INTERNATIONAL PERSPECTIVES ON FORENSIC MENTAL HEALTH

DANGEROUS PEOPLE

Policy, Prediction, and Practice

EDITED BY Bernadette McSherry and Patrick Keyzer

ROUTLEDGE

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An Overview

BERNADETTE McSHERRY and PATRICK KEYZER

Introduction

There will always be groups of individuals deemed to be "dangerous" by society. Just which groups will be targeted may vary according to culture, place, and time. How best to punish, manage, supervise, or treat those considered dangerous has occupied the minds of many policymakers and commentators across the years. The issue of preventive detention has similarly arisen in a wide variety of public policy contexts in regimes such as those for

- the mandatory detention of asylum seekers pending determination of their refugee status;
- the quarantine of those with infectious diseases;
- the involuntary commitment of those with severe mental illnesses in psychiatric institutions;
- the detention of people under investigation for or suspected of involvement in terrorist activities; and
- the civil commitment of sex offenders.

To explore current approaches to "dangerousness" and preventive detention, in 2009, pursuant to an Australian Research Council funded project, we invited a number of legal academics and mental health professionals to write a paper in answer to one or more of the following questions:

- What are some of the practical issues that have arisen following the implementation of preventive detention/supervision schemes for high-risk offenders?
- What are some of the issues relating to assessing the risk of future harm in the management of high-risk individuals?
- What diversionary programs/sentencing options should there be for high-risk offenders with mental illnesses?
- Should hospital orders and other diversion programs be used in preference to imprisonment for offenders with mental illnesses?

The resulting papers were intensively workshopped in May 2010 at Monash University's Centre in Prato, Italy, and subsequently revised prior to publication. What emerged were different explorations of the policies and practices relating to current out-groups—such as sex offenders, suspected terrorists, those with severe mental illnesses, young offenders, and those deemed to be high-risk offenders—in the United States, Scotland, England, and Australia.

During the workshopping process, there were a number of discussions about the best ways in which to manage those considered to be dangerous and whether preventive detention could ever be considered justifiable. A number of themes emerged relating to *risk assessment and management* as well as *legal* issues. Of course, the judges, lawyers, forensic psychiatrists, forensic psychologists, social workers, corrective services personnel, and others who work in preventive

detention contexts are interested in both categories of questions, so the distinction is only a convenient one and should not be overstated. A multiplicity of overlapping normative concerns and ethical challenges operate in the shared professional discourse that marks out the field of preventive detention.

In terms of structuring this book, we grouped this chapter and the ensuing ones into five parts as follows:

- *Parameters* in the general sense of the word as a boundary or limit. The chapters in this part explore the international human rights and legal limitations relating to preventive detention regimes.
- *Policy* in the sense of both governmental plans of action and the legislative objectives of regimes dealing with those considered dangerous. The chapters in this part deal with policies in relation to sex offenders, offenders with severe mental illnesses, and suspected terrorists.
- *Prediction* as it relates to determining who is likely to commit crimes in the future. The chapters in this part deal with assessing the risk of committing violent crimes in youth and in individuals with severe mental illnesses as well as some of the criticisms that may be made of risk assessment techniques.
- *Practice* as it relates to recent schemes in Scotland and England in relation to those considered at a high risk of reoffending.
- The *conclusion*, which sets out the challenges for future research in this field.

The rest of this chapter places the material that follows in context. It also outlines some of the problems that have arisen in relation to identifying the dangerous; explores the risk assessment, management, and legal issues alluded to above; then discusses the effectiveness of current policies and alternatives to post-sentence preventive detention.

Identifying "the Dangerous"

The title of this book pays homage to a collection of essays edited by Nigel Walker in 1996 and published in England titled *Dangerous People*. Some of that work focused on where the balance should lie between proportionality in punishment and public protection. In 1997, on the other side of the world, John Pratt's book *Governing the Dangerous* explored how certain offenders, thought to show a propensity to commit crimes, have generally been governed through some form of indeterminate prison sentence. These books were written when there was a focus on offenders being given indefinite prison terms *at the time* of sentence. Some 14 years on, offenders can now be "civilly" detained *after* their sentence has expired, which gives rise to a whole new set of issues.

It is interesting to note that while the literature may have moved beyond exploring the concept of dangerous people to identifying methods of assessing the risk of future harmful behavior, governments still couch their policies using the concept of dangerousness. In Australia, for example, certain legislation enabling preventive detention refers to those considered dangerous in statutory titles (for example, the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), the Dangerous Sexual Offenders Act 2006 (WA)) and in England and Wales, there are programs specifically targeted at "Dangerous People with Severe Personality Disorder" (Ministry of Justice and Department of Health 2010).

But how do governments identify the dangerous people from whom society requires protection? The aforementioned catalog of preventive detention regimes only provides some clues. No one would dispute that a violent, recidivist sex offender who has given evidence that he plans to commit fresh offences should be subject to supervision, and even some form of preventive detention, in certain circumstances. Nigel Walker (1978: 40) has pointed out that there is a

high degree of certainty in predicting that offenders who declare their intention of committing another criminal act will indeed do so. Such offenders may be considered dangerous because of the real threat they represent to the community if released or unsupervised.

However, people who arrive in a country without authority to seek asylum can hardly be called dangerous unless they carry disease or otherwise pose a threat to public safety or security. The evidence indicates that this is rarely the case (Blay et al. 2007). The maintenance of the integrity of an immigration system may require a limited period of detention to enable paperwork to be checked or to conduct health checks. But it is not justifiable on the ground that asylum seekers are, per se, dangerous people. In short not every variety of preventive detention responds to those considered dangerous.

It may simply be that the categories of those considered dangerous evoke strong emotional responses arising from fear or anger (Freiberg 2001). This may explain why of all the different varieties of dangerous people, the category that has received the most attention, at least until the terrorist attacks in the United States on September 11, 2001, has been that of sex offenders, particularly those who commit sex crimes against children. Edwin Sutherland (1950: 142) observed over half a century ago that "a community is thrown into panic by a few serious sex crimes, which are given nation-wide publicity; the community acts in an agitated manner, and all sorts of proposals are made; a committee is then appointed to study the facts and to make recommendations." This statement still applies today.

In 1990, Washington State responded to the brutal sexual assault of a child by a violent, recidivist sex offender with wide-ranging proposals for increasing criminal penalties for sex offences, the development of a sex offender registry, community notification powers, new measures to assist victims and also a new civil commitment system enabling the post-sentence preventive detention of sex offenders adjudged to be a high risk to the community if released (McSherry and Keyzer 2009: 2–6). The civil commitment regimes that have emerged in many of the states of the United States since 1990 provide the archetypal example of a shift from a post- to a "pre-crime society" (Zedner 2007). The rationale for these systems is that if certain individuals have demonstrated that they are incapable of being released into the community without a substantial risk existing that they will engage in sex offences, then it would be derelict of government not to take steps to protect the public against that risk.

The main challenge for policymakers is to find a midway point between assuming that all people in a certain group (sex offenders, suspected terrorists, young offenders, and so on) are dangerous in the sense that they are at a high probability of harming others and assuming that no one, even those who have declared their intentions of committing crimes, are a danger to others. A wealth of literature has emerged concerning the assessment of risk that attempts to identify the dangerous.

Risk Assessment and Management Issues

The assessment of risk is of such significance that it has been viewed as a core organizing concept of the Western world over the past two decades (Morgan et al. 1998; Rose 1998; Zedner 2009). During the early 1980s, the emphasis was on making clinical assessments of dangerousness, which did not provide a medical diagnosis, but involved "issues of legal judgment and definition, as well as issues of social policy" (Steadman 2000: 266).

Between the mid-1980s until the mid-1990s, the focus of mental health professionals shifted from assessing dangerousness to a focus on statistical or actuarial risk prediction. This shift to risk assessment and risk management has seen the rise of "scientific" literature examining a range of risk factors that have a statistical association to a future event.

In its current iteration, risk assessment involves the consideration of risk factors, harm, and likelihood. It combines both actuarial and clinical approaches to form what has been termed

structured professional judgment (see, for example, Heilbrun et al. 1999). In Chapter 11 of this volume, Lorraine Johnstone refers to some of the problems that have been experienced with actuarial risk models and outlines how the structured professional judgment approach is now well established and how "a burgeoning literature attests to its utility in terms of its reliability, validity, and clinical utility." She is concerned, however, that available risk assessment approaches are not sufficiently sophisticated to enable them to be used in relation to young offenders.

As well as the move toward a structured professional judgment approach to risk, there has been a conceptual shift that can be identified in the past decade in the focus from risk *prediction* to risk *management* (Douglas and Kropp 2002; Hart et al. 2003). That is, various assessment tools have been viewed as appropriate guides for the overall level of risk management that might be required (for example, the greater the risk, the greater the necessary resources). However, there is a concern that they should not be used to predict offences for the purpose of preventive detention regimes or be used as guidelines for specific violence prevention strategies.

It has been the use of actuarial approaches by experts in the courtrooms that has caused perhaps the most concern in the literature on risk assessment. In Chapter 12 of this volume, David Cooke and Christine Michie raise serious questions about actuarial methods for violence risk assessment that are currently used in many forensic and adjudicative settings. Focusing on individual offenders (whether suffering from mental disorders or not), Cooke and Michie's contribution critically analyses these practices with the objective of yielding "useful, valid, ethically sound information that is probative and not prejudicial." According to Cooke and Michie, a focus on the individual is essential because "there is confusion in the literature about what information from groups can tell us about individuals."

Cooke and Michie detail the misuse of actuarial models, which they conclude is based on misplaced confidence in their reliability and accuracy. Actuarial risk assessment instruments involve the use of information about groups to make predictions about individuals. Using statistical methods, Cooke and Michie test actuarial risk assessment techniques and conclude that the ability to estimate the average risk for a group is not matched by any corresponding ability to predict which individuals are going to commit crimes in the future. They state that it "remains worrying that the significance of uncertainty in violence risk assessment based on ARAIs [actuarial risk assessment instruments] is not widely understood." The authors conclude that the employment of actuarial risk assessment instruments should be subject to greater judicial skepticism and more rigorous legal challenge by defence counsel.

Legal Issues

Laws settle a normative framework for human activity. The regimes for detaining and managing those considered to be dangerous raise a number of issues that touch on the scope and appropriateness of laws that curtail individual freedom. This section outlines some of the issues discussed in the ensuing chapters.

International Human Rights Law

International human rights standards embody the aspirations of the most people and justifiably claim the widest normative realm. The jurisprudence of the United Nations Human Rights Committee (HRC), particularly relating to Article 9 of the International Covenant on Civil and Political Rights (ICCPR), is significant in the preventive detention context as the pre-eminent statement of the human rights of all people who are subjected to civil or criminal confinement (Keyzer 2009b). The HRC's jurisprudence indicates that when a person is detained without charge or trial, he or she must be informed, at the time of the arrest, of the reasons for arrest and must be entitled to take proceedings before a court so that the court may decide without delay on the lawfulness of the detention. In addition, a person subjected to unlawful arrest or detention

has an enforceable right to compensation in the domestic sphere (see Chapter 2 by Ronli Sifris in this volume).

It is important that Article 9 also protects people from detention that is inappropriate, unjust, unpredictable, inconsistent with principles of due process, unreasonable or unnecessary in the circumstances, and/or disproportionate to achieving its objectives (see Chapter 2; McSherry and Keyzer 2009).

Must nations abide by these standards? There is a substantial argument that the standards of lawfulness can only be settled at the international level, or else nation-states become the judges of their own laws (Blay and Piotrowicz 2001). Certainly, the 165 nations that are signatories to the ICCPR (including Australia, Canada, New Zealand, the United Kingdom, and the United States) must give serious consideration to the decisions of the HRC. But that does not mean that the covenant will be faithfully implemented. For example, Australia has adopted a policy of preventive detention of asylum seekers, and more recently a policy for the offshore detention of asylum seekers, that has been criticized as punitive in character, and which has been subject to repeated and sustained international criticism for that reason (Blay et al. 2007). A substantial number of the decisions of the HRC exploring the boundaries of Article 9 of the ICCPR have been decisions in response to communications by asylum seekers about Australian policies. But Australian governments have been slow to take steps to ameliorate the punitive character of these policies (the release of unaccompanied children from detention has only recently commenced).

Ultimately, even in those countries that have signed the First Optional Protocol to the ICCPR, which allows domestic complaints to be made to the HRC about breaches of human rights standards, the HRC does not operate as a court of appeal. Thus in recent years, a number of the Australian states have managed sex offenders considered to pose a high risk in the community by using prison as a venue for the preventive detention of sex offenders after the conclusion of their prison sentences. Two successful communications to the HRC made by Australian prisoners contesting these regimes found that the preventive detention regimes in these Australian states violated the ICCPR, which prohibits arbitrary detention, the retroactive infliction of increased punishment, and the use of prison for non-punitive objectives such as the preventive detention of high-risk offenders (see Chapter 3 by Patrick Keyzer in this volume). The Australian government had 180 days to respond to the committee's views, which were published in March 2010, but that period elapsed and over a year later, the government has done nothing to fulfill its human rights obligations in relation to preventive detention.

The Issue of Proportionality The civil commitment of those considered to be sexually violent predators in many states of the United States also raises a number of legal issues. The principle of proportionality—the need to adopt proportionate responses to the risk that a person would pose to the community if released—is a central theme in the writing on the punishment and detention of offenders. Proportionality is also a central theme in the United States constitutional jurisprudence of due process.

In Chapter 4, Christopher Slobogin argues that properly contained, preventive detention might turn out to be a useful means of protecting society that imposes less harm on offenders than strictly punishment-oriented regimes. Invoking United States constitutional standards of substantive and procedural due process, Slobogin argues that proportionality principles can justify only the least drastic risk-reducing intervention in any disposition. In addition, proportionality must be the guiding principle at every stage of a legal disposition: when a standard of proof is applied, when risk is calculated, and when detention length is calculated.

However, while the proportionality principle typically is applied when formulating standards of proof applicable in preventive detention contexts (for example, by requiring only a probability of danger to self and others for short-term emergency commitment, but requiring proof beyond

reasonable doubt that a person will commit a fresh sexual offence in sexually violent predator cases), courts have not applied proportionality principles to questions about the probability and magnitude of risk sought to be prevented, nor have they applied proportionality principles to determinations relating to incarceration.

Predictions of risk can have dire consequences, reinforcing concerns for due process and proportionate responses. Slobogin argues that proportionality should inform the evidentiary and procedural rules applied in cases where risk prediction may lead to preventive detention. For that reason, Slobogin adopts the controversial position that the state should be *required* to use actuarial instruments for the assessment of risk in any disposition adjudication, on the basis that actuarial risk assessment instruments are more reliable than clinical opinions. Evidence led by reference to actuarial risk assessment must be properly normed and demonstrably relevant to the prediction context. If the state cannot satisfy a minimum threshold warranting consideration of a preventive detention order (for example, that a person is high risk), then evidence drawn from (purely) clinical judgment should not be allowed. This position is controversial because, as outlined in the previous section, there has been growing criticism of the uncritical use of actuarial risk assessment instruments (see Chapter 12 by David Cooke and Christine Michie). Henry Steadman (2000: 268) has pointed out that although mental health professionals may have moved risk assessment beyond dichotomous thinking in relation to identifying whether a person is dangerous or not, "from the judicial perspective, [it is unclear] how much change has really occurred" in the forensic context.

Civil Commitment Regimes for the Dangerous

Assuming that a preventive detention system complies with international human rights standards and domestic constitutional standards, a range of questions arise about the appropriateness of the domestic institutional apparatus to ensure that rights standards are realized in practice. Ian Freckelton and Bernadette McSherry explore this issue in two diverse settings in their chapters in this volume.

Ian Freckelton (Chapter 8) surveys the legislative regimes dealing with the disposition of people found not guilty of serious criminal offences by reason of insanity or mental impairment in England and Wales, Canada, New Zealand, and the Australian states and territories. The Australian state of Victoria has adopted an approach of ensuring judicial review of indefinite detention orders made on these grounds. This approach contrasts with the approach adopted in many jurisdictions, which is to leave the power to alter dispositions to the executive government. Freckelton notes that the Victorian Supreme Court has adopted a conservative, gradualist approach to the revocation of indefinite detention orders, but has been "constructively informed by clinical opinion." The result has been that acquittees have been reintegrated into the community when it is clinically warranted, and in a staged process.

Do mental health professionals have any role to play in circumstances where a person does not have a diagnosable mental illness? Bernadette McSherry (Chapter 9) explores this issue in her contribution to this volume. Mohamed Haneef and Izhar Ul-Haque were arrested and subjected to detention and interrogations on the presumption that they possessed information about terrorist activities. Haneef was deported and his work visa was revoked on specious character grounds that were never properly explained by the Minister for Immigration at the time (Ewart 2009), with the Australian Director of Public Prosecutions later admitting that he should never have been charged. Ul-Haque spent six weeks in solitary confinement in a maximum-security prison before being released on bail. The Supreme Court of New South Wales ruled that evidence drawn from interviews conducted with him by the Australian Security Intelligence Organisation were inadmissible because they had been influenced by the oppressive conduct of the security officers. The trial was discontinued and the Court's decision was not appealed.