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Crime, Punishment and Prevention

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OVER the last decade, a remarkable change has occurred in the U.S. criminal justice system. Traditionally devoted to the punishment of past crime, it has begun to focus as well on the prevention of future crime by incarceration and control of dangerous offenders. Habitual offender statutes, like "three strikes" laws, sentence repeat offenders to life imprisonment. Jurisdictional reforms lower the age at which juveniles may be tried as adults, increasing the available terms of imprisonment beyond those of juvenile court. Gang membership and recruitment are criminalized. "Megan's Law" statutes require community notification of a convicted sex offender. "Sexual predator" statutes provide for civil detention of offenders who remain dangerous at the conclusion of their criminal term. Sentencing guidelines increase the sentence of offenders who have a prior criminal

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history, since these offenders are seen as the most likely to commit future crimes.

The evolution from punishment to prevention has not been accompanied by a corresponding change in how the criminal justice system advertises itself. It still presents itself as a system of criminal "justice" that imposes "punishment." But it is impossible to *punish dangerousness* within the meaning of those terms. To "punish" is "to cause a person to undergo pain, loss, or suffering for a crime or wrongdoing." Punishment can only exist in relation to a past harm or evil. "Dangerous" means "likely to cause injury, pain, etc."—that is, a threat of future harm. One can "restrain" or "detain" or "incapacitate" a dangerous person; but one cannot logically "punish" dangerousness. Yet our current criminal justice system increasingly blurs the difference between punishment and prevention, as if one could punish dangerousness. Why the shift to preventive detention? And why the attempt to keep the old "criminal justice" as window dressing?

The continuing crime problem

Every society must have a right to defend itself, and our society has good reason to feel it needs protection. Even with the most recent declines, the violent crime rate remains more than three times higher than during the decade following World War II. Today's aggravated assault rate is nearly four times what it was then. News reports commonly celebrate the current drop in crime rates to the levels of the late 1970s, failing to note that by then the long road of unbroken annual crime increases had already tripled the rates of the 1950s. Given the erupting epidemic of juvenile crime, the unknown effect of the coming wave of crack babies, and a host of other predictable or unpredictable changes, the decreases may not continue. But even if they did, the declining crime rate of the last eight years would have to continue unbroken for *another three decades* before we returned to the crime levels the Baby Boomers enjoyed as children.

And even if crime rates continued to drop every year for the next three decades, people would still have reason to be dissatisfied. As a result of the past three-plus decades of crime increases, people have dramatically changed how they live.

We no longer let our children walk home from school alone. We dead-bolt our doors, put "the Club" on our cars, and live in security-staffed apartments and "gated" communities. Current crime rates are as high as they are despite these precautions, and would be even higher without them. A return to the patterns of living we enjoyed when we were children would mean not only reducing crime to 1950s rates but recapturing the freedom and sense of security we had then. The apparent impossibility of that only highlights how much we have lost to crime since the fifties.

From this perspective, it is understandable that Americans should demand greater protection and that legislators should seek new ways to provide it. Yet the trend of the last decade—of shifting the criminal justice system toward the detention of dangerous offenders—is a move in the wrong direction. The difficulty lies not in the laudable attempt to prevent future crime but rather in using the criminal justice system to achieve the goal. That approach perverts the justice process and will undercut the criminal justice system's effectiveness in controlling crime. At the same time, the basic features of the criminal justice system necessarily make it a costly yet ineffective "preventive-detention system."

What is preferable is *a segregation of the punishment and prevention systems.* Punishment, especially through imprisonment, happily produces a collateral effect of incapacitation. If preventive detention is needed beyond the prison term of deserved punishment, it ought to be provided by a separate system that is open about its preventive purpose and is specifically designed to perform that function. Punishment and prevention are different functions—each with its own criteria and procedures. Trying to use a single system to perform both ensures that neither will be performed effectively. Today's mixed system, in which preventive detention is cloaked as criminal justice, achieves neither justice nor protection.

And justice for all?

Each of the prevention-based reforms of recent years distorts the goal of justice. For example, lowering the age of adult prosecution increases the number of young offenders who are held criminally liable. But there is little dispute that

many young offenders, especially those below the age of 15, lack the cognitive and control capacities of normal adults. Some may not appreciate the enormity of the consequences of their acts; others may lack the normal behavior-control mechanisms.

If such dysfunctions exist in an adult offender—due to insanity or involuntary intoxication, for example—an "excuse defense," or at least a formal mitigation, is generally available. Yet a similarly impaired young offender will get no mitigation or defense in adult courts. Traditionally, these courts have had no "immaturity excuse" since youthful offenders were dealt with in juvenile court. The recent trend to lower the age of adult prosecution has created the need for such an excuse defense but none has been developed, perhaps because it would interfere with the recent goal of gaining control over dangerous offenders without regard to their blamelessness.

The new policies that increase prison terms for offenders with prior criminal records—e.g., "three-strikes" and other habitual-offender statutes and prevention-oriented sentencing guidelines—create more common and damaging problems. Instances of long-term imprisonment for a minor offense are well known, such as the life sentence for a third minor check fraud in the Supreme Court case of *Rummel v. Estelle*. But the more pervasive, if less obvious, problem appears in every case in which a habitual-offender statute or guideline is used: The sentence imposed exceeds what is deserved for the offense committed. Indeed, that is the point of such statutes. They significantly increase the sentence over what it would be for the offense committed on the grounds that a prior record may predict future offenses. But the effect of such a policy is to have the criminal justice system regularly impose sentences that exceed the punishment deserved.

One can develop a justice argument that more punishment is deserved for an offense when it is a repeat offense. The new violation suggests a certain "nose-thumbing" at the system—a damaging public display of the offender's disregard for the community's norms. But such nose-thumbing is at most one of many possible factors that may aggravate an offense, like the use of needless violence or the targeting of a particularly vulnerable victim. One can hardly argue that the nose-

thumbing is more blameworthy than the offense itself. For example, a rape is a terrible crime. It may be more condemnable when committed by someone who has committed a previous offense, but the nose-thumbing is hardly more condemnable than the rape itself. Yet the new preventive doctrines can double, triple, or quadruple a sentence based upon a prior criminal record.

Although less common, the prevention approach can have the opposite effect, giving an offender less punishment than he deserves. For example, some states, following the Model Penal Code, lessen the punishment if the attempted criminal act was "inherently unlikely" to succeed and the offender does not otherwise present a danger. In several documented cases, prisoners with AIDS have spit at prison guards, believing they can thereby give the guard AIDS. These prisoners may not actually be dangerous, but they have demonstrated their willingness to cause another's death. That the offender has failed in his attempted murder may call for the normal discount given to an unsuccessful attempt, as compared to a completed murder, but there seems little reason from a justice perspective to reduce his punishment any further than that. Lack of dangerousness does not vitiate blameworthiness.

The problem of imposing less punishment than deserved arises more frequently in sentencing systems with broad discretion (e.g., without sentencing guidelines) where individual sentencing judges go easy on offenders they see as no longer a threat. The elderly Nazi concentration camp official or the now unmasked corrupt bank official may no longer present a danger but that hardly reduces the punishment their crimes deserve.

There is nothing wrong with a society protecting itself from dangerous offenders. What is objectionable is allowing such prevention to pervert the course of justice, whether it gives an offender more punishment than he deserves or less.

Such deviations from desert not only fail the goal of justice but also damage the crime-fighting effectiveness of the criminal justice system. A considerable body of social-science research suggests that social norms, more than the fear of official punishment, produce law-abidingness. To harness the enormous power of social norms, the criminal law must be rooted

in the ideal of justice. If the law speaks with the community's moral authority, it can effectively stigmatize offenders and reinforce moral standards. In contrast, a criminal law that is seen as pursuing some goal other than justice—even one as laudable as preventing future crimes—will not gain broad societal sanction and moral credibility. As the system shifts from blameworthiness to dangerousness, people will come to understand that criminal liability does not necessarily suggest a defendant's moral blameworthiness for past condemnable conduct; it may simply reflect a prediction of future conduct. This loss of moral credibility with the public will detract from the criminal justice system's ability to fight crime. A criminal justice system without moral authority cannot stigmatize offenders by imposing liability or help to shape moral norms, and it cannot signal morally condemnable conduct that is not obviously so on its face.

Prevention in disguise

Ironically, the perversions of justice suffered in the name of prevention also harm the prevention system itself. Difficulties arise primarily because of the effort to cloak the preventive measures as doctrines of criminal *justice*. Why the subterfuge? If reformers wanted to detain dangerous offenders, why not openly create a preventive system to fill in where criminal justice incarceration ends? Most jurisdictions allow civil commitment of persons who are dangerous because of mental illness, drug dependency, or contagious disease. Why the reluctance to preventively detain offenders who remain dangerous at the conclusion of their deserved criminal term of imprisonment?

The answer may reside in the bitter controversy prompted by the preventive-detention legislation of the 1960s. That legislation was decried as "Clockwork Orange" and "Alice in Wonderland justice," in which the punishment precedes the offense. It was said to introduce a "police state," to be "intellectually dishonest," "one of the most tragic mistakes we as a society could make." It "would change the complexion of American justice," and was "simply not the American way."

But the 1960s preventive-detention legislation was controversial in large part because it provided *pretrial* preventive

detention. In contrast, most of the current reforms provide preventive detention only after trial and conviction, an important difference. On the other hand, part of pretrial preventive detention's bad reputation stems from its procedure of sentencing before trial. That same objection can be made of present day post-conviction preventive detention, because detention for longer than the deserved term of imprisonment is justified as preventing predicted *future* crimes. It is not only punishment for an offense for which the detainee has not yet been convicted; it is punishment for an offense that he has not yet even committed!

Herein lies the genius of the current system's cloaking of preventive detention as criminal justice. By obscuring the preventive nature of the liability and sentence, by making it seem a part of a criminal justice system, the preventive-detention controversy can be avoided altogether.

But the effect of such cloaking is to impede the system's preventive effectiveness. For example, instead of examining each offender to determine the person's actual present dangerousness, the current cloaked system uses prior criminal record as a stand-in for dangerousness. But prior record is only a rough approximation of actual dangerousness and its use will guarantee unnecessary errors of both inclusion and exclusion. Indeed, criminality is highly age-related, and whether due to changes in testosterone levels or something else, the offending rate drops off steadily from its peak in the early twenties. The prior-record measure does not take account of this fact. Offenders with their criminal careers before them are not detained, because they have not yet built up their criminal résumés, while offenders with their criminal careers behind them are detained because they have the requisite criminal record. This gives us a costly prevention system of prisons full of geriatric life-termers, and simultaneously ineffective prevention, as the system does little during the period when the need for preventive detention is at its greatest. A rational and cost-effective preventive-detention system would more readily detain young offenders during their crime-prone years and release them for their crime-free older years.

An equally counterproductive aspect of the cloaked system is its early decisions and fixed ("determinate") sentences. Pub-

lic cynicism over a system that allowed subsequent reductions in sentences, as by a parole board, had given rise in recent years to calls for "truth in sentencing," determinate or fixed sentences, and the abolition of early release on parole. These reforms are quite understandable, but when applied in the context of prevention, difficulties emerge. Since the determinate sentences are shrouded in the cloak of justice, they are imposed soon after trial. But this sentencing practice is highly inappropriate and ineffective when the goal is prevention. It is difficult enough to determine a person's present dangerousness—whether he would commit an offense if released today. It is that much more difficult to predict an offender's future dangerousness—whether he would commit an offense if released at the end of the deserved punishment term, two, ten, or thirty years from now. It is still more difficult, if not impossible, to predict today precisely how long the future preventive detention will need to last. Yet that is what determinate sentencing demands: the imposition of a fixed term that predicts the needs of prevention far into the future.

A sentencing judge or guideline drafter is left to the grossest sort of speculation, inevitably doomed to setting either a term too long—thus unfairly detaining a nondangerous offender and wasting preventive resources—or a term too short—thus failing to provide adequate prevention. Given the two bad choices, it should be no surprise that decision makers commonly opt for making an error of the first sort rather than the second, hence the recent increases in the terms of imprisonment.

A rational preventive-detention system would do what current civil-commitment systems do: make a determination of present dangerousness in setting detention for a limited period, commonly six months, then periodically revisit the decision to determine whether the need for detention continues. Such a system is not only better for offenders, because it is more likely to limit detention to periods of actual dangerousness, but also better for society, because, while it provides needed detention, it avoids spending prevention dollars on needless incarceration.

Also distorted by the need for the justice cloak is the method of restraint. A rational preventive-detention system would fol-

low a principle of minimum intrusion: A detainee would be held at the minimum level of restraint needed for community safety. If house arrest or regular medication would provide the same level of community safety as imprisonment, then the former would be preferred as less intrusive to the offender (and less costly to the community). A term of deserved punishment, in contrast, often may require a prison term in order to reaffirm the community's strong condemnation of the offense. House arrest or regular medication may be unacceptable substitutes because they could be seen as trivializing the offense. When preventive detention must operate under the cloak of criminal justice, it too often must opt for imprisonment even when prevention would be satisfied with less intrusive restraint.

Similar distortion occurs in determining incarceration conditions. A criminal punishment term is meant to impose suffering, within the bounds of human dignity; punitive conditions are entirely consistent with a punishment rationale for the incarceration. But when an offender has served the portion of his sentence for the crime he committed and continues to be detained for preventive reasons, punitive conditions become inappropriate. When we civilly commit persons for the protection of the community—persons with contagious diseases, drug dependencies, or mental illness—we try to avoid punitive conditions. An offender who has served his deserved term of punishment ought similarly to be subject to nonpunitive conditions during his preventive detention.

Finally, and in the same vein, an offender who is being detained for preventive reasons ought to have a right to treatment, especially if it can reduce the length or intrusiveness of his detention. This is simply a specialized application of the general principle that we ought not restrict an individual's liberty to benefit others more than is necessary to achieve that benefit. If treatment can reduce the length of preventive detention, then it ought to be provided.

Segregating justice and prevention

Fortunately, the conflict between justice and prevention can be avoided by simply segregating the two functions: by having a criminal justice system that focuses exclusively on

imposing punishment for the past offense, no more, no less, and having a post-sentence civil-commitment system devoted to prevention. The sticking point in this proposal is not in having a criminal justice system that is guided only by justice. That is what the public assumes the criminal justice system has always sought to do. The difficulty comes, instead, with openly recognizing a system of preventive detention.

There is some precedent for preventive detention. As noted, all states presently allow civil commitment for society's protection. Moreover, many states have post-criminal-incarceration civil commitment of "sexual predators." Under these civil-commitment systems, the government can attempt to detain an offender at the conclusion of his criminal term if it can show continuing dangerousness.

Despite this precedent, there will be concern about creating a broader system of explicit preventive detention, and those concerns are understandable: The *Gulag Archipelago* potential for governmental abuse is real. But if the alternative is the present system of cloaked preventive detention, the risk is worth taking. An explicit system of post-criminal-commitment preventive detention would be better for both the community and for potential detainees.

The community is better off because such a segregated system offers both more justice and better protection from dangerous offenders. Allowing the criminal justice system to do justice is valuable for its own sake. It also gives the system greater moral credibility and thus greater long-term crime-control power. And a distinct system for preventive detention can, by looking directly at a person's present dangerousness, more accurately predict who is and who is not dangerous. Greater accuracy is enhanced further by periodic reevaluations, rather than the present unitary system's need to make a single prediction of dangerousness years in advance. Greater accuracy means more detention of the dangerous, better protection of the community, and less detention of the nondangerous, thus saving resources.

A segregated system also benefits the potential detainees. Better accuracy in prediction means less detention of nondangerous offenders, while periodic reevaluation means that detention will be limited to periods of actual dangerousness.

Acknowledgment of the preventive nature of the detention also suggests a right to treatment, nonpunitive conditions, and the principle of minimum restraint, meaning greater freedom for those who are detained.

An open system of preventive detention ought also to be preferred precisely because it is open rather than cloaked. Instead of the current unproductive debates—which are typically about whether "three strikes" sentences are "too long"—we could turn our attention to the many aspects of preventive detention that cry out for discussion: What is the reliability of predictions of dangerousness? Is the threatened danger sufficient to justify the extent of intrusion on personal liberty? Are there less expensive or less intrusive measures that would as effectively protect the community? Under the current cloaked system, these issues escape examination. And finally, while no one can guarantee that a legislature or court will not attempt to abuse its power, an open system of prevention makes such abuse harder, not easier. The openly preventive nature of the system subjects it to closer scrutiny, as it should, a scrutiny the present cloaked system escapes. If there is a danger of governmental abuse of preventive detention, it is at its greatest when that preventive detention is cloaked as criminal justice.