institute of Justice, 1977).

4) For analyses of the question of imprisonment as criminal punishment, see Norval Morris, The Future of Imprisonment (Chicago: University of Chicago Press, 1974), or Michael Sherman and Gordon Hawkins, Imprisonment in America (Chicago: University of Chicago Press, 1981).

5) For a literary treatment of the issue of the role of guilt in crime and punishment, see Herman Melville, Billy Budd: Foretopman (New York: Bobbs-Merrill, 1975).

6) For empirical evidence on the success of rehabilitation programs, see Robert Martinson, "What Works: Questions and Answers About Prison Reform", The Public Interest (Spring, 1974) pp. 22-54.

7) Jan M. Chaiken and Marcia R. Chaiken with Joyce E. Peterson, Varieties of Criminal Behavior: Summary and Policy Implications (Santa Monica: Rand Corporation, 1982), p. 20.

8) To a great extent, social scientists seeking to understand crime have relied on the "macro" approach that searched for broad

structural features of the society that "caused" crime. This orientation was appropriate to the purposes for at least three reasons. First, as a scientific matter, social scientists seek to develop the broadest, most general explanations of crime in the society. Just as a physicist would be uninterested in the question of how a particular leaf came to fall to a particular spot on the ground (except insofar as its journey and ultimate destination revealed the operations of gravity and air pressure on a light, irregular surface), so criminologists are often uninterested in the question of how a particular teenager happened to snatch a purse from a particular elderly woman on a given street (except insofar as the event illustrated the operations of social processes creating dispositions and opportunities to commit offenses of particular types in social space). Since it seems likely that these broad explanations were most likely to be found in "structural" variables such as social status, the availability of weapons, and so on, these variables (rather than individual differences in motivation) become the focus of attention.

Second, since large quantities of (more or less reliable) empirical information about aggregate patterns of crime exist, since the statistical techniques that allow tests of hypotheses require large numbers of consistently recorded observations, and since social scientists want their work to be empirically tested, it is natural to take a "macro" approach. The evidence is there to be used.

Third, many of the crucial questions that motivate the curiosity of social scientists are essentially macro questions rather than micro questions. Many social scientists are interested in examining the overall "fairness" and "justice" of the criminal justice system. In particular, they are interested in the important question of how social status influences the operations of the criminal justice system. Since "equality before the law" is an important principle in a liberal society, it is important to find out whether the system in fact operates with impartiality. These questions can only be investigated through aggregate analyses of crime and the criminal justice system.

For a comparable analysis of this point, see James Q. Wilson, Thinking About Crime (New York: Basic Books, 1975), pp. 47-71.

9) For an articulate presentation of this perspective, see Charles E. Silberman, Criminal Violence, Criminal Justice (New York: Random House, 1978).

10) Travis Hirschi, The Causes of Delinquency (Berkeley: University of California Press, 1969).

11) Although the most frequently cited example is the organized youth gang, there is evidence that less structured groups--which also "recruit" and commit crimes at high rates--contribute more to serious crime rates than do formal gangs. See, for example, Walter Miller, Violence by Youth Gangs and Youth Groups as a Crime Problem in Major American Cities, (Washington, D.C.: National Institute of Justice, 1981), or, more generally, Maynard L. Erickson, "The Group Context of Delinquent Behavior," Social Problems, 19 (1971) 114-129.

12) For a classic study indicating the role of alcohol and victim provocation in homicides, see Marvin Wolfgang, "Victim Precipitated Criminal Homicide", Journal of Criminal Law, Criminology and Police Science 48 (1957), pp. 1-11.

For a provocative analysis suggesting the phenomenon of "victim-proneness" (and, therefore, victim complicity in causing crime), see Michael Hindelang, Michael R. Gottfredson, and James Garofalo, Victims of Personal Crime: An Empirical Foundation of a Theory of Personal Victimization (Cambridge, Mass.: Ballinger,1978).

13) Mark H. Moore, "Criminogenic Commodities," (Mimeograph, John F. Kennedy School of Government, 1981).

14) Several studies in various cities report that some 40 percent of citizens have purchased home protective devices, such as alarms, guard dogs, or guns, in the last few years. For a comprehensive review of research on investments in self-protection, see Fred DuBow, Edward McCabe, and Gail Kaplan, Reactions to Crime--A Critical Review of the Literature, (Washington, D.C.: U.S. Government Printing Office, November 1979), pp. 41-46.

15) Paul Cirel, and others, Community Crime Prevention Program: Seattle, Washington: An Exemplary Project (Washington, D.C.: U.S. Department of Justice, 1977).

16) George L. Kelling, and others, The Kansas City Preventive Patrol Experiment (Washington, D.C.: Police Foundation, 1974).

17) James Q. Wilson, Varieties of Police Behavior (Cambridge, Mass.: Harvard University Press, 1968). See also, James Q. Wilson and George L. Kelling, "Broken Windows", Atlantic, March 1982, pp. 29-38.

18) For an anecdotal account of the background of an armed robber which seems to emphasize the role of casual violence in the family setting, see John Allen, Assault with a Deadly Weapon: The Autobiography of a Street Criminal (New York: Pantheon, 1977).

19) Of course, the most contentious piece of equipment involved in criminal activity is the gun -- specifically the handgun. For a current review of the state of the evidence and debate concerning gun control, see Philip J. Cook, ed. "Special Issue on Gun Control," The Annals, 456 (May 1981)..

20) This may be particularly important for juvenile offenders. Victimization surveys reveal that much juvenile criminal activity occurs in groups. See Alfred Blumstein and Jacqueline Cohen, "Estimation of Individual Crime Rates from Arrest Records," Journal of Criminal Law and Criminology, 70 (1979), 561-585.

Criminal collaborators are also obviously important in sustained, organized criminal activity such as drug dealing, extortion and so on. See Mark H. Moore, Buy and Bust (Lexington, Mass.: D.C. Heath and Co., 1975).

21) For an argument that this fact plays a crucial role in determining the success of narcotics control efforts, see Mark H. Moore, "Limiting the Supply of Drugs to Illicit Markets," Journal of Drug Issues, 9 (Spring, 1979), 291-308.

22) For information on the preparations and methods of active burglars, see Thomas A. Repetto, Crime and Housing in a Metropolitan Area: A Study of the Patterns of Residential Crime (Cambridge, Mass.: Urban Systems).

23) There is some statistical support for the notion that crossing the line from "honest citizen" to "criminal offender" represents a major threshold. The basic question is what is the conditional likelihood that someone will commit an additional offense given that he has already committed a certain number previously. There is a problem here in that eventually an aging effect takes over, and even those who have committed many offenses in the past will stop committing offenses. Still, what is remarkable is how the conditional probability of offending increases dramatically with the first several offenses. For statistical evidence on this point, see Marvin E. Wolfgang, Robert Figlio and Thorsten Sellin, Delinquency in a Birth Cohort (Chicago: University of Chicago Press, 1972) or Mark H. Moore, James Q. Wilson and Ralph Gants, "Violent Attitudes and Chronic Offenders," (Mimeographed, John F. Kennedy School of Government, January 1978).

24) Jacqueline Cohen, "The Incapacitative Effect on Imprisonment" in Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin, eds. Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (Washington, D.C.: National Academy of Sciences, 1978).

25) For techniques of estimating actual rates of offending from arrest data, see Blumstein and Cohen, "Estimation of Individual Crime Rates."

26) To get an idea of how a random process can result in each outcome, try a simple experiment. Suppose that a low rate offender runs a two percent risk of committing a crime each month over a twenty-year career. Now get a table of random numbers, and use each two-digit random pair to represent the results of a monthly "trial"; any two random pairs (say 98 and 99) mean that a crime was committed; any other pair means that no crime was committed. When we apply this procedure to the first page of Rand's Million Random Digits (Glencoe, Ill.: Free Press, 1955), we get the following results:

- All five simulated offenders had large gaps in their careers, in which they committed no crimes. The gaps averaged over ten years in length.
- The offender with the smallest gap committed no crimes for eight years; the offender with the largest committed only two crimes in his twenty-year career--one in his second year, and one in his twentieth, for a gap of over 18 years.
- A third offender committed his first crime six years into his "career", and committed his last with nine years still to run, thus concentrating four offenses in five years.

A little arithmetic shows that about 40 percent of these very low-rate offenders will commit two or more crimes in a month at some point in their career; if we consider that many thousands of people (youths in central cities, for example) face odds not unlike these, it is not surprising when we find that a few hundred or even thousand low-rate offenders will in fact commit crimes at a high rate some time in their lives. If intentions to commit crimes are influenced to some degree by recent, prior criminality -- if "getting away with it" once makes one more likely to try again -- then the random binomial 's will understate the relative concentration of a low rate offender's criminal career. At any rate, the concept of a "criminal career" is barely if at all useful when applied to large numbers of offenders with low rates of activity.

27) Radzinowicz and Hood think that the inability of the society to balance the seriousness of crimes with the frequency of crimes has been one of the main problems attending English efforts to focus on habitual offenders. As they remark,

> Inherent in all these schemes was a common fault. They were framed as if to apply to any felony, whatever its degree of seriousness, and they ignored altogether the problems posed by persistent minor misdemeanants ("Incapacitating the Habitual Criminal," p. 1328).

For further discussion of this issue, see pp. 69-84, above.

28) While including all index crimes means that we include many less frightening offenses such as shoplifting or burglary from an auto, it also means that some dangerous and fear-provoking crimes will not be included: simple assault, weapons offenses, and driving under the influence are obvious examples. The advantage to selecting index crimes for study is that nearly complete information on reported index crimes is available from the F.B.I. See, for example, F.B.I. Crime in the United States, (Washington, D.C.: Government Printing Office, 1981) for a definition of each Part I index offense and a discussion of the coverage of the Uniform Crime Reporting program.

29) Thorsten Sellin and Marvin E. Wolfgang originally developed their seriousness measure through sample surveys of college students, police officers, and judges; it reflects the seriousness of the victim's financial, physical, and psychological losses. See The Measurement of Delinquency (New York: John Wiley and Sons, 1964). The seriousness scores have been successfully replicated with a variety of different samples (including samples drawn from several foreign countries). The measure seems remarkably robust: the correlation between scores for different samples ranges from .85 to .95 (Charles F. Wellford and Michael Wiatrowski, "On the Measurement of Delinquency," Journal of Criminal Law and Criminology, 66 (1975), pp. 175-188).

30) The Police Executive Research Forum is experimenting with a crime classification system for use in police departments that includes information on the legal charge, the nature and size of the victim's loss, the relationship between victim and offender, and the location of the crime. This scheme has great appeal. See Gregory A. Thomas, "Summary Report on the Crime Classification System for the City of Peoria, Illinois," (Washington, D.C.: Police Executive Research Forum, 1982).

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

32) The F.B.I. has collected arrest records for over 5000 adult offenders arrested one or more times in Washington, D.C. between 1973 and 1975. All prior and subsequent arrests of these offenders made anywhere in the United States are included in the records. Several researchers, including Barbara Boland and James Q. Wilson ("Age, Crime and Punishment," The Public Interest 51 (Spring 1978), 22-34), Kristen M. Williams (Scope and Prediction of Recidivism, PROMIS Research Project Publication 10, Washington, D.C.: Institute for Law and Social Research, July 1979), and Blumstein and Cohen ("Estimation of Individual Crime Rates"), have relied on these records to draw conclusions about criminal careers.

33) When asked to report their own criminal histories, most convicted offenders volunteer many crimes that they have not previously been arrested for and charged with. (In the past, researchers have promised offenders to keep self-report information confidential; their efforts are now aided by a Federal statute prohibiting use of such survey information in the courtroom. See Joan Petersilia, "Criminal Career Research: A Review of Current Evidence," in Norval Morris and Michael Tonry, eds., Crime and Justice--An Annual Review of Research, Volume 2 (Chicago: University of Chicago, 1980).) One way of validating these self-reports is to compare the proportion of crimes for which these convicted offenders were arrested to some independently derived estimate of the probability of arrest. If the two are about the same, we conclude that the average offender is neither over nor underestimating the extent of his criminal history. If the apparent chances of arrest for convicted offenders are much higher, then offenders may be forgetting, lying, or for some other reason underestimating their activity. Consider the following probabilities of arrest--one derived from a self-report survey reported in Mark A. Peterson and Harriet B. Braiker with Suzanne M. Polich, Doing Crime: A Survey of California Prison Inmates, R-2200-DOJ (Santa Monica: Rand Corporation, April 1980), the other from official arrest records and victimization survey data (Blumstein and Cohen, "Estimation of Individual Crime Rates":

	Self-Report	Official Records
Robbery	.21	.07
Assault	.10	.11
Burglary	.07	.05

Note that the self-report arrest probabilities are somewhat higher, indicating that, on average, convicted offenders probably underestimate the extent of their previous criminality. (In addition, it is likely that the offenders slightly underestimated the number of previous arrests as well. See Joan Petersilia, Peter W. Greenwood and Marvin Lavin, Criminal Careers of Habitual Felons, R-2144-DOJ Santa Monica: Rand Corporation, August 1977). This result squares with similar surveys of delinquency among youth reviewed by Michael J. Hindelang, Travis Hirschi, and Joseph G. Weis in "Correlates of Delinquency: The Illusion of Discrepancy between Self-Report and Official Measures," American Sociological Review, 44 (1979) 995-1014. Still, it is likely that some respondents will overestimate the number of offenses, and it is clear that self-report data will account for a much higher fraction of the offenses committed than will official records.

34) Petersilia, Greenwood and Lavin, Criminal Careers; Peterson, Braiker and Polich, Doing Crime; Chaiken, Chaiken and Peterson, Varieties of Criminal Behavior.

35) Dale K. Sechrest, The Criminal Behavior of Drug Program Patients (Cambridge: Center for Criminal Justice, Harvard Law School, 1975).

36) Delbert S. Elliott, Suzanne S. Ageton, and David Huzinga, The National Youth Survey (Boulder: Behavioral Research Institute, 1978).

37) There are clearly incentives for a defendant to keep quiet about his activity. Some police departments devote much energy to placing additional charges against an offender already arrested. The practice helps the departments clear their books, gives the prosecutor added bargaining leverage, and makes long term incarceration of the defendant more likely. Although the extent of this practice differs from one jurisdiction to the next, some police departments "clear" 30 to 40 percent of their serious crimes in this way. See John E. Eck, Managing Case Assignments: The Burglary Investigation Decision-Model Replication (Washington, D.C.: Police Executive Research Forum, 1979). It is not surprising that an offender would be very wary of nosy researchers.

38) For a review of methods and conclusions concerning general incapacitation, see Jacqueline Cohen, "The Incapacitative Effect of Imprisonment: A Critical Review of the Literature," in Alfred Blumstein, Jacqueline Cohen and Daniel Nagin, eds. Deterrence and Incapacitations: Estimating the Effects of Criminal Sanctions on Crime Rates (Washington, D.C.: National Academy of Sciences, 1978).

39) The official arrest, conviction and incarceration records for a cohort of Philadelphia youths born in 1945 were collected through their early 20's, and analyzed by Wolfgang, Figlio, and Sellin in Delinquency in a Birth Cohort. Later, University of Pennsylvania researchers followed the cohort to age thirty; results of additional analysis are presented by James J. Collins in "Offender Careers and Restraints: Probabilities and Policy Implications" final report (Philadelphia: University of Pennsylvania, 1977), and Marvin E. Wolfgang in "Sociology of Aggression".

40) Reported in Marvin Wolfgang and Paul Tracy, "The 1945 and 1958 Birth Cohorts: A Comparison of the Prevalence, Incidence and Severity of Delinquent Behavior," prepared for our conference and published in Volume II of this report.

41) Wolfgang and Tracy, "The 1945 and 1958 Birth Cohorts."

42) Wolfgang and Tracy, "The 1945 and 1958 Birth Cohorts."

43) Rand conducted its first self-report survey of 49 armed robbers incarcerated in California in the mid-1970's (Petersilia, Greenwood and Lavin, Criminal Careers). A more general survey of California prisoners, based on a survey questionnaire rather than in-person interviews, was completed two years later (Peterson, Braiker and Polich, Doing Crime). Rand's third and most ambitious effort applies this questionnaire to 2600 offenders incarcerated in California, Michigan and Texas jails and prisons. Although the final report of this project is not yet available, Peter Greenwood presented some analysis results in a paper prepared for this conference ("Tradeoffs Between Prediction Accuracy and Selective Incapacitation Effects"), and has generously made working drafts of the final report available to us (Greenwood and Abrahamse, Selective Incapacition; Jan Chaiken and Marcia Chaiken, Varieties of Criminal Behavior (Santa Monica: Rand Corporation, 1982).) Results of this most recent survey are quoted with permission from the authors.

44) Greenwood with Abrahamse, Selective Incapacitation.

45) Andrew von Hirsch, "Desert and Previous Conviction in Sentencing," Minnesota Law Review, 65 (1981) 591-634.

46) Alfred Blumstein and Richard Larson ("Models of a Total Criminal Justice System," Operations Research 17 (1969), 119-132) used arrest data from the Minnesota Board of Corrections and the Federal Bureau of Prisons to determine the likelihood that an offender would be arrested for any of a list of index crimes, given the crime type of his last arrest. Williams, in Scope and

Prediction, computed a similar matrix from F.B.I. career criminal records (note 33, above), and Blumstein and Cohen ("Estimation of Individual Crime Rates") combined the same data set with information from victimization surveys to give more reliable results. Finally, Peterson, Braiker and Polich (Doing Crime) used self-report data to draw correlations between rates of offending for different crime types.

47) A major problem with the crime-switch matrix results is that they focus on the average over all offenses, rather than over all offenders. That is, if most burglaries are committed by burglary specialists, then the probability will be higher that an arrested burglar will be next arrested for burglary; however, if most burglaries are committed by generalists who commit all crimes at high rates, the burglary rearrest probability will be much lower. This result could still obtain, even if most of the offenders who committed burglaries were specialists--their offenses would be overwhelmed by the more frequent offenses of the high rate generalists.

When Chaiken and Chaiken compared the rate of offenses for specialists and generalists, in Varieties of Criminal Behavior, they found that this in fact had occurred: the offenders who committed crimes at the highest rates were overwhelmingly generalists (who they termed "violent predators"), while specialists were less active. Contrary to the earlier findings, then, most offenders did specialize to some degree.

48) Chaiken and Chaiken, Varieties of Criminal Behavior.

49) For an analysis indicating a similar pattern for drug use, see Denise Kandel, "Stages in Adolescent Involvement in Drug Use," Science, 190 (1975), 912-914. For an even more general analysis, see Floyd H. Allport, "The J-Curve Hypothesis of Conforming Behavior," Journal of Social Psychology, 5 (1934), 141-183.

50) Greenwood with Abrahamse, Selective Incapacitation, p. 45.

51) Preliminary results for Cohort II are presented in a paper prepared for this report by Wolfgang and Tracy. As the authors note, however, the differences between Cohorts I and II are not solely attributable to changes in the prevalence and activity of youth delinquents. Between the early 1960's (when Cohort I was most active) and the mid-1970's (when Cohort II committed most of its crimes), the population of Philadelphia changed greatly: by 1975, Philadelphia was blacker and poorer than in 1960, with a considerably increased rate of unemployment, particularly among young people.

The sons of many of the white middle-class youths included in Cohort I were now living in the suburbs, and not included in Cohort II. (As noted by Wolfgang, Figlio and Sellin in Delinquency in a Birth Cohort, delinquency was just as prevalent among members of this group as among the poor who stayed in the city; however, they committed considerably fewer crimes of violence.) Thus, though the structure of both criminal and legitimate opportunities and the motivations toward criminal activity had changed by 1975--in the city--these changes may not reflect changes in the country at large, or even within the Philadelphia metropolitan area.

52) Wolfgang and Tracy, "The 1945 and 1958 Birth Cohorts," pp. 26-27.

53) Wolfgang and Tracy, "The 1945 and 1958 Birth Cohorts," pp. 26-27.

54) Allport ("J-Curve Hypothesis") suggests that all social deviance is distributed throughout the deviant population according to a highly skewed "J-curve". That is, most people who commit deviant acts differ only slightly from social norms; a few deviate very greatly. Allports backs up his hypothesis with research results on deviance in work behavior (the number of employees clocking into a factory late), traffic activity (the distribution of parking violations, and behavior at a stop sign), and religiosity (the proportion of churchgoers who genuflect completely, and who kneel when praying).

55) Radzinowicz and Hood, "Incapacitating the Habitual Criminal," p. 1328.

56) Norval Morris, The Habitual Criminal (London: London School of Economics and Political Science, 1951) pp. 63-65.

57) For an analysis indicating that prosecutors are importantly influenced by the seriousness of the offense, see Brian Forst and Kathleen B. Brosi, "A Theoretical and Empirical Analysis of The Prosecutor," Journal of Legal Studies, 6 (1977) 177-191.

58) Jacqueline Cohen, Estimating Incapacitative Benefits

59) See, for example, Linda Sleffel, The Law and The Dangerous Criminal: Statutory Attempts at Definition and Control (Lexington, Massachusetts: D.C. Heath, Lexington, 1977).

60) Chaiken and Chaiken, Varieties of Criminal Behavior

61) To determine how well this definition identifies dangerous criminals, we applied it to a computer-simulated cohort of 1000 offenders. The parameters of the cohort were chosen to match our "best guesses" about the characteristics of the offending population at large. (For details, see William Spelman, "The Crime Control Effectiveness of Selective Criminal Justice Policies," prepared for our conference and published in Volume II of this report.) At some time in their careers, 195 of the offenders (19.5 percent) qualified as "dangerous" under this definition. These offenders committed violent crimes twice as quickly as the average offender, were responsible for 48 percent of all violent crimes committed by the cohort, and accounted for 58 percent of all arrests for violent crimes.

This method compares favorably with the identification technique detailed in Greenwood with Abrahamse, Selective Incapacitation. When the Greenwood approach was used, the 30 percent of offenders predicted to be the most violent were responsible for less than 45 percent of all violent crimes committed by the cohort. Because the characteristics of the samples differ, however, the methods may be about equally accurate.

62) Facilitating this "maturing out" process is one of the reasons for maintaining the secrecy of juvenile criminal records. That many (if not most) youths do "mature out" before reaching adulthood has been demonstrated several times, most recently by Marvin E. Wolfgang, "Crime in a Birth Cohort," in Roger Hood, ed., Crime, Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowicz, (New York: Free Press, 1974) 79-92.

63) See, for example, Collins, "Offender Careers," for an account of the "aging-out" process of the 1945 Philadelphia cohort to age 30.

64) John Monahan, "The Case for Prediction in the Modified Desert Models of Criminal Sentencing," International Journal of Law and Psychiatry, 5 (1982) 103-113.

65) See, for example, Michael J. Hindelang, Travis Hirschi, and Joseph G. Weis, "Correlates of Delinquency: The Illusion of Discrepancy between Self-Report and Official Measures," American Sociological Review. 44 (December, 1979).

66) Collins, "Offender Careers."

67) David F. Greenberg, "The Incapacitative Effect of Imprisonment: Some Estimates," Law and Society Review, 9 (Summer, 1975), 541-580; Collins, "Offender Careers"; Boland and Wilson, "Age, Crime and Punishment"; Blumstein and Cohen, "Estimation of Individual Crime Rates."

68) Boland and Wilson, "Age, Crime, and Punishment."

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

70) Wolfgang, Figlio, and Sellin, Delinquency in a Birth Cohort.

71) Williams, Scope and Prediction of Recidivism.

72) Greenberg, "Incapacitative Effect."

73) Cohen, "The Incapacitative Effect of Imprisonment."

74) Collins, "Offender Careers".

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

76) Peterson and Braiker with Polich, Doing Crime.

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

78) Greenwood with Abrahamse, Selective Incapacitation.

Chapter 3

A SELECTIVE FOCUS: THRESHOLD OBJECTIONS

Proposals to sharpen the focus of the criminal justice system on unusually dangerous offenders carry significant risks as well as potential benefits. For one thing, the proposed policies might fail to produce the intended effects. The dangerous offenders might account for fewer crimes than we now believe; they might evade capture and identification as dangerous offenders; or they might be replaced by other equally dangerous characters.[1] Beyond the prospect of practical failure, the proposed policies carry the risks of doing injustice to those subjected to different treatment, and of corrupting the ideologies and institutions that now guide the operations of the criminal justice system. Indeed, the whole idea of a special focus on "dangerous offenders" affronts the concept of "equal protection", and licenses attacks on "due process" by insinuating ad hominem motivations into the operation of the criminal justice system.

A useful way to identify the risks associated with proposals to sharpen the focus of the criminal justice system is to identify major objections to these proposals. In our view, critics have raised nine threshold objections to a policy of "focused punishment" or "selective incapacitation." Some raise doubts about the justice of such policies, others are skeptical about potential effectiveness, and still others worry about the broad, long run institutional

consequences. These objections are powerful -- so powerful, in fact, that they may lead some readers to advise against any further efforts to sharpen the focus of the criminal justice system. Even those who are not entirely discouraged, however, should see that the objections mark out vulnerable areas. As such, the objections should become the focus of further inquiries, and of managerial and social attention as the policy evolves. In effect, the objections structure an evaluative framework and research agenda that can usefully guide the development of selective criminal justice policies.

There is one additional point to be made. Some of the objections are quite general: they attack the concept of "selective incapacitation" at a fundamental level. Such objections can be discussed without knowing in much detail what is meant by a "selective focus on dangerous offenders." Other objections depend on more detailed specifications of the policy: what, exactly, is being proposed for what stage of the criminal justice system. The "justice" of a selective focus may differ depending on whether one is considering sentencing, bail, or investigative decisions. While some aspects of the proposed policy may be discussed in general, others may best be discussed only in the context of specific proposals for specific parts of the criminal justice system (sentencing, pretrial detention, prosecution, and policing).

In this chapter, we will present the objections to a policy of "selective incapacitation" that can be made at the most general and

fundamental level, and what can be said in response to those objections. In subsequent chapters, we will examine the justice and plausible effectiveness of more specific procedures introduced to sharpen the focus of the criminal justice at each stage of processing. This organization allows us to discuss the policy both in general and in detail, and to examine both the abstract idea and the concrete implications for the operations of the criminal justice system. Taken together, these views can usefully influence our general conclusion about whether such a policy is appropriate, useful and feasible; and where additional research should be conducted to shape the evolution of the policy.

A. The Justice of a Selective Focus on Dangerous Offenders

The most fundamental, first order objection to a policy of "selective incapacitation" is that it is unjust. Two different arguments are commonly made. The first emphasizes the fact that selective incapacitation operates by creating differences in punishment among people convicted of similar acts on the basis of characteristics of the individual (their prior criminal record for example). This feature is obnoxious to justice for at least two reasons: first, it makes punishment depend on characteristics of the individual as well as characteristics of the act; and second, the distinctions are based, to some degree, on forward-looking predictions about future conduct rather than on observations of past acts.[2] Both features are unjust in a system where justice is defined as punishment

for past acts.

The second argument gives less attention to the inherent justice of discriminating punishment, and more to the appropriateness of the techniques employed to distinguish high-rate, serious offenders from low-rate, less serious offenders -- or somewhat more narrowly, the techniques used to "predict" rates of future offending by convicted offenders.[3] The concern here is that any procedure (either statistical or clinical) that seeks to make distinctions among offenders (or predictions about future conduct) will necessarily produce errors: some people who are, in fact, low-rate, less serious offenders will be mistakenly assigned to the high-rate, serious offending group. Such errors (commonly called "false positives") are fundamentally unjust. Hence, any system that tolerates such errors is unjust.[4]

An additional concern about the methods of "distinguishing" dangerous offenders or "predicting" future criminal conduct is that some characteristics used in making the distinctions will be inappropriate: they will be characteristics over which the individual has no control (such as race or other physical characteristics); or only limited control (such as employment status); or that are at least partly produced by the idiosyncratic operations of the criminal justice system (age at first arrest, total arrests, time spent incarcerated, and so on). To the extent that the characteristics used in making the distinctions or predictions are based on something other than definitive descriptions of criminal conduct, the justice of

making punishment depend on these characteristics is in doubt.[5] Since most proposed systems of selective incapacitation do rely on "contaminated" variables for making the distinction among offenders, their inherent justice is in doubt.

These two general arguments supporting the notion that a policy of selective incapacitation is unjust in principle or in practice are powerful. They may even be decisive. But counter-arguments can be made supporting the justice of selective incapacitation, both in principle and in practice.

1. THE JUSTICE OF DIFFERENT PUNISHMENT FOR SIMILAR ACTS

In defending the appropriateness of imposing different levels of punishment for similar acts, four lines of defense are possible. The first is to rely on a "utilitarian" justification for the policy rather than a "principled" justification. The argument is simply that punishment has proper purposes beyond doing justice to individuals (crime control through deterrence, incapacitation and rehabilitation), and that these considerations may properly influence such matters as who becomes the target of criminal investigation, who is prosecuted, who is directed to special treatment programs and who serves prison terms of what length.[6] Obviously, there are limits on the extent to which utilitarian considerations may come into play. It would be wrong, for example, to imagine punishing people who had never been convicted of a crime through confinement.[7] And it would be wrong to have sentences radically influenced (say doubled or tripled) by

utilitarian considerations. But it does not offend justice to allow some utilitarian considerations to come into play in determining who will bear the brunt of the criminal justice system's response to criminal conduct.[8] Since nothing more than this is commonly proposed by those encouraging "selective incapacitation", the policy is tolerably just.

In fact, as a second line of defense, one can argue that "selective incapacitation" is really nothing other than the reciprocal of a policy of early release or parole. The basic concept of parole is to mitigate sentences given for specific offenses in the interests of individual rehabilitation.[9] The judgments about who is to be paroled are made on the basis of predictions of recidivism (which are themselves based on individual characteristics). As long as one keeps his attention focused on early releases, parole policies allow wise mercy in an otherwise rigid system. But as soon as one looks at this policy from the point of view of those left in jail (because of bad predictions of future conduct), it looks like a policy of "selective incapacitation." In an important sense, then, the concept of "selective incapacitation" may be justified because it is within our current practices. Indeed, one can argue that selective incapacitation is our current practice. We just call it something else and do it less explicitly and more unfairly than would be possible if the policy were explicitly acknowledged and managed.

The third line of defense for "selective incapacitation" is to

shift our perspective and place the policy squarely in the context of "retributivist" or "justice" ideals. From this perspective, selective incapacitation is not a policy based on predictions of future misconduct, but is, instead, a policy designed to discriminate among criminal offenders according to their degree of "wickedness". We punish some offenders more harshly than others (given identical offenses) not because we "predict" that some offenders are more active than others, but because some offenders reveal themselves to be more determinedly criminal than others, and therefore more deserving of punishment. The willingness to commit serious offenses repeatedly merits punishment more than episodic offenses. In this view, enhanced punishment for habitual offenders is not based on predictions of future conduct, but instead on retributivist ideas about how a person who has acted in certain ways in the past deserves punishment.[10]

If "selective incapacitation" policies were designed from this perspective, more than the language describing the policy would change, however. In fact, two important constraints would be introduced into the design of the policy. Both could have important consequences for the size of the "utilitarian incapacitation benefits" associated with the policy. The first constraint is that the distinctions among offenders would have to be based <u>exclusively</u> on information about prior criminal conduct. Anything else would be inconsistent with strict retributivist notions. To the extent that "predictive" or "discriminating" power eroded in distinguishing future

high rate serious offenders from low rate, less serious offenders by restricting one's attention to prior criminal conduct, some of the utilitarian benefits of selective incapacitation would be lost: one would be less accurate in focusing imprisonment on high rate offenders.[11] Similarly, to the extent that offenders ended criminal careers as they became older, and to the extent that the selective policy operated on the basis of an absolute number of prior offenses (rather than a rate of prior offending), a policy of selective incapacitation based on retributivist principles would end up using limited prison capacity on offenders who may have been fairly dangerous in the past, but are not likely to be particularly dangerous in the future.[12] This, of course, represents a further erosion of the utilitarian justification for the policy.

Thus, while one could justify a policy of selective incapacitation in terms of "just deserts" for past criminal conduct, the justification would introduce constraints into the design of the policy that would reduce the utilitarian benefits. How large this reduction would be depends crucially on: 1) the correlation between our knowledge of past serious offending and future serious offending; and 2) the rate at which offenders reduce their offending behavior as they age. While the loss of these utilitarian benefits may weaken the general argument for selective incapacitation, one can also argue that the losses are well worth taking if the system of selective incapacitation rooted in principles of "just deserts" is more

consistent with common (and philosophically appealing) notions of justice.

A fourth line of defense for selective incapacitation policies is that they increase the fairness of the criminal justice system by compensating (to a degree) for the inequities created by the general difficulty of solving crimes.[13] It is important to remember that a criminal justice system that made punishment strictly proportional to acts without adding any punishment for high rates or long periods of offending would, if it were operating reliably, punish high rate offenders much more frequently than low rate offenders. In fact, the distribution of punishment would exactly mirror the distribution of rates of offending. And, as a result, high rate, dangerous offenders would be spending very large fractions of their lives in confinement.

The problem is that the criminal justice system does not solve most crimes. Indeed, for any given offense, it is unlikely that the system will produce even an arrest to say nothing of a conviction.[14] This means that there is some looseness in the relationship between actual underlying rates of offending, and the criminal justice response to specific criminal offenders. Who gets punished how much depends not only on actual criminal conduct, but also on idiosyncratic features of the offenses and the criminal justice system that make some crimes easier to solve than others. The crucial issue, of course, is whether there is a systematic bias in the operations of the criminal justice system, and if so against whom the bias is directed.

We are accustomed to thinking that the bias in the "solvability" of crimes runs against "dangerous offenders": once they are known to the police, they are more likely to be suspected and arrested in the future. Moreover, common sense tells us that high rate offenders are arrested and punished more frequently than low rate offenders. But the crucial question in examining the bias of the criminal justice system is not whether high rate offenders are more likely to be punished, but whether they are more likely to be punished <u>for each offense</u> than low rate offenders. Given the enormous differences between high and low rate offenders (40 robberies per year of street time versus 2 robberies per year, for example), the high rate offenders would have to be punished not only more frequently, but 20 times more frequently in order for the system to be "fair" among offenders according to their acts. Given the magnitude of the punishment "deserved" by very high rate "dangerous offenders," and current limitations on our capacity to administer punishment, one can reasonably be skeptical about whether the high rate offenders get their "just deserts" relative to low rate offenders. In fact, one can make a plausible argument that the "natural" operations of the criminal justice system are biased in exactly the wrong direction: not against "dangerous offenders", but in favor of them. The argument is based partly on an intuitively appealing description of how the criminal justice system operates, and partly on direct empirical evidence.

The account of how the criminal justice operates to <u>benefit</u> dangerous offenders begins by noting the difficulty of solving the kinds of crimes committed by "dangerous offenders." There is ample evidence that crimes committed among strangers (primarily robberies and burglaries, but also some rapes and murders) are the most difficult to solve precisely because the victim cannot help to solve them.[15] Because dangerous offenders commit these crimes often, they are less likely to be arrested for each offense they commit than other offenders who commit crimes that are easier to solve. The bias continues at the prosecution stage. Prosecutors are primarily interested in "winnable" cases; and if their cases involve a "dangerous offender", they want to assure some jail time. To meet these objectives, prosecutors commonly build cases around a single serious charge that is very likely to succeed.[16] Since judges often sentence concurrently rather than consecutively, there is little to be gained by complicating the case with additional charges, and much to lose since a motley collection of weak charges may weaken the strong case on a single charge.[17] Thus, the criminal justice is less able to come to grips with offenders who commit violence against strangers at very high rates than those who commit simpler crimes at lower rates. As a result, the dangerous offenders get away with more than the less dangerous offenders.

Two crucial pieces of evidence lend credence to this account of the operations of the criminal justice system, and the important

implication that the system treats dangerous offenders more leniently (given their offenses) than ordinary offenders. The first piece comes from the Rand prison surveys. These surveys indicate that the probability of arrest, conviction, and punishment given an offense is lower for high rate offenders than for low rate offenders.[18] The second piece of evidence is that the distributions of rates of arrest and conviction are less skewed than the distribution of actual rates of offending. While this fact does not necessarily imply a bias against high rate offenders, it makes the hypothesis that the bias is in favor of high rate offenders much more likely than the opposite hypothesis.[19] So it seems that the criminal justice system gets tired of punishing the high rate offenders.

To the extent that high rate offenders are treated more leniently (relative to their acts) than low rate offenders, an important inequity is introduced into the system. One way of compensating for this inequity is to introduce a policy of selective incapacitation that would make the distribution of punishment fit the distribution of rates of offending much more closely than it would if we left the system to its natural operations. In this sense, then, the system would be fairer among offenders that it is now: the policy of selective incapacitation would allow the system to compensate for weaknesses in enforcement and prosecution when those activities are directed against active and experienced offenders.

In sum, a policy of "selective incapacitation" could be

consistent with a just system of punishment. Since utilitarian interests are not barred as a matter of principle in the design of the criminal justice policies, and since our current policies include a great many utilitarian justifications, the mere fact that selective incapacitation is often justified on utilitarian grounds does not exclude it from consideration or use. Moreover, one can argue that a policy of "selective incapacitation" or "focused supervision" is consistent with retributivist principles. To the extent that the policy is designed (and operated) to distinguish the "most wicked" among offenders on the basis of past criminal conduct, the policy is consistent with all but the most stringent retributivist principles.[20] In addition, one can argue that "selective incapacitation" enhances the fairness of the system by compensating for a systematic bias in favor of very active offenders in the operations of police, prosecuting and sentencing agencies. Obviously, none of the points is conclusive. A great deal depends on the details of the proposed policy. But there is room in our concepts of justice for a policy that seeks to enhance punishment for dangerous offenders.

2. THE JUSTICE OF DISCRIMINATING TESTS

Equally prominent in attacks on the justice of a selective focus in criminal justice policy is the argument that the discriminating tests used to distinguish dangerous offenders from less dangerous offenders are insufficiently accurate to avoid doing injustices to individuals selected for special treatment: some offenders who are

not, in fact, "dangerous" will nonetheless be classified as such and exposed to the special liabilities associated with this designation. This is a fundamental injustice to individuals. Since the practical benefits of a selective focus also depend crucially on the capacity to distinguish high-rate from low-rate offenders, an assessment of the accuracy and justice of discriminating tests are central to any overall evaluation of selective criminal justice policies.[21]

In the past, the question of whether our capacity to distinguish dangerous offenders from others was sufficiently accurate has been discussed as though only one test existed, and accuracy in selecting high rate offenders the only feature of the test that mattered. In fact, the issue is a little more complicated than this simple view. Many different "tests" are conceivable, and they all have different attributes in terms of their practical value, inherent justice, and convenience. The area of "discriminating tests," then, is much like many other aspects of proposed selective policies: there is room for additional experimentation and careful evaluation. To aid that process, it is useful not only to assess the current performance of discriminating tests, but also to develop a framework for describing and evaluating alternative discriminating tests.

a. Discriminating Tests: An Analytic View

A discriminating test is designed to sort people into categories that differ from one another in terms of some important but unobserved characteristic on the basis of some other characteristic that is

easier to observe. In the case of selective incapacitation policies, the aim is to divide the offending population into groups of offenders that are more or less dangerous (or more or less wicked) on the basis of observable characteristics (prior criminal conduct, juvenile record, drug use and so on). Unfortunately, the variables we can observe are only imperfectly correlated with the unobserved characteristics that interest us. This means that high rate (wicked) offenders will have a distribution of observed characteristics that overlaps (to some degree) with the distribution of similar characteristics among low rate offenders. The discriminating power of the test being used depends crucially on the magnitude of this overlap.

Figure 2 illustrates this point by presenting possible distributions of "scores" on a given test for high and low rate offenders. Figure 2(a) shows the distribution of scores for a good discriminating test: the scores of high rate offenders are tightly bunched and do not hardly overlap at all with the scores of low rate offenders. Figure 2(b) shows the distribution of scores for a poor discriminating test: the scores for both high and low rate offenders vary widely, and overlap to a considerable degree. Figure 2(c) shows the ordinary case of a moderately powerful discriminating test: the scores vary a great deal within the groups, and they overlap with one another, but there is still an important difference between the two groups.

Figure 2
Distribution of
Test Scores

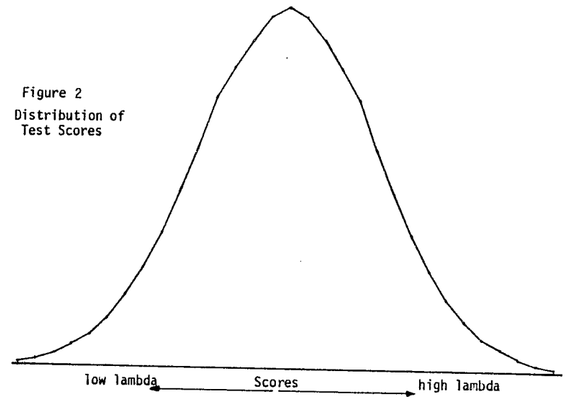


Figure 2-(c)
Moderate Discriminator

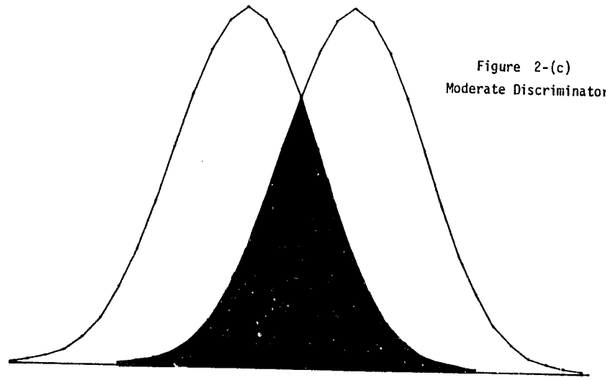


Figure 2-(a)
Excellent
Discriminator

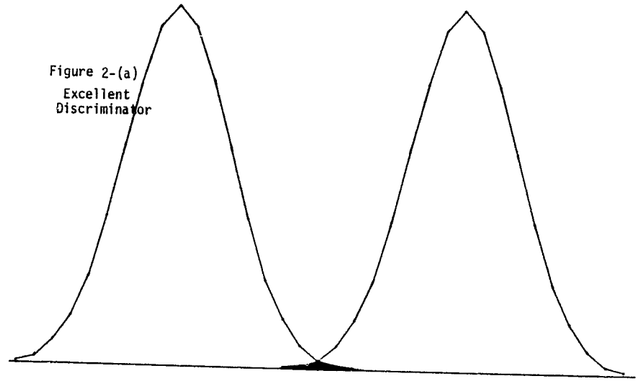
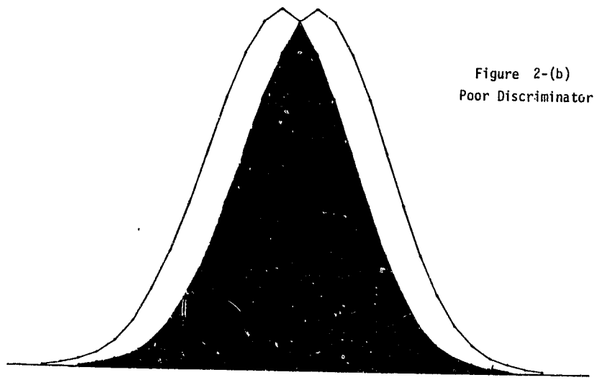


Figure 2-(b)
Poor Discriminator



It is important to understand that the shape of these distributions depends crucially on decisions that the test designer makes as well as on the underlying empirical reality. One decision concerns the definition of the groups into which the offenders are being assorted. One will observe quite different overlaps in the distributions of scores for the different groups depending on whether one is trying to identify the worst 10 percent of offenders or the worst 25 percent. In general, the smaller the groups that one is trying to observe, the harder it will be to find everyone in that group without mistakenly including some who are not in the group.[22] The second decision the test designer makes is which variables to include in constructing his test. In general, the more variables included, the greater the discriminating power established.[23]

Once the test designer has decided on the groups that are worth distinguishing, and has chosen the variables to include in his test, a third decision must be made to completely define his test: he must decide <u>where</u> in the distribution of scores on the test variables to establish the criterion that places people in one category or another. Note that this criterion is defined in terms of the <u>test</u> variable, not the underlying variables. Locating the criterion determines not only the total <u>number</u> of classification errors that will be made in relying on a given set of test variables and a given criterion, but also the <u>distribution</u> of errors between two different types: 1) mistakenly classifying a low rate offender as a high rate offender -- often

described as a "false positive" because we are trying to identify high rate offenders; and 2) mistakenly classifying a high rate offender as a low rate offender -- often called a "false negative". In general, given overlapping distributions of scores, one can reduce the number of "false negatives", only by increasing the number of "false positives". Or, in less technical terms, the more determined one is to find all the high rate offenders, the more likely one is to mistakenly include low rate offenders in the identified group of high rate offenders. This effect is illustrated in Figure 3 by showing the effects of locating the criterion for high and low rate offenders in different positions.

b. Evaluative Standards for Designing and Choosing Tests

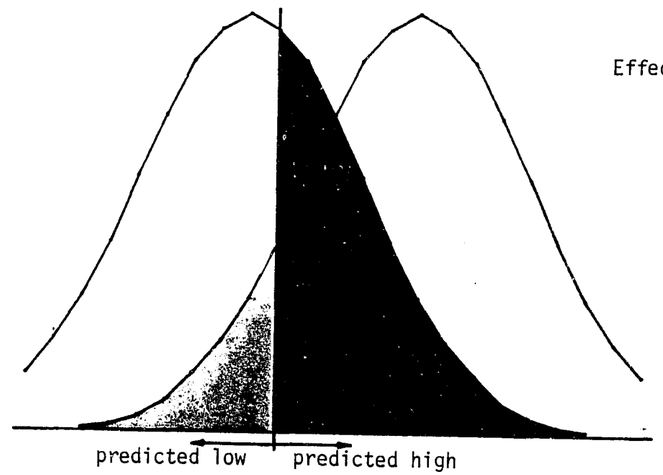
This general discussion of "testing" suggests that many different conceivable tests exist. The tests can be described in terms of these characteristics:

- the definition of the groups into which people are classified;
- the variables used in defining the test; and
- the specific criterion that is used to divide the relevant population into the relevant categories.

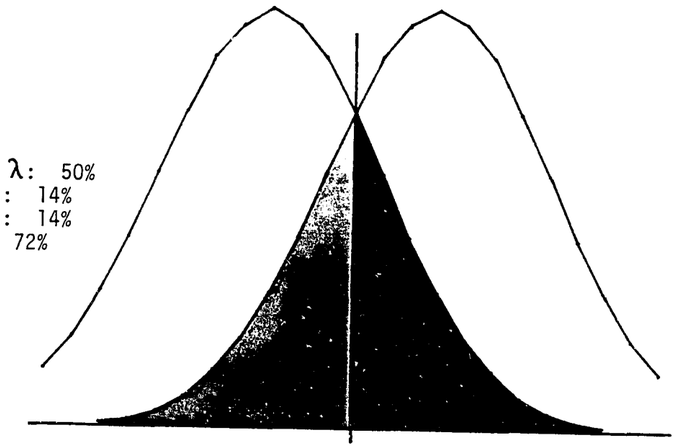
This suggests that it is difficult to give a general answer to this question of whether we can justly and usefully distinguish among criminal offenders.[24] What we can discuss are the standards we might use in evaluating any specific proposed test, and the characteristics

Figure 3

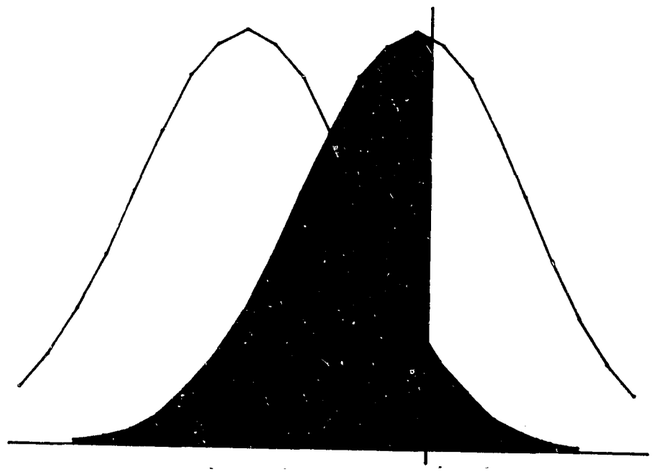
Effect of Moving the Cutpoint



Predicted high λ: 65%
False negatives: 5%
False positives: 20%
Test accuracy: 75%



Predicted high λ: 50%
False negatives: 14%
False positives: 14%
Test accuracy: 72%



Predicted high λ: 30%
False negatives: 2%
False positives: 23%
Test accuracy: 75%

of some tests that have been used in the criminal justice area. Taken together, these points may produce a rough sense for our current discriminating capacity, and what sorts of tests could be constructed and used that might be superior to these currently in use.

1) Defining the Groups. The interests in pursuing the utilitarian benefits associated with "selective incapacitation", and the requirements of justice dictate that certain principles be used in evaluating any given test. In terms of defining the groups to be distinguished, interest in justice and utilitarian benefits push in the direction of: 1) creating large differences among the groups in terms of the underlying characteristics that interest us; and 2) making sure that the average rate of offending in the high-offending group is very high -- high enough to justify the costs of special (and expensive) incapacitation in utilitarian terms, and high enough to eliminate any doubt about the existence of unusual motivations, capacities, and willingness to commit crimes in retributivist terms. Given the shape of the distribution of rates of offending, and our current knowledge about the distribution of types of offending, this implies looking for a small group of high rate offenders -- perhaps the "worst" five to ten percent of the population, rather than, for example, the worst third.[25]

2) Choosing Discriminating Variables. In terms of choosing variables to be included in the testing procedure, interests in justice and utilitarian benefits may seem to push in different

directions. Interests in securing utilitarian benefits counsel the inclusion of any variable that helps in distinguishing high rate offenders from low rate offenders regardless of its standing in our conceptions of individual justice. However, interests in justice counsel restraint in the use of: 1) variables over which the individual has limited or no control, such as age, sex, or IQ; 2) variables associated with class and ethnic bigotry, including wealth, religion, race, and national origin; 3) variables that are not directly related to criminal conduct and only partly under an individual's control, such as unemployment, or alcohol and drug use; and 4) variables that may be more representative of the idiosyncracies of the criminal justice system than of the individual's criminal activity -- arrests, age at first arrest, fraction of time spent in prison, and so on.[26]

The wide latitude utilitarian interests give in terms of appropriate variables seems to contrast sharply with the tight restrictions associated with protecting the interests of justice. And, to a degree, this conflict exists. But a substantial overlap in utilitarian and justice interests may also exist. If prior criminal conduct were in fact closely correlated with future criminal conduct, then the utilitarian interests and the justice interests would converge in choosing measures of prior criminal activity as the appropriate variables to use in the test. Given this possibility, it is significant that most actual efforts to discriminate between high

and low rate offenders find that the most powerful discriminating variables are those that help identify the level and seriousness of prior criminal activity -- age at first arrest, number of prior arrests and convictions, fraction of time spent in jail.[27] The fact that these are the best discriminating variables -- even in a world when we fail to solve most crimes, and the bias seems to favor high rate offenders -- suggests that, in the future, if we could solve more crimes, we could establish a happy reconciliation between the interests of justice and the interests in utilitarian benefits. We could restrict our attention to prior criminal activity and lose very little (perhaps nothing) in terms of discriminating capacity. Perhaps it is only because we now solve so few crimes and keep such inadequate records that a tension exists between the utilitarian interests and the justice interests.

While there is a slightly utopian quality to the notion the criminal justice system could eventually perform effectively enough to allow us to base an effective policy of selective incapacitation exclusively on reliable evidence of prior criminal activity, the realization that we could merge utilitarian and justice concerns by solving more crimes and recording the information more reliably adds urgency to this task. We need to impute crimes to individuals (that is, clear offenses and convict people of multiple counts) not only because that is desirable in itself, but also because it gives us a decent basis for discriminating dangerous offenders from less

dangerous offenders.

In the current world, however, one must still deal with the tension between the interests in securing utilitarian benefits and doing justice to individuals. In practice, this means making two difficult decisions: first, what indicators of prior criminal activity are appropriate for consideration; and second, whether it is appropriate to go beyond the indicators of prior criminal activity to other forms of conduct or even status to make decisions about how individual offenders should be handled. Again, while one can sustain a principled general argument about these matters (which we will do), what we do in the real world is importantly (and properly) affected by two other considerations.

The first consideration is what decision in the criminal justice system is being made: a sentencing decision, a bail decision, a decision about whether to proceed with a prosecution on a given charge, or an investigative decision about the level of effort to be made in developing a case. One can argue that the greater the consequences of the decision for the individual, the more important it is that the variables used in making the decision be just. In this light, it seems significant that sentencing decisions -- which are in many respects the most direct and significant choices for individuals -- have routinely incorporated information about many things other than criminal conduct. With the important exception of bail decision, this fact seems to grant a broad license to the other

parts of the system.

The second consideration involves a comparison between what is being proposed as a basis for distinguishing among offenders, and the current practice in the area. If less just or less reliable variables are now being used to distinguish among offenders, or if the system operates on an implicit, inarticulated set of criteria, one can argue that the explicit scheme represents an improvement in current operations, even if it is not perfectly just.[28] With these qualifications in mind, we can consider the general question of what sorts of variables can be included in a decent and effective policy of selective incapacitation.

As noted above, if we had good information about prior criminal activity, the tension between utilitarian and justice considerations in the selection of test variables might easily dissolve. The problem, of course, is that we do not have good information. What we do have is imperfectly recorded and maintained records of criminal justice system actions against individuals.[29]

There are some who would argue that any reliance on such faulty information is unjust and ineffective. The argument is that criminal justice records are far from a neutral indicator of criminal conduct. A criminal record (whether arrest or conviction) is produced by a social process in which the actual conduct of the individual is a trivial part. This social process includes factors that define the conduct as socially important (mores, statutes); that expose a

specific incident to public view (a private motivation to report the conduct, or a governmental effort to discover it); and perhaps careless or malicious acts by the government. Since the observed record reflects these factors as well as criminal conduct, it is unjust to treat criminal justice records as indicators of prior criminal conduct.

A less extreme but still very restrictive view holds that we should look only at records of adult convictions. The argument then is that convictions are the only reliably accurate criminal justice records, and that it is only when a person becomes an adult that we can be sure that his activities reflect his intentions rather than temporary impulses.

A slightly less restrictive view recommends reliance on adult and juvenile convictions for serious offenses to be used only when a person is convicted of a serious crime as an adult shortly after he leave the juvenile justice system. The argument here is that if a juvenile commits a serious crime after the juvenile period, the original reason for protecting the juvenile record (that he be encouraged to abandon criminal activity through the anticipation of a crime-free adult life unencumbered by a record of juvenile indiscretions) has already disappeared, and therefore, that there is no bar to examining the juvenile record.[30] A still less restrictive view could allow the system to examine arrests (particularly those in which a charge or indictment was issued) as well as convictions.

Obviously, the practical value of a policy of selective incapacitation increases as we are less restrictive in choosing which indicators of prior criminal activity should be used. There is very little power if we limit ourselves to adult convictions. There is more if we can include juvenile convictions, and there seems o be good reasons for doing this. We are tempted to go further and include indictments or arrests covered by warrants on the grounds that one must meet a moderately high standard of evidentiary proof to secure such actions from the criminal justice system, and because such information can give clues about the rate and persistence of offending.[31] Moreover, one cannot help but notice that "rap sheets" are now routinely used at all stages of the criminal justice system. But, interests in justice would be more reliably protected if we could restrict our attention to convictions rather than mere arrests or indictments. Views on the proper trade-offs here undoubtedly differ. We suspect that most people would end up somewhere between reliance on adult and juvenile convictions on the one hand, and using convictions plus serious adult and juvenile arrests on the other depending on the purpose lying behind the discriminating test.

In terms of variables other than criminal conduct, there are clearly many that are intolerable even to the most devoted utilitarian. Demographic characteristics (including age, race, religion, and so on) should clearly be excluded from consideration. Employment status we consider quite suspect and would urge that it be

excluded. On drug and alcohol abuse, we are ambivalent. On the one hand, the characteristics are under the control of the individual, linked to criminal activity, and relatively easy to measure accurately.[32] On the other hand, these are not by themselves serious criminal conduct, and to the extent that they are linked to criminal conduct, they are partly an artifact of our current social policies.[33] And, for some people, the characteristics may be beyond their control. The fact that they have significant discriminating power (and therefore yield substantial utilitarian benefits), and that they are now routinely used, counsel strongly for their inclusion as acceptable variables, but their inclusion is not -- strictly speaking -- just.

3) Setting the Criterion. In terms of setting the criterion for the test, the utilitarian and justice interests establish slightly different trade-offs between avoiding false negatives at the price of increasing false positives. The utilitarian position weighs the net benefits (in terms of reduced crime through incapacitation) of picking up additional high rate offenders against the cost (in terms of "wasted imprisonment") of adding relatively low rate offenders to the prison system. Ordinarily, this position pushes towards fewer false negatives and more false positives. The justice position regards the problem of false positives (unjust treatment of a relatively "innocent" person) as a much greater problem than false negatives (lenient treatment of a wicked offender). The most extreme justice position is that any false positives (even if based on indicators of

prior criminal activity) make the policy suspect.[34] In this area, we are inclined toward the justice position of weighing false positives very heavily against false negatives, and therefore setting a conservative threshold. This, combined with the earlier position that we look only for very high rate offenders, puts a great deal of strain on our discriminating tests. But that is our current view.

c. The Performance of Discriminating Tests

In the past, the most successful arguments against a policy of selective incapacitation emphasized the injustice of a selective focus and the demonstrable weaknesses of the "predictive" or "discriminating" tests.[35] The widespread view was that the tests were too inaccurate to allow widespread use (this, despite the fact that the tests were often used in parole decisions thoughout the period). More recently, many of those originally opposed to screening tests have become more accepting.[36] The question is, why? What has changed with respect to the design, performance, or evaluation of the tests?

The answer to this question is not entirely clear, but three factors characterize our current evaluation of testing procedures. First, increasingly the tests are based on conduct variables rather than status or demographic variables. This shift has made the tests both simpler and more just.[37] In addition, it has blurred the previous sharp contrast between "clinical" tests (based on careful observation of individuals by trained professionals) and "statistical"

tests (based on aggregate analyses of the influence of objective individual characteristics on performance). So, the form of the tests has improved as we have acquired experience with them.

Second, the tests seem to have become more powerful and more accurate. This effect occurs partly because the basis for evaluating the tests has changed. In the past, discussions of testing have focused heavily on the number of false positives or the ratio of false positives to true positives. Moreover, the empirical experience that was being evaluated was drawn from experience with civil commitments to psychiatric hospitals rather than from among criminal offenders convicted of crimes.[38] As a result, the tests looked very bad. Ratios of false to true positives of 20 or more were common.[39] More recently, the evaluation of the tests has emphasized the differences in average rates of offending among the different groups, and have been based on populations of criminal offenders whose rates of offending were both high and highly variable. From this perspective, the tests looked much better: they were successful in distinguishing offending groups with very different average characteristics. Moreover, the ratio of false positives to true positives improved -- rarely dipping below 1.0 but rarely worse than 2.0.[40] Table 15 presents data on testing procedures and how they have improved as they were applied to different groups.

Third, and most importantly, the context in which testing is being discussed has changed radically. Much of the early discussion

Table 15

Success at Predicting Dangerous Activity

Author/Year	Population Studies	% Identified as Dangerous	% of all Positives that were True	Ratio of False Positives/True	Fraction of the Positives Missed
Wenk, Emrich 1973	4,000 Youth wards: 1964-165; in California	6.8% (284) (Violent Parole violators)	9.8%	10.1	46%
Wenk, Robinson Smith 1972	California Dept. of Correction	3% (violent recidivists)	14%	7.1	92%
Wenk, Robinson Smith 1972	7,712 Paroles from California Prisons	21% (1,630)	0.3%	326	77%*
Wenk, Robinson Smith 1972	4,146 Youth Wards: California	10%	12.5%	8	50%
Kozol, Boucher, Garofalo, 1972	592 offenders (primarily sex offenders)	11%	34.7	3.1	65%
Murphy, 1980	2,000 Parolees from Michigan Prison, 1971	4.9% 12%	40% 20%	2.5 3.5	81% 68%
Murphy, 1980	1200 Parolees from Michigan Prisons in 1974	4.2% 11.5%	32% 29%	3.1 3.4	91% 71%
Peterson, Braiker, 1980	Convicted offenders in California	4% (High Rate Robbers) 7% (High Rate Robbers) 14% (High Rate Robbers)	71% 72% 53%	.40 .30 .85	80% 68% 52%
Williams, 1977	Recidivists from Arrested Population in Washington, D.C.	10% 15% 25%	41% 64% 92%	2.4 1.6 1.1	71% 61% 52%
Greenwood 1982	Imprisoned Offenders in California	25% Highest Rate Offenders (7 Factor Scale)	50%	1.0	67%
Hoffman and others, 1978	Federal Parolees	25% Most Likely to Recidivate	50%	1.0	62%

focused on predictions of dangerousness for civil commitment proceedings. This context was properly hostile to predictive tests because the test was the sole basis for state action against the individual, because the offical actions were unlimited and because the tests (constructed without the benefit of objective indicators of dangerous conduct, such as criminal convictions or arrests) were exceptionally weak.[41] Other uses of discriminating tests (for diversion programs, for classification within prisons, and for parole decisionmaking) were not subjected to as much hostile criticism because they were judged to be in the interest of individual rehabilitation. Now, in a world where prison capacity is limited, where many are skeptical about the potential for rehabilitation, and where there are increased interest in removing discretion from the operations of the criminal justice system, testing procedures which are based on conduct, which succeed in locating serious high rate offenders, and which reliably focus imprisonment on a small group of high rate offenders (with only a small number of false positives all of which were also convicted of serious crimes) gain a much more positive reception.

Still, it is important to keep in mind a number of important weaknesses in the current tests. First, their discriminating power (with respect to both average differences and to ratios of false to true positives) diminishes noticeably if status variables (such as employment history and drug abuse) are left out of the test

procedure.[42] Second, their power decreases even more sharply if one relies only on official adult records. Third, the main benefits claimed for the tests (crime reductions through incapacitation) are somewhat speculative, are fairly small, and are produced largely by the very skewed distribution of rates of offending.[43] All this means that while there is now greater acceptance of the idea of discriminating tests for the purposes of sentencing (and, therefore, perhaps, for investigation and prosecution as well), there are important reasons to be cautious in using such tests and to continue development and evaluation of different testing procedures.

In fact, we think that the ultimate success and acceptability of these tests depends essentially on improved measurements of criminal activity. This would minimize the tensions between a "just" test, and a useful test. In practice this means five things:

- Solving more crimes and attributing them properly to individuals;
- Developing record keeping capacities in both the adult and juvenile systems that are accurate and comprehensive with respect to individual criminal histories;
- Providing access to juvenile record of serious offending if the juvenile commits a serious offense shortly after "aging out" of the juvenile system;
- Developing "weighting" schemes that give greater emphasis to violent offenses than non-violent offenses, and greater weight to convictions than to indictments or arrests;
- Analyzing prior criminal activity not as absolute number of prior offenses, but as an estimated rate of serious offending maintained over a given period of time.

Each of these ideas is developed further in other sections of this report. While current tests may be acceptable, more useful and just tests will require improved measurement of criminal activity by individuals in the population.

3. SUMMARY: THE JUSTICE OF SELECTIVE POLICIES

The justice of developing a selective focus on dangerous offenders has been questioned on two grounds: first, that it is inherently unjust to punish people for individual characteristics and status rather than acts; and second, that in trying to distinguish dangerous offenders from less dangerous offenders, one will inevitably make errors, and rely on variables that are unjust because they do not relate to criminal conduct. The power of each of these points can be reduced, but the concerns they reflect can and should have an impact on the detailed design and operation of a policy of focused supervision.

The concern about the inherent injustice of punishing people for character rather than acts (which sounds decisive at the start) can be rebutted by showing that discriminating punishment is consistent with retributivist and utilitarian principles, and with current practices. In a retributivist perspective, a special focus on dangerous offenders

could be justified by arguing that the criminal law has always been concerned with the "character" of a person as it is revealed in criminal acts (otherwise why have a mens rea requirement or a law of attempt);[44] that a person who commits serious offenses frequently reveals a more "wicked" character (and eliminates doubt about the role of other factors in generating a crime);[45] and therefore that dangerous offenders deserve harsher punishment than less serious offenders. To be strictly consistent with this retributivist position, however, the enhanced punishment must be based on past criminal offending -- not predictions of future offending. One can also argue that criminal punishment has always tolerated utilitarian interests (in general deterrence, incapacitation and special deterrence or rehabilitation) as well as an interest in justice or retribution, and that a selective focus serves an important utilitarian interest (namely, achieving the maximum incapacitation effect with the least use of imprisonment).[46] Finally, one can point to current practices of individually tailored punishments based on predictions of rehabilitation potential and argue that this is really a system of selective incapacitation that is unacknowledged and managed haphazardly, rather than explicit and managed carefully. In this light, an explicit system could enhance the justice of a selective focus by making the system more predictable and fairer among defendants. Thus, there is room in our conceptions of justice for a selective focus. But it is also clear that the appeal of the

selective focus is enhanced if it is based on punishment for a sequence of past, serious offenses rather than on some other characteristics of the offenders.

The concern about the justice of relying on discriminating tests that are known to be imperfect (and, therefore, to assign people improperly to the unusually dangerous group) is mitigated by several points. First, it is important to keep in mind that the discriminating tests are to be used only with people who have been convicted of at least one serious crime, and more than one offense.[47] This makes the situation much different than one in which the test is the sole basis for state control (as in civil commitment proceedings). Second, the purpose of the tests can be understood as backward-looking and retributivist rather than forward-looking and predictive for utilitarian purposes. The tests may be seen as answering the question of who has committed many crimes in the past (and therefore deserves enhanced punishment), rather than making a prediction about who will commit many crimes in the future.

These points change the context in which the tests are evaluated, but one must still come to grips with the question of how they should be designed, and whether they are tolerably accurate. Our view is that the tests should be based primarily on information about past criminal conduct -- both adult and juvenile, and both convictions and arrests (though arrests without convictions should count less than convictions). In addition, they should be designed to identify a

small group of very high rate serious offenders (the worst 5 to 10 percent) rather than a larger group of relatively less serious offenders. Finally, they should use a stringent criterion for assigning people to the "dangerous offender" group (that is, they should prefer to miss a few people who are dangerous offenders to minimize the chance that a non-dangerous offender will be falsely identified as a dangerous offender).

Given the current capacity of the criminal justice system to produce information about criminal offending (and preserve that information in records), we think the tests are tolerably accurate for sentencing and other purposes in the criminal justice system. We are tempted to include information about arrests, juvenile offenses, and drug use in the interest of enhancing the discriminating power, but at the price of the inherent justice of the test. More importantly, though, we think the key to improving the justice and utility of these tests is not by constructing new tests based on current information and records, but instead to work on improving the quality of the information and records about individual offenders on which these tests now rest. In fact, we think that the tests could become much more effective if the criminal justice system improved its performance in several key areas: in solving crimes; in creating improved offender based records; in developing policies that would allow limited access to juvenile records; and in defining dangerous offenders in terms of a rate of serious offending over time rather

than an absolute number of offenses (which is the way "habitual offenders" are usually defined in habitual offender statutes).[48]

B. The Effectiveness of "Selective Incapacitation"

While some critics focus on the justice of selective policies, others argue that "selective incapacitation" would be ineffective. More specifically, they suggest that the reduction in crime these policies would provide is not worth the risk to our sense of justice that a selective focus entails. This general position hinges on four specific arguments against the claims that "selective incapacitation" policies would significantly reduce serious crime rates.

- Since discriminating tests are inaccurate, and since they become accurate only when high rate offenders are about to decrease their level of activity, using the tests will produce only a small impact on levels of crime.[49]

- Because opportunities to commit crime remain and attract offenders even though the people most apt to commit such offenses are already in jail, any incapacitation policy will be less effective than expected.[50]

- The current system already focuses selectively on dangerous offenders, and additional focus would reduce crime only slightly at the margin.

- By focusing on the most dangerous offenders, "selective incapacitation" proposals decrease the threat of punishment--and perhaps its deterrent power--to the vast majority of offenders who are less dangerous. Thus a selective focus is seriously deficient as an overall response to crime.[51]

The weight of each of these arguments will be explored below.

CONTINUED

2 OF 5

1. THE ACCURACY OF DISCRIMINATING TESTS

Obviously, the accuracy of the tests used to distinguish high rate offenders from low rate offenders affects the cost-effectiveness of selective incapacitation as well as the justice of such proposals. If the tests mistakenly assign low rate offenders to the high offense group (that is, produce many "false positives"), then the costs per crime avoided will be greater than if the tests discriminated perfectly. If the tests mistakenly assign many high rate offenders to low offense rate groups (produce many "false negatives"), then the policy will cut less deeply into current levels of crime than it would if the tests were perfectly accurate.

Moreover, as we have seen that there are reasons to be concerned about the accuracy of the tests -- particularly if they are restricted to use of prior adult convictions for serious crimes. The problem is that the criminal justice system produces so few convictions (relative to the number of crimes), and takes so long to produce these convictions, that by the time an offender accumulates a series of adult convictions for serious crimes, he has reached an age where he is likely to reduce his rate of offending. This situation can be remedied only by: 1) significant improvement of the criminal justice system in imputing crimes to individuals; 2) use of juvenile convictions for serious offenses as well as adult convictions; 3) use of information on arrests and indictments for serious crimes as well as convictions; 4) use of information about convictions for less serious offenses (to indicate rates of undetected serious

offending);[52] or 5) use of information about other social characteristics associated with high rates of offending (drug use, employment history, and so forth).

These remedies are listed in decreasing order of attractiveness in terms of justice. Our own guess is that they are also listed in decreasing order of discriminating power: that is, we think it is likely that past serious criminal behavior is a very good predictor of future serious criminal behavior; and, therefore, that if we improved our ability to measure past criminal conduct (by solving more crimes), we would significantly improve our capacity to predict future conduct. In effect, interests in justice and effective crime control lead in the same direction: towards better measurement of individual criminal offending. The reason that so much pressure is now placed on the use of social variables in trying to improve the performance of current tests (option 5, above) is that these variables are the only ones that can be added to the tests in the short run. In the slightly longer run, improvements in tests could be based on improved measurements of prior criminal offending (options 1 through 4). Moreover, reliance on the first four options for improving current tests would also speed up the capacity of the system to identify dangerous offenders: the system could find the dangerous offenders earlier in their careers when they were more active. This would increase the crime control effectiveness of selective policies.

Even in the short run, however, use of discriminating tests seem

to offer potential for improving the performance of the criminal justice system: current tests based on indicators of prior criminal activity (both adult and juvenile), drug use, and other social variables may be able distinguish high rate offenders from low rate offenders with enough accuracy to improve the incapacitative performance of the criminal justice system as much as 15 to 20 percent while holding prison capacity constant; or, alternatively, to reduce both crime and prison capacity simultaneously.[53] Figure 4 presents estimates of combinations of crime reductions and prison population reductions that can be produced by using one or another discriminating policy rather than continuing to rely on a non-discriminating policy. What this figure reveals is that the use of currently available tests allows a "Pareto improvement" in the performance of the criminal justice system: if we use discriminating tests (even at current levels of accuracy) we can have less crime and less imprisonment.

It is also true, however, that the magnitude of these potential improvement diminishes as one is more restrictive in terms of the variables that are included in the tests.[54] Figure 5 presents similar estimates of schedules of crime reduction and prison population benefits that are achieveable as one holds sentencing policies constant, but shifts from discriminating scales based on <u>all</u> variables (adult offenses, juvenile offenses, drug use, and employment history) to scales <u>limited to criminal offenses</u> (both adult and juvenile), and, finally, to scales limited to adult criminal convictions. The figure

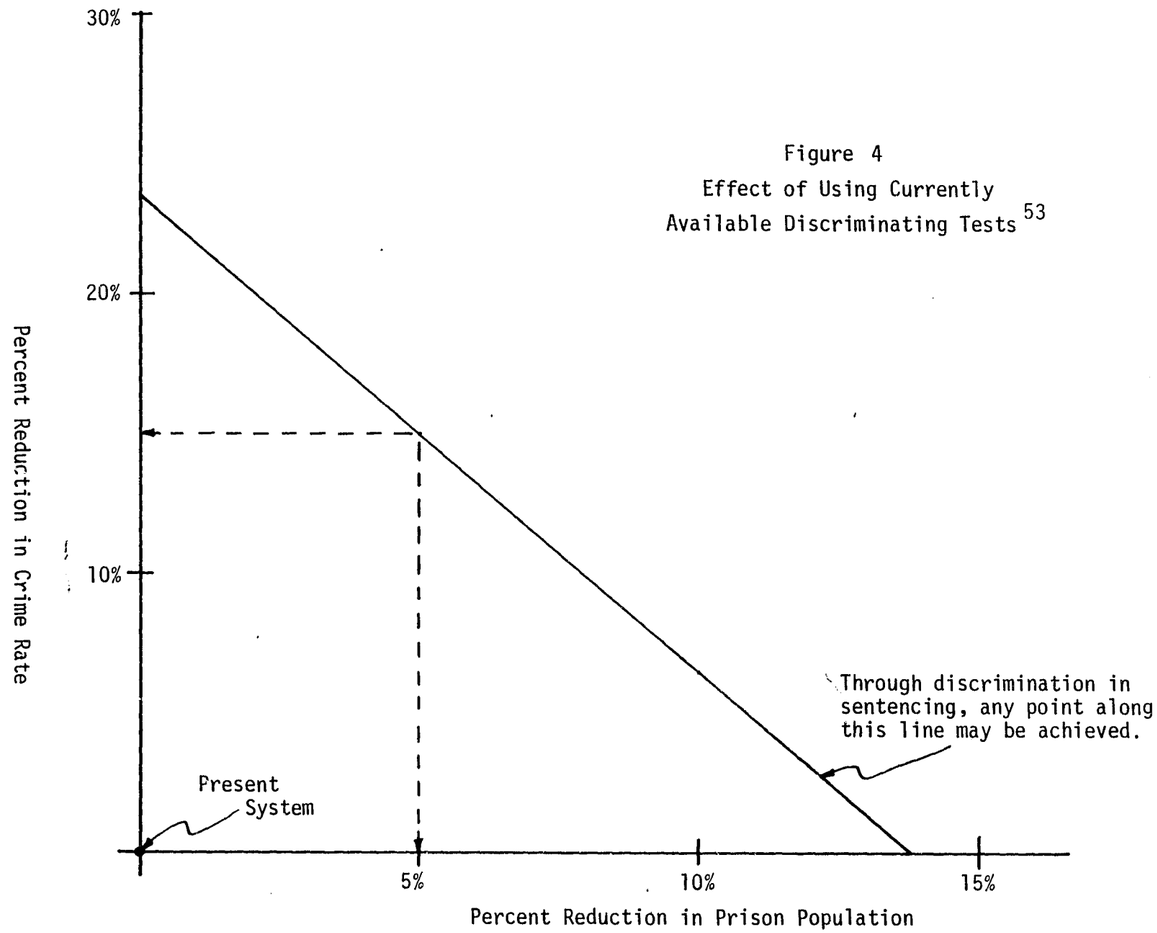


Figure 4
Effect of Using Currently
Available Discriminating Tests [53]

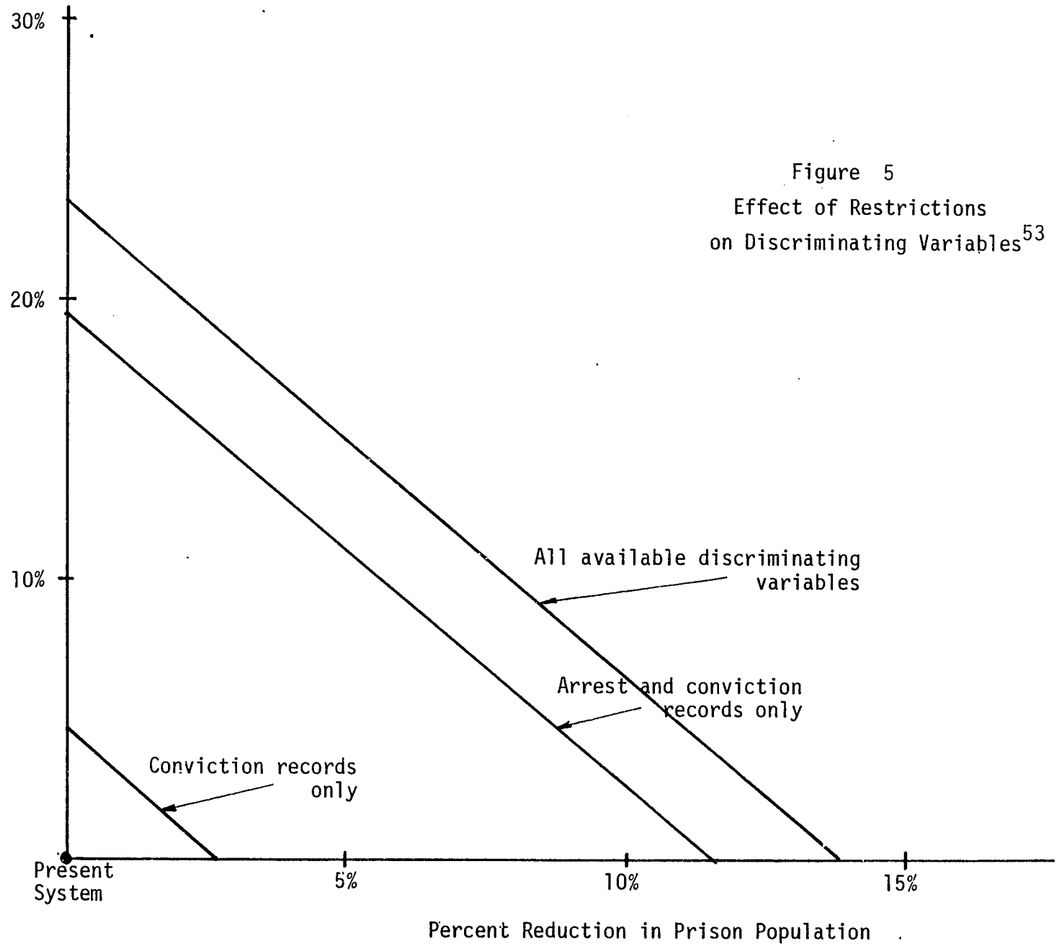


Figure 5
Effect of Restrictions
on Discriminating Variables[53]

indicates that while significant potential is lost in these shifts (indicated by the fact that the line for policies based on the complete scale is farther from the origin of the graph than the others), there is some advantage to be gained by discriminating on the basis of criminal offenses only.

The observations lead us to the conclusion that discriminating tests have sufficient accuracy, even in the short run, to justify their use in giving a selective focus to criminal justice system operations. In the short run, we think the tests should use adult and juvenile records, and should use some information about arrests and indictments as well as convictions. Moreover, we are tempted to use heavy drug use as well. But we do not think employment history should be used. In the long run, we think the tests can be improved not by finding better social "markers" of serious offending, but by improving the capacity of the system to impute crimes to offenders.

2. THE CRIME REDUCTION IMPACT OF INCAPACITATION

The effectiveness of a selective focus on dangerous offenders is also attacked on the grounds that incapacitation will not reduce criminal activity. At the extreme, one can argue that a special focus on dangerous offenders could increase crime. This effect could occur as the result of three different mechanisms. First, by "labeling" people as dangerous offenders (and thereby hardening their self-concept and restricting legitimate opportunities) one might actually increase their rate of criminal offending and the lengths of their

have committed if he had been free over the same period.[56] In effect, offenders are put out of commission for a period of time corresponding to their period under state supervision, and this has no long term effect (either positive or negative) on underlying rates of offending.

On balance, we think that incapacitation of dangerous offenders (through imprisonment of other forms of close supervision) will reduce crime, but think a variety of factors will make the effect smaller than we calculate when we assume that all the criminal offenses the dangerous offenders would commit simply disappear while they are under supervision. We come to this view for several reasons. First, we are persuaded that a great deal of crime is caused by unusually dangerous offenders, and it is their unusual motivation and capacities (rather than opportunities) that cause many of these crimes to occur. We find it implausible that people who commit 10 to 50 armed robberies per year are simply tempted by unusually attractive opportunities that would attract others if left unexploited. Moreover, we find it implausible that such people would have their rates of offending either increased or decreased by periods of imprisonment. Age may ultimately discourage them, but additional punishment would seem to make little difference to their self-identity, to their legitimate opportunities, or to their resolve to "go straight". Thus, we believe that incapacitation can (and may be the only) way of reducing crime by very determined offenders.

Second, we think this effect will be fairly small but not

insignificant relative to crime in general. Dangerous offenders account for more than their share of serious offending, but by no means all or even a majority of serious offenses. Our practical ability to identify dangerous offenders, while tolerably accurate, is limited. And we do take each of the arguments against a simple incapacitation effect quite seriously. Given imperfect abilities to identify dangerous offenders, we think it is plausible that some people will be wrongly identified, and that the identification can affect future rates of offending and lengths of careers. Given that many crimes do occur in groups or as part of on-going "gangs" or "rings", we can imagine that incapacitation of a single member will may not completely end crimes by that group. Finally, as will be discussed below, we worry that a narrowed focus of the criminal justice system could actually lead to increased crime by broadening the license for criminal conduct.

3. THE MARGINAL EFFECTIVENESS OF ENHANCED SELECTIVITY

The third argument questioning the value of greater selectivity is that there is little more to be gained: the system is already quite sharply focused on dangerous offenders, and while one can imagine a few operational changes that would enhance selectivity, these few remaining adjustments are simply too difficult to implement. In short, the system has already gone as far as it reasonably can in the direction of a selective focus, so there is little to be gained (and much to be lost) by explicitly embracing a selective policy.

The best way to address this objection is by a close analysis of current practices of the criminal justice system at each stage of its operations. That is a major purpose of Part II of this report. But before reaching Part II, one general observation is appropriate because it ties closely to the discussion of discriminating tests.

In general, the current system seems fairly selective at the "back end" (at the sentencing stage), but not at the "front end" (the investigative and prosecutorial stages). As a matter of both policy and practice, judges generally look at all aspects of an offender's record in making sentencing decisions, and they use their discretion to punish "dangerous offenders" harshly.[57] At the other end of the system, police and prosecutors have been discouraged from looking too closely at the characteristics of the offender when making discretionary decisions about investigative strategies, charging decisions, plea bargaining, and so on. The reason for this distinction seems to be that characteristics of the offender should not influence decisions at stages of the criminal justice system when questions of guilt or innocence are still at issue. The fear is that knowledge of an accused offender's character can contaminate the objective determination of guilt or innocence; thus, it must be kept out of the fact finding process for specific crimes. On the other hand, once guilt has been convincingly established and the issue is what sentence to mete out, it seems more appropriate to allow broad knowledge of the offender's character to come into play. It probably

also matters that it is a judge who makes the sentencing decision, and police and prosecutors who make the investigative and prosecutorial decisions. In our system, police and prosecutors are expected to have a more partial view of the social values at stake in handling individual cases than the judge: they are expected to be more interested in crime control than in individual justice. The judge, on the other hand, is presumed to balance these considerations according to the law and the broadest conceptions of the public interest. Thus, it is appropriate for judges to exercise discretion on a basis that police and prosecutors should avoid.

There is a convincing coherence and familiarity to this view. And the strongest part of the argument seems truly unassailable: namely that in considering questions of guilt and innocence, information about the character of the offender should be firmly excluded lest it contaminate this determination on which so much depends. That principle would assure that all such information be kept out at trial. But it is not at all clear that this principle should exclude police and prosecutors from taking evidence of character and prior conduct into account as they make decisions about how to spend their resources to develop cases. It is not at all clear that an interest in equal protection and due process entitles everyone to the ordinary sloppy investigation and prosecution. As long as constitutional restrictions on investigative procedures are respected, and as long as malicious ad hominem motivations are excluded as a

basis for investigative and prosecutorial focus, there is room for investigators and prosecutors to vary levels of effort. And, in principle, it seems that they could vary this level of effort systematically with evidence of prior criminal conduct. Since the cases they make most ultimately face the rigors of trial (or in the case of plea bargaining, in anticipation of a trial), there is adequate protection of interests in "due process" and "equal protection."

Indeed, it seems to us that an enhanced focus on "dangerous offenders" at the investigative and prosecutorial stages of the system might increase the justice of the system's operations. If it is true, as argued above, that dangerous offenders get away with more than ordinary offenders, then it would be in the interests of justice to try to correct this tendency. Equity among offenders would be increased, not decreased. Similarly, if dangerous offenders could be arrested and convicted for offenses more reliably, that would be desirable not only because they would be punished and incapacitated more effectively for current crimes, but also because a more reliable basis would be established for distinguishing them from more ordinary offenders in the future. For all these reasons, then, it might be in the interests of fairness and justice to focus greater investigative attention on dangerous offenders.

In addition, viewed from the perspective of the offender, it is not all clear that the sentencing decision is less consequential for

him than investigative and prosecutorial decisions. Indeed, the opposite seems much more likely to be the case. Sentencing decisions determine time in jail; investigative and prosecutorial decisions determine only the amount of surveillance and investigation an offender must endure. The implication is that if judgments about "dangerousness" can properly influence how much time a convicted offender spends in jail, then they should also be allowed in making less consequential decisions about who will bear the burdens of investigation and prosecution.

Taken together, these points suggest to us that marginal improvements in the justice and effectiveness of the criminal justice are more likely to be obtained by increasing selectivity of the "front end" of the system, rather than the "back end." This is true partly because sentencing is already fairly selective. Equally important is the observation that enhanced selectivity at the front end of the system is not only feasible (because that part of the system now operates with little selectivity), but also plausibly just and effective. It enhances the justice of the system by compensating for a bias operating in favor of "dangerous offenders"; and by building a more satisfactory basis for distinguishing dangerous offenders. The apparent risks to due process and equal protection seem illusory, at least in principle; they are in any case no greater than the risks to these values associated with discretionary sentencing. As long as constitutional restrictions on investigative procedures are respected,

information about prior criminal conduct is excluded from trail, and no hint of inappropriate ad hominem motivations exist, investigators and prosecutors should be able to use information about prior criminal in making discretionary decisions without worrying that fundamental notions of justice have been violated. Selectivity at the "front end" of the system increases effectiveness not only by drawing more dangerous offenders into the criminal justice system, but also by increasing the accuracy and decency of the discriminating tests on which selective policies are based. All this makes experiments designed to enhance investigative and prosecutorial selectivity very attractive to pursue, for they may reveal important ways of increasing both the justice and the effectiveness of the current system.

4. THE INCOMPLETENESS OF A POLICY OF SELECTIVE INCAPACITATION

A fourth objection to the notion that selective incapacitation policies would be effective is that they are incomplete: they typically leave unanswered the question of what should be done with the offenders who are not high rate serious offenders, and with the crimes that are generated by the temporary, accidental, or opportunistic offenders.[58]

If the answer to that question is "nothing," then one can reasonably worry that the crime reduction benefits will be smaller than we imagine because they will be offset by increases in less serious crimes that occasionally become serious crimes. Again, the best way to deal with the question of what could be done with less

serious offenders is to consider the question for each phase of the criminal justice system. And that will be done. But in advance of that discussion, one general point is worth making. We think that much room exists for forms of punishment and effective supervision that do not depend on the intensive (and expensive) form of supervision conducted through jails and prisons. We are interested in the potential of fines, restitution, house arrest, intensive parole, community service for offenders, using police as parole officers, and so on, as technologies that offer incapacitation benefits more decently and at lower cost than jails and prisons. Experiments with such devices should be an important component of any continued investigation of selective incapacitation policies.[59]

5. SUMMARY: THE POTENTIAL EFFECTIVENESS OF SELECTIVE POLICIES

In sum, we think there is reason to believe that focusing the supervising capacity of the criminal justice system on unusually dangerous offenders could produce a significant if not revolutionary impact on current levels of serious crime. The effect is produced via the effective incapacitation of unusually dangerous offenders who currently commit a noticeable fraction of serious offenses. The magnitude of this effect is eroded by three facts: some serious offenses are committed by non-dangerous offenders; our capacity for identifying dangerous offenders is relatively weak; and reduced offending by dangerous offenders may be partially offset by increased offending by "mis-labelled" offenders, continued offending by criminal

groups of which the dangerous offender was only one member, and increased levels of "non serious offending" that becomes serious. Despite these problems and uncertainties, however, the policy deserves further experimentation since: 1) estimates of its potential for reducing violent crime in our current system are large enough to make a noticeable difference, and to make this policy look favorable relative to other current proposals; and 2) further improvements in the operations of the criminal justice system guided by an interest in this policy could allow the policy to operate more effectively than our current estimates suggest.

C. Broad, unintended side effects

So far, our analysis of encouraging a selective focus in the criminal justice system has looked at the policy in fairly narrow terms: we have looked only at the direct, first round effects of sharpening our focus on dangerous offenders. Arguably, the most important effects of shifting the focus of the criminal justice towards "dangerous offenders" are not these, but instead the long term effects of this change on three broader, institutionalized features of the society: the integrity of our criminal justice institutions; the stature of the criminal law; and our general political ideology as it affects the criminal justice system. These are at stake in decisions about a "selective focus" because the facts and assumptions that constitute the case for selective policies necessarily affect these broader concerns.

1. EFFECTS ON CRIMINAL JUSTICE INSTITUTIONS

One of the most important effects of encouraging a selective focus on "dangerous offenders" is that it has the potential for "corrupting" criminal justice institutes by giving greater license to improper, ad hominem motivations.[60] In effect, by establishing a proper basis for interest in individuals as individuals where none now exists, we may create a greater license for improper motivations to intrude. At a minimum, we strip away an offender's expectation that he will be relatively anonymous before the criminal justice system. The system becomes less "blind" with respect to individuals.

The threat to corrupt the criminal justice system is not a logical requirement of encouraging a more selective focus, but it may be a natural sociological result. We think that the risks can be controlled by creating procedural disciplines at each stage of criminal justice system processing when a selective focus is feasible, and by maintaining strict anonymity of the defendant at the trial stages of processing. But even with these disciplines we note with concern the threat to the fairness and integrity of criminal justice institutions such as police, prosecutors and courts.

2. THE STATURE OF THE CRIMINAL LAW

A second broad question raised by advocating a sharpened focus on dangerous offenders is the issue of whether narrowing the focus of the criminal justice system weakens the general power and stature of the criminal law. After all, in encouraging a sharpened focus on those

few people who commit violent crimes often, the policy seems to retreat from a standard of general responsibility for all criminal offenses. In doing so, it reveals the "clay feet" of the criminal law: we are not either willing or economically able to punish for all possible offenses of criminal statutes now on the books.

Again, this point is worrisome. But its practical effect should be to focus our minds on the question of different forms of punishment than imprisonment or jail. Given the current costs of jail and prison, it is quite conceivable that there are many offenses that are worth punishing, but not through the clumsy instruments of jail and prison. If there were less expensive forms of punishment available (such as restitution, voluntary service, house arrest, perhaps even public shaming), we could save prison for dangerous offenders and still not erode the current stature of the criminal law.

3. IDEOLOGICAL EFFECTS

Perhaps the most important effect of embracing policies giving special attention to dangerous offenders is that such action may change our most general views of crime and criminal justice. At the base of the idea of selective incapacitation are some distinctly "illiberal" views. It is based on the notion that people differ in their capacity for evil. It also seems to assume that these differences are not the result of broad social processes, but something more intimate to the individual (for example, his own decisions about what to value, and what talents to develop; his

intimate surroundings of family and culture that build -- or fail to build -- decent character; and so on). Moreover, it assumes that the things that make people different are relatively permanent, and a just basis for punishment. And finally, it assumes that knowing all this, nonetheless, the criminal justice system will be restrained in deciding which people are dangerous offenders, and that real serious criminal conduct will be the dominant basis for assigning people to the category of dangerous offenders rather than some other basis such as race, culture, political views, and so on.

To state these background views explicitly shows how directly the concept of selective incapacitation challenges liberal views about crime. Liberals like to believe the opposite of all of these points: that people are equal in their capacity for evil; that observed differences among individuals are produced by broad social processes that are (or could be) shaped by public action; that everyone is redeemable; that the "labeling process" which identifies people as dangerous offenders reflects the prejudices of the society and the criminal justice system more than it does the real conduct of people; and that left to its own devices, the criminal justice system can become vicious in dealing with citizens.[61]

In our view, these ideological issues are important not only for explaining the politics of the debate about "selective incapacitation", but also as a potentially important <u>result</u> of explicitly adopting a policy of selective incapacitation. When the

ideology changes towards the assumptions about human nature underlying the conceptions of selective incapacitation, real potential for unleashing atavistic passion is created. Social hostility <u>can</u> become focused and more intense. Enthusiasm for attacking evil people can overwhelm due process designed to protect the rights of individuals. We take such possibilities seriously, and particularly when a selective focus is introduced in the early stages of the system where guilt is still an issue.

In principle, these worries about a major ideological change spawning a more vicious criminal justice system could be sufficient to overwhelm any arguments in favor of selective incapacitation. Indeed, against these worries, the possible benefits of a selective focus (greater fairness among offenders, a limited focus on the most dangerous offenders, greater crime control at low cost) seem small. Still, we think that a selective focus could be introduced into the criminal justice system without necessarily unleashing all these forces. The keys to keeping the passions in check are: 1) maintaining tight due process constraints over the gathering of evidence of criminal conduct; 2) keeping the discriminating tests closely tied to indicators of criminal conduct; and 3) creating some due process guarantees over the decisions that identify some specific individuals as deserving special attention from the criminal justice system. In effect, we rely on due process to protect individual rights even in a world where we can recognize significant differences among individuals.

D. Conclusion

In our view, the threshold objections to "selective incapacitation" do mark out important areas of vulnerability and uncertainty. Still, none stands as an absolute barrier to further consideration of the issue. In fact, many depend a great deal on what exactly is being proposed for what stage of the justice process. The question of whether the policy is objectionable depends a great deal on what exactly is proposed, for what purpose, and compared to what alternatives. Similarly, the question of whether the policy would enhance effectiveness depends a great deal on what is now being done. It is for these reasons that we turn next to a detailed look at how a selective policy would operate at each stage of the criminal justice system.

Appendix 3

Filtering Estimates of Criminal Justice Agency Selectivity

As we have seen, one of the strongest objections to increasing the criminal justice system's focus on frequent, violent offenders is that the present system is already doing it. If agencies are already putting much effort into processing the most dangerous offenders, there is a chance that making the agencies more selective would be unproductive or counterproductive. If dangerous offenders are already very likely to be arrested, for example, vastly increasing expenditures on programs to make them even more likely to be arrested will have little effect, and will draw resources from investigation of crimes committed by less dangerous offenders. Because this is a potentially serious problem with selective policies, we consider evidence indicating the degree of selectivity in the present system throughout Chapters 4 through 7.

Use of disaggregated data. It is fairly easy to determine how selective most criminal justice agencies try to be. When a selective judge passes sentence on a convicted defendant, he has available to him at least part of the defendant's prior record, some information on social and status variables such as drug and employment history, and perhaps the personal opinions of the probation officer who prepared the report, and those of the defendant's acquaintances, neighbors, and employers. If the judge is being selective, the form of the

selectivity will be fairly obvious: all else being equal, if three-time robbers receive longer sentences than first offenders, it is reasonable to infer that the judge is being selective, and is using the number of prior offenses as an indication of offense frequency, or blameworthiness, or something else that merits incarceration. By comparing how each agency processes the cases of offenders with different records and backgrounds, it is also possible to identify the selectivity of judges in deciding to set bail, of parole boards in deciding to grant parole, and of prosecutors in deciding what to charge or whether to bargain. This method works because information on each offender and the agency's response is readily available.

The straightforward approach is of little help in assessing the selectivity of the police, however. Police typically have far less information than other agencies about the offenders on whom they focus--most police effort is devoted to identifying the offender in the first place. Thus it is more difficult for the police to fashion programs that focus directly on dangerous offenders (at least, as long as they continue to react to incidents reported to them by citizens). Once the police have implemented a program that attempts to single out the most frequent or violent for special treatment, it is also difficult to evaluate the program. Should the police decide to throw their resources into the cases they deem most important, and not solve the others, they will never know whether the offenders they let get away are more or less dangerous than those they catch. Finally, in

contrast to the prosecutor and judge, who have almost total control over their disposition of the case, the outcome of police decisions lies largely in the hands of an uncertain and hostile authority -- the offender himself. If word gets out that the police are working hard to solve commercial robberies, for instance, smart offenders may stop committing them, and begin mugging pedestrians instead.

For these reasons, it is difficult to associate individual offenders with individual decisions, and also difficult to collect information on individual offenders in the first place. So the straightforward approach outlined above will not work very well. However, it is possible to get a partial answer to the question of police selectivity by gathering and analyzing information, not on individual offenders and agency decisions, but on aggregate ones.

An aggregate alternative. Recall that the distribution of lambda, the index offense rate, is very highly skewed. That is, a small proportion of the worst offenders commit crimes at a disproportionately high rate. If high-rate offenders "age out" of the offending population at about the same rate that lower-rate offenders do,[62] then this same small proportion of the worst offenders (say, the worst 10 percent) will commit an even greater proportion of crimes. If, further, the police, prosecutor, and judge are not at all selective -- all offenders face an equal chance of arrest, conviction and incarceration for each crime they commit -- then this worst 10 percent will account for progressively larger proportions of the

arrests, convictions, and incarcerations. In other words, the natural "filtering" of the criminal justice system stretches out the right tail of the offending distribution. What is more, the right tail becomes more important at a predictable rate.

To see why this is so, consider a simple example. Suppose there are two kinds of offenders -- intensives and casuals. Intensives comprise 10 percent of the offending population, and commit 20 crimes per year; the other 90 percent of offenders commit only 4 crimes each year.[63] Thus, it might be said that the worst 10 percent of offenders have 36 percent of the motivations to commit crimes.

They would also commit 36 percent of the crimes each year, if each offender committed crimes at exactly the same rate, year after year. Because there is a strong element of chance involved in committing crimes, however, (even offenders with strong motivations may not commit crimes due to illness, lack of opportunities, or quarrels with potential accomplices, for instance), lambda is an average rate, and the actual number of crimes committed will vary about it for each offender. In this case, the proportion of crimes attributable to the most serious offenders could only go up: a few temporarily motivated casuals would commit many crimes, and be counted among the 10 percent worst offenders, in place of temporarily unmotivated intensives. Thus the percent of crimes committed by the top 10 percent of crime committers must be greater than 36 percent; if crimes are committed according to a Poisson process (that is, if the

chances that an offender will commit a crime tomorrow do not depend on whether he committed one today), then it turns out that most active 10 percent of the criminals commit 39 percent of all crimes.

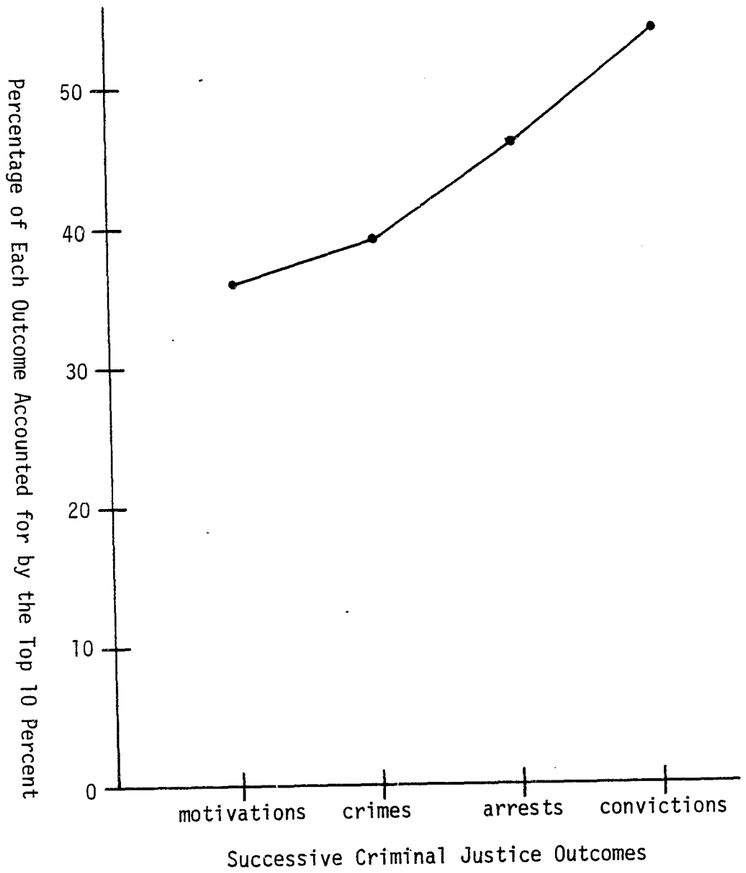
Now suppose that the police are successful in arresting offenders 10 percent of the time, and that this percentage applies equally to all offenders and crimes. At this rate, some offenders who commit only one or two crimes will never be arrested, and so will account for none of the observed arrests. The 10 percent of most-arrested offenders will certainly account for more than 39 percent of all arrests. In fact, if the chances of arrest for each crime are constant across all offenders, then the most-arrested 10 percent of the offenders will account for 46 percent of all arrests.

Finally, say that 50 percent of all arrests result in conviction and incarceration. Just as some offenders who committed only a few crimes were never arrested, so will some offenders with one or two arrests never be convicted. Thus the 10 percent of offenders with the most convictions will account for more than 46 percent of convictions. If the chances of conviction do not depend on the number of prior arrests, they will account for 54 percent of convictions.

Figure 6 shows the proportion of lambdas, crimes, arrests, and convictions accounted for by the top 10 percent of each distribution; this proportion might be thought of as the concentration of each outcome among the offenders in the right tail of the distribution. The higher the proportion, the more important is the right tail. The

Figure 6

Filtering Increases the Importance of the Right Tail



obvious result -- that the concentration of outcomes among offenders in the right tail is larger for outcomes further into the system -- is perfectly general, and can be relied upon to help measure the selectivity of criminal justice agencies.

The results do not change much when the distribution of lambda is taken to be continuous, and when nonselective incapacitation through incarceration is taken into account. Because incarceration falls disproportionately on the most active offenders due to filtering, these offenders on the right tail are off the street more than less active offenders, and the concentration of crimes, arrests, and convictions is somewhat reduced. However, note that, no matter what the original distribution of lambda, the proportions increase as we move through the system, so long as the police, prosecutor, and judge are not being selective.

Now let us suppose that one agency, say the police department, is being selective. That is, different offenders are subject to systematically different chances of arrest, for each crime they commit. Despite the department's best efforts, there is no guarantee that the selective policies will have the proper effect. Consider two possibilities:

- The police focus their activities on offenders they have already arrested, by checking modus operandi files, distributing mug shots, and surveilling offenders known to be active. As a result of this focus, the more arrests an offender has, the more likely he is to be arrested again.

- Experienced offenders learn to avoid capture, by committing crimes that are harder to solve, by working alone more

> often, and by more carefully planning their escape. Thus the more crimes an offender has committed, the less likely he is to be arrested for the next one.

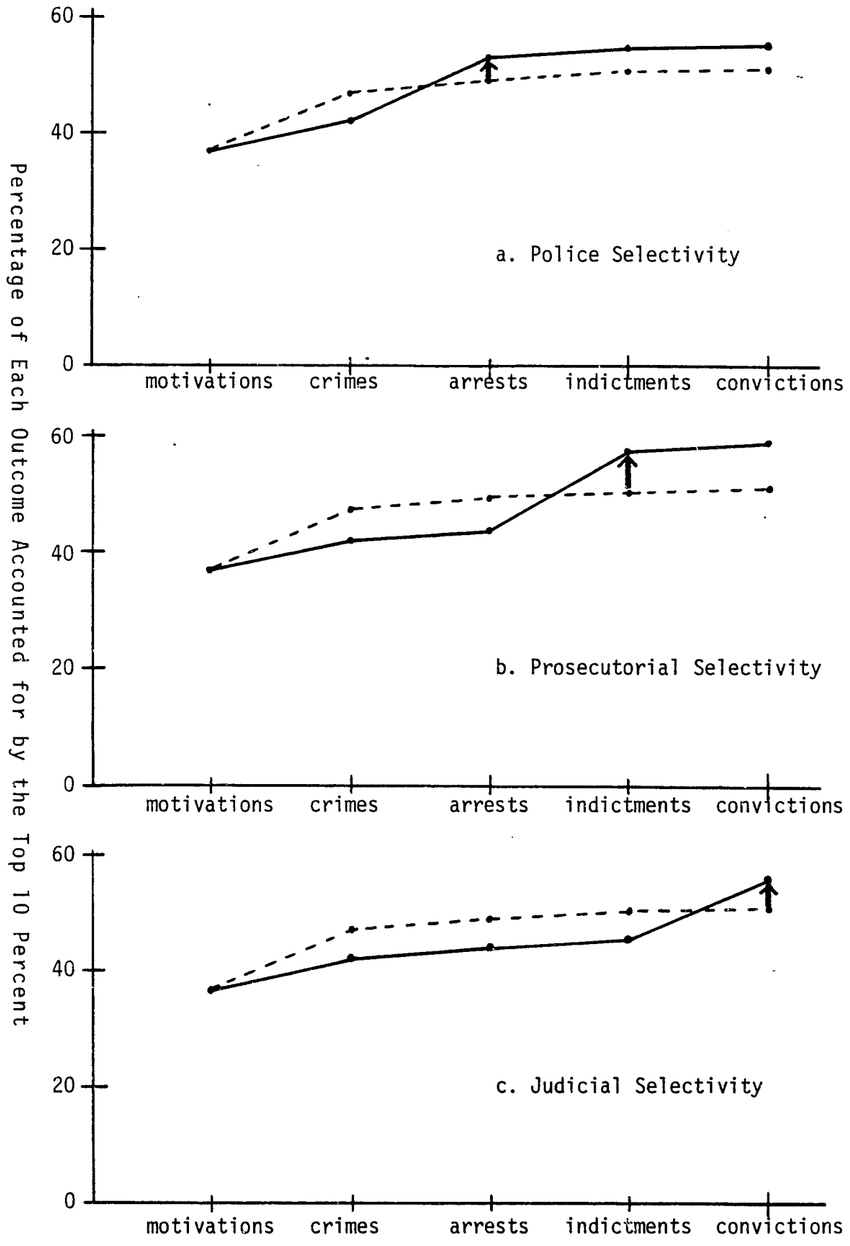
In each case, the police continue to clear 10 percent of crimes.[64]

When each of these two scenarios was applied to our simulated cohort, the effect of filtering on the concentration of outcomes among offenders changed dramatically. As shown in Figure 7a, by focusing on the actions of offenders with prior records, the police greatly increased the proportion of arrests (and with it, the proportion of convictions and incarcerations) accounted for by the 10 percent of offenders with the most arrests; the concentration of crimes among criminals incidentally decreased, as the most frequent offenders were incapacitated more of the time. When experienced offenders learned to avoid arrests, however, exactly the opposite results were obtained. The proportion of arrests, convictions and incarcerations accounted for by the worst 10 percent of offenders decreased; because frequent offenders were less often punished, they committed proportionately more crimes. In effect, selective police programs stretched the tail of the offending distribution, while offender actions leading to negative police selectivity suppressed the right tail.

This result suggests that it might be possible to determine whether the police are positively or negatively selective in making arrests, simply by comparing estimates of the distribution of lambda, crimes committed, and arrests made. If arrests are much more concentrated among offenders than crimes, then the police are picking

Figure 7

Selectivity Changes the Filtering Process



out the worst offenders (or, at least, they are picking out some offenders); if the distribution of arrests is no more skewed than the distribution of crimes -- and especially if it is less skewed -- then we can be sure that the police are being negatively selective. Although this method is most useful for estimating the selectivity of the police (since it is for the case of the police that alternative methods will not work very well), it can also be used to determine the selectivity of prosecutors and judges. The patterns corresponding to positive and negative selectivity for these agents, as shown in Figures 7b and 7c, are similar to those of Figure 7a.

The Selectivity of Police Activities: Some Estimates. A definitive answer to the question of police selectivity would require extensive data collection within a particular jurisdiction, including a survey of offenders to determine their offense history and offense rates, and a comprehensive review of arrest, conviction, and prison records. Because existing data sets were not collected for this purpose, and because complete distributional information is not available for any single jurisdiction (or even any single state), use of existing data to estimate seletivity is probably premature. However, we will try it anyway, partly to demonstrate the use of the method, and partly to show that police practices may be so counterselective that a particularly careful approach is unnecessary. The data used were gleaned from a variety of studies:

- The distribution of lambda was obtained from the Rand inmate surveys;[65]

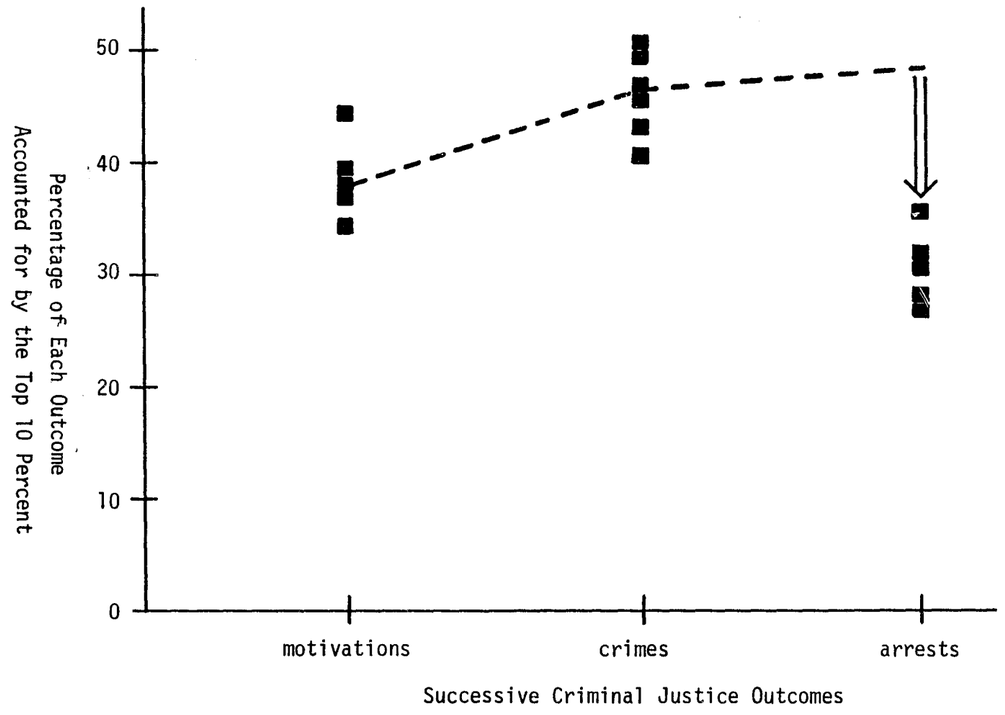
- The distribution of crimes committed was also obtained from the Rand surveys;
- The distribution of arrests was gleaned from the first and second Philadelphia cohort studies, from a cohort study of Columbus, Ohio youths, and from career criminal files in the U.S. and Denmark.[66]

Needless to say, there is no particular reason that these distributions, drawn from vastly differing populations, will be consistent with one another. We ask that our results be taken as suggestive, at best.

Figure 8 shows the proportion of lambdas, crimes, and arrests accounted for by the worst 10 percent of offenders in each distribution studied. The results are striking: the right tail of the distribution of offenders is consistently responsible for 35 to 40 percent of the lambda, and some 45 percent of the crimes committed. By contrast, the top 10 percent of offenders arrested account for only about 30 percent of the arrests. Compared to the results simulated above (shown here as a dotted line), it is clear that the distribution of arrests is markedly less skewed than one would expect, if police were selective or neutral with respect to frequent and violent offenders. In fact, the police seem remarkably counterselective. If these results are to be taken seriously, programs aimed at increasing the focus of police action on the most dangerous will not fail because their objectives are already being met. On the contrary, police selectivity programs appear to be desperately needed, if only to make the system neutral with regard to the most dangerous offenders.

Figure 8

Empirical Estimates of Criminal Justice System Filtering



Notes

1) See Alfred Blumstein, "Research Perspectives on Selective Incapacitation as a Means of Crime Control," prepared for our conference and published in Volume II of this report, for a concise analysis of these and other potential pitfalls of selective policies.

2) Norval Morris, The Future of Imprisonment (Chicago: University of Chicago Press, 1974), pp. 62-73.

3) John Monahan, Predicting Violent Behavior (Beverly Hills: Sage, 1981) pp. 31-36.

4) Morris, The Future of Imprisonment, p. 76.

5) Barbara Underwood, "Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Justice," Yale Law Journal, 88 (1979), pp. 1432-1447.

6) Herbert Packer, The Limits of the Criminal Sanction (Stanford: Stanford University Press, 1968) pp. 37-55. Also: Gerald Gardiner, "The Purposes of Criminal Punishment," Modern Law Review, 21 (1956); Francis A. Allen, "Criminal Justice, Legal Values and the Rehabilitative Ideal," Journal of Criminal Law, Criminology and Police Science, 50 (1950); and Johannes Andenaes, "The General Preventive Effects of Punishment," University of Pennsylvania Law Review, 114 (1960).

7) Alan Dershowitz, "The Law of Dangerousness: Some Fictions about Predictions," Journal of Legal Education 23 (1970) pp. 24-27.

8) Herbert Packer, The Limits of the Criminal Sanction, pp. 37-55.

9) The Twentieth Century Fund Task Force on Criminal Sentencing, in Fair and Certain Punishment (New York: McGraw-Hill, 1976), reviews both the genesis of parole discretion and its effects in producing inequitable and uncertain punishment.

10) The most complete and eloquent arguments supporting the notion that recidivists deserve greater punishment have been made by Andrew von Hirsch. See generally his Doing Justice: Report of the Committee for the Study of Incarceration (New York: Hill and Wang, 1976), and more specifically his recent response to critics of this notion, "Desert and Previous Convictions in Sentencing," Minnesota Law Review 65 (1981) 591-634.

11) Peter W. Greenwood, "Trade-offs Between Accuracy and Selective Incapacitation Effects," paper prepared for our conference and published in Volume II of this report.

12) For evidence on the "trajectories" of criminal ability over a lifetime career, see James J. Collins, Offender Careers and Restraints: Probabilities and Policy Implications," (Philadelphia: University of Pennsylvania, 1977).

13) This argument was made explicitly by Kenneth Feinberg in defense of proposals to incorporate the interest in "dangerousness" in bail decisions. In general, he argues that explicit principles increase the justice of any procedure since they give people warning and increase the likelihood that like cases will be treated alike (that is, they increase horizontal equity). Obviously these conditions may be necessary for a just system, but they are not sufficient. For an analysis of the evils of unbounded discretion, see James Vorenberg, "Narrowing the Discretion of Criminal Justice officials," Duke Law Journal (September 1976), 651-697.

14) Clearance rates for robbery average 20 to 30 percent; for burglaries 15 to 20 percent. F.B.I., Crime in the United States (Washington, D.C.: U.S. Department of Justice, 1975-1980).

15) Peter W. Greenwood, An Analysis of the Apprehension Activities of the New York City Police Department (New York: Rand Corporation, 1970). Vera Institute, Felony Arrests: Their Prosecution and Disposition in New York City's Courts, (New York: Vera Institute, 1977).

16) Brian Forst and Kathleen B. Brosi, "A Theoretical and Empirical Analysis of the Prosecutor," Journal of Legal Studies, 6 (1977), 177-191.

17) There is little systematic evidence available on the utilization of consecutive as opposed to concurrent sentencing. Anecdoctal evidence suggests that concurrent sentencing is much more common, and that if multiple counts have an effect, they affect the sentence length handed out for each (concurrent) sentence.

18) Peterson and Braiker found that offenders with "multiple criminal identities" (who committed many crimes at high rates) had lower probabilities of being arrested given an offense for armed robbery and burglary than other sorts of offenders. See Mark A. Peterson and Harriet B. Braiker with Suzanne Polich, Who Commits Crimes (Cambridge: Oelgeschlagen, Gunn and Hain, 1981), Table 44, p. 79.

19) We use a simulation model of the criminal justice system to explore this hypothesis in Appendix 3.

20) For an extreme view of the justice position, see Ernest van den Haag, Punishing Criminals (New York: Basic Books, 1975).

21) See pp. II-33 to II-37, above.

22) Monahan, Predicting Violent Behavior, p. 58.

23) See, for example, Jan Kmenta, Principles of Econometrics (New York: Macmillan, 1971), pp. 370-371, for a demonstration that the discriminatory power of any multiple regression model increases as explanatory variables are added.

24) As Monahan remarks, "Rather than we know it is impossible to accurately predict violent behavior under any circumstances, I believe a more judicious assessment of the research to date is that we know very little about how accurately violent behavior may be predicted under many circumstances." Monahan, Predicting Violent Behavior, p. 37.

25) Sir Leon Radzinowicz and Roger Hood argue that the failure of selective incapacitation policies in England is rooted in the failure to be precise about who is to be included in the dangerousness group -- those who commit serious offenses, or those who commit offenses often. See Radzinowicz and Hood, "Incapacitating the Habitual Criminal: The English Experience," Michigan Law Review, 78 (1980) 1305-1389. Morris also sees that the great risks associated with "selective incapacitation" are in the "plasticity" of the concept of dangerous offenders. See Norris, The Future of Imprisonment, p. 62.

26) Underwood, "Law and the Crystal Ball."

27) Peter W. Greenwood with Allan Abrahamse, Selective Incapacitation (Santa Monica: Rand Corporation, 1982). Kristen M. Williams, the Scope and Prediction of Recidivism. (Washington, D.C.: Institute for Law and Social Research, 1978).

28) Kenneth Feinberg, in "Promoting Accountability in Making Bail Decisions: Congressional Efforts at Bail Reform," prepared for our conference and published in Volume II of this report, argues an even stronger position: that replacing a system that secretly practices preventive confinement with an explicit system having identical results represents a gain in justice.

29) See Chapter 8 of this report.

30) See Chapter 8 of this report.

31) For example, Jan M. Chaiken and Marcia R. Chaiken found that the rate of robbery arrests predicted the rate at which offenders committed robberies, even after adult and juvenile convictions had been taken into account. See Varieties Of Criminal Behavior (Santa Monica: Rand, 1982), p. 111.

32) Eric D. Wish, and others, An Analysis of Drugs and Crime Among Arrestees in the District of Columbia (Washington: U.S. Department of Justice, 1981).

33) For an intriguing discussion of the view that the medical establishment should coopt the illegal drug market by regularly prescribing opiates, see Isidor Chein and others, The Road to H: Narcotics, Delinquency, and Social Policy (New York: Basic Books, 1964), pp. 369-386.

34) Morris, The Future of Imprisonment, p. 73.

35) Morris, The Future of Imprisonment, p. 73.

36) The most notable shift is by John Monahan. See Monahan, Predicting Violent Behavior.

37) One of the tests that appealed most to Monahan was developed by the Michigan Department of Corrections. See Terrence H. Murphy, "Michigan Risk Prediction: A Replication Study, Final Report," (Lansing, Michigan Department of Corrections Program Bureau, 1980).

38) The most commonly cited studies were: 1) Ernst A. Wenk, James O. Robison and Gerald W. Smith, "Can Violence be Predicted?" Crime and Delinquency, 18 (1972) 393-402; and 2) Harry L. Kozol, Richard J. Boucher, and Ralph F. Garofalo, "The Diagnosis and Treatment of Dangerousness," Crime and Delinquency, 18 (1972) 371-392.

39) Monahan, Predicting Violent Behavior, pp. 101-102.

40) Monahan, Predicting Violent Behavior, pp. 102-104.

41) Dershowitz, "The Law of Dangerousness."

42) Greenwood, "Trade-offs Between Prediction Accuracy and Selective Incapacitation Effects." See also Chaiken and Chaiken, Varieties of Criminal Behavior, pp. 64-119.

43) Greenwood with Abrahamse, Selective Incapacitation.

44) One can construct a persuasive argument that "character" as revealed by the intention to commit a criminal act is more fundamental to the idea of guilt and blameworthiness than the criminal act itself. The mens rea requirements, and the existence of diminished capacity defenses indicate that an intention or willingness to commit a crime is a necessary condition for blameworthiness, and that an act alone is not sufficient. The existence of laws making attempts to commit crimes criminal offenses suggests that an intention is sufficient, and the actual criminal act unnecessary. Thus, the intention is both necessary and sufficient for guilt, while a criminal act is neither. The next step is to argue that intention is important because it reveals something about the moral values and character of the defendant.

45) One way to think about why repeat offenders should be punished more harshly for their most recent offenses than someone convicted of a similar crime but without a criminal history is that doubts about the values and moral character of the individual are eliminated. It no longer seems plausible that the offender is "like us" but unlucky enough to have encountered provocative situations. It seems more likely that he differs from others in terms of his willingness to commit crimes, and is, therefore, more wicked.

46) Packer, Limits of the Criminal Sanction. For estimates of the magnitude of these "utilitarian effects," see Alfred Blumstein, Jacqueline Cohen and Daniel Nagin, eds., Deterence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (Washington, D.C.: National Academy of Sciences, 1978).

47) The exception would be discriminating tests used by police and prosecutors, which could focus attention on persons who had been arrested several times but never convicted. In this case, the mitigating point is that police and prosecutorial actions do not themselves deprive anyone of liberty; incarceration decisions are only made after a finding of guilt beyond a reasonable doubt. There is no such mitigating point in favor of using such tests in pretrial detention decisions, of course.

48) The problem with defining habitual offenders in terms of an absolute number of offenses is that a few low rate offenders will, late in their careers, accumulate enough convictions to qualify as "habitual offenders." Neither justice nor utilitarian interests are well served by this determination.

49) For an analysis of how restriction on access to juvenile records and low arrest and conviction rates can reduce the value of incapacitation policies, see Mark H. Moore, James Q. Wilson, and Ralph Gants, "Violent Attitudes and Chronic Offenders," (Mimeographed, John F. Kennedy School of Government, 1978).

50) Groups such as youth gangs, or larger networks focusing on fences for organized criminal syndicates may well recruit new members to replace those lost through incarceration. Alfred Blumstein, "Research Perspectives," points out that replacement is most likely for crimes associated with these groups such as drug sales and property offenses. In addition, to the degree that controlled substances such as drugs are in relatively inelastic supply, the incapacitation of old users will lead to addition of new uses; if drugs are an important criminogenic commodity, a crime replacement effect will result.

51) Radzinowicz and Hood, "Incapacitating the Habitual Criminal," p. 1377. See also, Michael E. Smith, "Alternative Forms of Punishment and Supervision for Convicted Offenders," paper prepared for our conference and published in Volume II of this report.

52) Jan and Marcia Chaiken found that dangerous offenders commit all sorts of offenses more often than less dangerous offenders. Because property offenses occur more often than dangerous offenses, it may be possible to use a high rate of property offending in conjunction with one or more violent offenses to identify dangerous offenders. Chaiken and Chaiken, Varieties of Criminal Behavior (Santa Monica: Rand Corporation, 1982).

53) Greenwood with Abrahamse, Selective Incapacitation.

54) Greenwood, "Trade-offs."

55) A large majority of the most serious offenses, and particularly the stranger-to-stranger violent crimes the public finds so frightening, are committed in groups; see, for example, Maynard L. Erickson, "The Group Context of Delinquent Behavior," Social Problems 19 (1971) 114-129. For both theory and empirical evidence of recruitment by and role assignment within the most active groups, youth gangs, see the classic study by James F. Short, Jr. and Fred L. Strodtbeck, Group Process and Gang Delinquency (Chicago: University of Chicago Press, 1965), Malcolm W. Klein's manual for gang workers, Street Gangs and Street Workers (Englewood Cliffs: Prentice-Hall, 1971), or Joan W. Moore's case studies, Homeboys: Gangs, Drugs and Prison in the Barrios of Los Angeles (Philadelphia: Temple University Press, 1978).

56) This is an intuitively appealing hypothesis, but there is no direct empirical demonstration of this effect yet. All the "demonstrations" of an "incapacitative effect" are simply analytic models that assume crimes are suppressed while an offender is in jail.

57) Empirical research verifying the effect of prior record on sentences passed is considered in Chapter 4, below. For a more comprehensive review that includes the impact of other offender characteristics and the attitudes and biases of the judge, see John Hogarth, Sentencing as a Human Process (Toronto: University of Toronto Press, 1971).

58) Michael E. Smith, "Alternative Forms of Punishment and Supervision for Convicted Offenders," paper prepared for our conference and published in Volume II of this report.

59) Smith, "Alternative Forms."

60) We are indebted to George L. Kelling for emphasizing this point.

61) Although most liberals would agree with all these assertions to a point, the view that the criminal justice system is biased and occasionally vicious is mostly closely associated with conflict theorists ("radical criminologists") such as Austin Turk and Richard Quinney. See, for example, Turk's Criminality and the Legal Order (Chicago: Rand McNally, 1969) or Quinney's The Social Reality of Crime (Boston: Little, Brown, 1970).

62) Sheldon and Eleanor Glueck, Unraveling Juvenile Delinquency (New York: Commonwealth Fund, 1950), were the first to explicitly state the "age of onset" theory, which suggests that the worst offenders start earlier and continue their careers longer than others. Although the theory has been provisionally confirmed, recent evidence suggests that the effect, if there is one, is weak. See, for example, Donna Martin Hamparian, and others, The Violent Few (Lexington, Mass.: D.C. Heath, 1978), pp. 56-69, 125.

63) Although this example is intended to demonstrate filtering, rather than to specify its effects with precision, the parameters were chosen to reflect what is known about the activities of offenders and criminal justice agencies. See William Spelman, "The Crime Control Effectiveness of Selective Criminal Justice Policies," prepared for our conference and published in Volume II of this report, for a detailed description of the simulation model and the parameters used.

64) In each case, the probability of arrest was a power function. Parameters were determined so that offenders who committed more than the median amount of crime would be twice (half) as likely to be arrested, on average, as those who commit less than the median.

65) Joan Petersilia, Peter W. Greenwood, and Marvin Lavin, Criminal Careers of Habitual Felons (Santa Monica: Rand, 1978); Mark A. Peterson and Harriet B. Braiker with Suzanne M. Polich, Who Commits Crimes (Cambridge, England: Oelgeschlagen, Gunn and Hain, 1981); Chaiken and Chaiken, Varieties of Criminal Behavior.

66) Marvin E. Wolfgang, Robert Figlio and Thorsten Sellin, Delinquency in a Birth Cohort (Chicago: University of Chicago Press, 1972); Marvin E. Wolfgang and Paul Tracy, "The 1945 and 1958 Birth Cohorts: A Comparison of the Prevalence, Incidence, and Severity of Delinquent Behavior," prepared for our conference and published in Volume II of this report; Hamparian and others, Violent Few; Preben Wolf, "A Contribution to the Topology of Crime in Denmark," in Scandanavian Studies in Criminology, Volume I, K.O. Christiansen, ed. (London: Tavistock, 1965).

PART II

IMPLICATIONS FOR CRIMINAL JUSTICE SYSTEM OPERATIONS

Chapter 4

SENTENCING

Our survey of proposals to enhance the selectivity of criminal justice system operations begins, in some sense, at the end. Sentencing is the last stage in the process of determining who will be punished and incapacitated. By the time we reach this stage, many of the most crucial decisions -- from the decision to arrest, to the investigation and preparation of the case, to the choice of charges, to the negotiation of a plea -- have already been made. These decisions determine not only who will reach the sentencing stage, but also impose significant limits on our ability to be selective. One limitation is associated with the current conviction offense: to the extent that judicial discretion is narrowed for sentencing and based on the nature of the offense, the potential to be selective with respect to characteristics of the individuals is weakened. Of course, many think of this as a virtue not a liability for the system.[1] But the point here is that the conviction offense constrains judicial opportunities to be selective -- both more mercifully, and with more hostility -- on the basis of individual characteristics of the offender.

A second limitation is less obvious, but equally important. It has to do with previous failures of the criminal justice system to assign crimes to individual offenders. If the system were routinely

solving crimes and attributing them to individual offfenders, then existing criminal justice records would reliably reflect underlying rates of offending, and judges could base judgements about who was "dangerous" on reliable information about prior criminal conduct. Because the system does not solve crimes, judges have less information in which to base sentencing decisions. In effect, neither the current offense nor the record of prior offenses offers a powerful basis for discerning "dangerousness," and that is due to the fact that the criminal justice system fails to solve crimes.

In fact, the more one thinks about it, the more apparent it becomes that proposals which put "selective sentencing" at the center are really trying to use sentencing discretion to retrieve the failures of the other stages of the system. If the system were routinely clearing criminal offenses -- if it were arresting those who commit the most offenses most often, if it were properly investigating their cases, and if it were charging and convicting them as often as they allegedly are committing offenses -- then we would hardly need to be very selective in sentencing. The most serious offenders would be convicted more often, and a sentencing system that made no pretense at selectivity would nonetheless produce results which were in effect highly selective with respect to individuals. "Dangerous offenders" would spend much more time in prison than "ordinary offenders." Because the system is <u>not</u> performing in this way, it is tempting to try to salvage the situation by turning sentencing decisions to the

purpose of "selective incapacitation." As we will see, this use of sentencing discretion places great strains on the system. It might be wiser to increase selectivity at earlier stages of the processing and making sentencing more neutral.

In this chapter, we focus on current proposals to make sentencing decisions more selective -- that is, to reserve prison cells for the most "dangerous" offenders. In doing so, we will follow a format that will govern our examination of each of the stages of the criminal justice system. This chapter, and all succeeding chapters, are organized around four main questions:

- o What does a selective focus mean in operational terms for this stage of the criminal justice system?
- o Would the shift to a selective focus be just?
- o What in practical terms, can we hope to accomplish by adopting the proposed changes?
- o What crucial areas of uncertainty need to be addressed and what basic research or field experiments could be mounted to resolve the key issues?

A. Focusing Sentences More Selectively

Sentencing decisions require judges, or legislators, or parole boards, to answer three questions: who goes to jail or prison; how long do they stay there; and what do we do with those who do not go to jail or prison. Answers to these questions inevitably reflect different philosophies about the purposes and functions of punishment

as well as practical assessments of our capacity to deliver punishment, and our ability to distinguish dangerous offenders from others. Our task in this section is to describe proposals for greater selectivity in sentencing so that we can evaluate them against standards of justice and current practice, and thereby make a judgment about the risk and benefits of selectivity in sentencing.

As at all other stages of the criminal justice system, selectivity in sentencing can be primarily offense-oriented, or primarily offender-oriented. Of course, most sentencing systems embrace both the offense and the offender: even in strict retributivist systems, we must know that the criminal offense was intentional; and even in thoroughly utilitarian systems (whether devoted to deterrence, incapacitation, or rehabilitation), we need a criminal offense to license state intervention. And it is also true that all proposals for greater selectivity in sentencing shift our attention from the act to the character of the offender as judged either by the current act, by the record of past acts, or by some other characteristics. But still, within these common limits, one can distinguish between proposals designed to increase selectivity by using the current offense to gauge character, and those that gauge character by other methods.

1. AN OFFENSE-ORIENTED PROPOSAL

Michael Sherman has recently proposed sentencing policies that are primarily, but not exclusively, offense-oriented.[2] His scheme to

determine who should recesive an extended prison term is based largely on the current offense. Those who commit murder and rob with a firearm would definitely be imprisoned, with few exceptions on a first offense. For all others, however, some evidence of "bad character" beyond the current offense must be offered. For non-robbery assaults, a showing of aggravated seriousness or repetitiveness must be made to justify imprisonment. For burglary and drug offenses, Sherman argues for a line drawn between "professionalism and amateurism," recommending incarceration for professionals but punitive alternatives not involving incarceration for amateurs. Presumably, the distinction is based on the scale and durability of the criminal conduct. How long should those who are imprisoned stay there? Sherman, arguing that the first year of a prison term means more than the tenth, suggests a general maximum of five years, with exceptions for a Charles Manson or for a case of serious mental disorder.

Sherman's proposal makes sentencing decisions depend a little on judgments about the character of the offender. Repetitiveness is an important criterion in sentencing assaulters, burglars, drug dealers, and so on. That is what makes this proposal selective with respect to offenders as well as offenses. But Peter Greenwood goes much farther in this direction. He proposes greater selectivity based on characteristics of the offenders -- including some characteristics that do not describe criminal conduct.[3]

2. AN OFFENDER-ORIENTED PROPOSAL

Greenwood and his associates at the Rand Corporation have developed a scale for distinguishing low, medium, and high rate burglars and robbers among offenders convicted of those crimes. The seven variables used to distinguish between classes of offenders are:

1. Incarceration for more than half of the two-year period preceding the most recent arrest;
2. A prior conviction for the crime type that is being predicted;
3. Juvenile conviction prior to age 16;
4. Prior commitment to a state or federal juvenile facility;
5. Heroin or barbiturate use in the two-year period preceding the current arrest;
6. Heroin or barbiturate use as a juvenile;
7. Employed less than half of the two-year period preceding the current arrest.

Under the Greenwood proposal, those who score high on the seven variable test ought to receive enhanced sentences, and those who score low, reduced sentences. Among California robbers, Greenwood and Abrahamse found that a 15 percent reduction in the robbery rate and a 5 percent reduction in the current prison population could both be achieved by increasing sentence terms for high-rate robbers and decreasing them for low and medium rate robbers. To bring about the same 15 percent reduction in crime without selectivity would require

a 25 percent increase in prison population. Among burglars, Greenwood and Abrahamse found that by increasing the population by 7 percent, one could bring about a 15 percent reduction in burglaries.

Reserving our prison capacity for selective use either on the basis of the seriousness of the offense or the characteristics of the offender means developing alternatives for those who do not meet our selectivity tests. One alternative, of course, is shorter prison terms -- that is what Greenwood recommends for his low-scoring burglars and robbers. But even under his approach, and certainly under Sherman's, there will be some individuals (indeed, many more than those we selectively seek to incapacitate) for whom alternatives to incarceration in prison must be developed. To do absolutely nothing to these offenders flies in the face of a broad social conviction that some punishment is deserved. To imprison these less dangerous offenders in scarce cells, on the other hand, is sure to impose limits on our ability to incapacitate those who do present a danger of violence in the future; given the numbers involved, even short terms are extremely costly. In sum, selectivity in sentencing involves allocating prison cells -- either on the basis of offense or offender characteristics -- to those offenders who pose the greatest danger of violence. In view of real-world political and financial constraints, introducing greater selectivity in sentencing means that we must not only develop the tests or standards which allow judges to select the most dangerous few for incarceration, but also the programs

which allow them to impose some real punishment, if not incapacitation, outside of prison for the many more who will not meet our test.

B. Is Selectivity in Sentencing Just?

In deciding whether proposals to enhance selectivity in sentencing are just, it is useful to begin by recognizing that it would be difficult to design a system of sentencing that allowed more injustice than the current system, which leaves wide discretion to judges in the interests of individual rehabilitation. If a just system of sentencing requires like cases to be treated alike, punishments properly fitted to offenses and offenders, and a fair determination of all the factual issues that place offenders in one category rather than another, then the current system of "rehabilitative sentencing" is a disaster. As a result, both the Sherman and Greenwood proposals in some ways represent improvements.

1. JUSTICE AND THE CURRENT SYSTEM OF SENTENCING

The greatest failures of the current system are the inability to insure that like cases will be treated alike, and its carelessness in making the factual determination on which sentences should depend. A major difficulty is the failure of constitutional principles or legislation to spell out what characteristics a judge may consider in sentencing, and how he should make determinations about these characteristics. What guidance there is for judges embraces a broad

philosophy of rehabilitation. That is the current court interpretation of sentencing principles, as well as the philosophy expressed in most state criminal laws. In deciding the case of Williams v. New York, for example, the Supreme Court found that criminal sentences should be based "on the fullest information possible concerning the defendant's life and characteristics."[4] Similarly, in Pennsylvania v. Ashe. the Court decided that, "for the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there by taken into account the circumstances of the offense together with the character and propensities of the offender."[5]

The Williams case is particularly instructive. There the trial judge overruled a jury recommendation of life imprisonment and imposed the death penalty on the basis not only of the shocking details of the crime (which had been revealed, of course, to the jury) but also on the information contained in the presentence investigation; according to the Supreme Court's account, the trial judge

> referred to the experience appellant 'had had on thirty other burglaries in and about the same vicinity' where the murder had been committed. The appellant had not been convicted of these burglaries although the judge had information that he had confessed to some and had been identified as the perpetrator of some of the others. The judge also referred to certain activities of appellant as shown by the probation report that indicated appellant possessed a 'morbid sexuality' and classified him as a 'menace to society.'

The Supreme Court upheld the imposition of the death penalty on this

basis against a due process challenge.[6] Noting that the "New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime," the Court reasoned that strict adherence to evidentiary rules limiting the bases for sentencing to testimony given in open court by witnesses subject to cross-examination would undermine the ability of judges to individualize sentences on the basis of the best available information.

The result, according to former Judge Marvin Frankel, is a system which "allow(s) sentences to be 'individualized' not so much in terms of defendants, but mainly in terms of the wide spectrum of character, bias, neurosis, and daily vagrancy encountered among occupants of the trial bench. . . . The evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely varying divergent sentences where the divergences are explainable only by the variations among the judges, not by material differences in the defendants of their crimes."[7]

The facts support Frankel's assertion. In 1974, fifty federal district court judges from the Second Circuit were given twenty identical case files, drawn from real cases, and asked what sentence they would impose. The results, summarized in Table 16 make clear just how broad the disparity was. Within the federal system, average sentences for robbery, for example, vary from 39 months in the

Table 16

Second Circuit Sentencing Study[8]

	Bank Robbery	Sale of Heroin	Theft, Possession of Stolen Goods	Possession of Unregistered Gun
Most severe sentence	18 yrs. prison $5000	10 yrs. prison 5 yrs. probation	7.5 yrs. prison	1 yr. prison
6th Most severe sentence	15 yrs. prison	6 yrs. prison 5 mos. probation	6 yrs. prison	6 mos. prison 3 yrs. probation
12th most severe sentence	15 yrs. prison	5 yrs. prison 5 yrs. probation	4 yrs. prison	3 mos. prison 21 mos. probation
Median sentence sentence	10 yrs. prison	5 yrs. prison 3 yrs. probation	3 yrs. prison	1 mo. prison 11 mos. probation
12th least severe sentence	7.5 yrs. prison	3 yrs. prison 3 yrs. probation	3 yrs. prison	2 yrs. probation
6th least severe sentence	5 yrs. prison	3 yrs. prison 3 yrs. probation	2 yrs. prison	1 yr. probation
Least severe sentence	5 yrs. prison	1 yr. prison 5 yrs. probation	4 yrs. probation	6 mos. probation

Northern District of New York to 224 months in the Northern District of Texas (see Table 17). And studies of a number of state systems also found substantial disparities in sentences for similar offenses and similar offenders.[9]

2. JUSTICE AND NARROWED JUDICIAL DISCRETION

Compared to the current system, proposals for selective incapacitation advance justice in at least two ways. First, they impose limits on the factors, and the hearsay, which may be considered in imposing a sentence -- something that the due process clause, at least as interpreted by this Supreme Court, does not do. Second, they would further horizontal equity among offenders: a uniform system of selective incapacitation sentences would result in similar offenders who commit similar offenses receiving similar sentences -- regardless of whose courtroom they find themselves in.

But that is not necessarily enough. A uniform system of selectivity may be less unjust than the current system, but that does not make it just; indeed, to the extent that such proposals formalize an only slightly improved version of an unjust status quo, they may make it more difficult to change in the future. Moreover, efforts are underway already, in Congress and in numerous states, to replace the unjust discretionary system with new systems where a specific sentence (mandatory) or sentence range (presumptive) is set forth for an offense by the legislature, with limited if any judicial discretion. Some states have also moved to eliminate the discretion of the parole

Table 17

Average Sentence Length for Selected Offenses -- Federal Courts

	Homicide and Assault	Robbery	Burglary	Larceny	Auto Theft	Forgery and Counterfeiting
National Average	102	120	63	40	38	42
Maine	-	-	-	144	21	24
Massachusetts	48	115	40	36	20	32
New York (Northern)	-	39	-	11	9	12
New York (Southern)	18	130	2	48	12	49
New Jersey	11	103	27	50	32	29
Pennsylvania (Eastern)	102	88	-	25	49	30
Maryland	6	146	61	45	49	40
Virginia (Eastern)	66	135	81	50	41	39
Florida (Middle)	-	126	34	37	32	41
Texas (Northern)	62	224	46	42	39	66
Kentucky (Eastern)	24	124	167	25	32	20
Ohio (Northern)	28	119	36	29	31	35
Illinois (Northern)	20	81	30	40	45	38
Indiana (Southern)	40	101	24	35	29	34
Missouri (Eastern)	27	180	60	54	46	46
Missouri (Western)	36	120	-	57	36	33
California (Northern)	79	115	120	32	42	37
California (Central)	190	96	24	40	41	43
Kansas	74	115	-	46	47	63
Oklahoma (Western)	29	85	48	31	36	41
District of Columbia	161	103	84	42	40	67

Source: Pierce O'Donnell, Michael J. Churgin and Dennis E. Curtis, Toward a Just and Effective Sentencing System: Agenda for Legislative Reform (New York: Praeger, 1977), p. 5.

commission to determine when an individual is "reformed" (determinate). In 1979, New Jersey, New Mexico and North Carolina joined Alaska, Arizona, and California in enacting presumptive sentencing laws. In the same year, eighteen states passed one or more mandatory sentencing bills covering violent, drug, or repeat offenses, bringing the total number of states having such laws to 27.[10] Evaluating the justice of the Sherman or Greenwood proposals, or any other proposal for selectivity in sentencing, solely by reference to the current wide open, discretionary system is in some sense no more than destroying an already-discredited straw man.

3. TWO PHILOSOPHIES OF SENTENCING

How, then, do we evaluate justice in sentencing? There is, after all, no abstract formula that produces the "just" sentence; as Hegel put it, "reason cannot determine. . .any principle whose application could decide whether justice requires for an offense 40 lashes or 39, or a fine of 5 thalers or 4."[11] Under the Constitution, virtually no limits exist on the length of a "just sentence." While the Eighth Amendment's cruel and unusual punishment clause limits the permissible use of the death penalty,[12] it provides virtually no limits on the length of a sentence of incarceration.[13] Nor does the due process clause, which limits the evidence upon which a defendant can constitutionally be convicted, impose any real restriction on the kinds of evidence or information upon which he can constitutionally be sentenced. What is just, then, depends at least in part on our

philosophy of punishment, our degree of hostility towards criminal offenders, and the resources available for punishment. In this, our interests in treating like cons alike and in restricting our attention to "relevant factors" when making selective sentencing decisions operate as constraints, but not as complete defining principles.

Broadly speaking, philosophies of sentencing can be divided into "utilitarian" and "retributivist" categories. The simple utilitarian concept is that we sentence in order to accomplish crime control purposes at tolerable costs to other purposes. In general, we believe that punishment affects levels of crime through one or more of three distinct mechanisms: general deterrence; special deterrence (or rehabilitation); and incapacitation. In the utilitarian system, we should choose aggregate and individual levels of punishments to minimize criminal conduct given constraints on public expenditures for prisons and notions of "proportionality" between the crime and the punishment. The central retributivist concept is that offenders should get their "just deserts" without any reference to the consequences of having punished them on their future conduct, or anyone else's. In this system, punishments are determined strictly by an offender's criminal conduct: no adjustments are made for any individual's ability to "profit" from, or the society's general willingness to pay for a given level of criminal punishment.

a. The Utilitarian Justification and Its Limits

Many current proposals for selectivity in sentencing appear to be utilitarian rather than retributivist in spirit. The basic justification for selectivity is usually given in utilitarian terms. The claim is made that one can have less crime and fewer people in prison by being selective. No reference is made to whether the individual offenders have been treated justly. Similarly, at the center of such utilitarian arguments are forward-looking predictions of criminal conduct -- not backward-looking assessments of criminal liability. This interest in future conduct as a guide to sentencing is decidedly utilitarian rather than retributivist. Finally, in constructing tests to distinguish dangerous offenders from others, advocates of selective incapacitation often seem to act as though any variable that increased the discriminating power of the test (with the important exception of several variables that defined "suspect classifications" such as race, religion, or political values) would be justified. All this gives proposals for "selective incapacitation" a decidedly utilitarian cast.

The utilitarian flavor of current proposals for "selective sentencing" creates difficulties. Clearly, it invites the hostility of those who reject utilitarian justification for punishment and prefer retributivist ideas. Perhaps even more important, it fails to give clear guidance on the crucial aspect of selective sentencing: how we should think about the inevitable "false

positives", those offenders we think commit dangerous crimes at high rates, but really do not; and what characteristics are appropriate to consider in making sentencing decisions. These <u>are</u> major problems for selective sentencing even for those who think of themselves primarily as utilitarians.

The major difficulty is that we are bound to identify a substantial number of "false positives." Of course, one can try to erase the problem with a semantic sleight of hand: we are not enhancing punishment for some, but rather reducing it for others. Even so, we are left with the question of why I, the "false positive" who has been wrongly classified as very dangerous, am not entitled to the same reduced punishment as other, non-dangerous felons. Moreover, in raising this question, the wrongly assigned offender may make two additional claims: that he has been denied individual justice by being made a member of a large class; and that the evidence that subjects him to additional years in prison through the sentencing system meets none of the substantive or procedural tests that must be met by evidence which is necessary to convict him at trial. In short, can a sentencing system that exposes some people to enhanced punishments on the basis of a few hard to verify characteristics stand beside an elaborate system of adjudicating guilt -- with its guarantees of assistance of counsel and trial by jury, the right to confront witnesses, and the requirement of proof beyond a reasonable doubt -- that has as its stated premise a notion that it is better

that ten guilty men go free than that one innocent man be convicted?

b. The Retributivist Solution

In our view, many of these difficulties with the utilitarian concept of "selective incapacitation" are lessened if we think of proposals for selective sentencing in a more retributivist perspective. In this view, the interest in "selective sentencing" derives not from focusing punishment on those who will be the most active offenders in the future, but instead from an interest in punishing those who, by their acts, have revealed themselves to be the most determinedly criminal people in the population. In effect, we understand that a single criminal act, although willed by the offender, can be an accident, or at least not a clear indication of incorrigible character. For this reason, guilt may be lessened. Repeated criminal acts, however, eliminate uncertainty about the character of the offender as we see that he intends the crimes, and does so persistently. To the extent that we think of the criminal law in general, and retribution theory in particular, as interested in character as revealed by acts as well as the acts themselves, the clear evidence of character given in repeated criminal acts could be seen as a proper basis for enhanced punishment. In short, a retributivist justification for enhanced punishment for dangerous offenders can be constructed. Interestingly, no one at our conference thought that it was unjust to enhance sentences for repeat offenders.

This retributivist justification for selective sentencing solves

some problems in the utilitarian justification, but does so at a price. It solves the problem of "false positives" by making the enhanced punishment depend not on forward-looking exploration of post criminal conduct. A person becomes liable not by virtue of future predictions, but on the basis of past deeds. By definition, then, the false position problem disappears. Moreover, it gives clear guidance as to what characteristics of offenders may be examined in giving out sentences: only prior criminal conduct may be considered. It would exclude characteristics such as employment history. But we pay a price for these restrictions. We cannot lessen punishment for individuals even if they seem unlikely to commit crimes in the future; and the discriminating power is less if we use only variables describing criminal conduct in the discriminating.

On balance, we evidence a "mixed conception" of sentencing. We think the society has obligations to advance crime control objectives and to do justice to individuals. To us, the retributivist justification for selective sentencing is more appealing than the utilitarian justification because it gives a structure of principles to a system that could otherwise become quite loose and unfair. Moreover, the retributivist justification has the great virtue of focusing our attention on where the real problems of the system may lie -- namely in the process of attributing crimes to individuals, and keeping records that reveal how frequently an offender has committed crimes. Finally, we think there is less tension between the

utilitarian and retributivist justification for selective sentencing than is often supposed. Precisely because past acts reveal character and provide a good basis for predictions about future conduct, we can have a largely retirbutivist system of selective sentencing that offers utiliarian benefits. Moreover, we think such a system would be just.

C. Potential Effectiveness of a Policy of Selectivity in Sentencing

The application of Greenwood's seven-variable test to California robbers and burglars suggests a real potential to control crime without expanding prison capacity by introducing formal systems of selectivity in sentencing. But that potential should not be overestimated: when Greenwood applied the same system in Texas, it did not produce nearly the results it did in California. In Texas, Greenwood found that he could not reduce crime while maintaining current capacity by selectively increasing and decreasing sentences according to his seven-variable scale. Among Texas robbers, a 10 percent reduction in crime required a 30 percent increase in overall incarceration. For burglars, the cost of a 10 percent reduction in crime was a 15 percent increase in incarceration. In short, the Greenwood test really didn't "work" in Texas -- if working is defined as reducing crime at no cost in terms of increased incarceration. Greenwood explains the Texas results as the combination of a low average rate and a more even distribution of rates of offending among Texas inmates.[14] Whether Texas is more or less representative than

California of the rest of the country is one important question in assessing the potential of selective incapacitation as a crime reduction strategy. Even if Texas is in some respects unique, the variables which work in California may not work nearly so well elsewhere. The theory may; the specific scale may not. Each jurisdiction may have to develop its own test, based on its assessment of which characteristics correlate with individual rates of offending in that jursidiction.

1. PRESENT USE OF SELECTIVITY IN SENTENCING

The more important question as to the potential effectiveness of selectivity in sentencing is whether the criminal justice system is not already imposing sentences selectively, at least with respect to variables such as the seriousness of the offense and past criminal record. That question is difficult to answer, but studies of individual jurisdictions as well as aggregate state prison data suggest that there may be more selectivity in current sentencing systems than is commonly assumed.

Seriousness of the offense and prior criminal record have repeatedly been cited as the most important factors in determining sentences. For example, Green studied the Philadelphia Superior Court sentences passed in the mid-1950's, and found the number of prior felony convictions to be the most important predictor of the sentence passed, aside from seriousness of the instant offense and the number of counts for which the defendant was convicted.[15] Green successfully

replicated his findings in a later study of Philadelphia courts, in which he found that Philadelphia judges were 50 percent more likely to sentence an offender to prison, and sentenced him to a prison term twice as long, if he had a violent conviction in his record.[16] Johnston and others discovered that Washington State judges sentenced thieves to longer terms if their last prior conviction was for a violent crime, and that the offense type of the last prior was almost as important as the total extent of the criminal record in determining the sentence passed.[17] In both Green's study and the examination of the federal district courts by Tiffany, Avichai and Peters,[18] prior record and prior convictions were most important when the instant offense was less serious, and might otherwise have led to a minimal sentence. A similar variable -- whether the defendant had previously served time in a jail or prison -- was found to be an important predictor of the sentence passed by judges in Los Angeles County[19] and Washington State.[20] When the sentence is set by the jury, not the judge, prior convictions may be even more important. A study aimed at determining what influenced California juries to issue death sentences concluded that

> the admission of a defendant's 'priors' into evidence at penalty is the most significant of all the variables analyzed in the study.[21]

The influence of prior arrests alone is less clear, particularly since offenders with several prior convictions tend to have long arrest records as well. Green maintained that prior arrest record was

meaningless after prior convictions had been taken into account;[22] Judson and others drew a similar conclusion.[23] Eisenstein and Jacob examined sentences in Baltimore, Chicago and Detroit, and found that convicted offenders with prior arrest records received insignificantly longer sentences than offenders without records.[24] On the other hand, Hawkinson found that the chances of incarceration increased by fifty percent when a convicted burglar had been previously arrested more than five times, suggesting a criminal "pattern of conduct" that was often obscured if the judge relied only on conviction records.[25] Johnston and others found the number of prior arrests to be more important than the number of prior convictions, and -- next to the instant offense -- the most important characteristic of all.[26] And Peterson and Friday found that similar considerations influenced parole decisions, as well: prisoners with three or more arrests were half as likely to receive early release as first-time offenders.[27]

Further support for this conclusion, and for the fact that the system is already putting a primary focus on the stranger-on-stranger violent crimes which are the focus of our study, is derived from the Vera Institute study of felony arrests in New York City.[28] In the case of robbery, for example, it was found that defendants were convicted in 88 percent of the stranger robberies (as compared to 37 percent of the nonstranger ones), and that 67 percent of those arrested were incarcerated (as compared to 21 percent of the nonstranger ones). Moreover, in the stranger cases resulting in

convictions, the influence of a prior criminal record in sentencing was striking: a convicted robber without a record of prior arrests had a one in six chance of being sentenced to jail or prison, while those with prior arrests had a 9 in 10 chance.[29]

Aggregate data also suggest that the sentencing system is currently operating with at least some degree of selectivity. Table 18, released by the Justice Department from a 1979 survey, shows that robbers and burglars constitute the two largest groups in our state prisons. Well over half of those imprisoned were imprisoned before at least once -- suggesting that they might well qualify for incapacitation under the Sherman, and perhaps even the Greenwood, tests. Sentence lengths tend to be higher than Sherman might prescribe -- but those listed are maximums, not the actual time which is likely to be served. Indeed, the overwhelming majority of those in prison are in the early years of their sentences, when, according to Sherman's argument, incapacitative effects are greatest.

2. LIMITS TO SELECTIVITY -- THE NEED FOR ALTERNATIVES TO PRISON

Even so, there may well be room for substantial improvement. The Abt Associates 1978 survey of state adult correctional facilities found that nationally, 47 percent of all those imprisoned in state adult correctional facilities had been convicted of violent crimes; 37 percent had been convicted of property offenses. There is substantial variance among states (see Table 19 and Figure 9). Massachusetts prison spaces, for example, appear to be allocated

Table 18

Selected Characteristics of Prison Inmates

November 1979

Characteristic	Number	%
Total	274,564	100.0
Age at survey	173,093	63.0
Under 30	101,471	37.0
30 and over	27.3	NA
Median		
Sex		
Male	263,484	96.0
Female	11,080	4.0
Race		
White	136,296	49.6
Black	131,329	47.8
Other	6,939	2.5
Ethnicity		
Hispanic	25,816	9.4
Non-Hispanic	248,748	90.6
Prior incarceration record		
With prior incarceration	175,473	63.9
Juvenile only	21,666	7.9
Adult only	79,652	29.0
Both	62,476	22.8
Not available	11,680	4.3
Without prior incarceration	97,866	35.6
Not available	1,225	0.4
Current offense		
Violent	157,742	57.5
Murder & attempted murder	37,352	13.6
Manslaughter	10,941	4.0
Sexual assault	17,053	6.2
Robbery	68,324	24.9
Assault	17,554	6.4
Other	6,517	2.4
Property	85,562	31.1
Burglary	49,687	18.1
Larceny	13,018	4.7
Auto theft	5,138	1.9
Forgery, fraud, embezzlement	11,894	4.3
Other	5,825	2.1
Drug	19,420	7.1
Public order	10,982	4.0
Unspecified	859	0.3

Characteristic	Number	%
Maximum sentence length		
Less than 5 years	56,517	20.6
5 to 9 years	63,775	23.2
10 to 14 years	39,062	14.2
15 to 19 years	24,211	8.8
20 to 97 years	46,015	16.8
98 years or more	2,143	0.8
Median	103.6	NA
Life	27,740	10.1
Death	1,270	0.5
Not available	13,832	5.0
Time served on current offense		
Less than 1 year	95,634	34.8
1 to 1.9 years	63,595	23.2
2 to 2.9 years	40,133	14.6
3 to 3.9 years	24,273	8.8
4 to 4.9 years	16,338	6.0
5 to 9.9 years	27,344	10.0
10 years or more	6,057	2.2
Median (in months)	18.0	NA
Not available	1,191	0.4
Education		
Less than 12 years	159,340	58.0
12 years or more	115,224	42.0
Median	11.2	NA
Prearrest employment status		
Employed	192,800	70.2
Full-time	165,577	60.3
Part-time	27,223	9.9
Not employed	81,005	29.5
Looking for work	38,230	13.9
Not looking for work	42,433	15.5
Not available	342	0.1
Not available	759	0.3
Prearrest annual income		
Total[1]	25,940	100.0
With income	20,172	77.8
Less than $3,000	4,982	19.2
$3,000-$9,999	7,834	30.2
$10,000 or more	6,457	24.9
Don't know	899	3.5
Median	6,660	NA
Without income	5,768	22.2

NOTE: Detail may not add to totals shown because of rounding.

NA Not applicable.

[1]Includes only persons admitted after November, 1977.

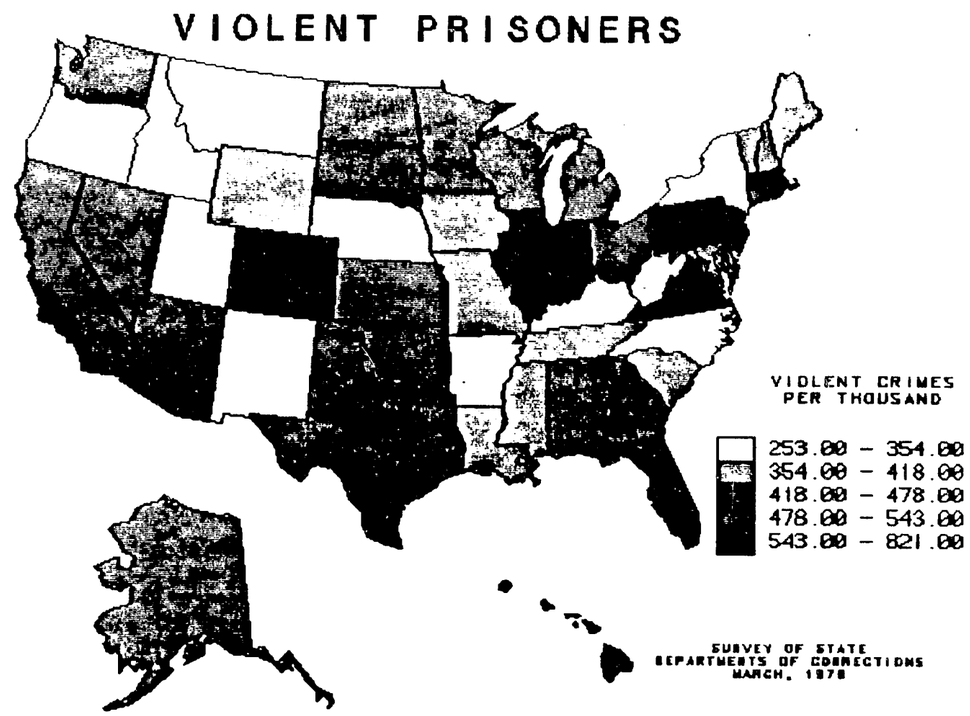
Table 19

Total Males in Federal and State Adult Correctional Facilities by Type of Crime -- March 31, 1978

	Total	Violent	Property	Public Order Or Other
NORTHEAST	33,117	14,957 (45%)	12,435 (38%)	5,725 (17%)
Maine	834	349	346	139
New Hampshire	236	119	92	25
Vermont	117	50	39	28
Massachusetts	2,297	1,886	231	180
Rhode Island	537	335	144	78
Connecticut	-	-	-	-
New York	16,498	4,749	8,578	3,171
New Jersey	5,701	3,179	1,491	1,031
Pennsylvania	6,877	4,290	1,514	1,073
NORTH CENTRAL	52,339	27,734 (53%)	17,386 (33%)	7,219 (14%)
Ohio	11,687	6,349	3,071	2,267
Indiana	3,671	2,343	1,128	200
Illinois	10,289	7,193	2,343	753
Michigan	11,841	5,402	3,094	2,545
Wisconsin	2,937	1,451	1,261	225
Minnesota	1,790	929	720	141
Iowa	1,700	694	982	24
Missouri	5,003	1,933	2,434	636
North Dakota	283	122	104	57
South Dakota	-	-	-	-
Nebraska	1,055	280	560	215
Kansas	2,083	1,038	869	156
SOUTH	100,000	44,238 (44%)	41,165 (41%)	14,597 (15%)
Delaware	0	0	0	0
Maryland	6,845	3,223	1,980	1,642
Dist. of Columbia	1,002	551	323	128
Virginia	7,246	4,028	2,222	996
West Virginia	1,238	470	591	168
North Carolina	13,421	3,717	7,627	2,077
South Carolina	5,339	1,954	2,347	1,038
Georgia	8,592	4,666	3,233	693
Florida	16,263	8,244	5,481	2,538
Kentucky	3,441	1,175	1,643	623
Tennessee	4,792	1,938	2,320	534
Alabama	-	-	-	-
Mississippi	1,675	602	753	320
Arkansas	2,274	625	1,521	128
Louisiana	1,832	756	783	293
Oklahoma	3,526	1,659	1,385	482
Texas	22,514	10,621	8,956	2,937
WEST	32,935	16,147 (49%)	9,232 (25%)	7,556 (23%)
Montana	600	152	288	160
Idaho	769	272	375	122
Wyoming	409	149	158	102
Colorado	2,331	1,304	769	258
New Mexico	1,692	546	549	597
Arizona	2,815	1,378	828	609
Utah	789	232	502	55
Nevada	1,141	617	393	131
Washington	3,694	1,556	1,635	503
Oregon	639	245	358	36
California	17,269	9,360	3,149	4,760
Alaska	394	148	134	112
Hawaii	393	188	94	111
Total States	218,391	103,076 (47%)	80,218 (37%)	35,097 (16%)
Federal	23,916	7,169 (30%)	5,468 (23%)	11,279 (47%)
Total State plus Federal*	242,307	110,307	85,686 (35%)	46,376 (19%)

Source: Survey of State and Federal Adult Correctional Facilities (FC-2), 1978.

Figure 9


VIOLENT PRISONERS
VIOLENT CRIMES
PER THOUSAND
253.00 - 354.00
354.00 - 418.00
418.00 - 478.00
478.00 - 543.00
543.00 - 821.00
SURVEY OF STATE
DEPARTMENTS OF CORRECTIONS
MARCH, 1978

highly selectively: 82 percent of the prison population is serving time for a crime of violence. In Missouri, on the other hand, which is more typical, the equivalent figure is under 40 percent. The South as a whole has the lowest percentage violent crime population of any region: 44 percent.[30]

The imprisonment of large percentages of non-violent offenders in many states raises the question whether their spaces could not be more selectively allocated to those who do pose a danger to the community. While the data do not tell us whether there are more dangerous offenders who are either not being imprisoned or not being held long enough, adoption of techniques such as Greenwood's, which allow for greater selectivity than that achieved by relying solely on criminal record, or of proposals such as Lloyd Ohlin's, which would make juvenile records available for youthful adult offenders, may increase the demand for prison spaces for the more dangerous offender. And in any event, if our underlying theory of sentencing is incapacitation, it is worth asking why petty thieves and public order offenders are occuping as many as one-third or more of our cells in state correctional facilities, as well as almost all of our city and county jails.

One important answer to this question seems to be that we don't know what else to do with them. Many of the proposals for selective incapacitation seem to assume that the tools are available to punish and even incapacitate the low-level or repeat petty offender without

resort to precious cells. Notwithstanding our assumptions, the fact seems to be, as Michael Smith points out in his paper,[31] that our ability either to punish or incapacitate offenders except by imprisonment is almost non-existent. The traditional tools -- fines and probation -- have accomplished neither of these goals for the most critical population, the petty recidivists and low-level offenders. These tools are, with good reason, not viewed as real punishment either by the community, the offenders, or the judges who impose sentence. As a result, a judge faced with an offender whose acts are serious enough or whose record long enough to demand that some punishment be imposed has little recourse but to impose a short jail or prison term. And since there are many more low-level offenders than serious chronic offenders, the sum total of the sentences imposed on the former imposes a limit on the extent to which our system can selectively incapacitate the latter for substantial terms.

The answer, of course, lies in the development of new forms of punishment for the low level and repeat petty offenders who "clog" our system. Whether we can also incapacitate these offenders outside of jail or prison is an open, and difficult, question; whether we should try -- whether this is an appropriate goal with this group -- is even more difficult. Since the group, by definition, is composed of those who commit offenses relatively infrequently and those who, if they offend more often, commit only petty offenses, the short jail and prison terms currently being used as punishment have a limited -- and

very expensive -- incapacitative effect. It is at least worth asking whether, at least in this area, it might make more sense to combine punishment with rehabilitation goals than with incapacitation efforts.

In any event, if we wish at least to punish -- and that seems to be beyond question -- we must design alternatives that impose real and enforceable sanctions on offenders. Community service sentencing, which mandates involuntary servitude in a highly supervised framework in the community, is one promising alternative.[32] To be effective as punishment, it must not only demand something of the offender -- work -- but must also back up that demand with a credible threat of incarceration for those who do not comply. That threat, in turn, is only credible if, unlike probation, caseloads are low enough to allow project staff to quickly identify and apprehend those who do not comply. Incapacitation in a jail "costs" one corrections guard for every two inmates. Punishment (or perhaps even incapacitation) on the outside may be cheaper in terms of bricks and mortar, but not necessarily staff.

D. Conclusions: The Potential of the Area

Introducing greater, and better, selectivity into the sentencing system requires us to face three challenges.

The first is to develop and make available the information which allows us to be selective on the least objectionable, most justifiable basis -- prior criminal record. As noted above, there are few principled objections to reliance on criminal record in setting a

sentence. The problem, instead, is to make such information available at an early enough stage in the offender's career to achieve significant crime control benefits through incapacitation; that problem, in turn, leads some to suggest that we rely upon other predictive criteria -- criteria like employment or education -- which raise substantial justice concerns. There may be a better answer. First, we could improve our ability to select fairly by adopting Lloyd Ohlin's suggestion that juvenile records uniformly be made available where a young person commits an offense soon after reaching the age of majority. Second and even more basic, just selectivity at the sentencing stage depends on greater effectiveness by police and prosecutors in clearing offenses -- particularly serious offenses -- at the earlier stages, so that criminal records serve to portray more accurately an individual's criminal activity.

The second challenge is to impose limits on discretion in sentencing which do not also limit fair selectivity in sentencing. As noted earlier, many jurisdictions are now considering or adopting legislation to replace the open-ended, discretionary sentencing schemes with systems where a specific sentence or sentence range is set forth for an offense by the legislature, with limited if any judicial discretion, and the option for early parole limited or eliminated.

Such systems are not necessarily inconsistent with a focus on dangerous offenders: mandatory sentences do select, albeit only on

the basis of offense rather than offender characteristics; and presumptive schemes generally do take account of prior criminal record in setting a sentence within the specified range. Moreover, most such schemes not only increase sentences for subsequent offenses, but also combine mandatory or presumptive sentences for individual offenses with habitual offender statutes for repeat offenders. The selectivity which can be accomplished under such systems, however, carries with it almost as much discretion -- and potential for abuse -- as the systems they were designed to replace. Charging decisions made by prosecutors become the critical factor in any mandatory scheme; judicial discretion is replaced by even more unreviewable prosecutorial discretion. Habitual offender statutes often provide for as much as life imprisonment, based on number -- rather than rate -- of prior convictions, and in many cases include all prior felonies rather than only serious ones. Sentencing decisions under these schemes create the potential for the same charges of unfairness and disparity which were aimed at the open-ended systems. Efforts to improve our ability to select, if they are ultimately to succeed practically and politically, should be accompanied by efforts to limit discretion so that enhanced punishment will in fact be confined to serious, repeat offenders.

The third challenge is to develop alternatives to imprisonment for the low-level and petty offenders who will otherwise occupy needed prison cells. It is often assumed that while our current system is

not very selective, alternatives to imprisonment are available for the offenders who would not merit real terms of incarceration in a more selective system. The truth may in fact be exactly the opposite: that our system is more selective than commonly assumed, and the alternatives less developed than commonly considered. And the latter problem may impose real limits on our practical ability to achieve greater selective incapacitation effects. Developing means to deliver punishment outside of prison is critical if we are to maximize the incapacitative effects of available jail and prison space.

Notes

1) As we show below, this argument reduces to the assertion that any information about the offender's background, including his criminal record, is at best irrelevant and at worst likely to lead to preventive confinement and an unjust denial of respect for individual autonomy, not punishment. See, for example, George P. Fletcher, Rethinking Criminal Law (Boston: Little, Brown, 1978), p. 466, and Richard G. Singer, Just Deserts: Sentencing Based on Equality and Desert (Cambridge: Ballinger, 1979), pp. 67-74.

2) See Michael Sherman, "Strategic Planning and Focused Imprisonment," prepared for our conference and published in Volume II of this report; see also Michael Sherman and Gordon Hawkins, Imprisonment in America (Chicago: University of Chicago Press, 1981).

3) Peter Greenwood, "Trade-Offs Between Prediction Accuracy and Selective Incapacitation Effects," prepared for our conference and published in Volume II of this report.

4) Williams v. New York, 337 U.S. 241, 247 (1949).

5) Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937).

6) Whether or not Williams remains good law in the death penalty area, its approach and reasoning was cited with approval and relied upon as recently as 1978, in United States v. Grayson, 438 U.S. 41, where the Court upheld a trial judge's discretion to increase a sentence (within statutory limits) based on his judgement that the defendant had lied during his trial.

7) Marvin E. Frankel, Criminal Sentences: Law Without Order (New York: Hill and Wang, 1973), at 21.

8) Anthony Partridge and William B. Eldridge, The Second Circuit Sentencing Study: A Report to the Judges (Washington, D.C.: Federal Judicial Center, 1974), p. 103. Designed as a self-evaluation, the study involved 43 active judges and seven of the senior judges of the six judicial districts constituting the Second Circuit. To avoid the customary judges' sentencing behavior, the study asked these 50 judges to impose sentence on 20 different defendants charged with those Federal offenses most representative of the Circuit's workload. The judges were given the same representative presentence report prepared for each hypothetical offender. The total number of sentences -- 901 -- roughly approximated the number of sentences these judges would normally render in a 6 month period.

9) See Leslie T. Wilkins, and others, Sentencing Guidelines: Structuring Judicial Discretion (Washington, D.C.: U.S. Government Printing Office, 1978) (1976 study of Colorado and Vermont); William Austin and Thomas A. Williams, III, "A Survey of Judge's Responses to Simulated Legal Cases: Research Note on Sentencing Disparity," Journal of Criminal Law, Criminology, and Police Science, 68 (1977) 306-310 (study of 47 Virginia district court judges); Shari Seidman Diamond and Hans Zeisel, "Sentencing Councils: A Study of Sentence Disparity and its Reduction," University of Chicago Law Review, 43 (1975) 109-149 (Northern District of Illinois and Eastern District of New York); George William Baab and William Royal Furgeson, Jr., "Texas Sentencing Practices: A Statistical Study," Texas Law Review, 46 (1967) 471-503 (Texas).

10) California, Florida, Louisiana and Tennessee included mandatory statutes for drug offenders. Idaho, Iowa, Maine, Montana, New Mexico, Ohio, Tennessee, and West Virginia took similar action for repeat offenders.

Violent offenses such as kidnapping, arson, rape, murder, and armed robbery were singled out for mandatory sentences in Arkansas, Arizona, California, Illinois, Iowa, Kansas, Louisiana, Montana, Nevada, New Mexico, North Carolina, Ohio, Oregon, and Tennessee.

A total of 27 states now have mandatory sentencing laws, including the following enacted in 1977 and 1978: for drug offenders, Hawaii, and Iowa; repeat offenders, Alabama, Arizona, Florida, Louisiana, Maryland, Mississippi, Nebraska, New Hampshire, New York, North Carolina, and Texas. Nicholas N. Kittrie and Elyce H. Zenoff, Sanctions, Sentencing, and Corrections (Mineola, New York: Foundation Press, 1981), at 539.

11) See Ernest Van den Haag, Punishing Criminals: Concerning a Very Old and Painful Question (New York: Basic Books, 1973), at 194.

12) See, for example, Coker v. Georgia, 433 U.S. 584 (1977) (rapist cannot be sentenced to capital punishment).

13) See Rummel v. Estelle, 445 U.S. 263 (1980) (life sentence upheld for three-time petty thief); Hutto v. Davis, 102 S. Ct. 703 (1982) (40-year sentence upheld for possession of marijuana with intent to distribute).

14) Peter Greenwood with Allan Abrahamse, Selective Incapacitation (Santa Monica: Rand, 1982), pp. 79-80.

15) Edward Green, Judicial Attitudes in Sentencing: A Study of the Factors Underlying The Sentencing Practices of the Criminal Court of Philadelphia (London: Macmillan, 1961).

16) Edward Green, "Inter and Intra-Racial Crime Relative to Sentencing," Journal of Criminal Law, Criminology and Police Science, 55 (1964) 348-358.

17) Barbara L. Johnston, Nicholas P. Miller, Ronald Schoenberg and Laurence Ross Weatherly, "Discretion in Felony Sentencing: A Study of Influencing Factors," Washington Law Review 48 (1973) 857-880.

18) Lawrence P. Tiffany, Yakov Avichai, and Geoffrey W. Peters, "A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted after Trial, 1967-1968," Journal of Legal Studies, 4 (1975) 369-390.

19) Peter W. Greenwood, and others, Prosecution of Adult Felony Defendants (Santa Monica: Rand, 1976).

20) Johnston and others, "Discretion in Felony Sentencing."

21) Charles J. Judson, and others, "A Study of the California Penalty Jury in First Degree Murder Cases," Stanford Law Review, 21 (1969) 1297-1497.

22) Green, Judicial Attitudes.

23) Judson and others, "California Penalty Jury."

24) James Eisenstein and Herbert Jacob, Felony Justice: An Organizational Analysis of Criminal Courts (Boston: Little, Brown, 1977).

25) Tom Hawkinson, "The Effect of Pre-Trial Release, Race, and Previous Arrest on Conviction and Sentencing," Creighton Law Review, 8 (1975) 930-937.

26) Johnston and others, "Discretion in Felony Sentencing."

27) David M. Petersen and Paul C. Friday, "Early Release from Incarceration: Race as a Factor in the Use of 'Shock Probation,'" Journal of Criminal Law and Criminology, 66 (1975) 79-87.

28) Vera Institute of Justice, Felony Arrests: Their Prosecution and Disposition in New York City's Courts (New York: Vera Institute of Justice, 1977).

29) Vera, Felony Arrests, p. 74.

30) Joan Mullen, Kenneth Carlson and Bradford Smith, American Prisons and Jails, Volume I: Summary Findings and Policy Implications of a National Survey (Washington, D.C.: National Institute of Justice, 1980).

31) Michael Smith, "Alternative Forms of Punishment and Supervision for Convicted Offenders," prepared for our conference and published in Volume II of this report.

32) In New York City, the Vera Institute of Justice currently administers a program of 1,000 community service sentences per annum. Those sentenced to the program average seven prior adult arrests and over four prior adult convictions. Fifty-eight percent were arraigned on felony charged, and 45 percent had been sentenced to jail or prison on their last conviction. The program requires community service work in a mandatory, supervised framework. Unlike probation, jail is an immediate and direct prospect for those who fail to comply. So far, only 10 percent of those assigned to the program have failed to complete it; and all 10 percent have been resentenced to jail terms. See Vera Institute of Justice, The New York Community Service Sentencing Project: Development of the Bronx Pilot Project (New York: Vera Institute of Justice, 1981).

Chapter 5

PRETRIAL DETENTION AND PROCEDURES

The public has reserved a special hostility towards crimes committed by accused defenders released on bail. Partly, it is the gall of the offenders that is so enraging. What clearer expression of disdain for the criminal law and its moral obligations could be given? But it is also the futility of a system which, having succeeded against formidable odds in solving a crime and arresting the apparent culprit, then releases the suspect to commit additional offenses. The affront to common sense invites public incredulity and indignation. The indignation, in turn, spawns proposals that allow (or require) judges to make decisions that increase the likelihood that dangerous offenders accused of current crimes will be detained following arrest but before trial.

The most radical and widely publicized proposals calls for explicit "preventive detention" of dangerous offenders. Under such proposals, accused defendants, found by some process to be dangerous to the community, could be denied bail and held in jail until their trial.[1] Other proposals stop short of categorically denying bail to dangerous offenders: instead, they simply require or allow judges to take the "dangerousness" of the offender into account in setting bail.[2] Depending on how much latitude is left to judges, and the financial capacity of defendants, such proposals may have the same

effect as preventive detention. But they leave the theoretical right to bail intact.

Obviously, proposals designed to focus pretrial detention on dangerous offenders have much in common with proposals for "selective incapacitation" as a philosophy of sentencing. They are motivated (and justified) by the same utilitarian interest in reducing crime. Their appeal as a crime control instrument is rooted in the sane, simple idea of "incapacitation" (that is, that periods of confinement eliminate rather than simply postpone crimes committed by the incapacitated offender). And they raise the same difficult issues of justice as "selective incapacitation." So, much of analytic framework and discussion of Chapters 3 and 4 can be carried forward to this chapter.

But there are some special issues that arise in assessing "preventive detention" and "risk-adjusted bail." The most crucial is that these measures lead to the confinement of "dangerous offenders" before the adjudication of guilt or innocence for a current offense. This risks injustice to accused defendants in a way that selective incapacitation does not. A second difference is that the total amount of detention (and therefore incapacitation) that is at stake in such proposals is probably much less than in proposals for selective incapacitation. If the definition of dangerous offenders remains similar, and if the average length of detention before trial is about three months, then the total increment in detention associated with

proposals for pretrial detention will be only a fraction of that associated with selective incapacitation. The implication is that the practical significance of such proposals in reducing crime must be much less than for selective incapacition. A third important difference is that there seem to be some very attractive alternative approaches to dealing with the problem of crimes commited by dangerous offenders released on bail that create much smaller risks of injustice.

The purpose of this chapter is to provide a summary and assessment of proposals to create a special focus on "dangerous offenders" in pretrial detention decisions. In assessing the proposals, we will consider, first, the justice of such proposals, and, second, their likely impact on crime. Finally, we will conclude with an overall assessment of the potential value of enhancing the selectivity of pretrial detention decision-making. Before assessing these proposals, however, it is useful to review the current performance of the pretrial decision-making process and to catalogue some concrete proposals for reform. This examination serves not only to show the central thrust and variety of the proposals, but also to indicate the breadth of the social interest in such proposals.

A. Proposals Focusing Pretrial Detention on Dangerous Offenders

People who have been persuasively accused of crimes but not yet convicted pose a major problem for the criminal justice system. On the one hand, since they have not been convicted of a current offense,

the state has little legitimate power over them. In fact, to give the presumption of innocence a concrete expression and to allow defendants important due process rights associated with preparing their defense, the state arguably has a strong obligation to release people who have been accused but not yet convicted of crimes. On the other hand, the state has an interest in assuring that the accused person will appear at trial, and some reason to believe that the accused person commited crimes. Both provide justification for some kind of continuing state supervision over the defendant.

In the past decades, these competing interests have been balanced by the bail system. The current orthodoxy involves the use of cash bail -- money deposited with the court by a defendant, his family, or other surety -- to guarantee appearance at trial. The requisite amount is set by a judge, and is supposed to reflect primarily (some would save exclusively) the society's interest in guaranteeing the defendant's appearance at trial. The other social interest in preventing defendants from committing additional crimes is, in principle, excluded.

There are four major problems with this system as it now operates. The first is that the system ends up detaining a large number of people. A recent national survey of pretrial detention practices found that about 15 percent of all arrested defendants were detained until trial; an additional 3 percent were detained for more than 30 days before being released in advance of their trial.[3] One

important consequence of this fact is that the nation's jails are now stuffed full -- so full that many are under court order to improve conditions.[4] This implies not only that unconvicted defendants are subjected to very harsh conditions, but also that there is less total jail and prison capacity to be used for convicted defendants. In effect, our harshest punishment is given disproportionately to those who have not yet been convicted of crimes!

The second problem is that the people detained were not necessarily those who have committed the worst crimes, or have the strongest case pending against them, or represent the greatest risks of additional offenses or flight. The people who are detained are those who could not make the requisite bail. This, in turn, is determined by the financial capacity of the defendant as well as by the level of bail established. It is significant in this regard that the national survey of pretrial release found that more than half of those detained were not arrested for Part I crimes, and that more than a third were charged with crimes against public morality (prostitution, gambling, public drunkenness, for instance) or public order (weapons, disorderly conduct, vagrancy).[5] The major reason that such people were detained was not that they were denied bail, or had bail set at outrageously high levels, but that they could not make even minimal bail demands. Indeed, 29 percent of the defendants facing demands for no more than $1,000 in bail (which typically implies a $100 cash payment to a bondsman) could not make bail and

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stayed in jail until their trial! On the other hand, about one-third of those facing more than $10,000 in bail were relased.[6] So the money bail system led to the detention of many minor but impoverished offenders, and the release of some serious but financially resourceful defendants.

A third problem is that the current system guarantee neither appearance at trial, nor the elimination of crimes commited on bail. About 6 percent of required court appearances were missed by released defendants, and about 16 percent of those released were re-arrested before their trials -- usually on minor charges. These rates of misconduct seem fairly low to many. Against the backdrop of expectations that these rates could and should be zero, however, the bail system does not seem to be performing well.

A fourth problem is that while the current bail systems typically operate under some explicit guidelines (whether legislatively or administratively established), a large amount of judical discretion is retained. While this allows for a more tailored response to individual circumstances, the available discretion also creates the potential for abuse, and diminishes the "fairness" of the process.

Taken together, these points suggest a lack of focus in pretrial detention decisions. It seems that too many are detained, but that too much crime on bail occurs, and that the question of who is detained is resolved by the vagaries of judicial discretion and the

financial capacity of defendants rather than a principled judgment of who should be detained. Thus, it is not surprising that some proposals have been made to sharpen the focus of pretrial detention decisions.

1. PREVENTIVE DETENTION PROPOSALS

The most radical proposals designed to focus pretrial detention decisions are those that allow or mandate "preventive detention." Despite their radical nature, these proposals have been made by three influential groups: the Attorney General's Task Force on Violent Crime, the American Bar Association's Task Force on Crime, and the Senate Committee on the Judiciary. The Attorney General's Task Force recommended: 1) that courts be permitted to deny bail to persons "who are found by clear and convincing evidence to present a danger to particular persons or the community," or who have been convicted of serious crimes committed while previously on pretrial release status, (2) that the government be provided the right to appeal release decisions, (3) that penalties for bail jumping be increased; and (4) that "in the case of serious crimes, the current standard presumptively favoring release of convicted persons awaiting imposition or execution of sentence or appealing their convictions" be abandoned.[7] Similarly, the Bar Association Task Force recommended that "judicial officers should be authorized to detain persons without bail pending trial where, after a full hearing it appears that (1) the defendant meets criteria which establish his danger to the community,

and (2) there is substantial probability that the defendant committed the offense with which he is charged." The recommendation broadens the preventive detention provisions already presented in Standard 10-5.9 of the ABA Standards for Criminal Justice, and includes many features borrowed from the District of Columbia's preventive detention statute.[8] Finally, Section 3502 of the Senate's proposed "Criminal Code Reform Act of 1981" provides for hearings to determine whether a defendant should be detained on grounds of dangerousnes "to any other person or the community."[9]

The proposals for preventive detention by the Attorney General's Task Force, the American Bar Association, and proponents of revisions in Federal Criminal Code, all have broad classes of suspects targeted for potential preventive detention ("dangerous persons"), and all provide due process safeguards through the conduct of special hearings.[10] In contrast, some preventive detention proposals target much narrower suspect populations. For example, an Illinois referendum in November, 1982 will allow voters to decide whether "judges should be permitted to deny bail to defendants facing life imprisonment."[11] A New York state law provides that the court may deny "bail for a defendant charged with a serious felony while free on bail for another."[12]

2. RISK-ADJUSTED BAIL

A more traditional approach to focusing attention on dangerous offenders in pretrial detention decisions is to allow or mandate

judicial consideration of dangerousness in setting bail. The basic notion is that, holding the current alleged offense constant, the greater the apparent dangerousness of the offender, the higher the bail should be. Such proposals risk injustice by allowing bail to become "excessive" relative to the offense charged. They also leave the ultimate questions of which arrestees are detained to the vagaries of defendants' financial capacities. And finally, they offend those who think that the only appropriate consideration in setting bail is to guarantee the defendant's appearance at trial. Despite these difficulties with the concept, such proposals have found favor with voters and with judges.

In 1982, for example, voters in California supported a change in the state constitution that would require judges making bail decisions to "take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case."[13] The new language in the constitution further states that "public safety shall be the primary consideration" in bail decision-making (emphasis added).[14] Wisconsin voters similarly amended their constitution in 1981 to change bail policy, and the state legislature there has subsequently enacted legislation specifying the form and nature of pretrial detention hearings.[15]

In Philadelphia, the judges decided to act on their own without legislation to guide them. Working with John Goldkamp, the

Philadelphia judges established "bail guidelines" to be used in setting bail in individual cases. They specify recommended bail levels ranging from release on recognizance to hundreds of thousands of dollars depending on: 1) the seriousness of the crime charge; and 2) the probability that the defendant will fail to appear or be rearrested on release. The probabilities, in turn, are based on characteristics of defendants such as prior criminal record, current residence, and so on, and are derived from earlier empirical research on bail risk. The guidelines are expected to increase equity in bail decision-making, effectiveness (by reducing failures to appear and re-arrests) and visibility of the process resulting in opportunities to consciously formulated and refine bail policy.[16]

This brief review of activity designed to redirect and reform the process of pretrial decision-making suggests a great deal of social ferment. A dominant thrust is towards reducing crimes committed by those who have pending criminal charges against them. But there is also a spirit of reform in these proposals, a desire to make the process much more explicit and principled. Despite these advantages, the various proposals have also attracted strong opposition: mostly from those who think the proposals are unjust, but also from those who think the proposals are impractical. It is to these observations and arguments about the justice and effectiveness of these proposals that we next turn.

B. The Justice of Focused Pretrial Detention

To many, the notion of jailing people not yet convicted of a crime on the basis of uncertain judgments about the danger they present to the community seems antithetical to our most fundamental legal traditions. Yet, this is exactly what is implied by proposals for "preventive detention." And while this is not the certain result of bail guidelines that increase the required bail as the perceived dangerousness of the offender increases, it is the frequent, unlamented result.

The objections to both "preventive detention" and "risk-adjusted bail" are essentially two: first, that it is wrong to jail -- therefore punish -- people who have not been convicted of crimes; and second, that it is particularly inappropriate to detain people accused of crimes on the basis of uncertain predictions about crimes they will commit in the future. Stated affirmatively rather than negatively, the only interest the state can properly have with respect to accused individuals is to guarantee that they appear for trial, that this interest hardly ever allows the state to deny bail, and that bail decisions should be established only with reference to this purpose. While such a system does not guarantee that accused people will not be detained, it does guarantee that those who are detained are detained for a just purpose. While compelling as a matter of principle, this position is undercut by three observations.

First, the casual way that the state uses detention in other

areas subverts any fastidiousness about using it in pretrial situations. The casualness with which we add or subtract years to prison sentences on the basis of conduct in prison, "rehabilitation potential", and so on weakens the commitment to scrupulousness in the use of pretrial detention. Similarly, the extensive use of "civil commitment" which allows the state to detain people because they pose a risk to themselves or others makes the use of pretrial detention seem less shocking. After all, the pretrial detention of arrested defendants is not the same as locking up someone simply because we suspect he might commit a crime. For arraigned defendants, a judge has made a determination that there is probable cause to believe that the accused person committed a crime. This is short of being convinced "beyond the shadow of a doubt" that a person commited a crime, but it is more than mere suspicion that a prison is capable of committing criminal acts. Since accused defendants exposed to pretrial detention typically face short periods of detention relative to convicted defendants and those civilly committed, and since there is relatively good reason to believe they have committed a crime at least when compared to those held under civil commitment procedures, limited pretrial detention cannot be wholly intolerable to justice.

Second, the actual operations of the existing bail system reveal the bankruptcy rather than the value of the principles that guide the system. As noted above, many are detained under the current system. And they are not the defendants in whom the state's interest in

guaranteeing a future appearance is the greatest. Instead, they are the defendants who have the most limited financial resources. This fact leads some critics of the bail system to urge the release of more defendants in their own recognizance, and other to propose the substitution of community "sureties" for the use of money bail on the grounds that these would be more equally available to defendants.[17] And such reforms might well lead to less pretrial detention without harming the state's interest in guaranteeing appearance at trial. But the point is that the current system allows many defendants to be detained before trial, and does so for the limited purpose of guaranteeing appearance at trial. If the right to be free before trial can be so easily overwhelmed by the state's limited interest in guaranteeing future appearances, than it cannot be that fundamental a right, and might also be overwhelmed by the state's interest in reducing crime as well.

Third, many simply deny that the state's interests in supervising convincingly accused defendants is limited to guaranteeing their appearance at trial. Some legal scholars have aruged that bail and community sureties were designed to satisfy community interests in promoting security as well as guaranteeing the defendant's appearance at trial.[18] And, as a practical matter, it is clear that both citizens and judges think it is not only appropriate, but crucially important that the citizens' interests in security be reflected in pretrial detention decisions.

Finally, the Supreme Court has so far refused to establish either an unlimited right to bail, or a principle that limits the state's interest in setting bail to guaranteeing future appearance at trial. The Eighth Amendment to the U.S. Constitution asserts flatly that "excessive bail shall not be required." But this simple assertion can be given at least three different interpretations.[19] The first is that the amendment means that "reasonable" bail should be set in those cases where bail is decreed by statute to be appropriate. No notion of a "right to bail" is envisioned in this interpretation. The second interpretation also rejects the notion that any "right to bail" is implied by the Eighth Amendment and further does not limit bail to those cases in which statutes provide for its possibility. This view simply is that "in the absence of constitutional or statutory direction . . . judicial discretion determines" the appropriateness of bail within the bounds that it should not be "excessive." The third interpretation is that a "right to bail" is implied by the Eighth Amendment. This viewpoint has been supported by an historical analysis of the use of bail in England.[20]

The District of Columbia enacted a preventive detention statute in 1970, and the constitutionality of the statute was tested recently in United States v. Edwards.[21] The District of Columbia Court of Appeals held that the statute was constitutional, rejecting the interpretation that the Eighth Amendment guarantees a right to bail. The court reviewed the origins of the excessive bail clause and the

case law pertaining to it and concluded that the aim of the Eighth Amendment was not to limit the power of Congress to deny pretrial release for specified classes of offenders or offenses but rather was intended to limit the discretion of the judiciary in bail setting. The court also ruled that the Fifth Amendment due process clause was not violated by the preventive detention statute. Opponents of the statute asserted that the statute permitted punishment of the defendant prior to full adjudication of the case. The court concluded that pretrial detention is not a form of punishment but rather permissible as a regulatory action of the state.

The case has been appealed to the Supreme Court, and the court has declined to consider the appeal. The Court may have chosen not to rule on the merits of the preventive detention statute, for reasons similar to those justifying its reluctance to consider a previous Nebraska case, Murphy v. Hunt.[22] That case involved the constitutionality of a Nebraska constitutional amendment which requires "the denial of bail to defendants charged with forcible sex offenses when the proof is evident or the presumption great." The U.S. Court of Appeals for the Eighth Circuit found the amendment to be an unconstitutional restriction on the right to bail and asserted that "The constitutional protections involved in the grant of pretrial release by bail are too fundamental to foreclose by arbitrary state decree."[23] The Supreme Court vacated the Eighth Circuit's decision and found that the case was moot because the defendant had already

been convicted for rape and sentenced to prison.[24] The Edwards case might also have been viewed by the court as not presenting a "live" issue because Edwards entered guilty pleas in both cases in which preventive detention was sought. Such a ruling poses an interesting dilemma since "pretrial detention orders will almost surely not outlive the appellate process".[25] The court could choose to treat a future case as an exception embodying the principle of being "capable of repetition, yet evading review," and this rule was employed by the District of Columbia Court of Appeals in its review of the case.

There is nothing particularly noble in this discussion that leads one to a strong view that justice requires the pretrial detention of dangerous offenders. And the notion of pretrial detention does fly in the face of our legal traditions. On the other hand, there is apparently no institutional principle that bars pretrial detention on the basis of dangerousness, much popular support for it, and lots of room for improvement in the operations of the current system. Indeed, the strongest reasons for changing pretrial decision-making so that pretrial detention is focused on dangerous offenders is to limit and rationalize the current system. Indeed, just as proposals for selective incapacitation of convicted offenders could lead to less use of prison, proposals to focus pretrial detention on dangerous offenders might lead to fewer people being detained, and to the use of explicit criteria that would foster greater fairness among offenders. Compared with a system that detains people as the outcome of

capricious bail decisions and the varying financial capacities of defendants, a system that detained only those few who represented great risks of flight and continual offending would be a welcome relief. In effect, interests in both substantive and procedural justice might be advanced. The only loss is the explicit recognition of a community interest in controlling crime on bail as well as in guaranteeing appearance at trial -- a principle that already seems to have great political and legal vitality.

C. The Practical Value of Focused Pretrial Detention

While one can construct a moral license for focusing pretrial detention on dangerous offenders, there are risks in doing so. To be valuable as a social policy, these risks must be balanced by some practical benefit which the society feels entitled (or even obliged) to pursue. In the case of pretrial decision-making, the aim is to reduce crime on bail. Whether this purpose is valauble and can be achieved depends on how much crime on bail exists, whether it is serious, and whether new proposals designed to incorporate judgements about dangerousness in pretrial decision-making could do beter than the current system in controlling crime on bail.

1. CRIME ON BAIL

The Lazar Institute recently conducted a study of eight jurisdictions in the United States. Data were collected on the case outcomes of a random sample of defendants in each jurisdiction, and approximately 3,500 defendants out of a total universe of 140,000

defendants were studied.[26] The researchers reported that 16 percent of the released defendants (476 out of 2,956) were re-arrested while awaiting trial. The rates for the various jurisdictions ranged from 7.5 percent to 22.2 percent. Thirty-eight percent of all re-arrests were for Part I offenses as categorized by the F.B.I. (homicide, forcible rape, robbery, aggravated assault, burglary and theft), and the remaining 62 percent were Part II crimes. The Lazar Institute researchers categorized the re-arrests into six groupings depending upon the nature of the offense, and they report that 20 percent of the offenses were crimes against persons (murder, nonnegligent manslaughter, forcible rape, robbery, aggravated assault, other assaults, and arson), 31 percent were various economic crimes such as burglary, forgery, fraud), 11 percent were drug crimes, 11 percent were crimes against public morality (prostitution, gambling and the like), 20 percent were crimes against public order (disorderly conduct, drunk driving, and so on), and 8 percent were other crimes of various sorts. One third of the defendants were re-arrested more than once.

Research conducted by Roth and Wice for the Institute for Law and Social Research produced similar findings.[27] The researchers studied pretrial release practices in the District of Columbia and reported that 13 percent of felony defendants released prior to trial were re-arrested. Similarly, Goldkamp reported that 16 percent of defendants released prior to trial in Philadelphia were rearrested.

Goldkamp noted that 6 percent were re-arrested for what might be considered "serious crimes": murder, manslaughter, rape, robbery, burglary, aggravated assault, kidnapping, drug offenses, and so on.[28]

Toborg has attempted to estimate the portion of overall crime in a jurisdiction attributable to crime on bail.[29] Toborg compiled estimates of the percentage of defendants having pending cases when arrested in six jurisdictions. Washington D.C. had the highest proportion of arrested defendants with pending cases (14.1 percent overall and 17.3 percent for defendants charged with felonies). The lowest estimates were for Miami (5.6 percent for felony arrests) and Tucson (7.3 percent for overall arrests). Toborg concluded that "based on the very limited and poor information available, it appears the 'crime on bail' accounts for no more than 10 percent to 15 percent of all crime (measured by arrests) in most major urban areas."[30]

In short, available information regarding the extent of crime on bail has increased greatly in recent years. The various studies all have limitations in sampling and data collection procedures but probably provide roughly accurate estimates of the extent of the problem. A consensus does not exist on the evaluation of the data, however. Some observers suggest that the problem of serious crime on bail is not a major one. Goldkamp refers to "a <u>mere</u> 6 percent of all defendants," (emphasis added) re-arrested on bail for serious crime;[31] Toborg states that "the extent of crime on bail seems to be

much less than popularly assumed."[32] On the other hand, the same statistics have been used by Chief Justice Warren Burger to deplore the "high figure" of crimes committed by people on bail[33] and Feinberg notes that while differing views may be held regarding the available statistics, the "advocates of pretrial detention appear to have had the better of the argument in recent years."[34] The judges participating in Goldkamp's current research on bail also view the re-arrest figures as unacceptably high.

Whether one considers this figure high or low, it represents in some sense the likely upper bound of proposals to reduce crime through adaptation in policies and procedures governing pretrial decision-making. One could presumably eliminate all this crime if everyone was detained. One might be able to cut into this level of crime if one detained the most dangerous of those now being released. Or, one might be able to both reduce this figure and release more people if we improved our capacity to distinguish the defendants who represented real risks of crime on bail from those who did not. But it is hard to think of a way that we could do better than reduce crime by this amount. How well we can practically do depends on how good our discriminating capacity is, and how widely the best capacity is now being utilized.

2. CURRENT USE OF FACTORS ASSOCIATED WITH PRETRIAL RE-ARREST

A variety of studies have attempted to identify factors associated with the use of money bail, failure to appear, and pretrial

arrest. Table 20 presents a summary of findings reported by Roth and Wice in their study of bail performance in the District of Columbia.[35] The three columns present data for use of financial bond, failure to appear, and pretrial arrest and the rows present information for current charges, crime severity, defendant criminal histories, and other descriptive characteristics of defendants.

The researchers note that none of the three activities listed in the columns can be predicted with very high levels of accuracy, but they point out that some intriguing findings emerge from the pattern of results. For example, as can be seen from the table, drug use is positively related to both failure to appear and pretrial rearrest and yet is not found to be statistically related to the use of financial bond by judges. Conversely, local residence is negatively related to the use of financial bond and yet found to be unrelated to either failure to appear or pretrial re-arrest. The first factor is apparently considered unimportant by judges when it, in fact, is important; the second factor is considered important when it, in fact, is not important. A number of factors associated with higher rates of pretrial arrest were not found to be statistically related to judges' decisions for the use of financial bond, including certain charges (robbery, burglary, larceny, and arson), and the number of arrests in the preceding 12 months.

The probability of use of financial bond did increase in cases of homicide, bail violations, failure to appear in a pending case, and

Table 20

COMPARISON OF VARIABLES EXPLAINING FINANCIAL CONDITIONS, FAILURE TO APPEAR, AND PRETRIAL REARREST

Explanatory Attribute	Behavior Being Explained: Use of Financial Bond	Failure to Appear	Pretrial Rearrest
Current Charge:			
Homicide	+	0	0
Assault	–	–	0
Drug violation	–	0	0
Bail violation	+	0	0
Sexual assault	0	–	0
Weapon violation	0	–	0
Robbery	0	0	+
Burglary	0	0	+
Larceny	0	0	+
Arson/Property destruction	0	0	+
Crime Severity:			
No weapon used	–	0	+
Defendant History:			
Nonappearance in pending case	+	0	0
Parole/Probation when arrested	+	0	0
No. pending cases	+	0	+
No. prior arrests/all crimes	+	0	0
No. prior arrests/crimes against persons	0	0	+
Arrested last 5 years?	+	0	0
No. arrests in preceding 12 months?	0	0	+
Defendant Descriptors:			
Local residence	–	0	0
Employed	–	–	–
Low income	–	0	0
Drug user	0	+	+
Caucasian	+	0	–
Older	0	0	–

Source: Jeffrey A. Roth and Paul B. Wice, *Pretrial Release and Misconduct in the District of Columbia*, PROMIS Research Publication no. 16 (INSLAW, forthcoming).

Note: The +, –, or 0 in each column indicates whether the attribute was found positively related, negatively related, or statistically unrelated to the probability of the event described by the column heading.

for various measures of arrest, even though these factors were shown to have no statistical relationship to failure to appear or pretrial arrest. Quite similar findings are reported by Toborg for factors distinguishing between financial and nonfinancial release conditions in six jurisdictions. Factors associated with financial release conditions included various aspects of prior records (including number of prior arrests, and number of prior convictions), current charges (especially robbery, aggravated assault or larceny), and local residence.[36] Toborg presents data for factors distinguishing between defendants who are detained due to inability to make financial conditions of bail versus those released. The most important factors were reported to be the defendant's prior record and specific charges (especially robbery, burglary and larceny -- the charges found by Roth and Wice to be related to re-arrests). See Toborg's paper in Volume II of this report for a detailed discussion of factors distinguishing detained and released defendants.

In short, judges often fail to use selected factors that are shown to be related to pretrial re-arrest (drug use, certain specific charges, and number of arrests in the preceding 12 months, for instance). Judges do make use of information regarding the defendant's prior record and some charges in setting financial bail conditions, and appear to be operating on some intuitive sense of dangerousness of the offender based upon their use of these factors.

3. PROBLEMS IN PREDICTING PRETRIAL REARREST

It is important to stress that the various factors associated with higher probabilities of pretrial re-arrest are not powerful predictors of the likelihood of re-arrest. Toborg summarizes this pattern of findings by stating, "In general, past studies were not notably more successful than random chance in predicting pretrial arrests, that is, pretrial arrests were relatively infrequent in the defendant groups studied. Additionally, those arrests were scattered among defendants with diverse characteristics. Consequently, no set of variables could be identified that would -- with reasonable accuracy -- isolate defendants likely to be re-arrested pretrial."[37] The Roth and Wice findings indicate that significant mean differences can be observed, but they are not powerful predictors.

Toborg has stressed the problem of the high rate of false positives that would occur during any effort to predict pretrial re-arrests and detain those considered to have a high probability of arrest. She notes that if defendants were detained randomly one could expect to avert the pretrial arrest of 16 defendants for every 100 defendants detained (since 16 percent of released defendants were found to be rearrested across the eight cities studied). Since some defendants were re-arrested more than once, the average number of arrests per re-arrested defendants was 1.4. Thus the detention of an additional 100 defendants chosen randomly would result in a decrease of 22 pretrial arrests (16 x 1.4). Toborg suggests that if one could

predict twice as accurately as chance, then the additional detention of 100 defendants would result in the avoidance of "45 pretrial arrests by 32 defendants." Toborg refers to such an improvement in predictive accuracy as "highly optimistic" and notes that even if such predictions were possible 68 of the 100 persons detained would be non-recidivists.[38] In addition, only approximately 20 percent of pretrial re-arrests are for "dangerous" offenses as was noted earlier. Toborg concludes that "if one is interested in reducing arrests for 'dangerous' crimes, the implementation of more stringent release standards is likely to be a highly inefficient means of achieving the end."[39] Goldkamp echoes the sentiments of Toborg in noting that in his study of bail in Philadelphia, "94 percent of released defendants were not re-arrested for serious crimes. What measures would need to be taken to increase that to, say 97 percent? Or, in a jurisdiction where detention facilities are crowded beyond the crisis point, how many more defendants would need to be detained to improve the success rate of defendants on release by 3 percent?"[40] Madeleine Crohn has summarized the concern with effectiveness by stating that no one knows if preventive detention statutes will have any impact on crime levels. She notes that, "the appearance of 'doing something about crime' may be more important for many than determining whether crime is actually reduced." She suggests that preventive detention statutes are popular because "constitutents demand action in response to their fears about crime while resources are unavailable for an effective strategy.[41]

D. The Potential of the Area

Bail policy remains a particularly difficult area of public policy due to the clash of strongly cherished values -- freedom and public safety -- in its operation. Earlier reforms have helped to address concerns with financial discrimination and other ills by encouraging release on recognizance for the typical case. This chapter has reviewed the potential of policies that increase attention upon defendant "dangerousness" in bail decision-making. The major issues discussed in this chapter are summarized here and the potential for such policies are reviewed.

Considerable disagreement exists regarding the seriousness of the problem of crime on bail, as was noted earlier, even when observers have the identical data available and do not question its accuracy. There is general agreement that approximately 16 percent of released defendants are re-arrested pretrial, but only 20 percent of this group are re-arrested for serious crimes against persons. Crime on bail appears to make up roughly 10 to 15 percent of a typical jurisdiction's overall level of crime.

Numerous proposals have been presented to enable judges to detain "dangerous" persons without bail following a hearing. The constitutionality of such proposals is not clear and research suggests that their effectiveness may be limited. For example, the District of Columbia preventive detention statute is rarely used due to its procedural provisions requiring the prosecutor to divulge his case

early in the course of preparation and due to speedy trial provisions. Judges in the District of Columbia impose high levels of money bail as a sub rosa preventive detention mechanism without the procedural problems of the statutory mechanism. If a preventive detention statute is consistently used (the Federal Criminal Code proposal eliminates the possibility of sub rosa detention though failure to meet financial bond requirements) and thereby forces explicit detention decisions, then additional problems arise.

As noted earlier, studies have demonstrated the marked imperfections in our capacity to predict low base-rate phenomena such as pretrial rearrests. Consequently, large numbers of persons would need to be detained to substantially decrease the incidence of pretrial arrests by persons released by court. Toborg "optimistically" estimated that at least 68 false positives would need to be detained to successfully detain 32 true positives.[42] The current crisis in availability of detention facilities (and the very high costs of building and operating such facilities) places distinct limits on possibilities for greatly increasing the number of persons that can be held in pretrial detention. This problem is further aggravated by the many court challenges to conditions of confinement across the nation and the likelihood that if pretrial detention facilities became grossly overcrowded in a jurisdiction, litigation on the issue would be soon to follow.

In light of the above constraints, it seems apparent that full

implementation of a policy of preventive detention would be very difficult logistically, possibly objectionable in terms of our legal traditions, and likely to have only a marginal impact on crime in any event. This is not to say that preventive detention statutes are completely without value to the justice system. They may serve to increase the visibility of otherwise sub rosa preventive detention decisions through high bail and may be of practical use to the judiciary in those extreme cases where public risk is very demonstrable. Viewed as a potential tool for the judiciary that will be rarely used in practice (as in the case in the District of Columbia) preventive detention statutes may have some value; such statutes should not be viewed as a panacea for a major proportion of the crime problem in America. Passage of the statutes with such an aim is an inappropriate approach and presenting overinflated projections of their impact in light of available empirical data suggests, as was noted earlier, that "the appearance of 'doing something about crime' may be more important for many than determining whether crime is actually reduced." Crohn further notes that "passing laws that elicit strong support is the action most commonly taken. But will the appearance of responsiveness be sufficient in the long run? And what will happen if those laws prove ineffective and costly? Time will tell whether the wisdom of this trend will remain unquestioned by the general public."[43]

Additional attention should be given to bail reform proposals

that take defendant "dangerousness" into account but are less sweeping than preventive detention. For example, the Philadelphia experiment with bail guidelines does factor in variables correlated with pretrial re-arrest as one of the determinants of recommended bail levels. Judges have discretion in adopting the recommended levels, but if they consider the likelihood of pretrial arrest it may be of at least limited value in crime control. Furthermore, the use of bail guidelines can assist in remedying the problems of inequity and low visibility and accountability in bail decision-making. Goldkamp has noted that pretrial detention is "partly premised on charge severity, to a certain extent on the luck-of-the-draw (the individual judge), and is partly arbitrary, a product of happenstance."[44] The Philadelphia experiment merits close examination when it is completed and possible replication across the nation if the outcomes are favorable.

Consideration should also be given to novel forms of supervision of persons released on bail who are judged to be high in risk. Such approaches as highly limited travel and close monitoring by the courts may be appropriate in selected cases; the defendant would still be free to prepare his defense, maintain employment, and the like, but would perhaps be constrained from encountering some crime opportunities. The appointment of private citizens to serve as "sureties" as suggested by Daniel Freed may be a promising solution in some cases.[45] Such an approach was employed extensively during

earlier periods in American history, and the persons serving as sureties were typically respected persons in the community who knew the defendant and agreed to promise the court that they would monitor the defendant and insure his appearance at trial and law-abiding behavior pretrial. Increased sanctions for persons committing crime on bail (longer sentences, consecutive sentences) may also be an appropriate response to the problem of crime on bail.

Finally, to the extent that public concern about crime on bail requires symbolic action, consideration should be given to four different ways to express hostility towards crime on bail: 1) reduce the delays between arrest and trial to limit the amount of time the released defendant is at risk;[46] 2) imposing harsher sentences on those who commit crime on bail;[47] 3) using consecutive rather than concurrent sentences for persons committing crime on bail so that crimes on bail are not "free"; and 4) increased supervision of persons who are considered high risks but still obtain pretrial release through the imposition of detailed conditions of release and close monitoring of their adherence to the conditions.[48]

The public debate on an issue such as bail is often dominated by superheated rhetoric (especially in an election year), dramatic horror stories of celebrated but highly unrepresentative cases, and promises of a utopian future if only the proposed policy is implemented. We hope that a sober analysis of available information regarding the functioning of bail policy will serve as an antidote to the frantic

quality of debates on such issues. The issues embodied in bail policy-making -- the balance between freedom and safety in a democratic society -- are far too important to treat casually; the public debate should involve a careful sifting of the available empirical data, constitutional issues, and related value premises in assessing appropriate policy in this area.

Notes

1) For example, see Attorney General's Task Force on Violent Crime, Final Report (Washington, D.C.: U.S. Department of Justice, 1981), pp. 50-53; American Bar Association, Criminal Justice Section, Task Force on Crime, Final Report to the Association (Washington, D.C.: American Bar Association, 1981), pp. 11-13.

2) California Assembly, Committee on Criminal Justice, Analysis of Proposition 8: The Criminal Justice Initiative (Sacramento: California Legislature, 1982), pp. 22-27.

3) Lazar Institute, Pretrial Release: A National Evaluation of Practices and Outcomes: Summary and Policy Analysis (Washington, D.C.: Lazar Institute, 1981), p. 6.

4) As of May, 1982, 29 states were operating either individual jails and prisons or entire prison systems under orders from Federal judges. Most Judges cited lack of adequate medical care and sanitation, and poorly trained and violent staff in declaring these states in violation of the Eighth Amendment right to freedom from cruel and unusual punishment. See Wendell Rawls, Jr., "Judges' Authority in Prison Reform Attacked," New York Times, (May 1982) 1.

5) Lazar Institute, Pretrial Release, pp. 10-11.

6) Lazar Institute, Pretrial Release, p. 7.

7) Attorney General's Task Force, Final Report, pp. 50-53.

8) See American Bar Association, Final Report, pp. 11-13. The District of Columbia Preventive Detention statute is reviewed in Nan C. Bases and William F. McDonald, Preventive Detention in the District of Columbia: The First Ten Months (New York: Vera Institute of Justice, 1972).

9) See Kenneth Feinberg, "Promoting Accountability in Making Bail Decisions: Congressional Efforts at Bail Reform," prepared for our conference and published in Volume II of this report for a discussion of the Criminal Code Reform Act of 1981. Senators Strom Thurmond, and Joseph Biden introduced S. 2572 on May 26, 1982, and the bill was designed to amend the Bail Reform Act of 1966 and allow for the consideration of dangerousness in bail setting. Rep. McClory introduced H.R. 6497 on the same day, and that bill was identical to S. 2572. The bills would require hearings for the purpose of deciding on pretrial detention.

10) California Assembly, Analysis of Proposition 8.

11) See The Pretrial Reporter 6 (May 1982) 5 for a discussion of the planned Illinois referendism.

12) Pretrial Reporter 6 (September 1982) 4.

13) California Assembly, Analysis of Proposition 8, p. 22.

14) California Assembly, Analysis of Proposition 8, p. 22.

15) Wisconsin, Amendments to Wisconsin Statutes (1982), Chapter 969.

16) Goldkamp, "Room for Improvement," reviews the guidelines study. See also John Goldkamp, Michael Gottfredson, and Susan Mitchell-Herzfeld, Bail Decisionmaking: A Study of Policy Guidelines (National Institute of Corrections, 1981).

17) Daniel Freed, in "Dangerous Offenders and the Bail Process: Protecting Public Safety without Preventive Detention" (unpublished manuscript, Yale University, 1982), provides an interesting discussion of improved approaches to establishing conditions of release including the notion of having respected individuals serve as sureties for defendants.

18) See John Goldkamp, Two Classes of Accused: A Study of Bail and Detention in American-Justice (Cambridge: Ballinger, 1979) for a detailed discussion of this issue.

19) Goldkamp, Two Classes of Accused.

20) Goldkamp, Two Classes of Accused.

21) United States v. Edwards, No. 80-294 (D.C. app., May 8, 1981), cert. denied, 22 March 1982.

22) The preventive detention statute had been upheld by the Supreme Court of Nebraska in Parker v. Roth, 278 NW 2d 106, 1979.

23) Hunt v. Roth, 648 F. 2d 1148, 1981.

24) Murphy v. Hunt, No. 80-2165, 30 Cr L 3075, 1982.

25) Pretrial Reporter, 6 (March 1982) 13.

26) See Mary Toborg, and others, Pretrial Release: A National Evaluation of Practices and Outcomes (Washington, D.C.: U.S. Government Printing Office, 1981); and Mary Toborg, "Potential Value of Increased Selectivity in Pretrial Detention Decisions," prepared for our conference and published in Volume II of this report.

27) Jeffrey A. Roth and Paul B. Wice, Pretrial Release and Misconduct in the District of Columbia (Washington, D.C.: Institute for Law and Social Research, 1980).

28) John Goldkamp, "Room for Improvement in Pretrial Decision-making: The Development of Judicial Bail Guidelines in Philadelphia," prepared for our Conference and published in Volume II of this report; see also John Goldkamp, Two Classes of Accused.

29) Toborg "Potential Value," p. 24.

30) Toborg, "Potential Value."

31) Goldkamp, "Room for Improvement," p. 11.

32) Toborg, "Potential Value," p. 4.

33) U.S. News and World Report, 22 February 1982, p. 38.

34) Feinberg, "Promoting Accountability."

35) Roth and Wice, Pretrial Release and Misconduct.

36) Toborg, "Potential Value," p. 9.

37) Toborg, "Potential Value," p. 17.

38) Toborg, "Potential Value," p. 18.

39) Toborg, "Potential Value," p. 19.

40) Goldkamp, "Room for Improvement," p. 12.

41) Madeleine Crohn, editorial, Pretrial Reporter 6 (March 1982) p. 2.

42) Toborg, "Potential Value," p. 18. A 68 percent rate of false positives could be achieved only by a prediction technique that was twice as accurate as chance.

43) Crohn, Pretrial Reporter, p. 2.

44) Goldkamp, "Room for Improvement," p. 10.

45) See Freed, "Dangerous Offenders."

46) Toborg and others, Pretrial Release for an examination of the pattern of bail crime over time.

47) The Attorney General's Task Force, Final Report, also recommends harsher sentences for persons convicted of jumping bail.

48) Freed, "Dangerous Offenders."

Chapter 6

PROSECUTORIAL DECISION-MAKING

Prosecutors have often been labeled the single most powerful actors in the criminal justice system due to their considerable discretion in deciding to bring charges and their critical role in all stages of case processing. In recent years, prosecutors have begun to use this discretionary power to target "dangerous" offenders for expedited case processing. Somewhat different issues arise in considering the prosecutor's focus upon "dangerous" offenders than those discussed in the preceding two chapters on sentencing, and bail decision-making. In both of those cases, the decision-makers have the option to deprive the offender of his liberty directly through incarceration or pretrial detention. The prosecutor cannot directly restrict the offender's freedom but has considerable power in the decision to charge and the allocation of resources to specific cases -- decisions that can ultimately result in the incarceration of the offender. Complex questions arise regarding how to fairly structure the prosecutor's use of this discretion to safeguard offenders' rights while also effectively controlling crime. This chapter provides a review of the major reasons prosecutors have begun to target resources on "dangerous" offenders and a summary of the major approaches used by prosecutors to expedite their prosecution. The justice of such targeted prosecution is considered and potential

safeguards to insure a fair process are discussed. The apparent effectiveness of efforts to target prosecution on "dangerous" offenders is discussed and suggestions for further revisions in prosecutorial practices to improve effectiveness are presented.

A. Selective Prosecution of Dangerous Offenders

A variety of problems have led to increased prosecutorial attention to "dangerous" offenders including:

(1) recognition of the disproportionate share of crime contributed by a relatively small group of offenders. Data on this issue have been reviewed in Chapter 2 of this report.

(2) the strikingly high attrition rate of cases as they proceed through the justice system. Such attrition could presumably enable serious, repeat offenders to "fall through the cracks" in the system. Data on felony case processing in New York City in 1979 indicates the magnitude of the problem. Five-hundred and thirty-nine thousand felony complaints were made to the police in 1979 and 105,000 arrests occured in response to these complaints. Only 16,000 felony indictments resulted from these arrests, and these indictments culminated in 12,800 convictions and 4,000 prison sentences.[1] A similar pattern of findings was reported by the Vera Institute of Justice for felony processing in New York in 1971.[2] The Vera researchers noted that only 15 percent of felony arrests resulted in a felony conviction, although roughly one-half of the arrests resulted in some conviction for a misdemeanor following plea bargaining.

Forty-three percent of all arrests resulted in dismissals, and 69 percent of all dismissals were due to complainant non-cooperation. The Institute for Law and Social Research has found similar problems with case attrition in Washington, D.C. For example, in a study of justice system processing of aggravated assault cases, INSLAW researchers reported that convictions occured in approximately one-fourth of all cases where there was a felony arrest. As in the case of the Vera findings, witness non-cooperation was a major problem, and 65 percent of preindictment dismissals were due to problems with witnesses not appearing at hearings or refusing to prosecute. Thirty-nine percent of post-indictment dismissals also involved witness problems. The INSLAW researchers indicated that only 7 percent of assaults reported in victimization surveys in Washington, D.C. resulted in the conviction of a defendant.[3]

(3) Concern that repeat offenders can manipulate the justice system to increase the probability that their case will not result in a successful prosecution. Knowledgeable defendants can presumably take steps to encourage their case being one that falls through the cracks in an already porous justice system. For example, if a defendant encourages delay in case processing he can gain a variety of benefits. Witnesses become discouraged from missing work for court appearances and are often alienated by the treatment they receive; memories of witnesses fade; passing the case among prosecuting attorneys may cause the quality of the case to deteriorate

as information and witness contacts are lost.[4] Since assistant district attorneys have a relatively high rate of turnover, many cases at trial predate a prosecutor's tenure with the office. Banfield and Anderson have documented the beneficial impact to defendants of court processing delay tactics in Chicago. Conviction rates were observed to drop precipitously as case length increases. Cases involving one to four court appearances resulted in a conviction rate of 92 percent while cases involving 17 appearances or more resulted in a convicted rate of 48 percent. Cross-tabulations in the study appear to indicate that the finding is not due to the simple fact that the shorter cases involved clearly guilty defendants while the long cases did not.[5] Frankfurter and Pound long ago noted the impact of trial delay and stated that, "The prosecution is at a disadvantage before the professional crime...the system engenders delay, and if enough delay can be gained, the cases may have to be dropped for lack of prosecution."[6]

(4) recognition that prosecutors have not effectively focused efforts upon serious, repeat offenders as a part of routine case processing. It might be expected that repeat offenders would receive additional attention from a prosecutor's office as a part of routine case processing because of a recognition that such offenders pose a greater threat to the community and warrant successful prosecution. Research conducted by the Institute for Law and Social Research in Washington, D.C. indicated that a selective allocation of

resources to repeat offenders was not occuring in the early 1970's.[7] They reported that, "The prior record of the defendants appeared to have no independent influence on actual office case processing decisions, which were moderately influenced by the seriousness of the crime, and heavily determined by the strength of the evidence."[8] The INSLAW researchers recommended that prosecutors expend additional resources on many cases that involve recidivists even if in some cases the evidence is weak and there is relatively low probability of conviction at the outset.

1. CURRENT SELECTIVE PROSECUTION PRACTICES

In light of the various needs noted in the preceding section, prosecutor's offices have begun to experiment with targeted prosecution efforts to increase the probability of successful prosecution of serious repeat offenders. One of the earliest such efforts was begun in the U.S. Attorney's Office in the District of Columbia. The Office developed a major violator's unit to improve the prosecution of serious misdemeanor cases. The project began in 1972 and used information from the Office's Prosecutor's Management Information System (PROMIS) to assist in identifying priority cases.[9] Both the seriousness of the offenses and the criminal record of the accused were used in prioritizing cases for special attention. In 1973, the Bronx County District Attorney's Office developed a Major Offense Bureau for the targeted processing of serious repeat felony offenders.[10] The Major Offense Bureau selected cases for prosecution

based upon a weighted combination of information regarding the offense, the offender's criminal history, and the evidence.

Support for nationwide experimentation with the selective prosecution of serious, repeat offenders was announced by President Ford in a speech before the International Association of Chiefs of Police on September 24, 1974. President Reagan provided moral (if not financial) support for the policy of selective prosecution before the same forum in September, 1981. President Reagan stressed the need for selective attention to repeat offenders in his major crime policy address, and the Attorney General's Task Force on Violent Crime had endorsed the same policy in August, 1981 as part of its recommendations for improvements in justice system processing of violent crime cases.[11] The Department of Justice funded over 50 "career criminal programs" in the four years following President Ford's address, and the projects varied considerably in form across the country.

The major goals of such units typically included, (1) a reduction in the proportion of targeted offenders release prior to trial, (2) a reduction in overall case processing time, (3) increased overall conviction rates, (4) increased conviction rates for the most serious charge, (5) reduced plea bargaining, (6) increased incarceration and, (7) increased average sentence lengths. Additional goals stated by some projects but not by others included reduced crime due to the incapacitation of career criminals, reduced crime due to the

deterrence of potential criminals who are impressed by the increased risks of crime due to the efficiency of the selective prosecution units, improved public attitudes toward the criminal justice system due to favorable publicity regarding the successful prosecution of repeat offenders, and improved morale in justice system agencies caused by the awareness that the system could work efficiently and effectively prosecute repeat offenders when resources were appropriately targeted. Some prosecutors have suggested that the presence of a selective prosecution unit has encouraged them to use systematic screening throughout the office.[12]

A wide variety of tactics have been employed for the targeted prosecution of serious repeat offenders. The aim of such approaches is to attain the goals noted above and eliminate possibilities for cases involving serious, repeat offenders to slip through the cracks in the system as was discussed above. Common procedures used by prosecutor's offices in the selective prosecution of such offenders include:

(1) the use of vertical prosecution. A single attorney is assigned to the case from start to finish and attends the case arraignment, comments on appropriate bail, handles pretrial motion hearings, and prepares for trial. Such a procedure is in contrast to the horizontal prosecution approaches used in many urban prosecutor's offices in which different attorneys handle each of the stages of case processing. Vertical prosecution enables the attorney to develop a

detailed working knowledge of the case, close contacts with victims, witnesses, and police investigators, and improves the quality of case preparation.

(2) systematic screening procedures. Prosecutor's offices that employ selective prosecution approaches typically use formal screening forms for the selection of cases. Projects vary considerably in the types of case criteria that they have established. Basic types include:

(a) crime-specific criteria. For example, the San Diego District Attorney's Office focuses upon suspects accused of robbery. To qualify for targeted prosecution, the suspect must have a prior robbery conviction, or a prior robbery-related homicide conviction, or selected other characteristics (for example, the present case involves the commission of three or more separate robberies at different times and places).

(b) offender history specific criteria. For example, the New Orleans prosecutor's office has developed relatively simple case criteria based upon prior record. A defendant (who may have either a current misdemeanor or felony charge) simply needs to have either two prior felony convictions or five prior felony arrests to qualify.

(c) weighted combinations of factors such as the crime, the offender, and the evidence. The Bronx Major Offense Bureau initially developed a complex weighted criteria form with the

assistance of the National Center for Prosecution Management. The screening criteria included facts related to the nature of the case (victim injury, use of a weapon, for example), and the nature of the defendants (past convictions, arrests, and so forth). The various factors received differing numbers of points based upon a weighting scheme developed by the National Center for Prosecution Management. The weights were determined by a statistical study of the apparent emphasis placed by the prosecutor on different factors in a sample of cases presented to him for ranking in terms of priority for prosecution. Cases which pass a threshold number of points (15) qualify for targeted prosecution in the Bronx District Attorney's Office.

(d) additional screening approaches. A number of additional procedures are employed by selected prosecutor's offices in screening cases for targeted prosecution. For example, the Dallas District Attorney's Office focuses upon stranger-to-stranger offenses regardless of the type of felony offense. Usually the defendants are required to have prior convictions, but first offenders committing particularly serious offenses also become the target of intensive prosecution.

The various case screening approaches summarized above have been developed to respond to policy priorities of the different district attorney's offices. The San Diego District Attorney's Office focused upon robbery as its top priority because of a sharp increase in

robbery in the jurisdiction; the Dallas prosecutor responded to citizen concern regarding stranger-to-stranger offenses regardless of the specific type of felony; other offices have developed criteria for targeted prosecution that fit the prosecutor's view of which offenders are the most critical to remove from the streets and thus deserving of the application of additional scarce resources.[13]

(3) procedural improvements. Prosecutors have implemented a wide variety of procedural improvements for the processing of serious, repeat offenders. These modified procedures are designed to improve case processing at all of the stages of the criminal justice system. Examples of these efforts to improve the selective prosecution of repeat offenders include:

(a) improved prosecutor - police cooperation. A variety of programs have been developed in police departments across the nation to improve police apprehension and investigation of repeat offenders. The Law Enforcement Assistance Administration funded Integrated Criminal Apprehension Programs (ICAP) in many cities, and some of the major achievements of these efforts are reviewed in the Chapter 7 discussion of intake and apprehension strategies.[14]

(b) increased prosecutorial review of bail. The various selective prosecution projects across the country typically seek to obtain detailed criminal history information on targeted offenders prior to bail hearings and to argue against pretrial release for those offenders who are targeted for selective prosecution.

(c) reduction of delays in case processing. A variety of approaches are used by prosecutor's offices to reduce case processing delay in cases receiving selective prosecution. Some offices have adopted policies of open discovery for major violator cases in order to reduce delays associated with motions for discovery. Many prosecutor's offices have developed techniques for the priority docketing of such cases on the court calendar to avoid delays due to calendar backlogs. Some offices have developed arrangements with the court whereby special court sessions are set aside for the processing of major violator cases.[15]

(d) strict limits on plea bargaining. Many prosecutors have strictly limited opportunities for plea bargaining in cases that are targeted for special prosecution. Some offices report that the limiting of plea bargaining in such cases has actually had a spillover effect into other parts of the District Attorney's Office, and once prosecutors saw that it was possible to limit plea bargaining and not be overwhelmed with cases going to trial in the major violator's unit some similar reductions in plea bargaining began to emerge in other felony bureaus as well.[16]

(e) intensive case preparation. Staff members in targeted prosecution units typically have substantially reduced caseloads and are able to invest large amounts of time preparing individual cases. The prosecutors can develop extensive contacts with victims and witnesses and insure their cooperation in case

processing.[17] Some prosecutor's offices encourage very early entry into cases by assistant district attorneys associated with the targeted prosecution unit. For example, some offices have the attorneys on call so that they can be contacted by radio-controlled "beepers" when an apparent major violator is apprehended. These attorneys proceed to the scene of the apprehension and join with police investigators in the collection of evidence, interview of victims and witnesses and related activities.[18]

(f) sentencing recommendations. Attorneys involved in selective prosecution efforts typically recommend maximum sentences for targeted offenders at the time of sentencing hearings and typically seek whatever enhancements to the sentence are possible (for example, extra time due to the use of a weapon in the offense.)

(g) parole hearing monitoring. A number of prosecutors have developed procedures to closely monitor parole hearings of serious, repeat offenders and to recommend continued incarceration of the offenders where that seems appropriate.

(4) staff improvements. Typical selective prosecution units employ highly experienced attorneys in order to improve the quality of case prosecution. The units typically are organized as separate bureaus within the district attorney's office and often develop the high level of esprit de corps associated with elite units and develop pride in maintaining high levels of case processing achievements.

In short, selective prosecution units employ objective case

selection techniques combined with a variety of improved procedures for case processing in order to expedite the effective prosecution of serious repeat offenders.

B. The Justice of Selective Prosecution

The justice of targeting prosecution on specific "dangerous" offenders has been debated actively in recent years. Major issues that have arisen include (1) the potential corruption of prosecutor's office decision-making, (2) potential inequities in resources available to the prosecution and the defense, (3) potential biases in judicial decision-making caused by awareness that the defendant is a target of selective prosecution, (4) concerns regarding the evenhanded nature of development of the targeted offender criteria and the opportunity for persons so classified to challenge their categorization as "dangerous" offenders, and (5) concerns regarding the types of factors used to classify offenders. Each issue will be briefly discussed in turn.[19]

1. CORRUPTION OF PROSECUTORIAL DECISION MAKING

Some observers have noted that the widespread development of targeted prosecution can lead to corruption of prosecutorial decision-making such that routine charging standards and common practices regarding types of crimes prosecuted may be distorted to accomodate selective prosecution. For example, if a prosecutor has targeted a specific "dangerous" offender, it is feared that charges may be brought with significantly weaker evidence than is normally

required. Such a practice would involve a form of harrassment of the defendant if, in fact, the evidence was insufficient to convict. Similarly, targeted persons could be charged with relatively trivial offenses that the prosecutor's office had otherwise ceased routinely charging at all. Such practices would involve ad hominem attacks on certain offenders by the prosecutor's office and would seriously compromise the prosecutor's responsibility to provide equal protection of the laws to all citizens in the jurisdiction.

Prosecutorial discretion does allow for legitimate variations in the extensiveness of resources assigned to different cases for investigation and case preparation. Presumably no one can assert an affirmative right to the average level of sloppy investigation emanating from a prosecutor's office. But prosecutors should not compromise routine charging standards and practices in the course of targeted prosecution. If an enhanced investigative effort results in sufficient evidence to charge the defendant under routine charging standards, then charging is appropriate and not discriminatory to the targeted defendant. In developing a targeted prosecution program, the prosecutor should develop means to structure the use of discretion so that the policy is administered in an evenhanded fashion and similar cases are treated similarly. Otherwise constitutional issues regarding equal protection rights become relevant.

2. INEQUITIES IN RESOURCES AVAILABLE TO PROSECUTION AND DEFENSE

Consideration needs to be given to the parity between resources available to the defense and the prosecutor for cases selected for targeted prosecution. Some defense attorneys have argued that selective prosecution programs that are currently in operation are patently unjust unless roughly comparable resources are available to the defense. In many of these cases the defendant is provided with a court appointed defender with limited time or funds to adequately prepare a defense.[20]

3. BIASES IN JUDICIAL DECISION-MAKING

An additional issue requiring attention is the maintenance of neutrality on the part of the person judging the case. Some programs that selectively prosecute repeat offenders have special trial sessions designated for the handling of their cases. Judges sitting in these sessions are aware that the cases coming before them are ones in which the prosecutor's office feels that the defendant is a serious repeat offender. Such knowledge may seriously impair the judge's ability to begin the trial with a presumption of the defendant's innocence. In jurisdictions that do not employ special sessions for major violator cases, prosecuting attorneys on the cases may be recognized by judges as being members of the special prosecution unit again raising the specter of "kangaroo court" proceedings in which the possibility of a presumption of innocence is greatly impaired. Some special prosecution units employ tactics to insure that judges are

aware of the special nature of the case (for example, bright red case folders distinguishable from routine case jackets and visibly placed on the prosecuting attorney's table). The degree to which such procedures, in fact introduce serious injustices into the court proceedings is unclear, but, needless to say, defense attorneys strongly question the propriety of many aspects of special prosecution units.

4. DUE PROCESS VIOLATIONS IN SETTING CRITERIA

Some observers have argued that due process safeguards should be available to persons who become classified as "dangerous" offenders and that procedures should be available for such persons to become aware of their classification and persons so classified should be able to challenge their classification if they believe it is incorrect. Clearly numerous difficulties would arise in providing such safeguards both in effective notification to persons who are unlikely to have consistently reliable addresses and in providing adequate legal assistance for challenging the classification. Prosecutor's offices should consider the possibility of such due process safeguards, however, and implementation of such a system would presumably also reduce possiblities for the corruptions in prosecutor decision-making noted earlier.

5. USE OF INAPPROPRIATE FACTORS TO CLASSIFY OFFENDERS

As has been noted earlier in this report, a variety of concerns arise in the use of differing factors for classifying offenders as

"dangerous."[21] Information on certain measures may be highly available but viewed as inappropriate for use in setting prosecution priorities. Such measures include various social status measures (such as work history, marital status and the like). Many observers have noted that the use of social factors in selective prosecution or incapacitation results in the punishment of the individual for inappropriate reasons. Proponents of this view suggest that the only appropriate grounds for decisions that may lead to punishment of an offender are those based upon the past criminal acts of the offender and not the offender's status. The use of age as a selection criterion without an independent verification that the offender is, in fact, committing criminal acts at a higher rate than other offenders of different age would presumably be opposed by those who feel punishment-related decisions should only be based upon an assessment of the criminal acts of the defendant. Prosecutor's offices need to be sensitive to the wide variety of concerns regarding the justice of selective prosecution and need to shape policies to minimize injustice.

C. The Potential Effectiveness of Selective Prosecution

As has been discussed in the preceding section, the major approach to selective prosecution from the mid-1970's to the early 1980's has been the development of specialized units within the prosecutor's office to target serious repeat offenders. In addition to improving management procedures in the prosecutor's office by providing a vehicle for prioritizing the application of prosecutorial

resources, such units were expected to improve the outcomes of cases handled (higher conviction rates, longer sentences, and so on) and to ultimately help reduce the overall crime rate in a jurisdiction. Programs appear to have had beneficial management impacts as indicated by a recent INSLAW survey of prosecutor's offices having career criminal programs. Seventy-five jurisdictions having such programs were surveyed, and 83 percent indicated the programs had improved case intake procedures, 69 percent indicated improvements in case tracking and monitoring, 66 percent indicated improved use of internal investigative resources, and 76 percent of chief prosecutors and program directors reported an improvement in overall attorney morale as a result of implementation of the targeted prosecution program.[22]

The impacts of the units on case processing outcomes are more equivocal. The Mitre Corporation study of four career criminal programs showed little or no improvement in conviction rates and incarceration rates.[23] The California Career Criminal Program evaluation of twelve jurisdictions did show an increase in average sentence lengths for defendants processed by the units (from 4.5 years for the control group to 5.4 years for the career criminal unit group).[24] Some observers have indicated that the California criminal code is particularly well-suited for the selective increase of sentences because of the flexibility provided to prosecutors in charging various "enhancements" to sentences. The paper in Volume II by Brian Forst provides additional detailed information regarding the

accomplishments and problems of career criminal units.[25]

None of the career criminal programs have had any clear impacts on levels of local crime. Given the limited size of the units, the fact that screening criteria were not selected to identify the highest rate offenders for incapacitation, and the tendency of the units to select cases that had strong evidence and were likely to result in conviction and incarceration even without special attention, it is not surprising that the units did not show a measurable impact on local crime rates. These problems are further magnified by the very low percentages of offenders arrested for offenses. Peter Greenwood recently noted regarding career criminal programs that, "the number of offenders handled by a CCP may be so small that the resulting incapacitation or deterrent effects on the overall crime rate cannot be distinguished from random fluctuations."[26] However, Greenwood emphasized that even if the crime reduction goal is not being met (and perhaps cannot be met given the current policies of the programs) the units may have had beneficial impacts by providing "symbolic justice" to the relatively small but serious group of offenders handled. They may provide some indication that the system can work, and also the programs may serve to encourage other innovations in the prosecutor's office.[27]

A number of suggestions have recently emerged in the literature to address the problems experienced by career criminal units in improving case processing outcomes and reducing overall crime rates.

These various aspects of the emerging model for selective prosecution are summarized in Table 21 and will be discussed in turn.

1. SCOPE OF SELECTIVE PROSECUTION FOCUS

Career criminal units tend to handle a relatively low proportion of the overall caseload in a prosecutor's office. For example, a unit focusing upon repeat robbery offenders may be able to handle only twenty percent of the incoming robbery caseload. The programs are limited by the number of staff available and the fact that these staff members carry greatly reduced caseloads to expedite prosecution (often one-fourth of the normal caseload for an assistant district attorney). Given the fact that only a small proportion of offenses result in arrests and the fact that selective prosecution resources are only available for a fraction of them and then do not result in substantial increases in conviction and incarceration rates, it is difficult to see how the current procedure could signficantly reduce overall crime rates.[28] An alternative approach is to have the entire prosecutor's office caseload prioritized in terms of the probability that offenders commit offenses at high rates. Such an "office-wide" emphasis would reduce the reliance upon specialized elite units with very low caseloads and instead prioritize resource allocation across the entire office in terms of offender levels of repeat criminality. Such an approach would reduce the intensive attention currently given to "career criminal" cases as defined by program subjective criteria. Such reduced attention is unlikely to have significant adverse effects

Table 21

Existing and Emerging Selective Prosecution Strategies

Program Policy	Career Criminal Model	Emerging Model
1. Scope of Selective Prosecution Focus	1. specialized unit focus	1. office-wide emphasis
2. Selection Process	2. decision machine approach (i.e., the use of numerical formulae for selecting cases)	2. insight/decision machine combination (increased awareness of factors predicting high offense rates without mechanical application of them
3. Type of Selection Criteria	3. local subjective criteria for screening	3. statistical screening criteria targeting high rate offenders
4. Approach to Case Screening	4. passive screening of incoming cases	4. aggressive seeking out of cases (e.g., New York Police Department Felony Augmentation Unit approach)
5. Seriousness of the Current Offense	5. focus on serious current offenses	5. less serious offenses also
6. Strength of the Evidence	6. stress relatively strong evidence	6. marginal evidence also combined with case building efforts
7. Age of Offenders	7. relatively old offenders	7. relatively young offenders

upon case outcomes in light of evaluation research and in light of the "slam-dunk" nature of many of these cases as characterized by prosecutors handling them. Attention to more marginal cases in terms of the severity of the crime of the repeat offender or the strength of the inital evidence would occur under the office-wide approach, and these issues will be discusssed later.

2. SELECTION PROCESS

As was noted earlier, career criminal units tend to select cases based upon criteria subjectively developed by local policymakers. The criteria have tended to be applied quite mechanically often through the use of numerical formulae with each case factor receiving a fixed number of points, and a threshold number of points required for assignment of the case to the career criminal unit. The programs allow some discretion to screening attorneys and their supervisors, but the approach could be characterized for the most part as a "decision machine" strategy with quite formal guidelines and case weighting mechanisms. Some researchers have noted the limitations with such a mechanical approach in recent years (see, for example, Alfred Blumstein's paper in Volume II of this report), and have suggested that the various discriminating factors found in research should be used to provide "insight" in decision-making and the prioritizing of cases but should not be mechanically applied due to the imperfections of the prediction criteria available and the need to take factors into account outside of the prediction criteria.

3. STATISTICAL SELECTION CRITERIA

As was noted in the preceding section, the screening devices currently in use by units that target serious, repeat offenders are typically designed to meet local prosecutor's office priorities for the enhanced prosecution of certain classes of offenders. Screening criteria range from those focused upon a specific type of crime, to those emphasizing offender histories, to those employing weighted combinations of factors. The selection criteria have not been designed to identify those suspects who are likely to be the highest rate recidivists based upon empirical study, although many of the prosecutor's offices assume that the criteria in use will tend to select out some of the highest-rate recidivists.

Williams has attempted to determine factors that are the best predictors of high rates of recidivism.[29] She has looked for common predictors in four studies of recidivism: (1) her own research (Williams, The Scope and Prediction of Recidivism, 1979); (2) research by Michael Keller and Gene Kassebaum published in September, 1978 in the Honolulu Advertiser; (3) the Rand research noted earlier that is published in Petersilia, Greenwood, and Lavin, Criminal Careers of Habitual Felons, and in Peterson and Braiker with Polich, Doing Crime: A Survey of California Prison Inmates, 1980; and (4) Toborg's study for the Lazar Institute entitled Pretrial Release: National Evaluation of Practices and Outcomes, 1981.[30] Williams

reports that the following factors were associated with recidivism in more than one study:

(1) prior criminal contact with the justice system. This factor appeared in all four studies. Prior convictions do not seem to be particularly good predictors when taken alone, since by the time a person has several convictions he has probably aged sufficently to have a reduced tendency to commit crime.

(2) The existence of a juvenile record was related to recidivism in both the Rand research and the Kassebaum study. Difficulties occur in obtaining juvenile record information, and they will be discussed later in this report.

(3) Property crimes were better predictors of recidivism than violent crimes with property motivation. Williams' research indicated that robbery and burglary defendants were the most likely to recidivate in her study of Washington, D.C., Prosecutor's Management Information System data. The Rand and Kassebaum research also highlighted the importance of property crimes.

(4) Unemployment or the lack of a steady work history was found to be related to recidivism in all four studies.

(5) Drug use was found to be associated with recidivism in the Williams, Rand, and Kassebaum research.

(6) Age was found to important in all of the studies, and younger persons were found to be more active recidivists in all of the studies. Petersilia and Lavin report that criminality "peaks in the

early 20's, tends to decline until the early 30's, and finally drops sharply in a 'maturing out' process. It has been observed that the age group of 14 to 21 years is characterized by a rate of 20 to 40 serious crimes per year; of 22 to 25 years, about 12 serious crimes per year; and of 26 to 30 years about 7."[31] Petersilia and Lavin found that six factors were associated with high rates of offending. Many of the factors overlap with those noted by Williams above (since the Rand research was one of the bodies of data included in Williams work). In addition to the factors cited by Williams, however, Petersilia and Lavin found that high rates of offending were associated with offenders who:

(1) were motivated by "high times" and "excitement" more than by economic need and temper factors.

(2) injured a crime victim.

(3) operate over an area larger than a single neighborhood or city.[32]

Considerable research is needed to determine which factors are consistently most associated with high rates of criminality. Information regarding such factors may be useful to prosecutors' offices in their attempts to develop screening criteria to select serious, high rate offenders for intensive prosecution. Williams has summarized the profile of a "career criminal" in light of current research studies as "a young person in his late teens or early twenties, arrested for robbery or burglary, or a series of property

crimes, with a juvenile record and a long criminal history given only a few years on the street, who is unemployed and who uses drugs."[33] This profile is at odds with selection criteria of many career criminal programs, particularly in regard to the age of the offender.

Table 22 presents a copy of a screening form developed by Rhodes and his associates, for targeting repeat offenders for prosecution.[34] The form was developed in light of empirical research on a sample of federal justice system cases. The researchers consider the screening form to represent "heuristic or demonstration guidelines that are consistent with the statistical analysis."[35] They note that individual prosecutor's offices may wish to modify their guidelines to meet policy goals independent of "predictive accuracy," and stress that the form merely suggests one approach to applying their statistical data to the task of screening offenders.[36]

It should be stressed that the determination of factors associated with high rates of criminality does not necessarily provide one with a high level of precision in predicting which specific criminal offenders will, in fact, commit crimes at high rates. Chapter 2 of this report discussed the problem of errors in prediction (that is, false positives and false negatives) at length. The values placed upon limiting such errors need to be carefully considered in implementing any policy based upon predictions of behavior.

In addition, the Rand researchers stress that multiple regression of the type reported in Doing Crime: A Survey of California Prison

Table 22

PROPOSED POINT SCORES FOR SELECTING CAREER CRIMINALS[34]

Variable	Points
Heavy use of alcohol	+ 5
Heroin Use	+10
Age at time of instant arrest	
Less than 22	+21
23 - 27	+14
28 - 32	+ 7
38 - 42	- 7
43+	-14
Length of criminal career	
0-5 years	0
6-10	1
11-15	2
16-20	3
21+	4
Arrests during last five years	
Crimes of violence	4 per arrest
Crimes against property	3 per arrest
Sale of drugs	4 per arrest
Other offenses	2 per arrest
Longest time served, single term	
1-5 months	4
6-12	9
13-24	18
25-36	27
37-48	36
49+	45
Number probation sentences	1.5 per sentence
Instant offense was crime of violence*	7
Instant offense was crime labeled "other"**	-18

47 points:
Critical Value to Label an Offender
As a Career Criminal

*Violent crimes include homicide, assault, robbery, sexual assault and kidnapping

**Other crimes include military, probation, parole, weapons and all others except arson, burglary, larceny, auto theft, fraud, forgery and drug sales or possession

Inmates does not provide a universal concrete formula for identifying offenders for selective prosecution because:

(1) the findings may be applicable only to a single state and sentencing policies.

(2) comparable data are often unlikely to be available (attitude measures, for example).

(3) the coefficients and conceptual results of the research need to be validated on other samples of offenders and over time. Such validation is necessary, and the power of the analysis would be expected to decline with a sample different from the one in which the initial multiple regression analyses were conducted.[37]

The availability of information regarding factors associated with high rates of offending is likely to result in a shift from local subjective screening criteria to statistical criteria, at least in jurisdictions that have established selective prosecution programs, in order to increase the incapacitation rates of the highest rate local offenders. Some jurisdictions may prefer to continue to use locally generated subjective criteria. For example, if a jurisdiction is experiencing a robbery or burglary increase, the prosecutor may target one of the specific crimes without regard to statistical predictors, or may superimpose available predictors on the targeted subset of crimes (selecting only robbers with specific statistically predictive characteristics, for instance).

4. PASSIVE VS. ACTIVE CASE SCREENING

Traditionally the career criminal programs have been relatively passive in screening cases, applying selection criteria to cases brought to them by the police. Recently, the New York Police Department has developed a Felony Augmentation Unit that aggressively seeks out cases for priority prosecution.[38] Offenders passing a threshold for number of prior offenses are listed on the computer and when one is arrested, enhanced police investigative resources are applied to the case. The effort at case building can surface cases that would otherwise be dropped or dismissed. At present, most felony arrests fail to result in a felony conviction, and the enhanced investigative efforts may improve the prosecution of targeted cases. Chapter 7 of this report provides a discussion of the advantages and disadvantages of targeted efforts for apprehension as well as investigation.

5. SERIOUSNESS OF THE CURRENT OFFENSE

Career criminal units have typically focused upon serious current offenses as part of their screening criteria, as was noted earlier. A variety of researchers have indicated that selective prosecution efforts should consider applying extra attention to less serious offenses as well if the offender has a substantial record. The Felony Augmentation Unit noted above takes that approach. Supporters of a focus on less serious offfenses of repeat offenders argue that such cases are often dismissed or given little attention when they provide

an opportunity to remove the repeat offender from the street. They further note that evaluation data indicate that serious crimes already result in high conviction and incarceration rates in many jurisdictions, and it is in the case of less serious crimes that career criminal programs can make significant improvement. Critics of enhanced prosecution of lesser offenses for selected high rate offenders note that this approach can result in the punitive use of prosecution. The discussion at the conference gave considerable attention to this issue, and Professor Alan Dershowitz noted that he felt many selective prosecution strategies could have a corrupting influence upon the prosecutor's office. Even with good intentions, these approaches could lead prosecutors to apply the law in a highly discriminatory and unfair manner. A similar argument is made by critics of selective prosecution for the next issue -- increased focus on cases having marginal evidence strength.

6. STRENGTH OF THE EVIDENCE

Many career criminal units have taken the strength of evidence available into account in their case selection processes. Critics have argued that this practice is one of the main reasons that these units do not typically show marked improvements over comparison groups in such measures as conviction and incarceration rates. Researchers at INSLAW, Rand and elsewhere have suggested that efforts need to be made to target cases with more marginal evidence where the extra resources may in fact produce significant gains in prosecution outcome

measures.[39] This issue was discussed at our conference at some length and participants noted that the charging standard should not be moved up and down selectively depending upon the nature of the offender's criminal history. The application of extra resources prior to charging in order to provide a thorough investigation was agreed upon by most to be totally legitimate and there was agreement that citizens cannot assert the existence of an affirmative right to receive only a typical cursory investigation. Once the investigation results in the collection of sufficient evidence for charging then the prosecution can proceed as usual.[40]

7. AGE OF OFFENDERS

The average age of offenders targeted by career criminal programs has typically been in the late 20's.[41] Research has indicated that criminal careers tend to be time bounded with a peak in the late teens and a decrease in rates of offending over time until the career of many criminals ends in the late 20's and early 30's.[42] In light of these findings, it is possible that most career criminal units have been incarcerating offenders at approximately the time that their criminal career was about to run its course. Such a policy is congruent with a rationale of retribution since the persons who have committed the largest volume of crime are punished, but not as appropriate for a rationale of incapacitation, since resources are targeted on persons committing offenses at a relatively low rate rather than upon high rate offenders. An emerging focus upon younger

offenders is a response to the data regarding patterns in criminal careers. The switch to a focus upon younger offenders raises a number of complex issues. If a program wishes to base its selection criteria upon the number of prior convictions of offenders, it would be very valuable to have detailed juvenile records available for review, since otherwise relatively limited records or no records will be available for young offenders. The problems with obtaining juvenile records are discussed in the section of this report dealing with records availability, and are noted briefly in the following selection.

8. CONSTRAINTS ON IMPROVING SELECTIVE PROSECUTION STRATEGIES

A variety of constraints exist in implementing improved selective prosecution procedures. Problems with data availability and with the appropriateness of using certain social factors as predictors are both quite substantial.

Problems in obtaining juvenile record information are particularly severe. Rand researchers have asked a group of prosecutors from across the nation regarding the availability of juvenile records. Sixty percent said that they were "never" or "rarely" provided by police with juvenile histories on youthful offenders, and when they were it was too late in the course of case processing to be of considerable use. Rand researchers have also noted that juvenile records are often inadequate, unclear, incomplete, and difficult to assess.[43] The Attorney General's Task Force on Violent Crime has recommended computerizing and making potentially

public the conviction records of juvenile repeat offenders. The fingerprints and photographs of violent juveniles convicted of serious crimes would be provided to the F.B.I. for distribution to prosecutor's offices on request.[44] Robert Morgenthau, the Manhattan District Attorney, is currently taking steps to develop a juvenile analog to his career criminal bureau and will seek to obtain juvenile records for the screening of cases in the new juvenile prosecution unit.

Additional problems occur in obtaining the types of information that the Rand research indicated were particularly strongly related to high rates of recidivism. The Rand researchers found that measures of attitudes toward crime and the nature of the offenders self-labeling as a criminal were strongly related to high rates of criminality, but such measures are virtually impossible to gather from a suspect. Suspect's self-reports would be likely to be minimally candid. The Rand researchers indicate that it may be possible to collect data that would serve as surrogates for their survey measures, and research is needed on that issue.[45]

A variety of practical problems arise in implementing a screening mechanism for the selection of serious repeat offenders including the question of at what stage screening should take place. Some observers have argued that the screening of cases should occur shortly after arrest in order to provide assistant district attorneys assigned to priority cases with the opportunity to collect evidence from victims

and witnesses while the information is still fresh. Others have noted the problems in obtaining reliable record information shortly after arrest and have noted that screening should occur at a later point, such as at the time of arraignment, when reliable criminal history information is likely to be available. Presumably the best strategy is to seek complete criminal history information as soon as possible after the apprehension of the offenders and then to make a screening decision and assign staff to the case as soon as adequate information is available. Some jurisdictions use a variety of screening stages in order to insure that no cases meeting the screening criteria of the program slip through the net.[46]

D. The Potential of the Area

This chapter has provided a review of major issues involved in the selective prosecution of "dangerous" offenders. The allocation of intensive resources to such cases appears to be within the normal scope of prosecutorial discretion. Such selections should be made in an evenhanded fashion, and the resources should be applied to improved investigation and case prepartion of the cases. A consensus emerged at the conference that prosecutors should not vary charging standards and routine practices in types of cases charged as part of the targeted prosecution effort; such practices would corrupt the prosecutor's responsiblity to provide equal protection to all citizens in the jurisdiction.

Numerous programs have been developed across the nation to

expedite the prosecution of serious, repeat offenders, and the basic characteristics of the programs have had beneficial management impacts, but have provided limited improvements in case processing measures (such as conviction and incarceration rates) and no measurable impact on crime rates in the jurisdictions having the programs. A variety of suggestions are provided in the chapter to potentially improve the impact of selective prosecution mechanisms. Prosecutor's offices should consider moving from a special unit focus for targeted prosecution to office-wide implementation of case prioritization in light of the likelihood of offenders recidivating. The special units currently in operation have not provided substantial improvements in case outcomes in most instances and are able to handle relatively small caseloads. An effort is needed to move from the use of local subjective screening criteria to criteria that are generated statistically and correlate with high rates of offending. These criteria need not be applied mechanically through the use of numerical formulae but can be integrated into the office's decision making and still allow for needed discretion. Aggressive seeking out of cases akin to the the practices of the New York Police Department Felony Augmentation Unit may be useful; at present most targeted prosecution units are relatively passive in their screening practices reacting to cases as they appear. A further suggestion involves the intensive processing of cases of serious repeat offenders even when they do not involve serious felonies. The New York unit noted above follows such

a procedure in cooperation with the prosecutor's office. Trivial offenses that would not otherwise be prosecuted by the office should not be pursued, but misdemeanors that are appropriate for prosecution but might receive very low allocations of resources would be appropriate for intensive prosecution in selected cases. Efforts are needed to improve investigative case building for those cases that arrive with marginal evidence. Once the cases meet the routine charging standard they should then be charged. Finally, additional consideration should be given to the age of offenders receiving targeted prosecution and research evidence suggests that younger offenders are likely to commit crimes at particularly high rates and deserve disproportionate levels of attention.

The targeted prosecution of "dangerous" offenders has been a high priority topic area for prosecutor's offices and state and national criminal justice research and planning agencies for nearly a decade. The concept has been widely adopted across the nation, and may ultimately promise to assist in improved prosecution and crime control. The various midcourse corrections suggested above may assist the programs to meet their stated goals. Virtually all of the suggestions are tentative and would benefit from further research. The implementation of the suggested changes in a number of sample jurisdictions and the intensive study of their achievements would be helpful in determining if the modifications should be replicated nationally.

Notes

1) See New York Times, January 4, 1981, p. 1; New York Times, March 16, 1981, II, p. 3.

2) See Vera Institute of Justice, Felony Arrests: Their Prosecution and Disposition in New York City's Courts (New York: Vera Institute of Justice, 1977). See also New York Police Department Legal Bureau, Felony Case Deterioration: Process and Cause (New York: New York Police Department, 1982).

3) Institute for Law and Social Research, Curbing The Repeat Offender: A Strategy for Prosecutors, PROMIS Research Publication 3 (Washington, D.C.: U.S. Government Printing Office, 1977).

4) See Andrew Halper and Daniel McGillis, An Exemplary Project: The Major Offense Bureau (Washington, D.C.: U.S. Government Printing Office, 1977).

5) Edward Banfield and Martin Anderson, "Court Processing in Chicago," mimeographed (Cambridge: Harvard University, Department of Government, 1968).

6) Felix Frankfurter and Roscoe Pound, eds., Criminal Justice in Cleveland (Cleveland: The Cleveland Foundation, 1922).

7) Institute for Law and Social Research, Curbing The Repeat Offender, pp. 16-18.

8) Institute for Law and Social Research, Curbing The Repeat Offender, p. 17.

9) William A. Hamilton and Charles R. Work, "The Prosecutor's Role in the Urban Court System: The Case for Management Consciousness," Journal of Criminal Law and Criminology, 64 (1973) 183-189.

10) See Halper and McGillis, Major Offense Bureau, for a discussion of the development of the early selective prosecution systems.

11) Attorney General's Task Force on Violent Crime, Final Report (Washington, D.C.: U.S. Department of Justice, 1981).

12) See Debra Whitcomb, An Exemplary Project: Major Violator Unit, San Diego, California (Washington, D.C.: U.S. Government Printing Office, 1980).

13) See Halper and McGillis, Major Offense Bureau, pp. 131-136, for a comparison of screening criteria used by eighteen programs across the nation.

14) See also John E. Eck, "Investigative Strategies for Identifying Dangerous Repeat Offenders," prepared for our conference and published in Volume II of this report.

15) See Eleanor Chelimsky and Judith Dahmann, Career Criminal Program National Evaluation: Final Report (U.S. Department of Justice, 1981) for a discussion of impacts of career criminal programs on case delay.

16) An Institute for Law and Social Research survey documented some additional types of spillover effects. The findings are reported by John S. Bartolomeo, "Practitioners' Attitudes toward the Career Criminal Program," Journal of Criminal Law and Criminology 71 (1980) 113-117.

17) Detailed workload data are available for the career criminal programs in California. For example, see Office of Criminal Justice Planning, California Career Criminal Prosecution Program: Second Annual Report to the Legislature (Sacramento: Office of Criminal Justice Planning, 1980).

18) Such procedures in the Bronx District Attorney's office are reviewed in Halper and McGillis, Major Offense Bureau.

19) The Institute for Law and Social Research has investigated the legal issues regarding career criminal programs in detail. A variety of court challenges to such programs have occurred, and appelate courts have typically held that selective prosecution of repeat offenders falls within the legitimate scope of prosecutorial discretion. See Career Criminal Briefing Paper No. 6: Responses to Legal Challenges (Washington, D.C.: Institute for Law and Social Research, 1980).

20) See William DeJong, Policy Briefs: Career Criminal Programs (U.S. Department of Justice, 1980) for further discussion of this issue.

21) This issue has been discussed in Chapter 4 in the treatment of criteria for selective incapacitation and in Chapter 3 in the discussion regarding the justice of classification.

22) Bartolomeo, "Practitioners' Attitudes."

23) Chelimsky and Dahmann, Career Criminal Program National Evaluation.

24) Office of Criminal Justice Planning, California Career Criminal Prosecution Program.

25) See Brian Forst, "The Prosecutor's Case Selection Problem: 'Career Criminals' and Other Concerns," prepared for our Conference and published in Volume II of this report.

26) Peter W. Greenwood, "Career Criminal Prosecution: Potential Objectives," Journal of Criminal Law and Criminology, 71 (1980) 85-88.

27) The role of career criminal units in stimulating broader office changes is noted in Bartolomeo, "Practitioners' Attitudes."

28) Forst, "Prosecutor's Case Selection Problem," underscores this limitation in stating, "The current procedures for dealing with repeat offenders, which use arbitrary selection criteria and which feature the 'career criminal' unit as a centerpiece, may be largely ceremonial, ineffective, and costly."

29) See Kristen M. Williams, "Selection Criteria for Career Criminal Programs," Journal of Criminal Law and Criminology, 71 (1980) 89-93.

30) See Kristen M. Williams, The Scope and Prediction of Recidivism, PROMIS Research Publication 10 (Washington, D.C.: Institute for Law and Social Research, 1979); Michael Keller and Gene Kassebaum, Honolulu Advertiser, 10-28 September 1978; Joan Petersilia, Peter Greenwood and Marvin Lavin, Criminal Careers of Habitual Felons (Santa Monica: Rand, 1977); Mark A. Peterson and Harriet B. Braiker with Suzanne M. Polich, Doing Crime: A Survey of California Prison Inmates (Santa Monica: Rand, 1980); and Mary Toborg, Pretrial Release: A National Evaluation of Practices and Outcomes (Washington, D.C.: U.S. Government Printing Office, 1981).

31) Joan Petersilia and Marvin Lavin, Targeting Career Criminals: A Developing Criminal Justice Strategy (Santa Monica: Rand, 1978), p. 16.

32) Petersilia and Lavin, Targeting Career Criminals, p. 17.

33) Williams, "Selective Criteria," p. 93.

34) William M. Rhodes and others, Developing Criteria for Identifying Career Criminals (Washington, D.C.: Institute for Law and Social Research, 1982).

35) Rhodes and others, Developing Criteria, p. 44.

36) Rhodes and others, Developing Criteria.

37) See Peterson and Braiker with Polich, Doing Crime, for a discussion of these issues.

38) Chapter 7 provides a more detailed description of this program.

39) For example see, Justice for Law and Social Research, Curbing the Repeat Offender.

40) See Floyd Feeney, "Prosecutorial Selectivity: A View of Current Practices," prepared for our Conference and published in Volume II of this report, for a further discussion of this issue. Feeney notes regarding evidence strength that, "In the two intensive study jurisdictions more convictions would require an increase in filings and some additional risk-taking on cases. These actions would reduce the conviction rate as a percentage of cases filed but would increase the number of robbers convicted."

41) The National Legal Data Center (Thousand Oaks, California) developed a series of mimeographed reports for the National Institute of Justice summarizing the characteristics of career criminal defendants across the nation.

42) Petersilia and Lavin, Targeting Career Crimnials, p. 16.

43) See Joan Petersilia, Juvenile Record Use in Adult Court Proceedings: A Survey of Prosecutors (Rand Corporation, 1980) for a detailed discussion of problems with juvenile record availability and content.

44) See Attorney General's Task Force, Final Report, pp. 81-86.

45) See Petersilia, Greenwood and Lavin, Criminal Careers of Habitual Felons.

46) A variety of documents provide useful discussions of prosecutorial screening strategies including: Institute for Law and Social Research, Case Screening (Washington, D.C.: Institute for Law and Social Research, 1976); W. Jay Merrill, Marie N. Wilks and Mark Sendrow, Prescriptive Package: Case Screening and Selected Case Processing in Prosecutor's Offices (Washington, D.C.: U.S. Department of Justice, 1973); James Vorenberg, "Decent Restraints of Prosecutorial Power," Harvard Law Review, 94 (1981) 1521-1573, addresses the broader issues of fairly structuring prosecutorial discretion in the selection and prosecution of cases.

Chapter 7

POLICE PRACTICES

Police practices affect the overall focus and selectivity of the criminal justice system in two important ways. First, police activity determines who can be a candidate for "selective incapacitation." If, for some reason, the police fail to catch "dangerous offenders," it does little good (and conceivably some harm) to have prosecutors and judges ready to focus their attention on them. Second, selective incapacitation polices are importantly based on past police activities as well as current. To the extent that a policy of selective incapacitation is based largely (or even exclusively) on information about individuals' past rates of offending, then the past success of the police in attributing crimes to offenders becomes the basis for distinguishing unusually dangerous offenders. If the police have failed to solve most crimes, or if they have been inaccurate in imputing crimes to offenders, then the selective focus will be less just and less effective than it otherwise could be. Thus, it is important to look at how effectively police practices could currently support a policy of "selective incapacitation" or "focused imprisonment," and how they might be adjusted to sharpen the focus of this part of the system.[1]

A. Focusing Police Attention on Dangerous Offenders

A crucial tenet of law enforcement in a free society is that

investigative efforts to solve crimes should be minimally intrusive and "fair" among individuals. A key part of the system that guarantees a proper balance between effective enforcement on one hand and the protection of important civil liberties on the other is the focus of the enforcement system on acts rather than on persons or groups. Restricting the attention of enforcement agencies to acts helps to insure a proper balance between enforcement and civil liberties in at least two ways. First, it assures that the attention of enforcement officials will be focused in areas where it does the most good. They are not allowed to investigate broadly, but instead only in the narrow areas surrounding an alleged criminal act. Despite the narrowness of the police focus, however, the police are likely to find a criminal act since it is precisely evidence of the act that focused their attention in that spot in the first place.

Second, the focus on the act minimizes the role that improper, ad hominem motivations can play in determining who becomes the target of police interest. If the police must establish some plausible evidence that a crime has been (or is being) committed, their interest in a particular person is no longer arbitrary and vulnerable to charges of improper motivation. It is, instead, firmly justified: there is justice to be done in ferreting out the offender, and it is that interest that justifies the intrusion associated with the investigation. Thus, a focus on acts is central to the management of a decent, non-intrusive, fair system of police investigation.

1. Criminal Acts v. Dangerous Offenders

In principle, the focus on acts (as distinct from persons) is not inconsistent with the idea of a focus on unusually dangerous offenders. If some offenders committed serious offenses much more frequently than others, and if the enforcement system were focusing on serious offenses and were unbiased with respect to individuals, then it would necessarily turn out that the dangerous offenders would receive the bulk of the investigative attention. The system would be just with respect to acts, and selective with respect to individuals because the individual differences in rates of offending would be reflected in the criminal justice system's response.

The problem, of course, is that the enforcement system is not a neutral recorder of serious criminal offenses. Critics point to three different sources of "bias" introduced into the enforcement system that result in unfair arrests and, therefore, both distorted punishment for the instant offenses and a distorted picture of who is an unusually dangerous offender.[2]

a. Street Crimes are More Threatening

One source of bias is the criminal law itself which creates criminal liability for some kinds of harmful acts and not others. The traditional position here is that "street crimes", such as robbery and burglary, are defined more naturally as crimes (and punished more harshly and reliably) than "white collar crimes," such as the illegal disposal of toxic wastes, exposure of workers to unknown health

risks, or a wide variety of consumer frauds. In effect, the structure of the criminal law fails to reflect a coherent view of what is a harm, and who is a criminal.[3]

We believe this to be an important criticism. Moreover, we acknowledge that our definition of dangerous offenses obscures rather than illuminates this bias. But we do not offer our focus on "street offenses" as a complete view of the "crime problem" or the "justice" of our current system. Instead, it is one important part of the problem of crime and justice -- just as a focus on dangerous offenders is only one part of a policy dealing with street crime. So, while we take this point seriously, we will not discuss it further.[4]

b. Some Crimes are Easier to Solve

A second source of bias that is more central to the problem we have taken for ourselves is the fact that some crimes are easier to solve (and therefore more likely to be solved) than others. Whether a given crime is easy to solve depends on three kinds of factors:

- The Crime itself --Was the offender a stranger to the victim or a friend? Was any distinctive evidence involved?[5]
- Police enforcement methods -- Where were police patrol units, and what were they doing? What methods did detectives use, and how well did they employ them?[6]
- Social position of those involved -- Were the victims eager or reluctant to cooperate with the police? Did the police regard the crime as important or unimportant?[7]

That so many factors are important suggests that there need not be any consistent relationship between criminal conduct and arrest records: much depends on the nature of the conduct, police activities, the

willingness of victims and witnesses to aid in the solution of the crime, and their capacity to capture police attention.

In the past, analysts noted that relatively few cases were solved, and emphasized the role of the social position of the victims, witnesses and suspects in case solution.[8] They felt that police worked hardest to solve crimes that involved victims and witnesses with high social status, and suspects with relatively low status. Poor victims and transient witnesses could not reliably command the attention of the police; socially powerful suspects could ward off intensive investigation.

While there may be substantial truth to this hypothesis, recent empirical work on how crimes get solved emphasizes, first, the importance of the offense itself, and second the nature of the police investigative effort.[9] By far the most important factor in determining whether crimes are solved is the quality of information available from victims and witness of the crime.[10] Evidence also indicates that the police are more likely to solve crimes and convict offenders when they locate multiple witnesses, search the crime scene for physical evidence, carefully prepare formal reports, and take other actions to make their cases stronger.[11]

If it is true that the major bias introduced into the solution of crime is associated with the inherent difficulty of solving the crime (and the nature of the police investigative effort) rather than the social position of the offender, then it becomes plausible that the

bias introduced into the arrest process is quite diffferent from what we have come to imagine. The view that social position influenced the probability of solving crimes led one to expect a bias in the system against low status people who attacked high status people: desperate robbers and burglars unwise enough to attack the rich and powerful were the ones who bore the brunt of the criminal justice system's response to crime. The view that the difficulty of solving the crime is the major factor influencing the probability of arrest and conviction given criminal conduct leads to a different expectation. Specifically, crimes among intimates and acquaintances should be solved more often than crimes among strangers, and crimes committed by inexperienced or irrationally passionate people should be solved more often than crimes committed by relatively practiced and detached offenders.

This, in turn, would lead to a different kind of inequity among offenders -- one where the episodic offender, lashing out at intimates and acquaintances, would be more likely to be arrested given a crime than the relatively practiced "violent predator" attacking strangers. Indeed, if we add to this story one additional plausible idea -- namely that police and prosecutors "satisfice" in the sense that once they get one solid charge against an offender that will involve prison time, they tend to stop trying to charge additional offenses to the suspect -- then one can easily imagine a system that is biased in <u>favor</u> of unusually dangerous offenders. Because

dangerous offenders commit crimes that are difficult to solve, and because they commit them so often that they exhaust the interest of the criminal justice system in attributing the crimes to them, they escape with many fewer arrests and convictions then their criminal conduct would warrant.

Far from exaggerating the criminal conduct of dangerous offenders, then, the enforcement system may minimize it. The real victims of the system are the amateur or passionate offenders who are very likely to be arrested for their occasional serious crimes. Thus, the bias introduced by the mechanics of identifying suspects and building cases may favor the dangerous offenders.[12]

<u>c. Some Police are Improperly Motivated</u>

A third source of bias introduced into the enforcement system is improper motivations among those doing the investigations. This could be broad racial, cultural, or class biases. The motivations could be political -- with enemies of a given political regime provoking unusual police interest. Or, the problem could be more narrowly focused, with specific enforcement agents becoming obsessed with arresting and prosecuting specific individuals whom they had some reason to dislike. If authorities are sufficiently motivated to apply additional resources to particular investigations, or even to override or ignore imporant restrictions on evidence-gathering activities, then they may increase the chances of arrest and conviction for certain individuals and classes. The resulting pattern

of arrests and convictions would give a distorted view of the underlying criminal conduct.

Thus, the ideal of an "act-based" system of enforcement that makes the criminal justice system's response an unbiased reflection of the seriousness and frequency of criminal offending (and, therefore, gives it an appropriately sharp focus on unusally dangerous offenders) may not be achieved by the current system. If this analysis of arrest bias is correct, it may be in the interests of justice (but possibly at the risk of protecting privacy and fairness) to retreat a little from the strictly act based system of investigation, and turn towards a system of investigation that incorporated and exploited information about prior rates of offending by specific individuals. In effect, to compensate for the bias introduced into the enforcement system by the difficulty of solving certain kinds of crimes (for example, those among strangers, or those committed with skill developed from previous experience), we should pay special attention to people whom we have reason to suspect commit such crimes often. Such an approach is not wholly alien to law enforcement, of course. In the areas of narcotics, gambling and organized crime, much of our investigative activity is already organized primarily around known offenders rather than specific offenses.[13] Moreover, the solution of many cases of robbery, arson, rape and burglary depend on showing mug books of known offenders to victims, or linking a specific modus operandi to a known offender who was in the area and has no reliable alibi.[14] Each of

these techniques is based largely on knowing something about offenders independent of a specific offense. Beyond these features of the current system, however, we can imagine several different ways that the police might adjust their operations to reflect the special interest in dangerous offenders. Each deserves some discussion, analysis, and empirical investigation.

2. Alternative Programs to Focus Police Attention

One strategy would not focus explicitly on known dangerous offenders, but would instead focus on the kinds of offenses that dangerous offenders commit more frequently than other sorts of offenders. The obvious option here is to turn the police to a very narrow focus on robberies. Since dangerous offenders commit these offense much more than other sorts of offenders, a focus on robbery would result in dangerous offenders being arrested more often than other less dangerous offenders.[15] Indeed, preliminary results from an evaluation of a special robbery suppression experiment in Birmingham, Alabama suggest that the kind of robbery attacked by a given strategy could produce a discriminating effect on the sort of offender who was arrested: stake-outs of commercial targets were likely to yield arrests of robbers with extensive prior records; decoys sent into parks to attract muggers produced arrests of people with less serious prior records.[16]

A second strategy would be to give special investigative attention to any offense that involved a person who had been

designated a dangerous offender. This is the basic idea behind New York City's "Felony Augmentation Program": whenever a previously designated dangerous offender appears as a suspect in a criminal case (no matter what the charge), the police make special efforts to gather evidence in the case.[17] The success of this strategy depends on the precision with which dangerous offenders were previously identified, the reliability with which the investigators link a particular case to a dangerous offender, and the returns to additional investigative activity in a case. It also depends on the willingness of prosecutors to pursue prosecutions of less serious offenses by known dangerous offenders.

A third strategy involves increased efforts with "post-arrest investigation." The basic idea is that it would be both valuable and feasible to expand investigative efforts to impute known crimes to already arrested dangerous offenders. In the past, police departments have "cleared" offenses through a variety of informal procedures. It has not been considered valuable to add counts to an indictment since it complicated the prosecutor's case, and added little to the sentence a judge would give if the offender were convicted. The interest in unusually active dangerous offenders suggests a new justification for trying to "clear" offenses more carefully. Additional counts could decently yield longer sentences in a criminal justice system trying to focus sharply on dangerous offenders.[18]

Perhaps more importantly, if the additional counts were

incorporated in criminal justice records, they could help to identify unusually dangerous offenders. In effect, the criminal justice system recognizes and distinguishes among offenders not by their actual rate of offending, but by their arrests and convictions. Yet the system also tends to stop filing charges and pursuing convictions when it has one convincing charge. This phenomenon may obscure and dampen the real differences among offenders. If the system continued to pursue charges where they were sustainable (even at the risk of complicating a case), the record of arrests, charges and convictions might mirror actual rates of offending more closely. This, arguably, is the value of "post-arrest investigations".

This strategy also seems feasible simply because it seems easier to make a case with a suspect in hand than without one. The suspect can be interviewed, his alibis can be checked, he can be shown to victims and witnesses in line-ups, and so on. For these reasons, more careful post-arrest investigations of dangerous offenders may yield punishments more consistent with actual rates of offending, and improved discrimination among offenders. After all, negative findings of post-arrest investigations could cast doubt on the identification of someone as a dangerous offender as well as harden that identification.

A fourth strategy consistent with an enhanced focus on dangerous offenders would require patrol officers to record observations of specially designated dangerous offenders when they observed them in

the course of ordinary patrol operations. This represents an enhanced level of open surveillance of dangerous offenders, but no major change in the deployment of patrol personnel. Such reports might occasionally become significant to investigators trying to solve crimes involving dangerous offenders since they could implicate specific dangerous offenders as suspects in a a crime, or belie a claimed alibi.[19]

A fifth strategy extends the fourth by relying on an intermittent, continuing, covert surveillance of dangerous offenders. Periodically, the police could place a designated dangerous offender under more extensive surveillance. This strategy is unlikely to be productive unless some additional information can be acquired about the likely time and place of offenses since even the most active criminal offenders commit crimes relatively rarely: several days or weeks could easily go by without observing an offense, even if the surveillance were continuous and undetected.

The limitation of the fifth strategy suggests a sixth possible strategy based on the identification of "related crime series"could plausibly be interrupted by a proactive police operation. The basic idea is that dangerous offenders commit streams of crimes using a similar modus operandi, and leaving behind witnesses who offer similar descriptions of the offender. If the offenses can be linked to one another, associated with a known offender, and associated with predictions of future targets, surveillance of the suspect or the

possible target location may result in an apprehension of an offender in the act of committing crimes. John Eck offers a plausible scenario for an investigation of this type

> An investigation of offender A is begun because it is suspected that offender A is involved in several commercial robberies. At this point, only a suspicion exists as to A's guilt and A cannot be found. An informant tells a detective that offender A is associating with offenders B and C and that the three have been committing armed robberies of convenience stores. The informant has no direct knowledge of this and would not testify to the fact even if he had direct knowledge. Files on offenders B and C provide addresses of their residences and descriptions of their cars. Surveillance of B and C leads detectives to offender A. Surveillance also shows that none of the three are employed and that they spend most of the day inside, coming out only at night. Photographs of offenders B and C are shown to witnesses of earlier robberies in which A is a suspect, one witness picks the photo of B out of a photo spread. Meanwhile, several convenience stores are staked out in an area the three offenders have been frequenting. Offenders A and C are captured at one of these locations while committing a robbery. The entire robbery is witnessed by the detectives staking out the store. Offender B escapes but is arrested later at his apartment.[20]

A seventh strategy would involve doing intermittent or continuous surveillance of dangerous offenders only while they were on probation or parole. In effect, the police could become useful adjuncts of Probation and Corrections Departments oriented to effective continuing supervision of people under their charge. This strategy has the great virtues of avoiding civil liberties objections that might be raised against the "unfair" attention given to people identified as dangerous

offenders, and of increasing the special deterrent and incapacitation effects of probation and parole. It has the disadvantage of requiring some potentially large redeployments of police personnel. Whether, on balance, patrol officers could usefully be deployed for this purpose is a suitable subject for experimentation.[21]

While each of these strategies is a logical possibility, whether any should actually be used depends on a closer analysis of whether they would be just and effective. While definitive answers to these questions must await experimentation, we can begin the process of evaluating their potential and problems here.

B. The Justice of Selective Investigative and Patrol Tactics

As in every other phase of the criminal justice system, the question of whether it is just and decent to focus police attention on persons rather than acts must be addressed. To a degree, this discussion mirrors the most general discussion of this subject. One can defend the general proposition by arguing: 1) that the criminal law has always been interested in character as well as acts, and that it was in the interests of justice to allow accurate information about rates of offending to influence the posture of the criminal justice system towards individuals; 2) that while there were some objectionable features to a selective focus in the criminal justice system, it was sufficiently useful to be adopted despite these features; 3) that a selective focus was necessary to compensate for non-selective, unjust biases introduced into the system by the

"natural" functioning of the criminal justice system; 4) that explicit adoption of a selective policy would simply codify and restrain current practices and thereby increase the justice of the system; and so on.

But the discussion of a selective focus in police information gathering also seems importantly different than the general subject. On one hand, one can consider the seriousness of the consequences for the individual of encouraging a selective focus in investigation and patrol. Arguably, the consequences are not as direct and significant as they would be for sentencing decisions. The offender who is exposed to heightened police interest loses some degree of privacy and anonymity, and with that, incurs a heightened vulnerability to arrest and prosecution, but still retains his freedom. He is still protected by constitutional restrictions in the adjudication of any charges against him. All he has lost is the average citizen's expectation of an indifferent police patrol, and an ordinarily sloppy police investigation. Since this loss is small relative to the threat of increased years in prison, and since tailoring sentences to individuals seems to have relatively widespread support, it must also be permissible for the police to take a special interest in those whose criminal records suggest they are unusually dangerous offenders.

On the other hand, the whole context of policing seems importantly different from the context of sentencing, and less naturally accomodating to the idea of an individual focus. The basic

problem is that a selective focus in patrol and investigation attacks our commitment to the presumption of innocence, and to fairness in the investigation of crimes. Moreover, it may allow scope for corrupt ad hominem motivations within police forces to express themselves in the observed pattern of enforcement. Patrol and investigation are concerned with developing evidence of crimes that can sustain convictions at trial. Arguably, this fact-finding is more fundamental than sentencing decisions because it is the basis on which the most fundamental decision is made -- namely, the guilt or innocence of a given suspect. Because it is more fundamental, scrupulous objectivity must be observed. Having prior information about offenders and encouraging the use of this information in focusing information gathering activities contaminates this process in a way that will ultimately undermine confidence in the system.

Similarly, the police are arguably more vulnerable to developing corrupt motives with respect to individuals because their operations involve them more personally and directly in the investigation of crimes. It is harder for them to remain dispassionate than judges because they see more and have greater personal stakes in the handling of individual cases than judges do. Moreover, they have frequent opportunities to violate due process guarantees in the collection of evidence. If this is true, then it is slightly more dangerous to encourage the police to develop a view of individuals as dangerous offenders than to allow judges the same latitude.

Finally, since it is largely through police information gathering activities that we know who is a "dangerous offender," and since in a system of "selective incapacitation" offenders will carry these labels for much of their life, it is especially important that police investigations be scrupulously fair and precise. For all of these reasons, a selective focus at the patrol and investigative stages of criminal justice processing seems less justifiable and more dangerous than a selective focus at the sentencing stage -- despite the fact that the immediate consequences for the individual seem less severe.

On balance, there are risks to the justice of the system associated with creating a selective focus at the investigative stage. In general, these risks are minimal if we can guarantee ourselves two things. First, the identification of people as dangerous offenders must be based on a stringent criteria (two convictions for violent offenses within a three year period and arrests for several other offenses, for example) and incorporate a relatively formal process (perhaps including opportunities for individuals to learn that they have been so designated and to contest the designation). Second, the "enhanced" patrol and investigative efforts must be "enhanced" only in terms of the resources applied -- not in terms of the intrusiveness or coerciveness of the enforcement methods. These should probably be conditions of any operating program to enhance the selectivity of patrol and investigative efforts.

Moreover, if we think about how these justice concerns apply to

the concrete proposals made above, it is possible to see that some proposals generate fewer objections than others. In general, the proposals to focus on certain kinds of offenses committed often by dangerous offenders, give special attention to cases involving dangerous offenders, and conduct "post-arrest" investigations do not seem to raise great problems if the two conditions described above are met. Indeed, such proposals may be in the interests of justice. Similarly, for different reasons, (namely that the offender is already under state supervision) the proposal to use the police as an adjunct to probation and parole seems relatively unobjectionable. The only problem cases are those involving patrol surveillance of dangerous offenders -- whether casual and open, or focused and covert. Of course, such surveillance is wholly within constitutional boundaries with respect to the form of the information gathering (that is, it is restricted to physical surveillance of public places). Yet there may be a problem of fairness in the special attention given to some individuals compared to others. A formal process designating someone as a dangerous offender might justify this focus, and could dispel worries about arbitrary police designations. But whether this would be sufficient to make us feel that the system was tolerably just is subject to debate.

Thus, there is scope within both the law and our common notions of justice to introduce some explicit efforts to enhance the investigative focus on dangerous offenders. The major risk is the

encouragement of corrupt, ad hominem motivations which tempt investigations into due process violations. This can best be controlled through the usual devices of establishing explicit procedures which can be reviewed both in general and in particular applications by the court and the public. Even with these procedures, however, risks remain. Whether it is worth it to run the risks depends at least partly on whether the techniques could be effective.

C. The Potential Effectiveness of Selective Enforcement Efforts

Whether selective investigative and patrol efforts could increase the effectiveness of the criminal justice system requires not only an argument that dangerous offenders exist and that it is plausible that we do less well in making cases against them than other offenders, but also an empirical demonstration that the selective tactics succeed in producing prosecutable cases, and that the tactics are not now routinely used in police departments. Fortunately, some experiments in patrol and investigative strategies that resemble those suggested here have been completed, or are sufficiently far along to have produced useful interim data. Table 23 indicates which studies have produced information about which proposed police strategies. While the coverage is neither complete nor precisely linked to the proposed selective strategies, one can draw several important conclusions from the existing literature about the potential of the selective strategies.

First, as a general matter it seems clear that simple case

Table 23

Field Experiments Containing Information About

Selective Patrol and Investigative Strategies

	Strategy 1: Case Preparation Quality	Strategy 2: Case Augmentation for Dangerous Offenders	Strategy 3: Post-Arrest Investigation of Dangerous Offenders	Strategy 4: Patrol Field Intelligence on Dangerous Offenders	Strategy 5: Perpetrator Oriented Patrol	Strategy 6: Pro-Active Suppression of Crime Series	Strategy 7: Police as Adjuncts to Probation and Parole
1) Pate, et.al. Three Approaches to Criminal Apprehension				●	●		
2) Chelimsky, et.al. National Evaluation of Career Criminal Programs	●						
3) Boydstun, et.al. Evaluation of the San Diego Police Department's Career Criminal Program					●	●	
4) Vera Institute, Felony Case Preparation	●						
5) Gay, et.al. Evaluation of the ICAP Program				●	●	●	
6) Eck, et.al. Investigating Crime	●	●	●				

preparation matters a great deal in felony cases involving serious offenses among strangers.[22] Simply doing the traditional investigative job with precision and determination can make important differences in rates of indictment, conviction, and felony-time sentences for important cases. Indeed, an interim evaluation of an experimental effort to improve the quality of felony case preparation in a New York City police precinct produced rather remarkable results on the disposition of robbery arrests:[23]

- The sentences for "felony-time" rose from 18.5 percent of all arrests to 24.6 percent (compared with a decline from 26.4 to 18.7 percent in the control precinct)
- The "conviction rate" for all robbery arrest (including those voided or nol-prossed) rose from 44.7 to 51 percent (compared with a decline from 54 to 46 percent in the control precinct)
- The "indictment rate" for all robbery arrests rose from 33.9 to 48.4 percent (compared with a smaller rise in the control precinct from 39.1 to 42.2 percent).

These results complement previous findings that the "quality" of a case mattered in determining its ultimate disposition by showing that management attention focused on the problem of increasing the quality of cases could in fact improve quality, and that the enhanced charge would be reflected in stronger dispositions. This finding is important for the selective focus of the criminal justice system not only because it suggests that case preparation can lengthen sentences for given offenses, but also because it suggests that case preparation can produce useable information about offending (such as convictions

and indictments) that could be used selectively in the future. In effect, in a system of selective sentencing, there is a first and second round effect of quality case preparation on criminal sentences.

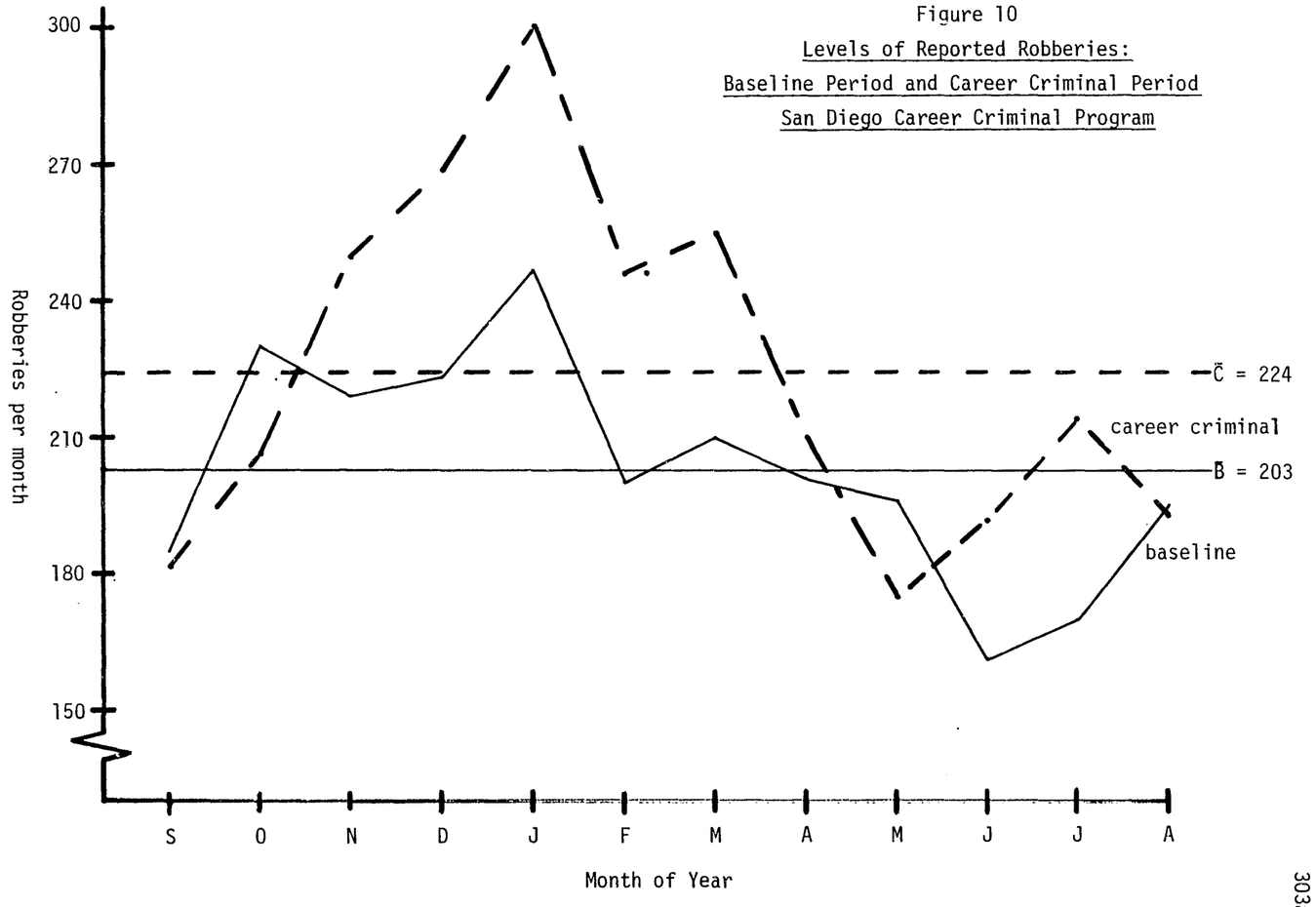
A second important finding is that a special focus on dangerous offenders does seem to increase the probability that dangerous offenders will be arrested, and that crime will be reduced as a result. The most striking evidence of this point is found in an evaluation of the San Diego Police Department's Career Criminal Program.[24] This program was actually a combination of: 1) improved investigation and case preparation; 2) special attention to crimes in which a dangerous offenders was a suspect; and 3) the identification and suppression of "crime series" through proactive investigations. While all of these activities were planned, it seems clear from the evaluation study that only the first and second strategies were in place during the "career criminal" period of the program's evolution.[25] Moreover, during this phase, the program was targeted primarily on robbery and burglary. What is remarkable about the results of this program is that while arrests for robbery actually declined a little in the experimental period, the level of robbery declined also. Figure 10 shows the difference in levels of reported robbery between the baseline period and the experimental period. This is the result one would expect if the robbery arrests were focused on the unusually dangerous offenders. Moreover, the effect was produced with a less than fully operational program designed to identify and

Figure 10

Levels of Reported Robberies:

Baseline Period and Career Criminal Period

San Diego Career Criminal Program



focus on dangerous offenders.[26] In later stages of the experiment, the program shifted to a broader focus on all crimes, and shifted away from the reactive investigative focus and towards a proactive patrol focus, and the results were less impressive.[27] But the performance of this experiment in its "career criminal stage" when it focused on robberies and unusually dangerous offenders suggests potential for a selective investigative focus on dangerous offenders.

Similarly, an evaluation of proactive patrol methods focused on dangerous offenders in Kansas City found that a focus on dangerous offenders could increase arrests and convictions -- at least when compared with less focused strategies.[28] One part of this program involved assembling information on police designated dangerous offenders and distributing this information to patrol officers: some who were assigned to general random patrol; and others assigned to "tactical missions" that focused on specific locations ("Location Oriented Patrol"), or specific people ("Perpetration Oriented Patrol"). Table 24 presents an analysis of the effectiveness of these units in arresting designated offenders, and the degree to which their effectiveness was influenced by the strategy they were following, and the supply of information to them. Review of this table indicates that most of the arrests of designated offenders were made by the tactical units rather than the general patrol units, and that information from crime analysis did not seem to have much impact on the effectiveness of these units. The authors speculate that

Table 24

Target Subjects Arrested by All Units by Amount of Information Available to Unit

		Information Provided to the Tactical Unit		
		No	Yes	Total
Information Provided to Units Other than the Tactical Unit	Yes	Arrested 21 (77.78%) Not Arrested 6 (22.22)	Arrested 19 (73.08%) Not Arrested 7 (26.92)	Arrested 40 (75.47%) Not Arrested 13 (24.53)
	No	Arrested 8 (29.63) Not Arrested 19 (70.37)	Arrested 15 (55.56) Not Arrested 12 (44.44)	Arrested 23 (42.59) Not Arrested 31 (57.41)
	Total	Arrested 29 (53.70) Not Arrested 25 (46.30)	Arrested 34 (64.15) Not Arrested 19 (36.85)	Arrested 63 (58.88) Not Arrested 44 (41.12)

Log Linear Model Analysis of Variance

Source	Chi-Square	Significance Level
Information provided to units other than tactical unit	11.351	$\rho = .0008$
Information provided to tactical unit	.943	$\rho = .3315$
Interaction Effect	2.4437	$\rho = .1180$

Source: Pate and others, Three Approaches to Criminal Apprehension.

information had no effect because these units already knew the dangerous offenders.[29] The table also indicates that information supplied to general patrol units can increase their effectiveness, in arresting designated offenders: the number arrested doubled in the units that had information. Unfortunately, more than half of these arrests were for crimes other than dangerous felonies.[30]

A second part of this study involved a comparative analysis of the "arrest-effectiveness" of the different strategies. Table 25 presents data on the arrests, indictments and convictions for target offenses of robbery and burglary per man-year expended for each of the three enforcement strategies. In addition, to give some idea of who was being arrested and convicted, Table 25 indicates the median number of felony convictions for those arrested for robbery for the different strategies. These data suggest that "perpetrator oriented patrol" is more effective than general patrol in terms of producing arrests and convictions, and more effect than "location oriented patrol" in terms of its focus on unusually dangerous offenders. If the structure of offending is as skewed as it seems to be, this could imply that the "perpetrator oriented patrol" is more effective in controlling target crimes even though it is less effective in producing arrests precisely because it focuses on the unusually dangerous offenders.

It is also important and interesting to note, however, that the fraction of arrests for target crimes that resulted in convictions was higher for general patrol than for location oriented patrol or

Table 25

Arrest Effectiveness of

Alternative Patrol Strategies

	Outputs of Patrol Strategies for robbery and burglary per officer-year expended			median prior felony convictions (robbery arrestees)
	Arrests	Indictments	Convictions	
General preventive patrol strategies	1.04	0.39 (30% of arrests)	0.13 (13% of arrests)	2.34
Location-oriented patrol	12.42	3.77 (30% of arrests)	0.96 (7% of arrests)	3.82
Perpetrator-oriented patrol	6.97	1.90 (27% of arrests)	0.53 (8% of arrests)	5.80

Source: Pate and others, Three Approaches to Criminal Apprehension

perpetrator oriented patrol. This suggests that the arrests made in the tactical patrol were weaker than those made in general patrol -- an unexpected and troubling result.

Taken together, these findings suggest that patrol forces focused on dangerous offenders can increase the ability to arrest and convict police designated dangerous offenders. The price, though, is that the arrests are for less serious charges, and have a weaker evidentiary basis. The implication of these findings is sobering: we do pay a price in terms of fairness and due process for targeting patrol efforts on dangerous offenders. Whether this is offset by reductions in crime remains unclear because of the lack of outcome data in the evaluation of the patrol strategies.

A third important finding is that police departments do not now have, and do not quickly develop the institutional apparatus that would allow them to focus on dangerous offenders. At a minimum this requires an effort to develop, distribute and update a list of dangerous offenders generated by some combination of analyses of arrest records and discussions with experienced police officers. More ambitiously, it would require some analytic capacity (whether computer assisted or not) that would permit the police department to link crimes on the basis of similar M.O.'s, similar descriptions of offenders, close geographic proximity, and so on. This linking would be important to identify an emergent "crime series" that could be intercepted, as well as to support post-arrest investigations designed

to add counts to the charges against a suspect dangerous offender.

While one might expect this rudimentary intelligence to be available routinely in police departments, it is not. Moreover, even when special efforts are made to create such capabilities, they are very slow to develop. In the on-going evaluation of the ICAP program (which has "crime analysis" as a central focus, and the development of a "serious, habitual offender" program as a minor component), William Gay found that few police departments could create the required capacities.[31] With respect to identifying "serious habitual offenders," for example, Gay reports that only 3 of the 4 evaluation cities attempted to develop and distribute such a file.[32] Moreover, in the 3 cities that tried, it took from 24 to 36 months to develop the first version of the file.[33] With respect to crime analysis, Gay also reports discouraging results: arrests that are made are not usually based on crime analysis, but part of the reason is that the crime analysis units are poorly staffed and not linked directly to operating patrol or investigative units.[34]

So, it appears that there is substantial room for improvement in the intelligence operations of police departments with respect to dangerous offenders. Whether such improvements could be made given the existing culture and systems of police departments; and if made, whether they could enhance the focus and crime control capacity of police departments remains uncertain and a suitable subject for experimentation.

D. The Potential of the Area

This is what is known in the areas that interest us. Wholly unexplored are the possibilities of post-arrest investigations leading to multiple - count charges (and therefore the more successful identification of unusually dangerous offenders), and the use of police as adjuncts of the Probation and Parole Departments. On balance, we think that there are opportunities to increase the selectivity of the patrol and investigative efforts, and that it is conceivable that such actions would be both just and effective. In order to guide experimentation in this area we recommend that experimenting administrators and evaluators keep five basic principles in mind.

First, for all experiments with enhanced selectivity it is important to describe the procedures of the program in detail. This is important not only for effective experimentation, but also to allow political and legal oversight and review of the operations.

Second, to the extent that the program relies on the designation of some specific individuals as "dangerous offenders", the procedures for making these designations must be defined in detail, and there must be some procedures for allowing people to know of and challenge these designations (except, of course, when they are the subject of a current investigation). In addition, there must be a procedure for purging the files.

Third, in general, we think that the programs that are reactive and work after a crime has been committed (such as quality case preparation, post-arrest investigation of multiple offenses, and pro-active suppression of a "crime series") contain fewer risks of violations of fairness and due process than those that operate before we have a known criminal act for which a dangerous offender is a plausible subject (field intelligence on dangerous offenders, or perpetrator-oriented patrol). Thus, these strategies should be tried first to see if they can succeed in focusing arrests on dangerous offenders.

Fourth, the programs should be evaluated not only in terms of criminal justice system "outputs" (arrests, indictments, convictions, sentences), but also in terms of the characteristics of those arrested, and the ultimate "outcomes", including observed results of serious crime. This is particularly important for the evaluation of selective arrest strategies because the whole idea of these proposals is that one can make a smaller number of arrests and have a greater impact on crime rates precisely because they are focused on an unusually active group of offenders.

Finally, it will almost certainly be important to re-analyze previously evaluated programs. The San Diego, Kansas City, and ICAP programs provide a wealth of evidence that can be mined to improve our judgments about what sorts of selective patrol and investigative strategies are just, feasible and effective.

Notes

1) There is a general concern that focusing public attention on dangerous offending creates a kind of "double jeopardy": not only will dangerous offenders face enhanced punishments, but also an increased probability of being arrested for crimes. This seems unfair. But it is important to keep in mind that offenders differ from one another significantly, and that there is a reasonable likelihood that the dangerous offenders are now being treated more leniently than their criminal conduct would merit due to the inability of the police to solve the crimes in which they are involved. If this were true, the special focus might increase the "fairness" of the system in the sense that it made criminal liability reflect actual criminal conduct more precisely.

2) What we have referred to as "bias" contains two rather distinct concepts: The likelihood of punishment, and the severity of the penalty if the offender is to be punished. It makes sense to declare the penalty system "unbiased" with respect to individuals and acts if the expected penalty for any given offender committing a particular criminal act (that is, the average penalty the offender would receive for each crime if he committed that crime many times) is directly proportional to the seriousness with which we regard that offense type. Thus the system might be biased for three broad reasons: 1) The expected penalty for that crime (averaged over all offenders) is disproportionately high or low relative to the perceived seriousness of the crime; 2) the expected penalty for that offender (averaged over all crimes he commits) is out of step with the perceived seriousness of that combination of crimes; 3) the expected penalty for that crime, for that offender is too high or low relative to the seriousness of the offense. These three cases correspond to the three types of bias described.

3) For a discussion of the current (largely unenthusiastic) response of the criminal justice system to white-collar crime, see John E. Conklin, "Illegal but not Criminal": Business Crime in America (Englewood Cliffs: Prentice-Hall, 1977) and Herbert Edelhertz, The Nature, Impact and Prosecution of White-Collar Crime (Washington, D.C.: U.S. Government Printing Office, 1970). There is considerable evidence that the public considers white-collar crimes to be considerably more important than criminal justice agencies do. See, for example, Peter H. Rossi, Emily Waite, Christine E. Bose, and Richard E. Berk, "The Seriousness of Crimes: Normative Structure and Individual Differences," American Sociological Review 39 (1974) 224-237.

4) For a view of one position on "white collar crime," see Mark H. Moore, "Notes Towards a Strategy for Dealing with White Collar Crime," in Herbert Edelhertz and Charles Rogovin, eds., A National Strategy for Curtailing White Collar Crime, (Lexington: D.C. Heath and Company, 1980).

5) Peter W. Greenwood, An Analysis of the Apprehension Activities of the New York City Police Department (New York: Rand Corporation, 1970); and Peter W. Greenwood, Jan M. Chaiken and Joan Petersilia The Criminal Investigation Process (Lexington: D.C. Heath, 1977).

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8) Black, Manners and Customs.

9) Floyd Feeney, "Case Processing and Police-Prosecutor Relations" (mimeographed, 1981); Greenwood, Chaiken and Petersilia, The Criminal Investigation Process; and Brian Forst, "Arrest Convictability as a Measure of Police Performance: Executive Summary," mimeographed, (Washington, D.C.: Institute for Law and Social Research, 1981).

10) Feeney, "Case Processing"; and Greenwood, Chaiken and Petersilia, Criminal Investigation.

11) Jerome E. McElroy, and others, Felony Case Preparation: Quality Counts (New York: Vera Institute of Justice, 1981). See also, Feeney, "Case Processing," and Forst, "Arrest Convictability."

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13) For an analysis of enforcement activities against narcotics traffic, see Peter L. Manning, The Narc's Game (Cambridge, M.I.T. Press, 1980) or Mark H. Moore, Buy and Bust (Lexington, Mass: D.C. Heath and Company, 1977).

14) Greenwood, Chaiken, and Petersilia, The Criminal Investigative Process.

15) This is an implication of the pattern of offending observed in the Rand Prison Surveys. See Jan M. Chaiken and Marcia R. Chaiken, Patterns of Criminal Offending, (Santa Monica: Rand Corporation, 1982).

16) This is based on a preliminary report of an anti-robbery program in Birmingham, Alabama, presented at a seminar at Harvard University by Mary Ann Wycoff.

17) This program was described by John Riech, a representative of Robert Morgenthau's Office who participated in two advisory group meetings for our project.

18) Obviously, if just punishment must be related to acts, then frequent acts merit enhanced punishment compared with single acts.

19) This strategy was tried with some modest success. See John E. Boydstun, San Diego Field Investigation: Final Report (Washington, D.C.: Police Foundation, 1975).

20) John E. Eck, "Investigative Strategies for Identifying Dangerous Repeat Offenders," paper prepared for Volume II of this report.

21) We are indebted to George Kelling for this idea. This was also a key part of England's efforts to incapacitate dangerous offenders. See Sir Leon Radzinowicz and Roger Hood, "Incapacitating The Habitual Criminal: The English Experience," Michigan Law Review, 78 (August, 1980), pp. 1305-1389, at 1336-1352.

22) McElroy, Felony Case Preparation.

23) McElroy, Felony Case Preparation, p. 12.

24) John E. Boydstun, and others, Evaluation of the San Diego Police Department's Career Criminal Program (Washington, D.C.: Police Foundation, 1981).

25) Boydstun, San Diego Career Criminal Program.

26) Boydstun, San Diego Career Criminal Program.

27) Boydstun, San Diego Career Criminal Program.

28) Pate, Bowers and Parks, Three Approaches to Criminal Apprehension.

29) Pate, Bowers and Parks, Three Approaches, p. 24.

30) Pate, Bowers and Parks, Three Approaches, p. 33.

31) William Gay, "The Police Role in Serious Habitual Offenders Incapacitation," paper prepared for Volume II of this report, pp. 12-13.

32) Gay, "The Police Role," p. 12.

33) Gay, "The Police Role," p. 12.

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Chapter 8

CRIMINAL JUSTICE RECORDS

A policy of "focused supervision" or "selective incapacitation" depends crucially on our ability to distinguish unusually dangerous offenders from less serious offenders. As a practical matter, this capacity, in turn, depends on the quality of records maintained by, or available to, the criminal justice system. In assessing the future potential of selective incapacitation policies, then, it is important to establish specifications for a record keeping system, and to evaluate current record keeping capacities against these standards.

A. Specifications for a Record Keeping System

A record keeping system designed to support a policy of "selective incapacitation" must meet standards of justice to the individual and usefulness to the criminal justice system as it seeks to sharpen its focus on dangerous offenders. Again, it often seems as though some tension exists between these broad purposes, but the fact of the matter is that both place a heavy emphasis on the accuracy and comprehensiveness of the records. The tension arises only when the accuracy and comprehensiveness falls short of some desirable level, and the question then arises as to whether the less-than-desirable-but-available records could be used to support "selective" decisions. Up to that point, the interests in individual justice and an effectively focused criminal justice system are the

same. Moreover, some features of the record keeping system matter a great deal to one of these interests and have little impact on the other. For example, the interest in individual justice may counsel strict limitations over access to the records, which would have little impact on the value of the records to the criminal justice agencies. Alternatively, the interest in the utility of the records for criminal justice system decisionmaking may put pressure on the timeliness with which the records can be produced, but this need not affect the individual's interests in privacy or fairness. For our purposes here, it is useful to establish standards for a records keeping system, in four different areas: accuracy; completeness; timeliness; and security. Interest in these operating characteristics of the system derive from the broader interests in individual justice and an effective criminal justice system.

1. ACCURACY IN IMPUTING OFFENSES TO INDIVIDUAL OFFENDERS

By far the most important characteristic of the record-keeping system is its accuracy. Ideally, we would like the individual records in the criminal justice system to include a complete account of the criminal activity of the individual. Obviously, some error is introduced into the system by the failure of the police to solve most crimes, and perhaps by the police wrongly imputing crimes to an offender. The best we can hope for, then, is a relatively accurate characterization of the criminal justice system's beliefs and actions with respect to individual offenders and specific offenses. But even

this limited kind of accuracy is difficult to achieve. Three difficulties are apparent to anyone who has worked with criminal justice records.

The first is the problem of accurately identifying defendants. This is crucially important because the whole idea of a selective focus depends on the idea of imputing a series of criminal activities to a specific individual. This implies that criminal justice files must be offender-based as well as offense-based, and that we have an unambigous way of knowing that a specific suspect, defendant, or convicted person now standing before the criminal justice sytem is the same person who has committed certain previous offenses. One might think this problem of identification and linking a current subject to past acts known to the criminal justice system is trivial, but in fact it is quite difficult.[1] The only completely accurate method is the use of fingerprints. As we will see, however, fingerprint identification is less widely used (and much slower) than people imagine.[2] The other identifiers (name, date of birth, mother's maiden name, and so on) are much less reliable, but more commonly used -- particularly at the front end of the system where investigative, prosecutorial and bail decisions are made. Thus, a crucial part of "accuracy" is the unambiguous identification of criminal justice subjects so that criminal justice actions with respect to individuals may be properly entered into offender-based files. Without this kind of accuracy, a selective focus in the

criminal justice system becomes not only unjust, but ineffective.

A second difficulty in maintaining the accuracy of criminal justice actions with regard to specific offenders is the inclusion of disposition information for specific charges against offenders. There is fairly widespread agreement that arrests of subjects are reliably entered into some record keeping system: some local, some state, and some national. In fact, it seems fairly clear that the majority of arrests for felonies and serious misdemeanors are reflected in national records.[3] But it also seems clear that data on charges, convictions (by trial or plea), and sentences are much less comprehensively reported.[4] What this means is that available records lack information concerning the strength of the evidence linking a given offender to a crime. We know that there was enough evidence to support an arrest, but not whether it was "beyond a reasonable doubt" that a given offender committed a specific offense. Lacking disposition data, then, we cannot be confident in imputing an offense to a specific subject.

A third problem related to the accuracy of the records concerns the confusing relationship between the legal categories that define offenses, and the actual event that occured in the world. When we use words like "robbery" or "assault", images come quickly to mind. These images do not typically include a divorced husband returning to his apartment and seizing a T.V. he claims as his own while verbally threatening his former wife, or a barroom scuffle in which one person

spits at another. Yet, the incidents described above could be defined as robberies and assaults, and often are.[5] In effect, the legal categories defining offenses do not always correspond closely to our intuitive sense of serious offenses that reveal a dangerous person at work. We want to know more about the circumstances and outcomes of a criminal offense that the legal charges necessarily imply. To an extent, differences in the "degrees" of offenses charged, and differences in the disposition of offenses will signal something about the nature of the offense being considered (and this constitutes another important reason to improve the reporting of information on dispositions), but a troubling gap remains between the actual criminal event and the legal charge. With this gap, our capacity to discern dangerous offenders from existing criminal records is weakened.

Given these difficulties in creating accurate criminal justice records, given the importance that will be attached to them in a system of "selective incapacitation", and given a strong interest in individual justice, it may be important that individuals who have records qualifying them as "dangerous offenders" be given the right to examine the records and correct inaccuracies and misrepresentations. To make this right effective, it is important that unambiguous criteria be established for designating someone a dangerous offender, that the person be notified when they have been so designated, and an opportunity be created for them to contest the factual basis of the designation. As a practical matter, this could occur after conviction

on the offense that caused the person to cross the line into the dangerous offender category, and could be a normal part of the sentencing process for that crime. The offender could also be warned at that time about the consequences of this designation: that he would be subject to increased police interest, that crimes against him would be pressed with unusual vigor, that bail decisions might be affected, and so on. Since a system that allowed offenders to challenge the record is in the interest of improving the accuracy of record keeping system, it is desirable not only that criminal justice records strain for accuracy in the identification of offenders, in the disposition of arrests, and in the characterization of offenses, but also that they include a procedure for offenders to challenge the accuracy of the records.

2. THE COMPLETENESS OF THE RECORDS

It is in the interest of both fairness among individuals and effectiveness of the criminal justice system not only to have accurate information about offenses imputed to individuals, but also to have complete information about offenses. Fairness is implicated because unevenness in the recording of offenses among individuals will produce an injustice in a world where the accumulated record of offending has an effect on criminal justice system processing: similarly situated people will be treated differently. Effectiveness is threatened because the best indicator of "dangerousness" (both in the past and in the future) is probably the record of accumulated serious offenses.

There are drawbacks to comprehensive record keeping, however. One may argue that keeping complete records helps to strip away the anonymity with which individuals are regarded by governmental agencies.[6] In the past, police procedures for identifying habitual offenders to receive added attention have been informal and discretionary -- potentially subjecting individuals to needless invasions by prejudiced authorities. The impact of these invasions of individual privacy has been mitigated by the fact that records have typically been sloppy, incomplete, and little-used. Any offender whose "rap-sheet" was so long that he was recognized as an habitual offender by the police had probably committed many more crimes than those reflected in readily available records. By keeping complete records, the margin of safety would be cut down considerably. As important, complete records are more likely to be used, inviting discriminatory actions by law enforcers.[7]

We consider this to be a powerful objeciton to a policy that changes procedures for keeping records but not procedures for using them. Phrasing the problem in this way, of course, suggests the solution: add and enforce safeguards to the procedures for using criminal justice records. In particular, strict procedures for identifying habitual offenders should be established, leaving relatively little discretion to individual criminal justice agents. Additionally, offenders identified as habitual should be notified, and given the opportunity to dispute the accuracy of the identification.

Although it is vital that individual rights to privacy be respected, an extension of due process rights strikes us as both more reasonable and more effective than continuing to rely on the inadequacies of present record keeping systems.

Two main obstacles to "completeness" in criminal justice records now exist. The first concerns the problem of crimes committed outside a given jurisdiction (city, county, or state). The second concerns the question of juvenile records. Different issues attach to these different obstacles, and each invites discussion.

a. Records from Other Jurisdictions

The question of whether serious offenses committed outside a given jurisdiction should be included in a record keeping system seems relatively straightforward to us: we think they should be included. If our task is to identify the most dangerous offenders, and our method is to examine criminal histories, then failing to include all offenses committed by any given offender will reduce the effectiveness of selective policies. And there is evidence that the reduction would be substantial: it has been estimated that more than one-third of all offenders commit crimes in more than one state; it is very likely that the vast majority of offenders commit crimes in more than one city or county.[8]

An incomplete records system is not just ineffective; it is also unfair. Fragmentary records cause us to deal more harshly with offenders who commit all their offense in one jurisdiction, and

relatively more leniently with the individuals who spread their offenses among several jurisdictions. If anything, mobile offenders who commit serious crimes in several cities and states may be more deserving of a selective focus than their stable counterparts, for it seems more likely that their offenses may be attributed to evil motivations, and less likely that they have fallen in with bad companions or have been lured by promising opportunities in their neighborhoods.[9] Although it may not be just (or particularly effective) to subject mobile offenders to longer sentences or additional attention from police and prosecutors,[10] we can be certain that the present incomplete system is being unjust when it does exactly the opposite.

The problem of ensuring individual privacy is particularly acute here, however, since the only fully comprehensive, interjurisdictional records must be maintained by the Federal government. Our political traditions encourage us to think that the power of the government and its indifference to individuals grows as one moves information from local, to state, to Federal levels. Thus the creation of national records poses threats to individuals that local records do not.[11]

b.

On the other hand, not that, even if national level records existed, most criminal justice operations would still be undertaken by state and local agencies. In effect, the information would be used primarily by the local agencies that had the context necessary to use the information with sensitivity to individual rights, even if the

information was accumulated at the Federal level.

Moreover, because our interests is in identifying dangerous offenders, we can agree to exclude from a national system the vast majority of offenses for which people are arrested. We are interested only in violent crimes, offenses that carry a substantial risk of violence, and property offenses that indicate the frequency and persistence of dangerous criminal activity. Finally, because relatively few people are arrested even once for these offenses, let alone several times in the space of a few years, the system will include relatively few people. In fact, if the criteria wer narrowly defined, it is possible that there would be a reduction in the volume of national records now held.

On balance, while we agree that there is greater potential for misuse of national records than of strictly local records, we think that potential is outweighted by the interest in fairly and accurately identifying dangerous offenders.[12]

b. Juvenile Records

The issues concerning juvenile records are slightly different. To a degree, one can make arguments about the importance of including offenses committed while young that are similar to those about offenses committed in other jurisdictions. (For example, it is not fair to those who did not offend while youths to ignore the offenses of those who did; the accuracy in identifying dnagerous offenders will be identified with increased accuracy; and so on.) But the discussion

of the use of juvenile records is overshadowed by two larger issues which conflict with one another and make the question of juvenile records more important and more difficult than the issue of national criminal justice records. On one hand, one can argue that juvenile records are irrelevant to considerations of "dangerousness" because the things that people do as juveniles are not indicative of their character and intentions. Even worse, by treating the bad actions of juveniles as indicative of character, we may unwittingly guarantee this result by influencing the juvenile's perception of himself and restricting opportunities in ways that make bad conduct seem attractive relative to other careers.[13] It is these considerations that stimulated the development of a separate juvenile justice system, and strong policies guaranteeing the privacy of juvenile records. Since juveniles could not be considered fully responsible for their acts, and since there was a strong utilitarian interest in avoiding "labels" that would handicap their social development, it was in the interests of both justice and effective crime control to "seal" juvenile records.

On the other hand, studies of criminal careers indicate that those who become dangerous offenders start their careers relatively early.[14] They reveal themselves not only by committing minor crimes at very high rates, but also by committing fairly serious crimes even while juveniles. Perhaps even more significantly, it seems fairly clear that the peak level of activity for dangerous offenders is the

late teens and early twenties. Taken together, these observations suggest that important information relevant to the identification of unusally dangerous offenders in the adult criminal justice system is being lost by preventing the use of juvenile records of serious offending in the adult system. Because the adult criminal justice system is ignorant of serious offenses committed by an offender while a juvenile, it fails to identify the unusually dangerous offenders among the young offenders who come before it. Even worse, by the time it does identify the offenders as dangerous, the offenders are already beginning to decrease the level of criminal activity. From this perspective, then, it seems obviously desirable for the adult criminal justice system to have access to juvenile records.[15]

While these two positions seem completely antithetical, there is a principle that stakes out a compromise position. The principle is that if a person is arrested for a dangerous offense shortly after he has reached the age at which he is handled in the adult criminal justice system, then the adult criminal justice system should be allowed to review the record of serious offenses committed while a juvenile in determining whether he should be treated as a "dangerous offender."[16] Note that this position is far short of routine access to juvenile records by the adult criminal justice system. Access to juvenile records is triggered only by an arrest for a dangerous offense shortly after reaching "adult" age. Moreover, it extends only to the record of serious offenses committed while a juvenile. The

principle that justifies this limited intrustion into juvenile records is that it is in the interests of justice and an effective criminal justice system to focus on unusually dangerous offenders, and that serious offenses committed while a juvenile are relevant to determining whether a person should be considered unusually dangerous. Moreover, the interests that originally barred access to juvenile records have not been violated by that limited intrusion. If the juvenile offender has committed several serious offenses, some of the presumed innocence of "youthful indiscretions" has disappeared, and with it, our desire to protect the youth from guilt and punishment. Similarly, if the person commits serious offenses as an adult, then the utilitarian interest in sealing the juvenile records (that the person would be encouraged to "go straight" by the absence of a crippling label) has already been lost: the juvenile continued to commit offenses. So, this compromise position strikes a proper balance between the principles and interests that originally motivated closing the juvenile records, and those that now motivate an interest in access to them to aid in the identification of dangerous offenders.

3. THE TIMELINESS OF THE SYSTEM

It is not enough that criminal justice records be accurate and comprehensive with respect to past serious offenses; it is also important that the records be available to criminal justice officials at the time they must make decisions about how to handle specific offenses and offenders. Timeliness is rarely a problem at the last

stage of the criminal justice system -- the sentencing stage. Sentencing typically occurs so long after arrests are made that there is plenty of time to complete a careful identification process, and conduct a relatively broad search of local, state, and national criminal justice records. The fact that enough time is available does not necessarily mean it is commonly used for this purpose, of course. Judges often have "rap sheets" at the time they give sentences, but the "rap sheets" often lack disposition data for prior offenses. The "rap sheets" may also be local or state, rather than national. And while the judge may have some informal information about juvenile offenses, this information is neither systematically gathered, nor documented. So the problems at the sentencing stage are linked to the structural problems of criminal justice records rather than their ready availability.

There is also little pressure for timeliness at the very front end of the system -- at the police patrol stage. As noted in the chapter on policing, it is possible to imagine focusing patrol attention on dangerous offenders by investing in an analytic process that identified unusually dangerous offenders, and then circulating that information to patrol units. There is no real time pressure associated with completing this process. It can be done at any time. Perhaps it is for this reason that it is rarely done, or done very slowly and sporadically even when resources and adminstrative pressure are directed toward this goal.

The place where there is a great deal of pressure on the timeliness of criminal justice record availability is in the middle of the system where much of the consequential action now occurs. In the first 24 to 36 hours following an arrest, a great many important decisions must be made. The police must decide how much investigative effort to devote to the case, how comprehensive they must be about locating witnesses, how careful in preparing the paper that provide the basis for the court case, and so on. The prosecutor must decide what charge to make, and what bail to ask for. And the judge must decide whether there is probable cause for the arrest, and how much bail to set. Obviously, these decisions are important for the future of the case and the offender in the criminal justice system. If the system is going to become selective, then, it must know in these few critical hours whether it is dealing with an unusually dangerous offender. And this puts pressure on the ready availability of criminal justice records.

In the best situation, local or state systems operating with on-line computer capabilities can produce a relatively complete record in a matter of an hour or two once they have a positive identification. The crucial rate-determining step in these systems is the difficulty of getting a positive identification. At this stage of criminal justice processing, a positive identification often requires a fingerprint. The transmission and analysis of fingerprints is inherently a lengthy process -- a matter of several hours even in the

most sophisticated states.[17] This means that local information is usually "in time" for charging and bail decisions, but it is usually not in time for stepping up the level of investigative effort on a case since many opportunities to elaborate the investigation will be lost in the few hours following an incident followed by an arrest. For some cases this is not a problem, of course. Cases that are built on prior investigative efforts often have developed information on the suspects well before an arrest is made. But for the many arrests that occur at the scene of the offense, or very shortly thereafter, the ready availability of records may have an important effect on the level of the investigative effort and the quality of the resulting case.

In the more common systems, the situation is worse. It may take several hours to get incomplete, local information. Statewide information may take a day or two. It is also worth noting that all requests for national information based on fingerprint identification from the FBI must be submitted by mail and returned by mail: this implies a turnaround time of 30 days at least -- well past the time that this information could be used in charging and bail decision.[18]

In sum, then, a slow records system affects investigative, charging and bail decisions, except when the police have already gathered information about the defendant as part of their investigation. Since many important decisions are made at these stages, and since many arrests are made at the crime scene without the

police knowing anything about the offender, the requirements for timeliness are stringent ones. The best that can now be done is to get local information several hours after an arrest, and national data thirty days later. The average performance is worse than this.

4. AVAILABILITY OF RECORDS OUTSIDE THE CRIMINAL JUSTICE SYSTEM

A fourth area of concern in the design of record keeping systems to support a policy of selective incapacitation involves controls over the accessibility of the records to people outside the criminal justice system such as licensing boards, potential employers, lenders, and so on.[19] We are not particularly expert in this area, but it seems to us that much of the concern about "labeling" people that prevents a focus on unusually dangerous offenders in the criminal justice system arises because criminal justice records circulate a little too freely in the world outside the criminal justice system. Thus, we would propose rather tight restrictions on the circulation of criminal justice records outside the system. In effect, we think that individuals caught up in the criminal justice system should not be protected with respect to prior criminal activity by the sloppiness of record keeping procedures, but we also think that this information should not be easily available outside the criminal justice system. This may allow us to gain some benefits in identifying unusually dangerous offenders without paying too great a price for "labeling" offenders in the broader social and economic world.

B. Major Shortcomings of the Current System

Measured against these performance requirements, the current record keeping system seems to suffer from three major weaknesses. While not all states have the same degree of difficulty, the identified weaknesses seem to be characteristic of most state systems.

1. ACCURATE JUVENILE RECORDS ARE NOT AVAILABLE

The greatest weakness of the current record keeping system (in terms of its capacity to support a policy of selective incapacitation) is the difficulty of obtaining access to juvenile records of serious offending. We suspect this is a great weakness for two reasons. First, we strongly suspect that our capacity to identify high rate serious offenders depends crucially on having information from juvenile records. Table 26 shows how different the population appearing before adult felony courts looks when juvenile records are included in the information available to the courts: when juvenile records are excluded, only 16 percent of the population looks like chronic offenders; when juvenile records records are included, the fraction identified as chronic offenders doubles -- reaching 33 percent.[20] Second, the restrictions on access to juvenile records are established as a matter of formal policy rooted in statutes or administrative regulations. For reasons indicated above, we think these policies restricting access to juvenile records should be loosened to allow access to information about serious offending by juveniles who are arrested for a serious offense within a year after "graduating" from the juvenile system.

Table 26

Effect of Juvenile Records on Criminal Histories of Young Defendants

Young Chronics (5+ arrests) in Trial Court

	Age				
Adult Record	16	17	18	19	Total
Percent chronic	0	10	20	25	16
Adult and Juvenile Record	19	28	37	40	33
Percent chronic					
Number of defendants	31	49	49	67	196

Source: Boland, "Identifying Serious Offenders."

While we think changes in current policies governing access to juvenile records could have important long run effects on the capacity of the system to focus on dangerous offenders, there are two reasons to be a little skeptical about how great the value of such a change would be. One possibility that gives us pause is that juvenile records may already be available to the adult criminal justice system. This is almost certainly true in police agencies when the information exists within the same organization. But it may also be true for prosecutors and courts. To the extent this information is already available, a formal change in policy will have little practical effect.

A second concern is that the juvenile records are in such bad shape that access to them will mean very little. The informality of juvenile court processes have prevented formal findings of guilt for specific offenses and discouraged the creation of papers and files, and may mean that it is impossible to assemble an accurate record of serious offending as a juvenile, or so expensive and time consuming as to be practically impossible.[21] So, while we think that efforts should be made to shore up the record keeping system by allowing access to juvenile records and putting pressure on the juvenile system to keep better records, the immediate effects of such actions may be smaller than our analysis of the importance of this information indicates.

2. DISPOSITION RECORDS ARE INCOMPLETE

The second most significant weakness in the current record keeping system is the erratic coverage of data on the disposition of arrests. This is crucially important in supporting a policy of selective incapacitation because we are uneasy about basing the policy on either arrests (since they give too inadequate a characterization of the seriousness of the offense and the weight of the evidence against a suspect), or on limited data on convictions (since this information is both weak and unfair in identifying dangerous offenders.) It would be much better if our record systems included data as to arrest, charge, bail set, disposition sentences, and actual time served as well as simply the arrest. The reason, of course, is that such information helps us weigh both the seriousness of the offense and the strength of the evidence against the offender, and this, in turn, helps us gauge the dangerousness of the offender more precisely.

To obtain improved reporting of disposition data is hardly trivial, however. It depends on developing some central record keeping capacity that spans the organizational and jurisdictional boundaries of local police, county prosecutors, and state courts; and giving that agency enough power and resources to strengthen the capacity of these agencies (particularly prosecutors and courts) to feed information to them. We realize that much effort has already gone into such efforts, but we offer an additional reason for maintaining or increasing the pressure in this area: a policy of

selective incapacitation cannot operate decently and effectively without such information.

3. ACCESS TO NATIONAL RECORDS IS LIMITED

The third most important weakness of current record keeping systems is the limited access to national records. The national system is now wisely limited to reports of felonies and serious misdemeanors,[22] but selective incapacitation policies could be effective even with tighter restrictions on the kinds of offenses reported to the national level. One problem with the national system is that some jurisdictions report no information, while others report incomplete information. More importantly, the Federal government responds slowly to local inquiries.

One possible improvement that could be made in this area is to revive the FBI's computerized "career criminal file". This provides criminal records on-line for a limited number of offenders who have serious criminal histories. The file now includes 1.9 million records (this is probably too many), and the system once included 15 participating states.[23] Controversy about the appropriateness of the system has cut participation to eight states currently.[24] In light of the fact that about one third of the known offenders commit crimes in more than one state, we think it is important to improve the accessibility of national level records for a group of offenders who commit serious offenses often. A useful vechicle for accomplishing this purpose is to revive a tolerably limited form of the FBI's career

criminal file and encourage a much broader participation of states.

C. Recommendations for Improvement and Research

A policy of selective incapacitation would place great operational demands on criminal record keeping systems. Moreover, the success of these policies depends crucially on the accuracy and completeness of the records, and the speed with which they may be retrieved. A fully computerized Federal system linking local, state, and national records systems is the only way we know to ensure that accurate, complete, and fast records are available to all levels of the criminal justice system. We urge the Federal government to act immeditely toward procuring such a national records system.

Exactly what the system should look like, it is difficult to say. In sizing up the weaknesses of existing record keeping systems, we are mostly operating on the basis on ancedotal evidence. Although we have confidence in the anecdotes, a more systematic investigation of record keeping capacities is necessary. The Federal government should undertake the following projects in order to gather the information needed to procure an improved, national system of criminal justice records.

Survey in detail existing record keeping systems and operating capacities. This could be based in part on a broadly distributed questionnaire, but it should also include both actual operating tests of systems used in various cities and states (how long it takes to produce a criminal record of some degree of accuracy and completeness,

for example), and observations of how officials acquire and use information about criminal histories at different stages of criminal justice processing.

Study juvenile record keeping systems, the legal basis for the restrictions governing access, and the amount of informal sharing of information that occurs.

Based on the analysis of existing record keeping systems and procedures, develop a detailed specification of improvements necessary to support a decent and effective policy of selective incapacitation. This should involve not only the identification of weaknesses in the accuracy, completeness, and timeliness of records, but also controls over the circulation of these records, and the development of procedures that allow records to be challenged by the subjects.

Study the available technology. Some states have developed capacities that could now be transferred conveniently to others.

Finally, determine how much it would cost and how long it would take to procure improved criminal justice record keeping capacities throughout the U.S. If the cost is fairly low, this might then be proposed as a limited financial contribution the Federal government could make to states.

In our view, if clear specifications could be established for criminal justice records, and a market guaranteed for computerized systems that fit these specifications, then we could dramatically increase the quality of criminal justice records in a relatively short

time -- within six to ten years. This is a project worth taking seriously, and crucial to the future of selective incapacitation policies.

Notes

1) For a historical account of the development of methods for identifying criminal offenders, see Leon Radzinowicz and Roger Hood, "Incapacitating the Habitual Offender: The English Experience," Michigan Law Review, 78 (August, 1980), 1305-1389.

2) Statement by David Nemecek, Chief of the Criminal Identification Division, Federal Bureau of Investigation, at our conference on February 22, 1982.

3) Nemecek statement.

4) This is based on research experience that involves looking at "rap sheets" which rarely included information on disposition. It was also supported by the testimony of David Nemecek at our conference.

5) For suprising accounts of the actual events underlying felony charges, see Vera Institute, Felony Arrests: Their Prosecution and Disposition in New York City's Courts (New York: Vera Institute, 1977).

6) We are indebted to Professor Philip B. Heymann for focusing our attention on the crucial role that an expectation of anonymity -- that the system would be blind with respect to the previous conduct of individuals -- plays in protecting individual privacy and preventing abuses of official power.

7) See National Advisory Commission on Criminal Justice Standards and Goals, Criminal Justice System (Washington, D.C.: Law Enforcement Assistance Administration, 1973), pp. 114-117 for a discussion of the possible ill effects on individual privacy of moving to computerized record keeping systems.

8) Nemecek statement.

9) The literature on youth delinquent activities, in particular, emphasizes the role of socialization and learning, and shows how difficult it may be to distinguish between opportunity and motivation when the offender's behavior is linked closely with that of friends and neighbors. See, for example, Richard A. Cloward and Lloyd Ohlin, Delinquency and Opportunity (Glencoe, IL: Free Press, 1960), David Matza, Delinquency and Drift (New York: John Wiley and Sons, 1964), and Albert K. Cohen, Delinquent Boys: The Culture of the Gang (New York: Free Press, 1955).

10) This may interfere with the right to travel and migrate. See Shapiro v. Thompson, 394 U.S. 618, for example.

11) There has been an extensive, on-going national debate about the appropriateness of developing national criminal justice records. The specter of "Big Brother" hangs heavily over this debate. For a view emphasizing the need for safeguards to prevent impropriety, irrelevance, and secrecy, see the discussion of computerized medical recordkeeping in Alan F. Westin, Computers, Health Records, and Citizen Rights, National Bureau of Standards Monograph 157 (Washington, D.C.: U.S. Dept. of Commerce, December 1976). The National Advisory Commission on Criminal Justice Standards and Goals recommended similar safeguards in Criminal Justice System (Washington, D.C.: Law Enforcement Assistance Administration 1973), pp. 119-138.

12) This recommendation is broadly consistent with the recommendations of the Attorney General's Task Force on Violent Crime, and with the current inclinations of the F.B.I. See Attorney General's Task Force on Violent Crime, Final Report (Washington, D.C.: U.S. Dept. of Justice, 1981), pp. 11-12; p. 18; p. 23.

13) For a compelling theoretical and empirical development of this idea, see Cloward and Ohlin, Delinquency and Opportunity.

14) Jan M. Chaiken and Marcia R. Chaiken, Varieties of Criminal Behavior (Santa Monica: Rand, 1982) and the other Rand inmate studies are only the most recent supporting the notion that habitual offenders start their careers earlier. See, for example, Sheldon Glueck and Eleanor Glueck, Unraveling Juvenile Delinquency (New York: Commonwealth Fund, 1950).

15) Barbara Boland and James Q. Wilson, "Age, Crime and Punishment," Public Interest, 51 (Spring, 1978) 22-35.

16) Lloyd E. Ohlin, "Limited Access to Juvenile Records for Adult Felony Prosecution and Sentencing," prepared for our conference and published in Volume II of this report.

17) Nemecek reported that only 17 states have centralized record systems, and only some of these are automated. In New York City, it takes a minimum of 3 to 5 hours to obtain a record from the central file despite the existence of a fairly sophisticated automated system.

18) Nemecek statement.

19) For an account of the effect "labeling" by criminal justice authorities may have an offenders' access to legitimate opportunities, see Don C. Gibbons, Society, Crime and Criminal Careers (Englewood Cliffs: Prentice-Hall, 1977), pp. 49-77.

20) Barbara Boland, "Identifying Serious Offenders," paper prepared for Volume II of this report.

21) Jan and Marcia Chaiken suggest that records in the juvenile system as they currently exist are probably inadequate for identifying dangerous offenders. See Jan and Marcia Chaiken, Varieties of Criminal Behavior, p. III-2

22) Nemecek statement.

23) Nemecek statement.

24) Nemecek statement.

PART III

CONCLUSIONS AND RECOMMENDATIONS

Chapter 9

A PROPOSED RESEARCH AGENDA

The main conclusion we have reached is that programs which could sharpen the focus of criminal justice system operations on those who commit serious crimes often have potential for improving both the justice and the effectiveness of the criminal justice system. The potential is great enough for us to observe the current evolution of the system in this direction with modest enthusiasm.

At the same time, however, we note that important uncertainties remain about the real potential of a sharpened focus on dangerous offenders. Indeed, there are risks not only of failure (for example, crime may not decrease dramatically because high rate offenders account for smaller proportions of overall crime than we now guess to be true, or because the offenders are "replaced" by others, or because our discriminating tests perform too unreliably) but also of disaster (for example, crime may increase as a result of implicitly licensing less serious offending, or the criminal justice system may become vicious and unfair with respect to individual offenders as a result of a change in philosophy and ideology). Because these uncertainties exist, research is important and useful. But research is also expensive and time consuming. Because budgets and patience are limited, then, we must develop an agenda of research in which projects are ranked in priority.

A. Alternative Approaches

Broadly speaking, three different approaches can be used to construct a research agenda that informs public policy debates. The first approach, which might be considered the "classic approach," is to focus research efforts on the nature of the social problem being addressed, and to use the research to enhance our understanding of the causal relationships operating to shape that problem. For example, we might look more closely at the relationship between actual levels of violent crime among citizens and levels of fear, and we might try to satisfy outselves once and for all about the role that opportunity (as distinct from offender motivation) plays in producing criminal offenses. The basic assumption of this approach is that we cannot intelligently design policies until we are well informed about the nature of the problem we are trying to address; and conversely, that once we know a lot about the relevant causal relationships shaping the problem, it will be easy to imagine and propose attractive policies. Because this approach takes a broad, open-ended view of the problem of crime, and implicitly argues that nothing can intelligently be chosen until we understand what causes crime, it leaves the greatest room for basic social science research on the nature of crime.

A second approach, what might be called the "policy analysis approach," is different. Instead of focusing on the nature of the problem to be solved without reference to specific policies and programs that are being considered, it begins with a primary interest

in one (or several) programs designed to deal with a given problem, and asks whether a given program is likely to be successful. In principle, of course, this judgement depends on more or less explicit hypotheses about the "causes" of crime (since the policy can only produce effects on the crime problem by altering some of the causes of crime). Indeed, it is precisely this point that has led the "classic approach" to be dominant within the crime research community. But one can still discern an important difference in emphasis between the "classic approach" and the "policy analysis approach." In spirit, the "policy analysis approach" is at once both less and more than the "classic approach".

It is <u>less</u> than the classic approach in that it tolerates a sketchier and more uncertain image of the causal systems operating to shape a particular problem. A policy analyst is content if he can establish the <u>plausibility</u> that a target variable (such as, dangerous offenders) plays a significant causal role in determining the magnitude of a given problem (such as, violent crime). He doesn't demand certainty about the causal role. Nor does he demand that the variable that interests him is the "most important" variable. In short, much of what is "causing" the problem can be left in the background.

It is <u>more</u> than the "classic approach" because it includes an idea about governmental action designed to deal with a given problem (that is, a "policy") as well as a characterization of the problem.

The imagined policy is what focuses inquiries into the nature of the problem. But the imagined policy can also become an object of study in its own right. We can ask, for example, to what extent existing institutions are already behaving consistently with the imagined policy, and whether it would be hard or easy to implement the proposed innovation. Thus, the inclusion of an imagined policy in our conception of the research problem to be resolved focuses attention on the operations of the governmental institutions designed to deal with the problems as well as on the nature of the problem itself.[1] In contrast to the classic approach, the policy analysis approach is designed to tell us less about the problem and more about a possible (but not definitively known) solution.

A third approach to developing a research agenda designed to be useful to policy makers could be thought of as the "adaptive" or "evolutionary" approach. In this conception, systematically gathered knowledge research -- is seen as only one factor contributing to the development of a policy.[2] This approach recognizes that we always have a policy (in the sense that we always have institutions operating in ways that affect the shape of a given problem, and always have some more or less broadly shared understanding of how those institutions are supposed to work), and that our policy is always in a state of flux. Given this situation, a research agenda should be designed to accomplish two different purposes: first, to plan research projects that can shape the evolution of the policy; building momentum for the

policy if results are favorable and slowing it down if results are unfavorable, focusing attention on one aspect of the policy and leading it away from others; second, to make sure that accumulating experience with current policy initiatives can be documented and used to influence future policies. In effect, we treat current policies as experiments which can yield future insights. The "evolutionary approach", then, is like the "policy analysis approach" in that it focuses on "policies" as well as "problems". It differs from "policy analysis" in that it rejects the idea that policies are decided once and for all, and instead recognizes and consciously exploits the fact that policies are dynamic and adaptive.

B. A Proposed Approach for Research on "Dangerous Offenders" and "Selective Incapacitation"

In designing an agenda for research on "dangerous offenders" and "selective incapacitation", and a generally sharpened criminal justice focus a dangerous offenders, we think that we should draw from each approach, but emphasize the "evolutionary approach" over the others. This conclusion is not a general conclusion, but is based on two judgments about this particular subject: first, a judgment about which uncertainties concerning "dangerous offenders" and "selective incapacitation" are both significant and resolvable; and second, a judgment about how fast and how far the world will move towards a policy of "selective incapacitation" in the next few years even if we do nothing in the research domain.

As we reviewed the observations and evidence surrounding the role of unusually dangerous offenders in the crime problem and the various policies designed to deal with dangerous offenders, it seemed to us that the most significant uncertainties lay in the feasibility of an enhanced focus on dangerous offenders rather than in the role of dangerous offenders in the crime problem. This is <u>not</u> to say that there are not important uncertainties concerning the role of dangerous offenders in shaping the crime problem that could be resolved by more research. We note, for example, lingering doubts about the relative importance of fear compared with actual victimization in defining the crime problem, and uncertainty about the role of real violence among strangers in generating fear. We also note continuing uncertainty about the degree to which serious offenses are produced by a small number of offenders, and exactly how frequently the high rate offenders commit what sorts of crimes. And, finally, we note doubts about the extent to which incapacitation of dangerous offenders will actually reduce crime rates -- noting the possibility that other offenders may take the places of those incapacitated, or that the dangerous offenders will "store up" crimes while in prison rather than reduce the time available for committing offenses. All of these ideas are plausible. And since they are plausible, they reduce the anticipated benefits of a policy designed to incapacitate dangerous offenders. Nonetheless, when we think about <u>how</u> likely it is that a policy of focusing on dangerous offenders would eventually fail for

one of these reasons, the likelihood seems not particularly large, and much less likely than that the policy would fail for reasons associated with the operational difficulties of giving the criminal justice system a selective focus.[3] In effect, we think that the image of the crime problem that puts a relatively small number of very active and violent offenders at the center is not a bad picture of the current reality. We can sharpen and refine that picture, but only at some cost, and, in our view, with only modest likelihood that the picture would change radically.

The areas where we feel much more uncertain, and where the uncertainties could possibly be resolved by research activities, are those concerning our capacity to effectively enhance the selectivity and focus of the criminal justice system. The major part of our uncertainty here is the difficulty of making reliable distinctions between dangerous and less dangerous (or wicked and less wicked) offenders. Our reading of the literature in this area suggests to us that real potential exists for distinguishing between high- and low-rate dangerous offenders based on good measurements of past criminal activity.[4] Indeed, it seems to us that variables describing past criminal activity are much more powerful in distinguishing high and low rate offenders than status variables. And, since these variables are less objectionable in terms of justice, it is very important to see how well we can do in making distinctions based on improved measurements of past criminal conduct. Thus, while there is

a good possibility that we will be able to make decently reliable and just distinctions among offenders, and that posssibility should be pursued, it is also possible that this effort will fail, and with it, any practical hopes for an effective policy of a sharpened criminal justice focus. Indeed, failure for this reason seems more likely than failure for any of the reasons described above.

Beyond the problem of distinguishing high- and low-rate offenders, however, is the practical problems of <u>enhancing</u> the current selectivity of the different stages of the criminal justice system. The basic notion is that the criminal justice system is already focusing on dangerous offenders, and to the extent it is not, it cannot be easily turned to this objective. Limits on will and capacity to implement an enhanced selective focus frustrate the theoretical potential of the policy. As we think about this argument in the light of current knowledge about the operations of the system, two conclusions seem particularly important. First, we note efforts to be selective at the stages of the system where issues of supervision are being considered (that is, at the sentencing stage, at the bail setting stage, and, to a lesser degeree, at the prosecutorial stage). At the same time, however, we note that although these decisions are <u>designed</u> to be selective with respect to dangerous offenders, they lack much of the information that would be required to be justifiably and effectively selective. Due to poor crime solving efforts by the police, poor records throughout the system, and

restrictions on access to juvenile records, the decisionmakers are (probably) importantly ignorant of prior criminal activity.[5] Thus, even though criminal justice officials are trying to be selective at these stages, they may be failing.

Second, at the <u>front</u> end of the system (at the pretrial, investigative, and arrest stages) we note a <u>lack</u> of selectivity. Violence among strangers are the crimes least likely to be solved.[6] Few special efforts are made to surveil and investigate dangerous offenders in the community.[7] This lack of selectivity at the front end of the system is potentially crippling to a selective focus on dangerous offenders for two slightly different reasons. First, since the police begin the process through arrests and investigations, a lack of selectivity at this stage implies that the capacity for selectivity later in the process is significantly reduced: if the police miss the important cases and pick up the unimportant cases, there is little that prosecutors or judges can do to improve the situation. Second, in making distinctions among offenders based on prior criminal conduct, all the other stages of the process are fundamentally dependent on the police because the police are the ones who tell us about the criminal offending of individuals. If the police fail to attribute crimes to individual offenders, we will be unable to distinguish high from low rate offenders.

Thus, as in the case of distinguishing high and low rate offenders, there is the <u>possibility</u> that we could dramatically improve

the selectivity of the operations of the criminal justice system. But it is also possible that the system is now behaving with as much selectivity as it is conceivable to imagine. And, indeed, this hypothesis seems to us a little more likely source of failure for a policy of selective incapacitation than finding out that unusually dangerous offenders did not figure prominently in the crime problem.

Given that our judgment is that we are more uncertain about the criminal justice systems operations with regard to unusually dangerous offenders than we are about the role of dangerous offenders in determining the shape of the crime problem, it seems natural to take the "policy analysis approach" and devote relatively greater attention to the feasibility of a policy of enhanced selectivity than to take the "classic approach" which would devote all the time to clarifying the problem to be attacked.

The second observation that leads away from the "classic approach" to the design of a research agenda is that a policy of enhanced selectivity is already being implemented throughout the U.S. We are not now in a position where the policy awaits the approving nod of researchers before it will be launched. Politicians and practitioners are already working to make it happen.[8] Given this situation, it is much more useful to think of designing the research agenda through the evolutionary approach. We should plan research projects to produce results that will shape both the speed and the direction of an evolving policy. We should also design research to

take advantage of all the natural experimentation that is now going on. In short, because the policy is already happening, we are drawn towards the "evolutionary approach", and away from the "classic" and "policy analysis" approaches.

C. A "Sensitivity Analysis" of the Relative Importance of Uncertainties About Selective Incapacitation

To check our intuitive judgements about the "sensitivity" of expectations for the success of a selective incapacitation policy to degrees of uncertainty about relevant features of the structure of criminal offending and the criminal justice system's response, we constructed a model that simulated the results of selective incapacitation policies for different assumptions about these variables. Details of the model and its results are presented in a separate staff paper.[9] For our purposes here, it is sufficient to understand five basic features of the model.

- First, the model describes the structure of criminal offending in terms of four basic parameters: 1) the "average" (mean) rate of offending; 2) the career length of offenders; 3) the "concentration" (skew of the distribution) of offending; and 4) the correlation between violent and property offending.
- Second, the model describes the criminal justice system's response to the structure of offending in terms of three variables: 1) the probability of arrest given a crime

(which is also influenced by the number of prior arrests and recent prior crimes); 2) the probability of conviction given an arrest (influenced by the prosecutorial resources applied); and 3) the length of the sentence meted out (which is based on both the current offense and the prior crimnal record).

- Third, each of these variables takes on a range of possible values corresponding to our degree of uncertainty about the actual facts concerning that parameter. Parameters about which we are very uncertain take on a wider range of values than parameters about which we have more information. In the case of the probability of arrest, for example, the parameter takes on certain values based on current police performance in clearing crimes, and, in addition, is influenced both positively and negatively by the number of prior arrests. This wide range of possible values incorporates a high degree of uncertainty about how previous arrests affect the likelihood of future arrests given crimes.
- Fourth, the impact of given criminal justice policies on given structures of offending is defined in terms of two different indicators: 1) a measure of "selectivity" (defined as the percent of crimes prevented by criminal justice policies divided by the percent of offenders in

jail); and 2) a measure of "crime reduction elasticity" (defined as the percent increase in imprisonment required to produce a 1 percent decrease in the amount of crime). In general, the more "selective" the system is, and the smaller the "crime reduction elasticity" the better the performance of the system.

- Fifth, the way that the model is used is to run the model for all combinations of the possible values of the different parameters weighted by the likelihood that a parameter takes on one value rather than another, and then to analyze the results in terms of a regression analysis in which the "impact of criminal justice policies" is the dependent variable, and the independent variables are the parameters describing the structure of criminal offending, and the character of the criminal justice system's response. The amount of variance in the "impact of criminal justice policies" explained by each of the model's variables is interpreted as the relative importance of uncertainty about that variable for predictions about the potential of selective incapacitation policies.

In somewhat less technical language, what the model does is simulate many different possibilities (weighted by how likely they really are), and then reveals which features of the world seem to have the most dramatic effect on the potential of selective policies.

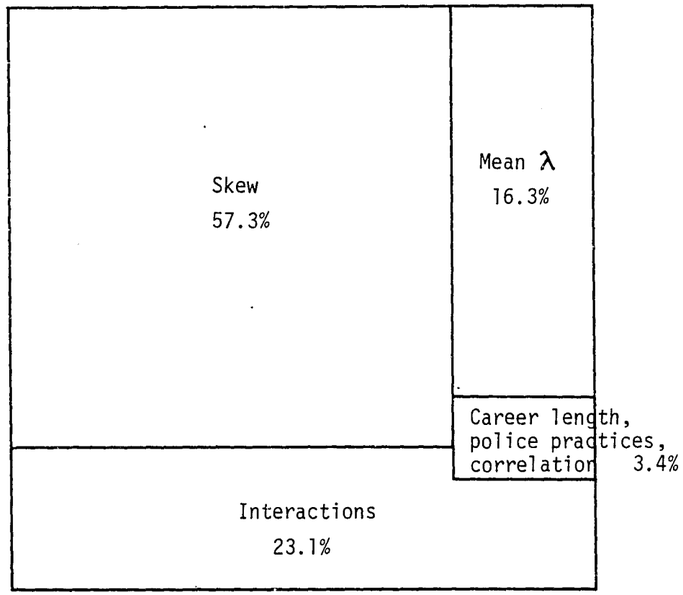
The results of this exploration are given in Figures 11 and 12. Figure 11 shows the relative importance of the various parameters in determining the success of selective policies defined in terms of the "selectivity" of the system. In this analysis, the crucial uncertainties are the parameters describing the structure of offending (namely, skew and mean rates of offending). This is not surprising since it is precisely the skewed structure of offending that creates the potential for "selectivity" in the first place. Figure 12 shows the relative importance of the various parameters in determining the "crime reduction elasticity" of selective criminal justice policies. In this analysis, the crucial variable is the arrest function. This makes sense since: 1) arrests are fundamental to the workings of the policy (since they allow people to be incarcerated and create the basis for future selective enhancements); and 2) there is substantial uncertainty about how this arrest function operates. Thus, the analytic model supports our intuitive notion that the crucial uncertainty to be resolved in trying to improve the criminal justice system's crime control capacity by increasing its selectivity is the uncertainty surrounding the arrest and clearance process.

D. Specific Research Projects

Given this set of judgments about the important areas of uncertainty and the proper approach to the design of a research agenda, the specific areas in which research should be conducted follow naturally.

Figure 11

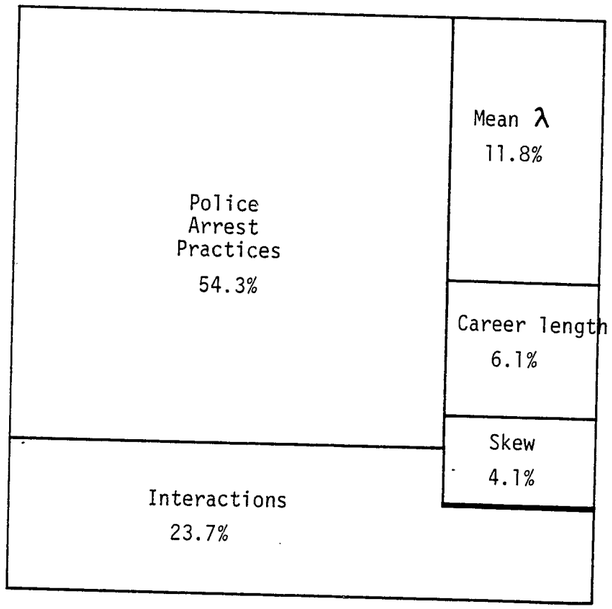
Importance of Skew in Explaining Uncertainty about Selectivity



Analysis of Variance in Selectivity

variable	degrees of freedom	sum of squares($\times 10^2$)	variance explained
Skew of λ	2	117.61	57.3%
Mean of λ	2	33.40	16.3
Average career length	1	4.34	2.1
Police arrest practices	2	2.42	1.2
Corr(λ_v,λ_p)	1	0.14	0.1
Interactions	99	47.42	23.1
Total	107	205.33	100.0%

Figure 12
Importance of Police Arrest Strategies
in Explaining Uncertainty about Elasticity



Analysis of Variance in Elasticity

variable	degrees of freedom	sum of squares	variance explained
Police arrest practices	2	135.48	54.3%
Mean of λ	2	29.55	11.8
Average career length	1	15.32	6.1
Skew of λ	2	10.19	4.1
Corr (λ_v, λ_p)	1	0.01	0.0
Interactions	99	59.11	23.7
Total	107	249.66	100.0%

1. THE DESIGN, DEVELOPMENT AND EVALUATION OF DISCRIMINATING PRINCIPLES FOR USE OF DIFFERENT STAGES OF THE CRIMINAL JUSTICE SYSTEM.

At the heart of a policy of sharpened focus on unusually dangerous offenders is a set of principles or tests for distinguishing high rate offenders from low rate offenders. So far, our efforts to design, develop, and evaluate these tests have been ad hoc and sporadic. Researchers have used what information was available to produce the best possible test. What we propose is something more ambitious and systematic: namely, a sustained effort to develop discriminating tests that could be effectively used at each stage of the criminal justice system.

At minimum, this involves the following steps. First, it is important to gather all the different tests that are now being used at different stages of the system to determine how much variety currently exists. One can easily imagine doing this for parole decisionmaking, habitual offender statutes, sentencing guidelines, traditional practices in presentencing reports, bail guidelines, criteria for inclusion in "career criminals programs" in prosecutors' offices, and even for including offenders in special habitual offender programs in police departments. In each case, we would examine the attributes used in making the distinctions, and the definition of the criterion.

Second, for a portion of the tests, a careful evaluation of their discriminating power should be conducted. The evaluation should be

conducted in terms of: 1) differences in mean rates of serious offending among the classified groups; and 2) rates of false positives and false negatives in the assignments to the dangerous offender groups. The evaluations of testing principles could be done retrospectively or prospectively. If done retrospectively, the tests should be evaluated through the use of split samples. The aim in all of this would be to see how well currently proposed tests based on currently available information performed on relevant dimensions.

In addition, however, we think it would be important to undertake theoretical and developmental efforts to design superior discriminating tests for the future. Part of this is to develop model tests that are nowhere used, now, but are quite attractive for theoretical reasons. Specific theoretical questions that should be resolved in the design of an optimal test include: 1) how to handle the problem of weighting offenses so that we have a good measure of the rate of "serious" offending; 2) how to handle the problem of estimating the "time available" for committing offenses given ambiguity in the definition of a "criminal career" and practical problems in capturing information about time under state supervision; 3) the appropriateness and value of using information about less serious offenses (which are more common than serious offenses) as a way of distinguishing high rate violent offenders from low rate violent offenders earlier in their careers than would be possible if we relied only on serious offenses; 4) the amount of discriminating

power that could be added in adult cases if information about juvenile records became available. These questions look to the design of better discriminating tests than we now employ.

A second part of the effort to improve the discriminating tests, however, is simply to work hard at increasing the quantity and quality of information that is used in the tests. Current tests are based on current crime solving and record keeping capacities. This fact may guarantee that the discriminating capacity of any test will be low. Future tests could conceivably be based on improved crime solving and record keeping capacities. The discriminating power could become much greater. The only way to know whether the tests get better as the general performance of the system improves is to try to improve the performance of the system. Thus, to evaluate an improved test, one may have to make important operational changes in the system that produces the information used in the tests.

2. DIAGNOSING THE SELECTIVITY OF LOCAL CRIMINAL JUSTICE SYSTEMS

Given the major uncertainty about the degree of selectivity achieved by local criminal justice systems, it should also be a high priority research objective to develop protocols for diagnosing their selectivity, and to use these protocols to gauge the selectivity of a sample of local criminal justice systems. For each stage of criminal justice system processing, the protocols would require analyses of: 1) the existence of explicit or implicit authorization of a focus in dangerous offenders; 2) the existence of operating procedures that

produced (or failed to produce) a special focus on dangerous offenders; and 3) the actual results of processing in terms of the handling of unusually dangerous offenders. For police organization, for example, the protocol might include: 1) looking for policies governing investigative priorities that properly reflect concerns about dangerous offenses and dangerous offenders; 2) analyzing clearance rates by crime classification (for example, violence among strangers, risk of violence among strangers, and so on); 3) examining procedures governing "post - arrest" investigations and clearances, and the ways in which that information is incorporated in police, prosecution and court records; 4) looking at police records and files to determine whether efforts are being made to identify serious offenders; 5) checking to see how information about dangerous offenders is disseminated and used by patrol and investigative units; 6) analyzing arrest rates of designated dangerous offenders over the course of a year; 7) analyzing how significant arrests of dangerous offenders are in the overall arrest activity of a given department; and so on. For pre-trial bail decisions, one would 1) search for the existence of explicit procedures, and the significance accorded to prior criminal activity in the procedures; 2) survey the detained and released population to determine whether those with serious criminal records were more likely to be detained; 3) look at the quality and quantity of information available to the bail-setting agency or judge at the time they make the decision, and so on.

The development of systematic protocols for analyzing the selectivity of different phases of the criminal justice systems a high priority research task for three different reasons. First, if we could analyze the degree of selectivity in local criminal justice systems, we could resolve one of our most important uncertainties: namely, the question of how much room for improvement exists in the operation of the current system. We would know whether current systems were biased against or in favor of unusually dangerous offenders. Second, to the extent we could develop these protocols for convenient use, and encourage them to be used beyond the range of a specific research project, some incentives would be created to enhance the current selectivity of criminal justice systems. In effect, the use of the protocols by local criminal justice agencies would tacitly encourage the existing systems to become more selective. To the extent that enhanced selectivity seems desirable, this is a tangible benefit of the research. Third, if we could routinely analyze how selective given systems were, we would have laid the basis for powerful aggregate analyses of whether enhanced selectivity reduced serious crime. The measures of selectivity developed through the protocols could become independent variables in cross-sectional aggregate analyses of crime rates to determine whether enhanced selectivity in criminal justice operations had any important effect on crime. As a result, we could exploit the natural variation in local criminal justice operations for research purposes.

In principle, we need protocols for each stage of the system. To the extent that it was desirable to establish priorities among stages of the process, however, we would recommend focusing on those areas where current capacities for selectivity are most uncertain, and most sensitive. In our view, this means working first on the protocol for patrol and investigative activity, and second for prosecution.

3. DESIGNING AND EXPERIMENTING WITH PROGRAMS TO ENHANCE SELECTIVITY AT DIFFERENT STAGES OF CRIMINAL JUSTICE SYSTEM PROCESSING

In addition to the broad diagnosis and description of criminal justice system operations recommended above, we also think it would be desirable to do experiments with efforts to improve selectivity at various stages of the process; or somewhat less ambitiously, to explore current operations candidly with an eye to recommending new procedures that could enhance selectivity, and could become the focus of experimental investigation. A list of possible programs to be designed, implemented and evaluated is presented below for each stage of criminal justice system processing.

Sentencing:

1) Improve the quality of information about prior rates of offending to judges who make sentencing decisions (for example, provide better access to juvenile records, more complete information from other jurisdictions, more complete information from police, and so forth).

2) Evaluate the impact of sentencing statutes which make

explicit provision for consideration of prior criminal activity.

3) Evaluate the impact of specific policy guidelines regarding the use of " habitual offender" statutes.

4) Evaluate the impact of specific policy guidelines regarding the use of concurrent and consecutive sentencing.

5) Drafting model language for "dangerous offender" statutes to replace the current "habitual offender statutes."

Bail:

1) Replicate the Philadelphia Experiment with the introduction of bail guidelines incorporating interests in the "dangerousness" of the offender (and using measurements of prior criminal activity as the indicators of dangerousness).

Prosecution:

1) Introduce a program of enhanced selectivity in prosecutors' offices not through the establishment of a special unit, but by initiating special procedures used by everyone in the office when they encounter a case involving a "dangerous offender". The special procedures should include varying combinations of: a) expedited handling; b) special evidence gathering (and preservation) efforts; c) improved assistance (and protection) for victims and witnesses in the case; d) restrictions on plea-bargaining; and e) a willingness to

prosecute weaker but still winnable cases.

2) Improve the quality of information available to prosecutors' offices about prior criminal activity of defendants (including, for example, juvenile records, fuller information from the police, etc.)

3) Enhance Police - Prosecution Collaborating in the identification, arrest and prosecution of "dangerous offenders."

Police:

1) Improving post-arrest investigative activity to improve clearance rates and generate multiple count charges for prosecutors.

2) Improving police capacity to identify and keep track of dangerous offenders through their record keeping systems -- including the formal and informal means for retaining information about unusually violent and active juvenile offenders.

3) Experiment with the use of police as "sureties" in bail proceedings and as probation and parole officers following convictions.

4) Experiment with a "field intelligence program" that records patrol observations of people who have been identified as unusually dangerous offenders on the basis of past convictions.

Records:

1) Develop "offender-based files" for use throughout the criminal justice system.

2) Develop policies and procedures that would allow limited access to juvenile records by officials in the adult criminal justice system.

Again, while all these projects have interest as devices for evaluating the potential of an enhanced focus on dangerous offenders, to the extent that priorities need to be established, we would recommend focusing most of our attention on programs that could increase the quality of the information available about the criminal activity of offenders. To us this means working on record systems, on police capacity to gather evidence and make cases, and the existence of procedures at each stage of the process to insure that those making decisions have convenient access to accurate information concerning the prior criminal activity of offenders. In fact, of all possible programs to try in terms of increasing the selectivity of the criminal justice system, we think that the most important and most interesting would be to try to establish a joint police-prosecutorial focus on dangerous offenders to determine whether it could be effective in dealing with violence among strangers in a major metropolitan area. There is an analogy here to federal "strike forces" focusing on organized crime. But there is the added value that the collaboration of two different organizations would force the development of explicit

criteria and procedures for designating people as dangerous offenders, and that in operating the program, police intelligence capacities might be improved, prosecutorial reluctance to take on difficult cases overcome, and in general, relationships between the two kinds of agencies improved. Among the various innovative programs for enhancing selectivity, we think this idea should rank very high.

4. FURTHER INVESTIGATIONS OF RATES OF OFFENDING WITHIN THE OFFENDING POPULATION

Although much has been learned about rates of offending through analyses of arrest records, cohort studies, and prison surveys, much remains to be done. Some of the tasks are methodological. Important tasks in this area are the following: 1) improving methods of valdidating self-report information; 2) learning how to estimate rates of offending from arrest data; 3) weighting the seriousness of offenses; and 4) developing a conceptual basis for the concept of "periods of activity". Others are substantive issues. Among the most important substantive issues are the following:

- To what extent do distributions of rates of serious offending vary across states? What could account for the differences?
- To what extent does an individual's rate (and pattern) of offending vary over his career? What seems to account for differing "career trajectories"?
- To what extent are patterns of offending within age cohorts varying across history? Is the trend towards more or less violent and active patterns? What factors can explain this trend?

Probably the best way to design research in this area is to let the established community of researchers who have pioneered the methods and who are deeply involved in the substance of these questions propose the next round of projects. It seems to us that this is an area where one can safely let the research initiatives come from those who have shown themselves to be competent to deal with the issues in the past.

5. EXPERIMENTS WITH LESS RESTRICTIVE AND LESS EXPENSIVE FORMS OF INCAPACITATION FOR LESS DANGEROUS OFFENDERS

As noted in our report, a potential weakness of selective incapacitation policies is their silence on how to deal with less serious offenders. This is a problem because implicit licenses granted to less serious offenders and less serious offenses may result in higher rates of serious offending. To the extent that one considers this hypothesis an important possibility (which we do), it becomes desirable to design and experiment with "incapacitation" programs for less dangerous offenders. There must be less expensive and (ideally) less restrictive forms of incapacitation than jails and prisons that are almost as effective in suppressing crimes while the offender is under state supervision.

Possible programs here include: 1) "house arrest" that restricts

individuals to their homes and requires them to report their movements to police or probation officials on pain of jail time if they cannot be found; 2) very intensive probation that involves checking to see that a person is on a job, a "sheltered workshop," or in some other program on average several times a day; 3) "community correction programs" that involve both close checks on job holding and participation in programs during the day, and in-house residence at night; and so on. Such programs have existed in the past, and they have been evaluated in terms of their rehabilitative effectiveness. We think these programs should be reviewed and evaluated not in terms of their rehabilitative results, but instead in terms of their "incapacitation" effects. We think it is likely that such programs produce signficant (but not perfect) incapacitation results at much lower cost and with more decency then jails and prisons. To the extent this hypothesis is confirmed, these programs can be the answer to the questions of what to do with less serious and less active offenders.

E. Summary

In sum, we think that a carefully designed research agenda can powerfully influence the development of enhanced selectivity in the criminal justice system by providing new tools and tests ideas for practitioners of various stages of the system, and by building the base for more effective overall evaluations of the policy. Key (roughly in order of priority) projects are the following:

- Basic design and evaluation work on the tests used to distinguish dangerous from less dangerous offenders.
- The development of standard protocols for measuring the selectivity of local criminal justice systems both in general and at each stage of the process; and the application of these measures to several major cities.
- The design and evaluation of operating programs which enhance the selectivity of the criminal justice system--most importantly, a combined police-prosecutor effort to arrest and convict dangerous offenders.
- The design of a criminal justice record keeping system that would support selective policies, and create a large enough national market for such systems to allow effective procurement.
- Continued investigations of the structure of offending in different geographic areas and over time.
- Design and evaluation of alternative forms of punishment for less serious offenders.

Notes

1) Mark H. Moore, "A Feasibility Analysis of Methadone Maintenance Programs" Public Policy, 26 (Spring, 1978). See also Mark H. Moore, "Policy Analysis vs. Social Science: Some Fundamental Differences" (mimeographed, 1981).

2) Laurence E. Lynn, Jr., Knowledge and Policy: The Uncertain Connection (Washington, D.C.: National Academy of Sciences, 1978). See also Donald T. Campbell, "Reforms as Experiments," in Elmer L. Struening and Marcia Guttentag, Handbook of Evaluation Research, Volume I (Beverly Hills: Sage, 1975).

3) This is a crude application of "decision analysis" to the question of whether we should adopt a selective focus. For an elegant explication of this technique, see Howard Raiffa, Decision Analysis (Reading, PA: Addison-Wesley, 1968).

4) Peter W. Greenwood, with Allan Abrahamse, Selective Incapacitation (Santa Monica: Rand Corporation, 1981).

5) See Chapters 4 and 8, above.

6) Vera Institute of Justice, Felony Arrests: Their Prosecution and Disposition in New York City's Courts, (New York: Vera Institute of Justice, 1979). Peter Greenwood, Jan M. Chaiken, and Joan Petersilia, The Criminal Investigation Process (Lexington: D.C. Heath, 1977). Floyd Feeney, "Case Processing and Police-Prosecutor Relations" (Mimeographed, 1981). F.B.I., Crime in the United States, annual (Washington, D.C.: U.S. Government Printing Office).

7) See Chapter 7, above.

8) See, for example, California, Office of Criminal Justice Planning, Report on The California Career Criminal Program (Sacramento: California Office of Criminal Justice Planning, 1982.

9) William Spelman, "The Crime Control Effectiveness of Selective Criminal Justice Policies," staff paper prepared for Volume II of this report.

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