'DANGEROUS PERSONS':
TO BE GAOLED FOR WHAT
THEY ARE, OR WHAT THEY
MAY DO, NOT FOR WHAT
THEY HAVE DONE

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THIS PAPER RECOGNISES THAT THE GARRY DAVID CASE IS CURRENTLY THE
subject of a reserved judgment in the Supreme Court, and while the paper will
attempt in many ways to reflect upon the problems Mr Justice Hedigan is
confronting in that case it is fairly important, particularly in a conference like
this, to confront the issues of dangerousness head-on. There are some very
fundamental flaws that need to be addressed in the legislative program that the
government has implemented. This state has embarked upon what was
necessary in an Act to achieve the desired result. The desired result was
achieved by conferring upon a court the ability to order preventative detention.

Let us discuss this in its correct context. The first aspect that requires analysis is
the role of the criminal justice system. In the Middle Ages when the King was a little
unhappy with some of his enemies, he managed without too much difficulty to get an
Act of Attainder which was passed through parliament to detain one of his enemies, a
person he may have ceased to trust and eventually the attainder was used to impeach
the person, the catch phrase was 'danger to the state'—something that rings some bells
in the context of the present debate.

As the judicial system started to evolve and the roles of parliament and the courts took
their own separate paths these Bills of Attainder fell in disrepute and
by the eighteenth century had all but been eliminated. Indeed the last usage of the Bills of
Attainder were in respect of persons who were being impeached for criminal charges. Since
the eighteenth century the role of the courts took over, the parliament made laws and the
courts applied those laws. Of course that did not resolve the problem of people who were
dangerous to the state, so we in Australia, probably more than most, became aware of the
treatment of habitual offenders. People who committed offences more than once were
transported to the colonies. During the nineteenth century a legislative pattern of gaoling
habitual offenders, under the notion that these people were 'dangerous' to the state evolved.
That has been an evolution that has occurred in England, it has been tried in the USA and
still exists in some shape or form in many of the states of Australia.

The essence of an habitual offender is that the person was still gaoled for the offence
committed and courts used the sentencing principles appropriate at the time. Because there
were second or third offences, however, the courts put into effect a 'surcharge' on the
penalty of imprisonment. This surcharge had to be imposed at the time of sentence, not at a
later point in time. In effect, this fell foul of the sentencing principles as you were able to
punish for the nature of the offence or for the offenders past conduct. Its use became more
infrequent as there was quite a strong judicial aversion to it as it introduced an
indeterminate aspect into sentencing. The courts were well equipped in any event to handle
the problem of the repeat offender. Obviously the third time offender secured harsher
treatment than the first time offender.

In Victoria such legislation was finally repealed in 1986. It has lingered on in the
other states but it is rarely used and certainly not regarded as a vehicle to try and deal
with someone who is 'dangerous'. The courts on occasion try in effect to take this
problem into their own hands and sometimes hand out a severe sentence which may
have gone beyond that which the crime warranted in the circumstances of the case.
Occasionally those excesses resulted in what was effectively preventative detention.
The High Court in R v. Veen (No. 2) firmly put down such an idea by upholding what
it called the doctrine of proportionality. In other words people would be given
sentences by reference to the crime they had committed, having regard to the prior
conduct and the particular circumstances of the offender. But it was not for the courts
to protect the public by superimposing on normal sentencing principles, a principle of
preventative detention.

The end result of this little foray into the criminal justice system is that the courts
are there to gaoil people for offences they have committed and it is Parliament's role to
stipulate what those offences are. Indeed Parliament has done so under the Crimes Act
1958 (Vic.). If people threaten to kill or threaten to cause harm then that is a serious
offence that can be punished by imprisonment. That is the role of the criminal justice
system. It has never been used and should never be used to gaoil people for their
personality, that is for what they are, rather than for what they have done.

This has led to problems in the mental health area. Over a long period of time
under the mental health system, a system of involuntary detention has been accepted as
necessary to prevent harm to the individual or to prevent harm to the public. People
who are mentally ill may be subjected to
involuntary detention after appropriate certification and examination. These people could be treated so that eventually as with any illness they may be cured or were curable and could be released back into the public domain.

In Victoria, the mental health system fell into disrepute as the certification procedures were able to be abused and the definition of 'mental illness' was possibly a little too flexible. We had a very enlightened approach and after a series of reports our Mental Health Act 1986 (Vic.) was passed which made it fairly clear that the Mental Health Review Board (constituted by eminently qualified experts) was well placed to handle appeals from certification to prevent involuntary detention which could no longer occur in an arbitrary or subjective manner. This, together with new definitions of mental illness, was regarded as a very enlightened approach to the problem. The problem for present purposes was that an anti-social personality disorder alone, is not to be regarded as mental illness.

The system in effect left no role for what we call the dangerous person. Such a person is not mentally ill but gives rise to the present problem. The Garry Davids of the world would have been certified under the pre–1986 legislation. It was to prevent abuse of that procedure that the 1986 legislation was passed. The expedient of saying such persons were mentally ill in either lay terms or any other terms was no longer available. That gave rise to the problem of what do we do with dangerous persons. They do not fall within the criminal justice system and they do not fall within the mental health system. Where do they fall? And if so why?

Firstly, it is important to understand what they are. It is fairly clear that you cannot draw upon what the offender has done other than as an aid to some form of analysis or diagnosis of the problem. One may draw on what they threaten to do again; however this can only be an aid. If there are genuine threats to kill or to commit massacres then those persons would quite properly be prosecuted under the relevant provisions in the Crimes Act. If the threats are not genuine then their mere existence is not much of a guide to 'dangerousness'.

So what do we do? The problem is where do you start? When the Community Protection Act 1990 (Vic.) was introduced into Parliament, the second reading speech of the Attorney-General stated:

as elected representatives of the people of Victoria we have a responsibility to protect the safety of Victorians wherever and whenever possible.

One cannot object to that, as a statement of government policy. He went on:

If horrendous threats of violence are made by any person, that let us believe that the person making those threats can, and will, carry them out then, we must take all possible steps to protect the public.

Again, one can have no quarrel with this and that is why we have the Crimes Act to deal with that very problem.

The Hoddle Street and the Queen Street mass murders deeply affected our community, we could never knowingly expose Victorians to another
The accusation in Garry David's case is that he had threatened to commit a Hoddle Street or Queen Street massacre. The author does not believe that people think those who make such threats and intend to carry them out should be wandering around the streets. There lies the problem—it is an offence to make a threat. If for some esoteric reason the debate is that mass murder is not specific enough to be a crime, then the Crimes Act should be amended. That was not what was done. As a result of the analysis of the alleged 'threats' as he had made, Garry David has his own Act.

The Mental Health Review Board conducted a sixteen-day hearing into Garry David. There were 2,100 pages of transcript, fifty-eight exhibits, and many psychiatrists who looked at this particular offender. In its decision the Board said:

We believe it unlikely that he would carry out his threats by violence directed towards the community at large or public officials. However there is evidence to suggest that he does pose a threat to members of the police force and to people in his immediate surrounds if he were placed under stress with which he could not cope. We do not believe that Mr David is likely to embark upon a rampage as soon as he is released into the community.

The finding by the experts set up for the purpose was that he was not mentally ill. It was a finding deliberately made, and cautiously made. The point the author wants to make quite strongly is that one of the dangers with a case such as this is that the case is in effect predetermined by trial by media or by the public mood.

Therefore as the author suggested at the beginning of this paper, it depends what question is asked. If we ask:

Should we allow someone who is going to carry out a Hoddle Street massacre to roam the streets?

The question answers itself—of course not. But when we ask the question somewhat differently and ask:

What do we do with such a person in respect of whom opinions legitimately differ—who has in the past shown a tendency to be violent in certain circumstances and who may or is likely to exhibit the same tendency in specified circumstances? Do we lock them up for what they are, that is for having a serious anti-social personality disorder?

The answer is more difficult and raises the second real point—we are locking them up for what they are, we are locking them up for their personality. We are not locking them up for threats—we are locking them up entirely for what they might do. This has to be confronted in that way.

Garry David's case is probably the most extreme test of the principle. One would not find many other people who fit quite as neatly into the pocket he
has fitted into. There are few people that one can waive the aura of 'threatened' public massacres around under the umbrella of saying 'this person cannot be allowed onto the streets'. Another thing that is said about him, and indeed about many other people who are said to be dangerous, is as to the violence they will inflict on the community. In fact, when one reads Mr Justice Fullagar's judgment, and the Mental Health Review Board's analysis of Garry David's problem, most of his acts which have been quite horrific have been self-mutilation. Principally he has taken his anger out on himself. He has on occasions been involved in some violent incidents but that is not at the forefront of the case against him. So the problem is obviously a much more complex one than is suggested.

The third warning about people like this, is that in his case he has spent the last ten years in custody. What one sees in the evidence thrown up against him, is in fact a compression of ten years experience into a hearing of sixteen days. These events are taken out of context, and he is put forward as 'man who attacks his own sex organs, a man who attacks his own body' and suddenly one sees a horrific situation. Put in a broader context they may take on a different light. The author is not arguing his case one way or the other, but believes there is a general warning about the dangers of trying to anticipate human behaviour or personality. His case is a good example of how expert views can legitimately differ about his mental state.

This leads to the next point. Can we predict dangerousness? How likely is it that such persons are likely to be violent. It seems clear that the psychiatrists are in agreement that there is no scientific process or basis to form a view about dangerousness. It seems to be highly subjective. The greater the track record, the more meaningful the threat, the more likely the predictability. You have to estimate—is this a threat made to a psychiatrist to express anger, is this a threat made just to produce a fear or a reaction, or to take advantage of a particular situation, or is the threat real? These are real problems.

There is a fundamental flaw in the notion that dangerous persons should be gaoled after they have served their time. Of course whatever they were at the beginning of their prison term, the author does not believe anyone would suggest that a violent person is going to become less violent in a gaol environment at the end of the imprisonment. The treatment or help that they get in the course of their prison term is very modest indeed. The Office of Corrections was reported in the press as stating that after Garry David's ten years of imprisonment they had failed him completely.

Garry David had not been assisted into readjusting into society. Therefore, whatever situation he was in at the beginning, the state has to take responsibility for the transition between what he was when he entered that system and what he had become after he was due to leave it.

This is a burden that the state has to accept. The state cannot take the short-term option and say 'well, whatever the reason is at the end of ten years this is what we are confronted with; let us just lock him up and throw the key away'. This is a pretty important problem. Some argue that this is only for the most serious offenders: the rapist, the murderer, and the person who has been guilty of consistently violent crime. How can we assess whether the tendency, such as the rapist's tendency, has gone within a prison period. It is
almost an impossible task because the prison environment is such a unique one. Until we have more resources and a more enlightened approach, it is hardly likely that the kind of treatment and benefits that must occur within this environment will benefit the prisoner's personality.

The Community Protection Act demonstrates the failings of the whole system. It was brought into being after a great publicity beat up, and in the context of failed certification. It was not preceded by a Law Reform Commission report on the problem of community protection. It came about as a short-term fix to a problem that the government had no solution to. It created a one-person law, unique since the Bill of Attainder in the days of the Middle Ages. The Act dispensed with the rules of evidence, enabled documentary and hearsay evidence to be accepted and acted upon as evidence. The Act dispensed with medical privilege and allowed the case to be determined on the balance of probabilities. This is unique legislation enabling the court to act upon evidence that is not otherwise admissible. The Council of Civil Liberties was very critical at the time. The real point is why did the government have to take these extraordinary steps—setting aside basic protections and rules which our criminal justice, and even our civil justice system give. The answer is because such rules (for example, strict rules of evidence) would not be able to achieve the required result; that is, Garry David's detention. They could not have achieved the desired results if it had to be 'proof beyond reasonable doubt'.

In summary, the problem of dangerous persons is a terrible indictment of our prison system. We cannot blame those administering it, but the author blames those who are responsible for the fact that these institutions are not given the resources they require to fulfil the task of rehabilitation. It is also an indictment of our mental health system, because the mental health system has wiped its hands of the problem, and yet a man who is now in detention and in need of treatment has not been treated for the ten years in which the state had an obligation to treat him. We have a Catch 22, he is not mentally ill therefore he cannot be treated. If he cannot be treated how is he going to change his personality? Is this an indeterminate sentence? At the moment the author does not think that anyone can suggest that the Community Protection Act is anything other than an indeterminate sentence. It is like locking him up and throwing away the key. Where does that leave Garry David? A man living in hopelessness about his future. What does that do to his anti-social personality? It hardly offers a curing, or a beneficial effect.

The answer is obvious. These people must be treated, must be helped and must be assisted from the first day they enter gaol. It is not good enough and it is quite wrong for the government to think it can take up the problem at the end of the prison term and subject these persons to something that our criminal justice and our mental health system has never permitted. If it is wrong for one, we must not fool ourselves that by making it applicable to all in order to satisfy 'the equality of all before the law' principle that we are solving the problem. We are exacerbating it as if it is wrong for one, it becomes wrong for all.

We cannot ignore the risk to society in having people who may be dangerous out there, but sometimes we have to live with such risks. We have gun laws and
they give rise to risks which for some reason we are prepared to accept. We have cars, we have drink—these create risks that can lead to death, but we permit them. We have building construction sites which cause accidents and sometimes death. We have to live with risks because sometimes the cost of doing otherwise is too high. Until we can satisfy ourselves that we can scientifically or objectively establish on proper principles that a person is actually going to cause harm, we have to live with the risks of potentially dangerous people being out there, free in the community. A solution lies for rehabilitation within the prison system from the first day that such persons arrive there and in the parole system, in trying to give incentives to ensure the people who serve their sentence can re-enter society. The solution does not start at the end of imprisonment. This is something that governments need to give a lot of careful consideration to. What had started out as a misconceived exercise in legislation, a one person Dangerous Person Act will become an all persons Dangerous Persons Act. Initial trial by media has resulted in a short-term expedient creating an intractable problem. That is not the way that law reforms should proceed in a modern, western civilised society.

References