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Dangerous Offenders: The Elusive Target of Justice

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DANGEROUS OFFENDERS: THE ELUSIVE TARGET OF JUSTICE. By *Mark H. Moore, Susan Estrich, Daniel McGillis and William Spelman.* Cambridge, Mass.: Harvard University Press. 1984. Pp. x, 252. \$20.

Criminal justice scholars have long hypothesized that a small number of unusually dangerous offenders is responsible for a substantial percentage of criminal offenses. Drawing on this assumption, proponents of the theory of selective incapacitation contend that these dangerous offenders should be given longer sentences than their offenses would ordinarily warrant. According to the theory, incarcerating highly active criminals should cause the overall crime rate to fall as the total prison population is reduced.

This theory, originally known as predictive sentencing, has been criticized on both practical and moral grounds. Opponents argued that the identification methods frequently misidentified people as dangerous offenders. Furthermore, since prediction techniques often involved the use of such characteristics as race or employment history, critics contended that the theory was immoral because it proposed punishment based on demographic profile rather than individual culpability.¹

Recent studies by the Rand Corporation² that support the hypothesis that the dangerous offender exists have rekindled the debate regarding selective incapacitation. *Dangerous Offenders: The Elusive Target of Justice*³ examines the new data with emphasis on the ethical problems inherent in the recent trend toward the use of selective incapacitation policies in the criminal justice system. *Dangerous Offenders* is divided into two parts. Part One discusses the new and old data regarding the existence of a highly active and dangerous group of offenders, various methods of identifying members of this group, and the justice of advocating harsher punishment on the basis of such identification. Part Two examines each stage of the criminal justice system from recordkeeping to sentencing in order to determine where a more "selective focus" will enhance the efficiency of the system. The authors conclude with a "qualified endorsement" of such policies.

The studies discussed in Part One conclude that the dangerous of-

1. See generally von Hirsch, *Selective Incapacitation*, 12 REV. L. & SOC. CHANGE 11 (1983).

2. J. CHAIKEN, M. CHAIKEN & J. PETERSON, *VARIETIES OF CRIMINAL BEHAVIOR: SUMMARY AND POLICY IMPLICATIONS* (1982); P. GREENWOOD & A. ABRAHAMSE, *SELECTIVE INCAPACITATION* (1982); J. ROLPH, J. CHAIKEN & R. HOUCHEMS, *METHODS FOR ESTIMATING THE CRIME RATES OF INDIVIDUALS* (1981).

3. The authors of the book are: Mark H. Moore, Guggenheim Professor of Criminal Justice Policy and Management, Kennedy School of Government, Harvard University; Susan R. Estrich, Assistant Professor of Law, Harvard Law School; Daniel McGillis, Senior Research Associate, Center for Criminal Justice, Harvard University; and William Spelman, Assistant Project Director, Police Executive Research Forum, Washington, D.C.

fender, unlike the average criminal, does not specialize in certain types of crimes during his career. Rather, these offenders commit crimes ranging from victimless petty offenses to crimes involving serious physical violence (pp. 42-46). The data also indicate that these offenders commit crimes at extremely high rates — as many as fifty per year (p. 38). The authors observe that, significantly, arrest and conviction records do not reflect the same pattern and rate of offending. On the basis of this observation, they contend that the system is biased in favor of dangerous offenders because they are arrested and convicted less frequently *per offense* than the average criminal (pp. 48-49). The authors argue that the use of selective incapacitation policies is “essentially just” in order to counteract this bias (p. 67).

The authors argue that the lack of a reliable definition of dangerous offenders has been the most significant stumbling block in past attempts to introduce selective incapacitation policies into the criminal justice system. The confusion surrounding the identification of the dangerous offender is evident in the current use of selective policies. The threshold determination of who gets recidivist treatment under repeat offender statutes varies markedly from state to state (pp. 53-55). To address this disparity, the authors offer a model definition and present guidelines outlining the goals and types of variables which should be considered in the definition.

The model definition identifies dangerous offenders as those who have (1) at least two convictions for violent offenses within three years; (2) two additional arrests or indictments for violent offenses, or two convictions for property crimes that involve a serious risk of violence; and (3) a juvenile record that includes violent crimes or serious property offenses (p. 60). This definition, which excludes such demographic factors as employment record and drug abuse (p. 60), concentrates entirely on the “blameworthy” behavior of the offender, thus (the authors contend) avoiding the moral issues raised by other predictive sentencing models (pp. 54-58).

The authors suggest that the goal in formulating a definition of dangerous offenders should be

to distinguish the guiltiest offenders based on past activity and to punish them for their blameworthy conduct rather than to predict which offenders will be most active in the future on the basis of any characteristics which aid in prediction, and incapacitate those predicted to be offenders for as long as they appear dangerous. [p. 57]

The authors postulate that a definition will be consistent with conventional notions of justice if it reflects retributivist rather than utilitarian concerns. By using the authors’ formula, society will presumably be identifying offenders who have “clearly revealed their guilt through a pattern of criminal activity that merits special attention” (p. 56).

Unfortunately, the authors’ goal of emphasizing retributivist policies is fundamentally flawed. Implicit in the theory of selective inca-

pacitation is the assumption that the incapacitation of the offender will *prevent* him from committing more crimes. That is, if society is to derive the presumed benefits of selective incapacitation, the definition of dangerous offenders must successfully predict which offenders present a significant *future* threat to society. But if, as the authors insist, the concept of the dangerous offender is entirely retributivist, then society could conceivably (and ethically) target someone for dangerous offender treatment who no longer presents a threat to society. The authors ignore this problem almost entirely, simply assuming at one point that those who have committed many crimes in the past are more likely to commit more offenses in the future (p. 56). The authors base their entire argument in favor of retributivist goals on this assumption; yet they fail to link the assumption with the empirical data presented in such agonizing detail earlier in Part One. By following the authors' formula, society would be adopting policies that present a serious threat to individual rights without substantial evidence that incapacitating these offenders would achieve the desired reduction in crime.

Furthermore, the authors fail to address adequately the profound moral questions raised by selective incapacitation. Their definition seems to advocate harsher treatment on the basis of unidentified crimes which they suppose these dangerous offenders must have committed at some time in the past. By asserting that the criminal justice system is somehow "biased" in favor of dangerous offenders and by using this designation to counteract that "bias," the authors turn the presumption of innocence on its head, arguing that it is not unfair to punish dangerous offenders more severely because they probably eluded punishment many times in the past. The presumption of innocence is further undercut by the inclusion of arrests and indictments in the formula for determining dangerousness. In response to this objection, the authors contend that they would not punish offenders for presumed past offenses; rather, the definition merely provides a method of identifying offenders who will probably be dangerous in the future. If this is the case — and it must be, given the discussion of the presumed benefits of selective incapacitation (pp. 80-84) — then the authors are merely proposing another prediction-type test. However, their test is possibly even more objectionable than former models because the assumption of past, unproven offenses serves as a principal basis for harsher treatment.

Even if the moral and constitutional objections to a sentencing policy based on predicted misbehavior or retribution for past, unproven acts could be overcome, significant practical obstacles would remain. First, even using the new studies cited by the authors, a disturbingly high number of "false positives" would threaten the effectiveness and integrity of any selective incapacitation policy. The authors concede that the problem of false positives poses difficulties, but they imply

that if a "demanding and stringent threshold" is used the problem can be overcome (p. 75). Finally, after several pages of distressed acknowledgement that the problem of false positives remains even in the new studies, the book makes the startling assertion that a system of selective incapacitation can be just if based on retributive principles despite a "tolerable" number of false positives:

From the point of view of justice, it would be better to base [selective incapacitation policies] exclusively on accurate measures of prior criminal offending, renouncing all attempts to predict future criminal conduct in favor of distinguishing the most dangerous and wicked offenders on the basis of past acts. Indeed, only this position can overcome the objections associated with the fundamental injustice of false positives. If selective policies are seen as retribution for past acts, if the discriminating tests are limited to information about criminal conduct, and if the past acts have been attributed through appropriate criminal justice procedures, then having some mistaken assignments to the category of dangerous offenders is no worse (though also no better) than some mistaken convictions for current offenses. In this context a few false positives are tolerable. [pp. 78-79]

In other words, any injustice introduced by new sentencing techniques can be excused if it is no worse than existing injustices. The authors appear to believe that engrafting new injustices onto existing injustices is, to borrow their word, "tolerable."

Perhaps the moral problems inherent in the theory of selective incapacitation could be overlooked if the benefits to society were large and certain. Unfortunately, the authors fail miserably in their attempt to convince the reader that the possible benefits of selective policies outweigh the risks to individual rights. The Rand studies indicate that crime could be reduced by more than twenty percent by employing a definition using all relevant discriminating factors. The potential benefit if only prior "criminal" activity (including arrests and juvenile records) is considered is estimated to be slightly less than twenty percent (pp. 82-84). Certainly these estimates, if accurate, seem impressive. But the assumptions accompanying the estimates are unrealistic. The studies assume that these offenders would have committed other crimes if they had not been incarcerated — that is, that the identification method has accurately predicted future dangerousness (p. 80). Second, the studies assume that prison does not accelerate the rate of offending upon release (p. 80). Even the authors admit that the practical benefits may be significantly lower than the Rand estimates. After a strained analysis of the benefits of incapacitation, the authors conclude that "incapacitation will reduce crime, but less than perfectly" (p. 87). Unfortunately, the authors never tell us *how imperfectly* incapacitation may work. With remarkably little analysis and support, the authors simply state: "[W]e think that in aggregate terms the reduction [in crime] will be small but not insignificant" (p. 87).

What may be the most crucial argument in the entire book, that the implementation of selective policies will significantly reduce the crime rate, is so poorly presented that the reader is left with the impression that the authors are simply trying to brush over a crucial point. Unfortunately, the muddled analysis is characteristic of the way the authors present a number of their arguments. This reader was not surprised to find a mislabeled graph in the middle of this chapter (p. 81) — few sections in Part One were without similar sloppiness.⁴

With the exception of the development of the definition of dangerous offenders, Part One contributes little to the debate regarding selective incapacitation. However, the unique and useful nature of *Dangerous Offenders* becomes evident in Part Two. Each chapter in Part Two analyzes a separate stage of the criminal justice system focusing attention on selective policies already in use, the potential benefits of further selectivity, and the risks to justice inherent in the implementation of such policies. After discussing sentencing, pretrial detention, prosecution, police practices, and recordkeeping, the authors conclude that “[t]he potential for practical gains and enhanced justice of selective policies is likely to be greater at the front end of the criminal justice system [recordkeeping, police practices] than at the back end, the sentencing stage, which is already quite selective” (p. 185).

The book is most optimistic about the use of selective incapacitation policies in police and prosecution operations (p. 186). Specifically, it recommends that police pursue post-arrest investigations in crimes involving dangerous offenders with greater enthusiasm in order to clear up unsolved crimes which are probably attributable to the same offender. The authors maintain that if the offender is charged with and prosecuted for multiple offenses, society can more easily identify the chronic recidivists and sentence them appropriately (p. 186). In addition, prosecutors are urged to ask for consecutive rather than concurrent sentences on the basis of the additional evidence provided by the police (p. 186). These recommendations are consistent with the authors’ commitment to making sure that the “bias” in favor of dangerous offenders is eliminated and that these criminals receive the punishment that they “deserve.”

The authors conclude with a “qualified endorsement” of selective policies. The principles that “qualify this endorsement are that selective policies (1) should employ a very narrow definition of dangerous offenders, (2) should be viewed as primarily retributivist, and (3) “should not be considered a comprehensive solution to the problems

4. The explanatory paragraph on page 82 for the graph on page 81 states that “[t]he policies whose lines are farthest from the origin of this graph are preferable to policies that are closer to it.” Thus, the paragraph concludes that policy 3 is the most preferable. The line indicating policy 3 on the graph on page 81 is the *closest* to the origin. The graph on page 43 provides an example of a similar type of mistake.

of the criminal justice system” (pp. 182-83). As pointed out earlier, the first two principles do little to protect the inherent threat to individual rights posed by the widespread use of selective policies. The third principle, however, is possibly the most important message in the book — that society must not latch onto one theme in dealing with a problem as complex and important as criminal behavior.

The authors also point out that “selective proposals may enhance justice as well as produce practical benefits” (p. 181). The enhancements to justice referred to by the authors are the ability of selective policies to compensate for the “bias” in favor of dangerous offenders and the improvement of criminal justice decisionmaking to reduce “discretion . . . in favor of guidelines based on an individual’s prior criminal conduct” (pp. 181-82). These conclusions sound like the final results of a fair and thorough debate on the subject. Unfortunately, the debate offered by *Dangerous Offenders* fails to address completely the moral dilemmas and threats to justice created by selective incapacitation policies. The balanced discussion promised in the introduction simply never materializes. Instead, *Dangerous Offenders* offers no more than a justification for the use of selective policies. The authors came to the debate with the outcome already decided.

— *Elizabeth T. Lear*