

An Analysis of Preventive Detention for Serious Offenders

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I INTRODUCTION

Modern societies are increasingly concerned with risk and the management of insecurity. Preventive detention occupies a key role in the penal response. It is difficult to deny that particularly dangerous offenders should be detained for substantial periods until the risk they pose has reduced. Indeed many Western constituencies demand laws providing these powers. However, preventive detention is an extremely serious and invasive intervention, bearing directly on fundamental human rights and civil liberties. It is also an inherently expansionist policy, often driven by fear and alarm.¹ As such a detailed examination of the complexities with, and objections to, the practice of preventive detention is appropriate.

The term “preventive detention” as used in this paper is a general species of sentence defined by three characteristics: it is of indefinite duration; it is targeted at “dangerous” offenders; and it is intended to prevent the offender from causing serious harm in the future. While the term preventive detention is used in New Zealand, the sentence goes by a myriad of aliases in other jurisdictions. As this paper takes a generic focus, a variety of equivalent rather than jurisdiction-specific terms are used to refer to these indefinite sentences for public protection.

Discussion of, and objections to, indefinite sentences come from many different fields, including philosophy, ethics, human rights, the medical and predictive sciences, and legal theory. The concerns expressed are serious, but always contested. Although the legitimacy or illegitimacy of preventive detention cannot be determined on the basis of any one set of considerations, all have a role to play in defining the requirements for a justifiable form of this sentence.

This paper acknowledges that preventive detention is, in extreme cases, morally justified. Without focusing on the reform of any particular sentencing regime, it argues for stricter limits on the imposition and management of preventive detention, depending on the jurisdiction. Identified and discussed are the practical, moral and legal concerns that must always remain in the forefront of judicial and political thought on preventative detention.

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1 Easton and Piper, *Sentencing and Punishment* (2005) 145.

The body of this paper is divided into five main sections. The first section gives a brief history of preventive sentencing. The second section describes its modern manifestations in various common law jurisdictions, with most attention being given to New Zealand. This historical and jurisdictional survey suggests that “dangerousness” is an amorphous and contested concept, which is explored in the third section. The fourth section sets preventive detention in its wider context by sketching the traditional philosophical justifications of punishment. It then considers in more detail the two main justifications of preventative sentences. The fifth and largest section explores in depth a number of issues and key criticisms arising in relation to preventive detention.

II THE HISTORY OF PREVENTIVE SENTENCES

Legislation seeking to incapacitate dangerous offenders has existed for over a century. Some 118 years ago, Seth Cary argued that the “Indeterminate Sentence is the next great step in the treatment of the vicious classes” and that “the criminal [should] be sent to the prison appropriate to his age, or degree of vice, *with no time limit*, and to remain there till his presence in the community is no longer a source of danger to the State; then to go forth, whether he has been incarcerated one year or fifty!”²

However, the targets of incapacitative, often indeterminate, sentences in the English-based jurisdictions have periodically changed. Around the turn of the 20th century, the focus was on recidivist or “habitual” criminals.³ Pratt observes that, “as a justification for this new modality of governing the dangerous, we begin to find the concept of ‘public protection’ being written into law”.⁴ The shift in political rationales from liberalism to welfarism allowed “the state to intervene as appropriate to the risk that a particular criminal posed, rather than simply match punishment to crimes”.⁵ As a result, the Habitual Criminals Act 1905 in New South Wales, the Habitual Criminals Act 1906 in New Zealand, the Prevention of Crime Act 1908 in England, and the Indeterminate Sentences Act 1908 in Victoria, were enacted.⁶

These early preventive sentences show that it had become justifiable to imprison offenders for what they were, assessed through employment records and association, not just what they had done. Indeed in New Zealand, “one could be charged *with the offence* of being an habitual criminal, in which case an habitual criminal order, involving ‘detention

2 Seth C Cary, “Prison Reform — The Indeterminate Sentence” (1889) 8 *The Alpha* 3.

3 Easton, *supra* note 1, 137.

4 Pratt, *Governing the Dangerous* (1997) 52.

5 *Ibid* 45.

6 Easton, *supra* note 1, 137; Pratt, *Governing the Dangerous*, *supra* note 4, 35.

during the pleasure of the Governor' would be made."⁷ The state was expected to provide security and protection from risks. In the penal context the main risk was the habitual offender, and the means for ameliorating this risk was prolonged imprisonment.

The increasing institutionalisation of psychological knowledge within the criminal justice system precipitated a second generation of protective measures around 1950.⁸ These targeted not only habitual criminals but also sexual offenders, particularly paedophiles. Indeterminate sentences were made available for the latter in the Criminal Law Offences Act 1945 in Queensland and the Criminal Justice Act 1954 in New Zealand. Dangerousness had now assumed overtly sexual overtones.

The preoccupation with habitual criminals soon evaporated in many jurisdictions; "very quickly, it is as if the dangerousness kaleidoscope is shaken again and new images are produced: by the mid-1960s, the habituals all but disappear from its formulation".⁹ In New Zealand, from 1967 to 1987, preventive detention was only available for sexual recidivists.¹⁰ Ashworth notes that in England, judicial and academic concern that preventive detention was being imposed in response to minor offences and upon people that "could hardly be described as real menaces" persisted through the 20th Century, and resulted in the sentence being only rarely imposed.¹¹ Similarly in Canada the Committee on Corrections in 1969 concluded that habitual criminal laws were being applied very unevenly across the country and "in a substantial percentage of cases ... to persistent offenders who, while constituting a serious social nuisance, are not dangerous".¹²

Contemporary manifestations of preventive detention target violent and sexual offenders. Illustrated by the bifurcated approach of the English Criminal Justice Act 1991, a clear line is drawn between offences against property and offences against the body.¹³ The latter is now considered "the very core of dangerousness".¹⁴

It is to this contemporary position in the major common law jurisdictions that we now turn. In all cases, the countries discussed employ a community protection rather than treatment model in dealing with dangerous offenders.¹⁵

7 Pratt, *supra* note 4, 58.

8 *Ibid* 70-72.

9 *Ibid* 98.

10 *Hall's Sentencing* (LexisNexis NZ, Source Directory, University of Auckland Library) (at 22 May 2006) SA87.1.

11 Ashworth, *Sentencing and Criminal Justice* (4 ed, 2005) 183; McAlinden "Indeterminate Sentences for the Severely Personality Disordered" [2001] Crim LR 108, 109 notes: "In 1956 it was imposed in only 13 per cent of cases in which the formal requirements for preventive detention were actually made out."

12 Jackson, "The Sentencing of Dangerous and Habitual Offenders in Canada" (1997) 9 Fed Sentencing Rep 256, 256-257.

13 McAlinden, *supra* note 11, 110.

14 Pratt, *supra* note 4, 120.

15 Connelly and Williamson, *A Review Of The Research Literature On Serious Violent And Sexual Offenders* (2000) 1.24.

III PREVENTIVE DETENTION IN MAJOR COMMON LAW JURISDICTIONS

Canada

Sections 752 and 753 of the Canadian Criminal Code allow for preventive detention to be imposed on “dangerous offenders”, designated as such at a special hearing. Under section 752.1 a single overarching “neutral” assessment of the offender must be prepared and filed with the court as evidence.¹⁶ The offender must have committed either a form of sexual assault or an indictable violent offence punishable by ten or more years’ imprisonment, and must be found to constitute “a threat to the life, safety or physical or mental well-being of other persons”, based on a pattern of persistent aggressive behaviour or the brutal nature of the offence.¹⁷ In the case of a sexual offender, the conduct must show a “failure to control his or her sexual impulses” and there must be a likelihood of “causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses”.¹⁸ If the trial judge is satisfied of the likelihood or threat beyond a reasonable doubt,¹⁹ and the offender is found to be dangerous, the sentence of preventive detention must be imposed.²⁰ The first parole review hearing for a dangerous offender occurs seven years from the date of arrest, with subsequent reviews every two years.²¹

England

Of the jurisdictions outlined in this paper, England is the most recent to introduce an indeterminate sentence specifically for dangerous offenders. Sections 224-236 of the Criminal Justice Act 2003 are headed “Dangerous Offenders” and set out “an entirely new regime” that brings England squarely within the community protection model of sentencing.²² Of particular relevance is the new sentence of imprisonment for public protection, described by the Home Office:²³

We want to ensure that the public are adequately protected from those offenders whose offences do not currently attract a maximum penalty of life imprisonment but who are nevertheless assessed as dangerous ... [We have developed] an indeterminate sentence for

16 Jackson, *supra* note 12, 258.

17 Criminal Code (Canada), s 753(1)(a).

18 *Ibid* s 752(1)(b).

19 See e.g. *R v Currie* [1997] 2 SCR 260.

20 Criminal Code (Canada), s 753(4); Manson *The Law of Sentencing* (2001) 325.

21 Criminal Code (Canada), s 761.

22 Ashworth, *supra* note 11, 210.

23 *Ibid* 211-212.

sexual and violent offenders who have been assessed and considered dangerous. The offender would be required to serve a minimum term and would then remain in prison beyond this time, until the Parole Board was completely satisfied that the risk had sufficiently diminished for that person to be released and supervised in the community. The offender could remain on licence for the rest of their life.

Imprisonment for public protection is mandatory under section 225(3) if the court “is of the opinion that there is significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences”. Section 229 even requires that for offenders over 18 who have previously been convicted of a relevant offence, “the court must assume there is such a risk”, unless the court considers it “unreasonable” to so conclude. Ashworth describes this presumption as “draconian” and questions whether it is compatible with the European Convention on Human Rights.²⁴ The court is not required to obtain a psychiatric report on the offender, but must have regard to one if available. Henham’s study of the sentencing of dangerous offenders found that “judges in any event draw the main inferences on risk from previous convictions and offence circumstances, and see these as the determinant factors to be extracted from any psychiatric report” if available.²⁵ Following a finding of dangerousness, the court is required to specify a minimum term when imposing its sentence.²⁶ When this expires, a prisoner has the right to challenge the grounds for continued detention. Release of the prisoner is decided by a panel of the Parole Board, who may only continue the detention on public protection grounds.²⁷

Australia

Each Australian state has its own sentencing regime. Only New South Wales and the Australian Capital Territory have not granted the Supreme Court the power to impose indefinite sentences.²⁸ Although it is beyond the scope of this paper to comprehensively review all of these provisions, a few brief observations are necessary.

First, the required standard for sentencing an offender to preventive detention varies. For example, in Victoria the court must be “satisfied, to a high degree of probability, that the offender is a serious danger to

24 Ibid 214-215.

25 Henham, “Sentencing Dangerous Offenders: Policy And Practice In The Crown Court” [2001] Criminal LR 693, 702.

26 Criminal Justice Act 2003 (UK), s 225(4).

27 Easton, *supra* note 1, 151; *Hussain v United Kingdom* (1996) 22 EHRR 1.

28 See Penalties and Sentences Act 1992 (Qld), s 163; Criminal Law (Sentencing) Act 1988 (SA), s 23; Sentencing Act 1995 (WA), s 98; Sentencing Act 1995 (NT), s 65; Sentencing Act 1997 (Tas), s 19; Sentencing Act 1991 (Vic), s 18A.

the community”.²⁹ In Western Australia the criterion is “on the balance of probabilities” that the offender would be a “danger to society” if released,³⁰ whereas in Tasmania the court must only be “of the opinion that the declaration is warranted for the protection of the public”.³¹ Second, South Australia is the only jurisdiction that requires the court to order and have regard to medical reports on the offender’s mental condition. Third, Western Australia is the only state where an administrative body rather than the Supreme Court is responsible for discharging the sentence. Fourth, after the first review, subsequent reviews of the sentence may take place every six months,³² every two years,³³ or every three years,³⁴ depending on the state.

Both Victoria and New South Wales have experimented with legislation allowing for the protective detention of a particularly dangerous individual.³⁵ These were both *ad hominem* in nature: the Community Protection Act 1990 (Vic) targeted Garry David, and the Community Protection Act 1994 (NSW) applied exclusively to Gregory Kable. The Victorian Act was repealed in 1993 after David committed suicide.³⁶ The NSW Act was ruled invalid by the High Court of Australia, primarily because it violated the separation of powers doctrine under the Commonwealth Constitution by asking a judicial body to engage in the “very antithesis of the judicial process” (assessing whether a person will re-offend).³⁷ However, since this decision a similar piece of legislation aimed at keeping dangerous paedophiles in custody has been passed³⁸ and upheld by the High Court of Australia.³⁹

United States of America

Perhaps unsurprisingly, the USA is “an extreme example of the community protection model”.⁴⁰ As with Australia, every state has its own penal laws, creating a huge body of legislation. Heilbrun et al reviewed this material and identified two approaches:⁴¹

29 Sentencing Act 1991 (Vic), s 18B(1).

30 Sentencing Act 1995 (WA), s 98(2).

31 Sentencing Act 1997 (Tas), s 19(1)(d).

32 South Australia.

33 Northern Territory, Queensland, Tasmania.

34 Western Australia, Victoria.

35 Bagaric, “Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments” (1996) 22 UNSWLJ 535, 550-551.

36 *Ibid* 551.

37 *Kable v DPP (NSW)* (1996) 189 CLR 51, 106.

38 Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld).

39 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50.

40 Connelly, *supra* note 15, 2.1.

41 Heilbrun, Ogloff and Picarello, “Dangerous Offender Statutes in the United States and Canada: Implications for Risk Assessment” (1999) 22 *Int'l JL & Psychiatry* 393, 394.

[T]here are two major kinds of dangerous offender statutes: those applying to “repeat sex offenders” and those applying to habitual offenders more generally. Every jurisdiction reviewed included a statute on sexual offenders, while the great majority (38) also included statutory language for habitual offenders. The phrase *violent offender* is used in 12 jurisdictions, sometimes in addition to a habitual offender statute and at other times in place of the term *habitual*.

Of particular note is the fact that the preventive detention of dangerous offenders (generally “sexually violent predators”) often occurs immediately *after* the expiration of their determinate sentence. The first instance of this was Washington’s Community Protection Act 1990, since followed by 16 state legislatures.⁴² These laws are generally presented as civil in nature. At a full hearing the prosecution must prove beyond reasonable doubt that the prisoner is a sexually violent predator:⁴³

[A] person convicted or charged with one or more sexually violent crimes, who is deemed to have a mental abnormality or personality disorder which makes them likely to engage in predatory acts of sexual violence if not confined to a secure facility. Mental abnormality is defined as a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts. Personality disorder is not defined.

Under Washington’s statute, detainees are evaluated on a yearly basis once committed. If there is probable cause that their mental abnormality or personality disorder has changed, a full trial will be held with the burden of proof on the state to prove otherwise. Evidence suggests, however, that release is very difficult to obtain.⁴⁴

New Zealand

Sections 87 to 90 of the Sentencing Act 2002 set out perhaps the broadest range of offenders for whom preventive detention has ever been available in New Zealand. The regime has been expanded to include first time offenders and those between 18 and 21 years of age. The range of qualifying sexual and violent offences has also been widened. These changes indicate a sharpened focus on the offender’s risk of causing future harm, as opposed to the seriousness of the triggering offence. Indeed the purpose of preventive

42 Miller, Amenta and Conroy, “Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals and Research Directions” (2005) 29 *Law & Hum Behav* 29.

43 Connelly, *supra* note 15, 2.12.

44 *Ibid* 2.26.

detention is explicitly stated to be “to protect the community from those who pose a significant and ongoing risk to the safety of its members”.⁴⁵

There are three conditions in relation to the offender that must be met before a sentence of preventive detention may be imposed:⁴⁶

1. the commission of a qualifying offence (sexual offences with at least a seven year maximum sentence and serious violent offences);
2. by the offender when aged 18 years or over; and
3. “the court is satisfied that the person is likely to commit another qualifying ... offence” when released from any other potential sentence.

The third condition is the key consideration for the sentencing court. As an assessment of future risk, it is not necessary for the incident offence to be particularly serious. For example, in *R v Dean*,⁴⁷ the defendant was sentenced to preventive detention based on his substantial risk of re-offending, despite his triggering offences (indecent assaults on boys) not being serious ones of their type. However, it was noted in *R v Parahi* that:⁴⁸

Such cases are likely to be exceptional, and will usually turn on persistent, knowing behaviour, despite firm warnings (although that is not an absolute prerequisite), accompanied by the necessary cumulatively serious harm. The sentence will not be appropriate to get indefinitely out of the way those whose conduct, although a nuisance, does not qualify as serious. It would be quite wrong to resort to the sentence as, in effect, a “street-cleaning” exercise.

The Court must also have regard to the matters set out in section 87(4) when considering whether to impose the sentence:

- (a) any pattern of serious offending disclosed by the offender’s history; and
- (b) the seriousness of the harm to the community caused by the offending; and
- (c) information indicating a tendency to commit serious offences in future; and
- (d) the absence of, or failure of, efforts by the offender to address the cause or causes of the offending; and
- (e) the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.

45 Sentencing Act 2002, s 87(1).

46 *Ibid* s 87(2).

47 (17 December 2004) unreported, Court of Appeal, CA 172/03; [2005] NZSC 15.

48 [2005] 3 NZLR 356, 370.

These have been recognized as “substantially a codification in different words of the matters traversed in *Leitch*”,⁴⁹ the leading authority on preventive detention under the Criminal Justice Act 1985.⁵⁰

Two procedural requirements under section 88(1) must also be met: the offender must have been notified that the sentence was being considered, and the Court must have considered at least two psychiatric or psychological assessment reports. From these reports, the Court generally focuses on the predictions of future risk and the prospects of rehabilitation. However, whilst important, they are not determinative of the sentencing result.⁵¹ It should also be noted that, in contrast to other jurisdictions, even where all the statutory requirements have been met, the imposition of preventive detention remains at the discretion of the Court.⁵²

When a sentence of preventive detention is imposed, a minimum period of imprisonment of not less than five years must also be set.⁵³ Only at the expiry of this period is the prisoner eligible to apply for parole, with subsequent annual reviews.⁵⁴ Further enhancing the protective qualities of the sentence is the fact that the offender, once released, is subject to recall for life.⁵⁵

The above historical and jurisdictional survey has demonstrated the widespread popularity of sentencing legislation that targets those deemed to be dangerous criminals. However, the types of criminals who fall into this class have varied from time to time, and place to place. “Dangerousness” is not an objective standard; “there is no such psychological or medical entity as a ‘dangerous’ person”.⁵⁶

IV THE DIFFICULT CONCEPT OF DANGEROUSNESS

According to the Floud Committee, “Dangers are unacceptable risks: we measure or assess the probability and severity of some harm and call it a risk; but we speak of danger when we judge the risk unacceptable and call for preventive measures.”⁵⁷ But, as John Pratt points out:⁵⁸

[D]angerousness is neither a statistical artefact nor a political property. Instead, dangerousness, as it were, is a creation of modernity itself, possessing a life force that began when the concept of risk and its

49 *R v Leitch* [1998] 1 NZLR 420, 429; *R v C* [2003] 1 NZLR 30.

50 *R v Mist* [2005] 2 NZLR 791, 805.

51 *Hall's Sentencing*, supra note 10, SA87.1, SA88.3.

52 *R v Leitch* [1998] 1 NZLR 420, 429; *R v C* [2003] 1 NZLR 30, 34.

53 Sentencing Act 2002, s 89.

54 Conte, “Human Rights, Non-Parole Periods and Preventive Detention” [2004] NZLJ 202, 202.

55 Parole Act 2002, s 6(4)(d).

56 Floud, “Dangerousness and Criminal Justice” (1982) 22 Brit J Criminol 213, 213.

57 Floud and Young, *Dangerousness and Criminal Justice* (1981) 4.

58 Pratt, supra note 4, 6.

strategies of management found their way into the social fabric of the late nineteenth century. From that time onwards, dangerousness has been given a continuous momentum by the fears and anxieties attendant upon the conditions of modern life. Most of the dangers that beset pre-modern and early modern societies (plague, famine, destitution and so on) have now been eliminated: instead, modern society brought with it a new sense of value — both to individuals and the population at large — which persistent offenders put at risk and thereby became “dangerous”.

Serious violent and recidivist sexual offenders are currently regarded as the most dangerous of criminals. For them, the crime control model of criminal justice is increasingly favoured over the due process model, for society demands protection from such terrors.⁵⁹ In many cases, indeterminate sentencing laws were enacted in response to high profile incidences of serious, often sexual, recidivism.⁶⁰ Reactionism, however, does not often lead to rational penal policy. Indeed the MacLean Committee on Serious Violent and Sexual Offenders pointed out that:⁶¹

Although these crimes are serious, and should be prevented if at all possible, it should be borne in mind that members of the public face a greater likelihood of suffering violent crime at the hands of people who consume too much alcohol or illegal drugs, than as a result of the actions of any identifiable and separate group of high risk offenders with a propensity for acting violently. While it is right to reduce the risk to the public from this second group, so far as this can be achieved, this will only make a relatively small difference to overall violent crime.

Amorphous as it is, however, dangerousness remains a key concept in modern penal policy, and especially in preventive sentencing regimes. Although neither a static nor entirely rational construct, it must be accepted that there is widespread political consensus on the core group of offenders from whom society demands protection. This would include serial rapists, murderers and paedophiles. It is around the edges of this core that disagreement will occur.

59 Conrad, “The Quandary of Dangerousness: Towards the Resolution of a Persisting Dilemma” (1982) 22 *Brit J Criminol* 255, 258-260.

60 Manson, *supra* note 20, 319; Connelly, *supra* note 15, 2.9; Scottish Executive, *Report of the Committee on Serious Violent and Sexual Offenders SE/2000/68* (2000) 5.

61 Scottish Executive, *supra* note 60, 5; for discussion see Floud and Young, *supra* note 57, 3-19.

V PREVENTIVE DETENTION AND THE JUSTIFICATION OF PUNISHMENT

Preventive detention, as part of the penal system, is ostensibly punishment: an infliction of suffering in response to a specific offence, albeit a response justified on the grounds of public protection. This raises the question that has vexed philosophers and criminologists for centuries: what morally justifies a state in punishing its citizens? And what justifications exist for the state imposing so severe a penalty as preventive detention?

The Philosophical Problem of Justifying Punishment

Punishment, as the deliberate infliction of pain and suffering, is morally problematic insofar as it resembles the offence for which it is imposed. As Deirdre Golash puts it, “every punishment inflicts upon the offender some harm that, if it were not a response to crime, would itself be a crime.”⁶² A normative theory of punishment is therefore needed both to justify the practice of punishment and to provide a critical standard against which to compare current practices. Justifications for protective sentences are typically rooted in a certain theory of punishment.

A great chasm exists between the two broad theories that seek to justify punishment — the retributive and utilitarian. Retributive theories are backward-looking: “Where an offence has been committed, the offender *deserves* punishment. No further justification is needed; it is all but obligatory to deliver such punishment.”⁶³ Also, the punishment meted out should be proportional to the offence committed. Utilitarian theories, in contrast, are forward-looking: punishment is only justified when it positively contributes to some independently identifiable good.⁶⁴ The quantum of punishment is therefore more concerned with achieving specific outcomes, generally crime reduction. John Rawls has poignantly stated that “no justification is without those who detest it ... [but] both views have a point”.⁶⁵ Perhaps for this reason, the New Zealand Sentencing Act 2002,⁶⁶ like most jurisdictions, is “unabashedly eclectic” in its incorporation of both philosophies in its stated purposes.⁶⁷

Despite this macro-level eclecticism, the justification for preventive detention is fundamentally ontological: the prevention of future harm via the incapacitation of a person whose very *being* is deemed to be that of an incorrigible offender. The wordings of the various provisions already

62 Golash, *The Case Against Punishment* (2005) 49.

63 Marshall, *Beyond Retribution* (2001) 98.

64 Duff and Garland (eds), *A Reader on Punishment* (1994) 6-7.

65 Rawls, “Two Concepts of Rules” in Feinberg and Gross (eds), *Punishment* (1975) 59.

66 See s 7(1).

67 Roberts, “Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002” (2003) 36 ANZJ Crim 249, 256.

covered illustrate this. The acceptability of such a justification will, to a large extent, depend on one's views on the justification for the institution of punishment. While this paper does not defend any specific normative theory, it is worth noting that only the staunchest retributivist, who repudiates all utilitarian considerations, would argue that preventive sentences are never justifiable. For most theorists the more pressing issue is determining the necessary requirements for a justifiable sentence of preventive detention.

Justifications for Preventive Detention

There is undoubtedly in every society a small group of offenders who pose a significant and ongoing danger. The recidivist paedophile Leroy Hendricks, for example, admitted that only death would stop him molesting children.⁶⁸

Advocates of preventive detention insist that it is an essential tool by which a society is able to protect itself from future harm at the hands of such people. They point out that the concept of dangerousness already permeates the criminal justice system, and it would be naïve to attempt to exclude it from our jurisprudence.⁶⁹ Robinson argues that in America disproportionately long sentences, "three strikes" laws, and the lowering of the age of criminal responsibility are, in reality, preventive measures designed to give society more control over dangerous offenders. However, these provisions are surreptitiously disguised as "just punishment" so as to avoid the "logical restrictions" that preventive detention carries, such as the need for periodic review of the prisoner's dangerousness.⁷⁰ It is far better for society to be open about its right to prevent future offending so that procedural safeguards are observed and justice is not endangered.

One leading justification of preventive detention is the forfeiture thesis. This thesis states, on the presumption of harmlessness, that all citizens who have not harmed others have a right to be free from interference. This right is forfeited, however, by causing harm to others; and the state is then justified in taking preventive action. "The harm someone has caused or attempted to cause is more than a predictor: it is part of the moral justification for subjecting that person to a precautionary measure."⁷¹ This argument was mounted in the Floud Committee's influential report *Dangerousness and Criminal Justice*:⁷²

68 *Kansas v Hendricks* (1997) 521 US 346, 355.

69 Slobogin, *Minding Justice* (2006) 103; Morris "Incapacitation Within Limits" in von Hirsch and Ashworth (eds) *Principled Sentencing* (2 ed, 1998) 107.

70 Robinson, "Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice" (2001) 114 *Harv L Rev* 1429, 1446.

71 Walker, "Incapacitation, Dangerousness and Forfeiture of Rights" in von Hirsch and Ashworth (eds) *Principled Sentencing* (2 ed, 1998) 104.

72 Floud and Young, *supra* note 57, 46.

A man must justly forfeit his right to be presumed innocent before his right to be presumed harmless can be brought into question. The right to punish for past wrong-doing is a pre-condition of the right to prevent future wrong-doing.

A moral choice is then required between the risk of harm to potential victims and the risk of imprisoning an offender who would not have re-offended if released. This choice is made on the principle of just redistribution of risk. In order to consider shifting the burden of risk to the offender, there must be a threat of grave harm to others.⁷³ But this does not mean that proportionality must be jettisoned:⁷⁴

A protective sentence depends for its justification ... as much on our having the right to continue to punish the offender as it does on our having good reasons to continue to detain him because he remains dangerous. Protective sentences are longer than would be justifiable on other grounds alone, but they are not exempt from the proportionality rule.

Slobogin takes a somewhat different tack in his first justifying theory for preventive detention.⁷⁵ He provides conditional support for an incapacitative system running alongside, but separate from, the criminal law.⁷⁶ Preventive detention should only apply to individuals who are “truly undeterrable”, identified by one of two psychological characteristics: (i) an unawareness that one is engaging in criminal conduct (including, for example, people who commit crimes while sleepwalking); or (ii) extreme recklessness with respect to the prospect of serious loss of liberty or death resulting from the criminal conduct (that is, the “police officer at the elbow test”).⁷⁷ These persons are impervious to criminal punishment and so society is entitled to opt for preventive detention because the commands of the criminal justice system *cannot* work.⁷⁸

Interestingly, or perhaps alarmingly, Slobogin’s second (alternative) theory is a radical advancement on his first.⁷⁹ He advocates a “system of liberty deprivation that takes the dangerousness criterion as the sole predicate for intervention [that] would not shadow the criminal code but instead constitute it.”⁸⁰ State intervention is triggered by an antisocial act which is both non-accidental and unjustifiable. The aim of the intervention is not to punish or blame but to incapacitate the offenders and hopefully reduce their propensity to commit crime. This would occur through

73 Ibid 49-55.

74 Ibid 61.

75 Slobogin, *supra* note 69, 103-151.

76 Robinson, *supra* note 70, also advocates such a system.

77 Slobogin, *supra* npte 69, 135.

78 Ibid 106.

79 Ibid 152-177.

80 Ibid 152.

indeterminate sentences for all “offenders” comprising “routine risk assessment, periodic review, community placements, and rehabilitative efforts”.⁸¹ Such a regime, it is argued, would be more effective at preventing crime, and better able to do justice (or less likely to do injustice) in the face of increasing scientific evidence of behavioural determinism and therefore, to a greater or lesser extent, diminished responsibility.

These theories are serious and coherent attempts to justify indefinite sentences. In practice the first two proposals would largely resemble the operation of contemporary preventive sentences. The third proposal, on the contrary, serves to illustrate the potential result of dangerousness being allowed to become the hegemonic criterion justifying state intervention. In light of this, we turn now to consider in more detail some of the substantial criticisms that can be levelled against preventive detention, and the complexities entailed in operating a just and justifiable regime of preventive sentencing.

VI CRITICISMS AND ISSUES WITH PREVENTIVE DETENTION

The Problem of False Positives and Predicting Future Harm

Probably the most common criticism of preventive sentences is the problem of false positives. “False positives” are those offenders who are preventively confined unnecessarily, since they would not have re-offended if released at the end of a normal sentence. As a result of a mistaken classification, these people are subjected to the most serious punishment available: the extended deprivation of all liberties. “False negatives” are dangerous offenders who are not preventively confined and who commit further serious crimes. In general, critics focus concern on the former situation, while public concern focuses on the latter.⁸² After all, “there is no political constituency of support for persons labelled ‘dangerous’.”⁸³

Predicting future serious offending is extremely difficult and, given the rarity of serious offences, for statistical reasons there is an inherent tendency to over-predict.⁸⁴ The process “resembles trying to hit a small bull’s-eye with a blunderbuss: to strike the centre of the target with any of the shot, the marksman will have to allow most of his discharge to hit outside it”.⁸⁵ The force of this argument is that there are likely to be

81 Ibid 177.

82 Floud, *supra* note 56, 217-218.

83 Ashworth, *supra* note 11, 218.

84 von Hirsch, “The Problem of False Positives” in von Hirsch Ashworth (eds) *Principled Sentencing* (2nd ed, 1998).

85 Ibid 100.

substantial numbers of non-dangerous offenders incarcerated to ensure the truly dangerous ones are not set free.

The first rebuttal to the false positives objection concerns the nature of the prediction being made. A prediction of dangerousness is not a prediction of a particular result but a statement of a present condition.⁸⁶ This may be illustrated by an analogy with a dangerous object: unexploded bombs. These may properly be described as dangerous despite the fact that very few actually end up going off and most are successfully rendered safe. The same logic should be applied to dangerous people: “that the person predicted as dangerous does not do future injury does not mean that the classification was erroneous”.⁸⁷

The unexploded bomb analogy is, however, a weak one. No one is harmed by treating an unexploded bomb as dangerous. A bomb does not have rights and cannot suffer. Offenders who are predicted to be dangerous, however, do have rights and will certainly suffer when imprisoned. Furthermore, crucial to any justification for preventive detention is the predicted *actuality* of future harm. It therefore “becomes a matter of legitimate concern whether the person would have committed the predicted misdeed”.⁸⁸ If a preventive detainee is as unlikely to cause harm as an unexploded bomb is to detonate, then they have been treated unjustly.⁸⁹

A second and more recent response to the problem of false positives focuses on the desired proof of dangerousness. This rebuttal comes in two parts. The first is the assertion that modern prediction methods are accurate and no longer produce substantial numbers of false positives. The second is the assertion that it is misguided in any event to desire anything approaching the “beyond all reasonable doubt” standard required for criminal conviction; a certain number of false positives are unavoidable, but acceptable. We will consider this second assertion first, then return to the question of the accuracy of prediction methods.

1 The Standard of Reasonable Doubt

It is argued that although it is better for ten guilty people to go free than to have one innocent person punished, a different calculus should be employed for preventive detention.⁹⁰ “Beyond all reasonable doubt” is a very high threshold for a past crime because the punishment imposed cannot undo the harm that was caused. In the case of future harms, utilitarian considerations should be employed: if we could identify a group of ten people, among whom six will kill in the near future, imprisoning the entire

86 Floud and Young, *supra* note 57, 24-25, 56-58.

87 Morris, *supra* note 69, 108.

88 Von Hirsch, *supra* note 84, 102.

89 Bottoms and Brownsword, “The Dangerousness Debate after the Floud Report” (1982) 22 *Brit J Criminol* 229, 245-247.

90 Slobogin, *supra* note 69, 109.

group would be justified given the costs of not doing so. This is at least arguable, but it requires acceptance of an unabashedly utilitarian morality that many people would reject. If convicting and punishing an innocent person is morally wrong for deontological reasons, then it remains wrong even when the sanction has utilitarian benefits in a preventive sense.

It is also argued that the criminal justice system already accepts much less accurate predictions of dangerousness. Vagrancy laws (for example, prohibiting loitering within thirty feet of a cash machine), endangerment laws (such as, drink driving) and possession laws (for instance the possession of burglary tools or drugs) attract criminal punishment on the basis of weak and uncertain predictions of harm.⁹¹ However, this argument confuses the motivation for criminalizing certain forms of risky conduct with the need to prove (beyond all reasonable doubt) that one actually engaged in the prohibited conduct. It also does not adequately draw the distinction between consciously *doing* a prohibited act and the prediction that a person *is dangerous* and *will do* a dangerous act in the future.

Despite the weaknesses in the “reasonable doubt” argument, it should not be entirely dispatched. On utilitarian grounds at least, there is an arguable case that an acceptable standard of proof that an offender will commit future serious offences may be lower than that for a conviction. This would hold only as long as preventive sentences are regularly reviewed, and where the required standard of proof of future harm at each review increases as the duration of imprisonment increases. In this way an offender could not be incarcerated for an extended period on a low standard of proved dangerousness; this would be akin to lowering the standard of proof for a conviction, and perhaps even worse as the sentence would be indefinite. This requirement is elaborated on in the discussion of proportionality below. Now, it falls to examine the first part of the reply — current accuracy of predictions of future violence.

2 The Ability to Predict Future Dangerousness

There is a surprising degree of divergence in the academic literature concerning the accuracy of predictions of future violence. The traditional camp argues that it is impossible to predict human behaviour with any degree of certainty.⁹² This claim is regarded as empirically justified:⁹³

[T]he proportion of falsified judgments of *dangerous*, even at its lowest, is so uncomfortably high that no-one engaged in making predictive judgments in the administration of justice can fail to be impressed — or, more likely, depressed. As matters now stand, parole boards and similar bodies, to say nothing of courts, are, on

91 Ibid 146-147.

92 See e.g. Bagaric, *supra* note 35, 556-557.

93 Floud, *supra* note 56, 217-218. Emphasis added.

average, at best as likely to be wrong as right in thinking that the offenders they decide to detain as dangerous will actually do further harm if left at large.

Indeed the American Psychiatric Association told the United States Supreme Court in *Barefoot v Estelle*⁹⁴ that psychiatrists' predictions of future dangerous in an individual are *at best* wrong "two out of three" times.⁹⁵ Many later commentators continue to adhere to these claims.⁹⁶

Others argue, however, that predictive techniques have significantly advanced in recent years, such that "clear and convincing evidence of dangerousness, if not proof beyond a reasonable doubt, is available for certain categories of individuals".⁹⁷ The MacLean Committee expressed similar views, and were optimistic of future improvements and developments in assessment tools.⁹⁸ Members of this camp do not, however, suggest that predictive accuracy will ever approach certainty.

These wildly conflicting claims require explanation. The traditional camp originated in studies in the 1980s (and earlier) into the accuracy of clinical judgments. Almost without exception these found predictions of violence to be very poor, often worse than chance. However, substantial further research has since taken place using actuarial (statistical) tools in the place of subjective human judgment.⁹⁹ Surprisingly, many members of the traditional camp continue to ignore this body of knowledge. McAlinden's article is a prime example.¹⁰⁰ Despite writing in 2001, she almost exclusively cites studies from the 1970s and 1980s.¹⁰¹ Other scholars make only cursory references to the later research, instead continuing to focus on outdated studies.¹⁰² However, Stephen Morse, in defence of the traditional camp, argues that optimists about prediction make too much of more recent studies and ignore their methodological flaws and limitations.¹⁰³

Given the competing claims it is pertinent to look into a selection of the more recent predictive literature. Several important conclusions may be drawn from the predictive literature of the last 15 years.

First, actuarial measures are universally regarded as superior to

94 463 US 880 (1983).

95 La Fontaine, "A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases are Unconstitutional" (2002) 44 BCL Rev 207, 223.

96 See e.g. McAlinden, *supra* note 11, 119; Bagaric, *supra* note 35, 556-557; Ashworth and Von Hirsch, "Protective Sentencing Under Section 2(2)(b): the Criteria for Dangerousness" [1996] Crim LR 175; Robinson, *supra* note 70, 1450.

97 Slobogin, *supra* note 69, 111; see also Heilbrun, *supra* note 41, 393.

98 Scottish Executive, *supra* note 60, 7.

99 See generally Heilbrun, *supra* note 41, 393.

100 McAlinden, *supra* note 11, 119-120.

101 For similar selective citation see La Fontaine, *supra* note 95, 233-234.

102 Ashworth, *supra* note 11, 215-216.

103 Morse, "Blame and Danger: An Essay on Preventive Detention" (1997) 76 BUL Rev 113, 127.

clinical judgments at predicting future violence.¹⁰⁴ Actuarial methods are based on statistical studies and direct the clinician as to which factors to take into account and the formula by which to combine them. Unstructured clinical judgments rely on the intuitive and subjective analysis of risk by the clinician, both in which factors to consider and how to interpret them.¹⁰⁵ By the end of the 1980s it was clear that “[m]ore research demonstrating that the outcome of unstructured clinical assessments left a great deal to be desired seemed to be overkill: That horse was already dead”.¹⁰⁶

It is worth noting, however, that in many countries actuarial methods have not been widely adopted by clinicians.¹⁰⁷ There is also debate over whether they are sufficient for legal purposes. Both the Floud¹⁰⁸ and MacLean committees recommended an approach in sentencing hearings that combines the objective empiricism of actuarial approaches with the judgment of individual risk factors afforded by expert clinicians.¹⁰⁹

Secondly, predictive accuracy has noticeably improved. Perhaps the leading example is the work of the MacArthur network into violence in mentally disordered persons.¹¹⁰ The actuarial instrument produced from their extensive research study was able to place persons into one of five classes indicating the risk of committing an act of serious violence during the 20 weeks following discharge. For the highest risk group the rate of violence was 76 per cent, while for the lowest risk group it was only 1 per cent. However, when the model was applied to a new sample of individuals it lost predictive power with only 49 per cent of the high risk group committing a further act of violence.¹¹¹ This model has not as yet been validated on any population other than American acute psychiatric inpatients.

The Violence Risk Appraisal Guide (“VRAG”) is another promising model. It studied violent recidivism over an extended follow-up period

104 See e.g. Wollert, “Low Base Rates Limit Expert Certainty When Current Actuarials are Used to Identify Sexually Violent Predators: An Application of Bayes’s Theorem” (2006) 12 *Psychology, Public Policy, and Law* 56, 58; Bonta, Law and Hanson, “The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis” (1998) 123 *Psychological Bulletin* 123, 137; Rice, “Violent Offender Research and Implications for the Criminal Justice System” (1997) 52 *American Psychologist* 414, 416; Lidz, Mulvey and Gardner, “The Accuracy of Predictions of Violence to Others”, (1993) 269 *JAMA* 1007; William Gardner et al, “Clinical Versus Actuarial Predictions of Violence in Patients with Mental Illnesses” (1996) 64 *Journal of Consulting and Clinical Psychology* 602.

105 Hilton, Harris and Rice, “Sixty-Six Years of Research on the Clinical Versus Actuarial Prediction of Violence” (2006) 34 *The Counseling Psychologist* 400, 401.

106 Monahan et al, *Rethinking Risk Assessment* (2001) 7.

107 Hilton, *supra* note 105, 404; Scottish Executive, *supra* note 60, 9. However in New Zealand actuarial instruments are used: Wilson, *The Utility of the Psychopathy Checklist- Screening Version for Predicting Serious Violent Recidivism in a New Zealand Offender Sample* (PhD Thesis, University of Waikato, 2003); also see e.g. the assessment reports noted in *R v Mist* [2005] 2 NZLR 791, 806-807 and *R v Parahi* [2005] 3 NZLR 356, 364-365.

108 Floud and Young, *supra* note 57, 27.

109 Scottish Executive, *supra* note 60, 9-13. Qualified support of this approach is provided by Monahan et al, *supra* note 106, 130-135.

110 Monahan et al, *supra* note 106.

111 John Monahan, et al, “An Actuarial Model of Violence Risk Assessment for Persons with Mental Disorders” (2005) 56 *Psychiatric Services* 810.

of seven years among men admitted to a mental health centre prior to standing trial for a violent offence.¹¹² The instrument classified the subjects into nine distinct risk groups, with recidivism increasing steadily from 0 to 100 per cent as scores from the prediction equation increased.¹¹³ On an extended follow-up and expanded sample, the VRAG maintained its predictive accuracy.¹¹⁴ It was also found useful in a smaller Swiss cross-validation.¹¹⁵ Similarly Wilson's study found that a key component of the VRAG, the Psychopathy Checklist: Screening Version ("PCL:SV"), was a good predictor of serious recidivism in a group of 200 serious offenders in New Zealand. Those scoring over 19 had a re-imprisonment rate of 70 per cent, while the rate for those scoring the maximum 24 was 80 per cent over the four year follow-up period.¹¹⁶ At the recommended cut-off value of 16 the false positive rate was 32 per cent, and the false negative rate 24 per cent.¹¹⁷

Thirdly, although accuracy has improved, false positives are still regarded as inherent to risk assessment models, but not declaratory of their predictive accuracy, as they depend on the base rate of violence in the study sample.¹¹⁸ If the offenders studied have a recidivism rate of 75 per cent, it is much easier to generate a low false positive rate than in a sample with 5 per cent recidivism. As such, predictive models are now evaluated for comparative accuracy using the receiver operating characteristic ("ROC"), a measure independent of base rates.¹¹⁹ In general, this shows that as the probability of a true positive increases, so does the probability of a false positive.¹²⁰ Thus a high ROC value, often described as the model's predictive accuracy, does not ensure a low false positive rate.

Fourthly, although many of the studies covered have been on offenders with some degree of mental disorder, this does not invalidate the results for the general offender population. Both the VRAG and PCL: SV have been used on populations that are likely to be representative of dangerous offenders. The findings of Bonta's meta-analysis of violent recidivism prediction studies are highly relevant.¹²¹

112 It should be noted that the characteristics of this population were not expected to be significantly different to the general dangerous offender prison population: Harris, Rice and Quinsey, "Violent Recidivism of Mentally Disordered Offenders: The Development of a Statistical Prediction Instrument" (1993) 20 *Crim Just & Behav* 315, 320.

113 *Ibid* 327. Although note that groups 1 and 9 were relatively small with only approximately 10 members.

114 Rice and Harris "Cross-Validation and Extension of the Violence Risk Appraisal Guide for Child Molesters and Rapists" (1997) 21 *Law & Hum Behav* 231.

115 Urbaniok et al, "Prediction of Violent and Sexual Offences: A Replication Study of the VRAG in Switzerland" (2006) 17 *Journal of Forensic Psychiatry & Psychology* 23: violent recidivism was observed in 58.3% of members in categories 8-9.

116 Wilson, *supra* note 107, 113-134.

117 *Ibid* 133.

118 *Ibid* 39-40.

119 Mossman, "Assessing Predictions of Violence: Being Accurate About Accuracy" (1994) 62 *Journal of Consulting and Clinical Psychology* 783.

120 On the VRAG, see Rice, "Violent Offender Research and Implications for the Criminal Justice System" (1997) 52 *American Psychologist* 414, 417.

121 Bonta, *supra* note 104, 139.

The major predictors of general and violent recidivism appear comparable for mentally disordered and non-disordered offenders. Criminal history, antisocial personality, substance abuse, and family dysfunction are important for mentally disordered offenders as they are for general offenders. In fact, the results support the theoretical perspective that the major correlates of crime are the same, regardless of race, gender, class, and the presence or absence of a mental illness.

Finally, a large number of the factors contributing to a high risk assessment score are static — historical facts that cannot be changed.¹²² These include prior violence and criminality, and frequent and serious physical abuse as a child.¹²³ One of the best models at predicting sexual recidivism, for example, is based on four static criminal history items.¹²⁴ However, it should be noted that the PCL:SV includes variables that are both static (such as adolescent antisocial behaviour) and dynamic (for example lacking in goals).¹²⁵

This discussion clearly shows that predictive accuracy has improved in recent years. It is no longer defensible to dismiss all predictive models as grossly erroneous. False positives, however, remain unavoidable. Even in the most successful studies, the rates have been from 20-30 per cent, and when cross-validated on new populations this rate increases. We are thus left with a moral, not a scientific, question: what rate of false positives is tolerable before preventive detention becomes unjustified? Gray suggests that even a 20 per cent false positive rate should leave citizens uneasy.¹²⁶ Conversely, in *R v Rameka* the New Zealand Court of Appeal held that a 20 per cent risk of a convicted rapist sexually re-offending was substantial enough to justify indefinitely extending an already long determinate sentence.¹²⁷

The false positives objection is only a conditional challenge to preventive detention. There is a strong possibility that predictive methods will at some stage pass the critical threshold necessary to reduce false positives to a level considered morally acceptable. But there remain other, more fundamental challenges to preventive sentencing.

Philosophical Criticisms

Two broad philosophical objections to preventive detention are possible. The first is that it involves punishing offenders for future crimes, and in

122 Scottish Executive, *supra* note 60, 10.

123 Monahan et al, *supra* note 106, 38-60.

124 Wilson, *supra* note 107, 37.

125 *Ibid* 134.

126 Gray, "Preventive Detention Laws: High Court Validates Queensland's Dangerous Prisoners Act 2003" (2005) 30 *Alt LJ* 75, 78.

127 *R v Rameka* [18 June 1997] CA178/97.

doing so denying their autonomy and treating them as dangerous “things” to be controlled rather than being fully human agents. The second is that imposing a punishment on the basis of risk or danger inevitably leads to punishments that are grossly disproportionate to the offence.

1 Denial of Autonomy and Dehumanization

The ability to control one’s destiny, to choose right from wrong, is an essential component of what it means to be human. Therefore to sentence someone on the basis of what they might do, not what they have already done, is to deny their humanity by taking away their capacity to exercise autonomous decision-making in the future. It is to treat them as less than human, as “tigers might be treated in a circus, as beings that have to be restrained, intimidated, or conditioned into compliance because they are incapable of understanding why biting people (or other tigers) is wrong”.¹²⁸

Some respond to this charge by arguing that preventive detention does not deny that the offender has the capacity to choose good, it just predicts that the offender will not do so. But this will not do. It honours the autonomy of the offender in name only, not in practice. The very reason they are denied the opportunity to exercise good moral choice is because it is claimed that under all circumstances they will not do so.¹²⁹

A different defence is to appeal to the practice of quarantine as an example of a widely accepted preventive practice. If quarantine, which entails at least a minimal violation of human rights, is morally justifiable,¹³⁰ then preventive confinement cannot be absolutely unjustifiable.¹³¹ The only question is the circumstances in which it is an acceptable sentence.

There is a certain coherence to this argument. But there are substantial differences between medical quarantine and preventive detention. Golash tentatively agrees that “we may incapacitate the dangerous on the same basis as that on which we quarantine”, but draws numerous distinctions between the prospect of an epidemic and the possibility of future criminal harm, inferring that these differences make the comparison unhelpful.¹³² The Floud Committee, however, concluded that preventive detention and quarantine are conceptually dissimilar. Quarantine is designed to protect the public from unintentional harm, in the same way as civil psychiatric detention does, and therefore respects autonomy. However, it is a very different matter when these measures are extended to preventing wilful harm by responsible agents.¹³³ Accordingly, quarantine is justified for typhoid carriers because harm is primarily caused unintentionally, but

128 Von Hirsch, “Censure and Proportionality” in Duff and Garland (eds), *A Reader on Punishment* (1994).

129 Slobogin, *supra* note 69, 122-124.

130 Bottoms, *supra* note 89; Discussed under “Human Rights Considerations” below.

131 See Schoeman, “On Incapacitating the Dangerous” (1979) 16 *Am Phil Q* 27.

132 Golash, *supra* note 62, 47.

133 Floud and Young, *supra* note 57, 41.

not for AIDS carriers because harm is primarily caused through wilful actions.

Yet another defence to the charge of dehumanisation is to justify preventive detention on punitive rather than utilitarian grounds. As protection of the community is an essential consideration in sentencing, indeterminate sentences may be accepted as legitimate punishments. This was the view taken by a three member minority of the United Nations Human Rights Committee (“HRC”).¹³⁴ This position is arguable, however, on the grounds of proportionality, which leads to the second philosophical objection to preventive detention.

2 The Problem of Disproportionality

It is a fundamental principle of retributivism that the punishment should bear a reasonable relation to the degree of blameworthiness of the criminal conduct.¹³⁵ Only a proportionate penalty can serve as a “moralising sanction” that conveys the wrongness of the conduct.¹³⁶ Bagaric insists that proportionality is, at common law, the “predominant objective of sentencing” and “cannot even be trumped by what many believe to be the most important aim of sentencing: community protection”.¹³⁷

Critics charge that preventive detention is generally incompatible with the principles of just deserts and proportionality. The sentence length is not tied to the gravity of the offence. Moreover, predictions of dangerousness are often based on factors completely unrelated to culpability or desert,¹³⁸ such as the offender’s childhood experiences, socio-economic status and mental or personality disorders. In fact, many of these factors would ordinarily be regarded as mitigating factors at sentencing! Some theorists have proposed that preventive sentences are justifiable insofar as recidivist offenders may be regarded as having been on notice. Indeed, New Zealand courts have often handed out explicit warnings of the prospect of preventive detention for future offences.¹³⁹ However, this does not help to justify the sentence. An immoral sentence cannot be justified solely because the offender has been warned.¹⁴⁰ “‘No littering’”, Golash argues, “is a reasonable rule, but ‘No littering on pain of death’ is not”.¹⁴¹

It is true, of course, that proportionality is notoriously difficult

134 Newbold, “The Legality of Preventive Detention” [2004] NZLJ 205, 206.

135 See especially von Hirsch, *supra* note 128; and generally Hudson, *Understanding Justice* (2 ed, 2003) 39-43.

136 Ashworth and von Hirsch, *supra* note 96, 176.

137 Bagaric, *supra* note 35, 558-559.

138 von Hirsch, “Selective Incapacitation: Some Doubts” in von Hirsch and Ashworth (eds), *Principled Sentencing* (2 ed, 1998).

139 Note that this is not a condition precedent to imposing preventive detention, the sentence is available to first-time offenders: *R v Al Baiyary* (17 October 2005) unreported, CA 120/05.

140 Morse, *supra* note 103, 145.

141 Golash, *supra* note 62, 78.

to measure.¹⁴² At best, the principle of proportion provides us with a broad range of justifiable sentences,¹⁴³ or perhaps with a narrower range of permissible sentences. Some claim that the recognition of this fact requires us to “abandon the quest for proportion and equality”.¹⁴⁴ This probably overstates the problem; at a minimum, the principle requires that any sentence imposed is not obviously disproportionate.¹⁴⁵

The weight given to the proportionality objection very much depends on one’s theory of the justification of punishment.¹⁴⁶ Proportionality is a pillar of the retributivist approach. For utilitarians, however, proportionality is just one of many considerations when imposing a sentence, and in the case of protective sentences it is certainly not the central one. However, in most jurisdictions it is still an overarching concern in sentencing and in notions of fairness.¹⁴⁷ So, although preventive detention is a necessary exception to the stricter requirements of proportionality,¹⁴⁸ both its initial imposition and its cumulative weight must not be obviously disproportionate. The first condition is satisfied by only imposing the sentence in response to serious offending. The second, by demanding increasingly strong evidence of dangerousness the longer the detention continues:¹⁴⁹

Although each new commitment at the periodic review need not be preceded by a new antisocial act (because, if effective, the intervention should prevent such acts, and because the justification for preventive detention is dangerousness, not behaviour), it should be permitted only upon increasingly more stringent proof of dangerousness, whether the setting is criminal or civil commitment. Evidence of resistance to treatment, recent overt acts, and other new indicia of dangerousness can meet this burden under some circumstances. At some point, however, release should simply be required simply because the requisite certainty level demanded by the proportionality principle has become so high it cannot be met by any type of evidence. That proposition might require, for instance, automatic release after a certain period unless new evidence of dangerousness is forthcoming.

Human Rights Considerations

Human rights-based objections to preventive detention are found in two sources: theoretical literature on human rights and associated rights-based

142 Tonry, “Selective Incapacitation: The Debate over Its Ethics” in von Hirsch and Ashworth (eds), *Principled Sentencing* (2 ed, 1998) 130.

143 Morris, *supra* note 69.

144 Morse, *supra* note 103, 145.

145 Although note that US Supreme Court in *Lockyer v Andrade* (2003) 123 S Ct 1166 upheld a sentence of 50 years — for two thefts of a total of 11 blank video tapes — as not grossly disproportionate!

146 Tonry, *supra* note 142.

147 Roberts, *supra* note 67, 249 argues that it underlies the New Zealand legislation.

148 Ashworth and von Hirsch, *supra* note 96.

149 Slobogin, *supra* note 69, 144.

methodologies, and documents that are declaratory of human rights. In many ways, the philosophical and pragmatic criticisms already covered turn on issues of human rights, so only a brief discussion of the rights dimension of such objections is required at this point.

The Floud Committee's forfeiture thesis is built on the right to be presumed free of harmful intentions. Those who forfeit this right must carry the burden of accepting the principle of just redistribution of risks. This conception essentially derives from an explanation of the justifiability of quarantine. Bottoms and Brownswood strongly criticize this as a "thinner view of rights" which treats them as merely "peripheral constraints" that only "rule out minimal arguments of expediency".¹⁵⁰ Moreover, the ethical methodology employed is seen as "basically designed to produce an intellectual justification for a few simple intuitions".¹⁵¹

As a replacement, a rights-based methodology is proposed. This is based on a strong view of a right: "it shuts out appeals to expediency, or convenience, or public interest. A right can only be defeated by a competing right."¹⁵² Preventive detention puts the offender's right to be released at the end of a normal term in conflict with the right of citizens not to be harmed. We therefore have to calculate which course of action will minimize the violation of rights. On one side of the calculation is the certainty that preventively imprisoning the offender will immediately and in a fundamental way violate his rights. Thus to tip the scales towards preventive incarceration we must have a high degree of certainty that, if released, the offender would violate the rights of another in a serious way. Only the satisfaction of a "vivid danger" test will suffice; this is only likely to be met in very exceptional cases.¹⁵³

This approach is preferable to that of the Floud Committee as it acknowledges that an offender's rights *are* being violated when preventive incarceration is imposed, and it takes this violation more seriously by setting a much higher threshold to be satisfied. The major difficulty with this argument, however, is its reliance on assertions of both the nature of rights generally (and thus the methodology for resolving conflicts), and the content of certain specific rights. Both are difficult to prove.

Dispute over the content of specific rights may be resolved to a certain extent by recourse to declaratory documents on human rights. The Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights ("ICCPR") are two such documents. Both give protection against the imposition of "cruel and unusual" punishment¹⁵⁴ and

150 Bottoms, *supra* note 89, 235.

151 *Ibid* 239.

152 Bottoms and Brownswood, "Incapacitation and 'Vivid Danger'" in von Hirsch and Ashworth (eds), *Principled Sentencing* (2 ed, 1998) 105.

153 Bottoms, *supra* note 89, 240.

154 Charter of Rights and Freedoms (Canada), s 12; ICCPR, art 7; Similarly, New Zealand Bill of Rights Act 1990, s 9: "everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment".

“arbitrary detention”.¹⁵⁵ Thus, preventive detention has been challenged on the basis of human rights in many different fora. In *R v Lyons*¹⁵⁶ the Supreme Court of Canada examined whether their preventive detention regime violated the rights guaranteed in the Charter. It was held that the parole process prevented the sentence from being “cruel and unusual” because it ensured that detention would continue for only as long as the individual case required. Manson, however, notes that those parole reviews did not need to find dangerousness in order to support continued detention. The failure to recognize this crucial distinction between the parole criteria and the dangerous offender process is seen as the weakest part of the decision.¹⁵⁷

New Zealand’s preventive detention regime under the Criminal Justice Act 1985 was also the subject of a communication to the HRC, on the grounds that the complainants were sentenced without regard to, and inconsistently with the ICCPR.¹⁵⁸ The decision was one of the most mixed ones in the history of the HRC, with nine out of the 16 members expressing individual, partly dissenting, opinions.¹⁵⁹ Put simply, the majority regarded the right to regular review as a crucial factor in ensuring that preventive detention was not arbitrary or cruel and unusual. This is illustrated by the opinion of Committee member Kälin:¹⁶⁰

While preventive detention for the purpose of protecting the public against dangerous criminals is not prohibited as such under the Covenant and its imposition sometimes cannot be avoided, it must be subject to the strictest procedural safeguards, as provided for in art 9 of the Covenant, including the possibility for periodic review, by a Court, of the continuing lawfulness of such detention. Such reviews are necessary as any human person has the potential to change and improve, i.e. to become less dangerous over time (e.g. as a consequence of inner growth or of a successful therapy, or as a result of an ailment reducing his physical abilities to commit a specific category of crimes).

The dissenting Committee members believed that it was unfair and arbitrary to imprison someone for crimes not yet committed.

Indeterminate sentences have the strong potential to violate the human rights of the offender. However, the precise quality of the rights claimed and their strength are contested. It is difficult to deny that the state should be able to intervene to protect the rights of its citizens from harm. But when this involves the prolonged imprisonment of offenders it must

155 Charter of Rights and Freedoms (Canada), s 9; ICCPR, art 9.

156 [1987] 2 SCR 309.

157 Manson, *supra* note 20, 330-331.

158 *Rameka v New Zealand*, Communication 1090/2002.

159 Conte, *supra* note 54, 204.

160 Newbold, *supra* note 134, 206.

be acknowledged that important human rights are being subordinated in order to protect other rights. This trade-off must be acknowledged, and then justified. While this has occurred to varying extents in countries with entrenched human rights legislation, it has been extremely superficial in New Zealand. The Court of Appeal in *R v Leitch*¹⁶¹ and *R v D*¹⁶² declined to consider human rights issues raised by preventive detention under the NZ Bill of Rights Act 1990 or the ICCPR, the latter judgment deferring to the select committee's consideration of the issue.¹⁶³ Unfortunately, this committee did not discuss, or even mention, any of the human rights issues raised by preventive detention.¹⁶⁴

Ethical Problems with Medical Reports Used at Sentencing

Although not a challenge to the practice of preventive detention per se, the ethical complexities surrounding medical reports used at sentencing should be considered. What ethical boundaries should a medical professional, especially a psychiatrist, observe when giving evidence that will be used for sentencing? This is an important question because this evidence may be used to justify a sentence of preventive detention, and may at a later date make it less likely that the offender will be granted parole.¹⁶⁵

Medical ethics, traditionally concerned to protect the well-being of the patient and avoid causing any harm, are violated when medical reports are used for sentencing purposes. This is especially so when the medical relationship has "become an intensely therapeutic encounter", and thereby elicited potentially prejudicial disclosures.¹⁶⁶ Stone submits that:¹⁶⁷

[R]egardless of whether appropriate ethical and legal warnings have been given, whenever an evaluation turns into a therapeutic encounter and produces unguarded disclosures, the psychiatrist should disqualify him- or herself from submitting expert testimony.

There is force in this argument, but it does not preclude all use of medical reports in sentencing hearings. Indeed preventive detention laws often specifically require the consideration of psychiatric reports. The public has an interest in ensuring that the most accurate evaluations of an offender's dangerousness are before the sentencing judge, and it has been argued that psychiatrists have a prior responsibility as citizens to consider the interests of the general public.¹⁶⁸ However, the public also has

161 [1998] 1 NZLR 420.

162 [2003] 1 NZLR 41.

163 Ibid 47.

164 Justice and Electoral Committee, *Sentencing and Parole Reform Bill* (148-2) (12 February 2002) 20.

165 O'Grady, "Psychiatric Evidence and Sentencing: Ethical Dilemmas" (2002) 12 *Criminal Behaviour and Mental Health* 179, 180.

166 Stone, "Revisiting the Parable: Truth Without Consequences" (1994) 17 *Int'l JL & Psychiatry* 79, 83.

167 Ibid 84.

168 O'Grady, *supra* note 165, 182-183.

an interest in people seeking and fully engaging in treatment programmes to prevent criminal behaviour.¹⁶⁹ As such, communications made within therapeutic, as opposed to assessment, relationships should not be admitted in sentencing.¹⁷⁰ Simpson concludes with guidelines for practitioners beginning assessment relationships:¹⁷¹

[T]he mental health professional performing a court report must be meticulous in ensuring that the defendant is aware of the nature of the relationship, its purpose and what will happen to the information gathered.

If strict procedural guidelines are adhered to and the mental health professional remains aware of the potential for ethical breaches, the interests of the offender, the public and justice can be adequately balanced.

VII CONCLUSIONS

Preventive sentences are undoubtedly controversial. The criticisms and issues highlighted by critics are substantial, but they do not necessarily invalidate the entire practice. Instead they demand that a range of procedural safeguards and conditions be observed in jurisdictions that employ preventive sentencing.

The most fundamental safeguard is a strict limitation on its application. It should be used as sparingly as possible. Preventive detention should only be imposed in response to the most serious offences and on those who fall within the small group of especially dangerous criminals. The “vivid danger” test sets the threshold at a just level. This ensures that the sentence is not used in situations where it would be manifestly disproportionate. It also acknowledges the unique severity of the measures being taken and prevents net widening. Sentencing judges should, at the minimum, be required to consider one psychiatric report containing the results of at least one empirically proven actuarial instrument, because unaided clinical judgments are notoriously inaccurate. Although not determinative, it should be very unusual for preventive detention to be imposed to an offender presenting (statistically) as low risk.

It is also imperative that all preventive detainees have the right to regular review of their sentence. This should initially occur when the court-specified ordinary proportionate, or punitive, sentence expires. From then on reconsiderations should occur at least annually, for the assumption

169 *R v D* [2003] 1 NZLR 41, 50.

170 This is provided in New Zealand under s 33 of the Evidence Amendment Act (No 2) 1980; see also the slightly expanded protection in s 59 Evidence Act 2006.

171 Simpson, “The Role of the Mental Health Professional in the Sentencing Process” (Paper presented to the Conference Sentencing: principles, perspectives and possibilities, Australia, February 2006) 11.

should always be that every offender has the potential for some level of rehabilitation and change. If and when an offender is no longer considered dangerous enough to remain preventively confined, his continued suffering becomes unjustified. Frequent reviews reduce the potential harm that could be caused by an overly cautious review body that could postpone a borderline case for two or three years.

At the review hearings the parole criteria should be almost exclusively concerned with proof of the prisoner's dangerousness. Standard parole criteria involve extraneous considerations that obfuscate the sole justification for continuing imprisonment, viz., predicted future harm. Furthermore, the length of the confinement should remain proportional to the risk posed. This is achieved via an ever-increasing standard of proof of future dangerousness at each review hearing. An offender should not be locked up and the key thrown away for preventive reasons short of complete certainty of future grave harm.

Since the confinement is solely for the good of the public, a strong case can be made for these conditions being as unrestrictive and as least punitive as possible. A heavily punitive environment is unlikely to aid the rehabilitation of most offenders. Perhaps even more importantly, the state should have an obligation to provide intensive rehabilitation and treatment programmes. The violation of human rights is minimized when an offender is assisted to change and is thus able to be released and not go on to commit further crimes.

Finally, preventive detention must always be seen as an instrument of last resort. It is not a panacea for danger in society. Risk permeates human life. Generally we accept the existence of risks, especially where the burden of eliminating them would fall heavily on the wider public. Risk is something we learn to live with rather than something with which we can wholly dispense. An undue emphasis on negative sentencing as the means for producing a safer society would be misguided, and may well divert attention away from more positive, effective and equitable measures for managing the stresses and dangers that inevitably attend human beings living together in community.