COPING WITH THE HIGHLY DANGEROUS: ISSUES OF PRINCIPLE RAISED BY PREVENTIVE DETENTION

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The Garry David case has raised in stark form a dilemma for the legal system. When, and for how long, may persons representing a danger to the community legitimately be incarcerated beyond the period of the sentence imposed upon them for past crimes?

In the case of Garry David, this question has to a considerable extent been clouded and confused by the issue of mental illness. If Garry David could be regarded as mentally ill then his continued detention would be justified on ordinary principles relating to civil commitment. The balance of psychiatric opinion, however, establishes clearly that the concepts of mental illness and personality disorder or psychopathy are quite distinct, and this view was adopted by the Mental Health Review Board in allowing Garry David's appeal (Case No. 230190:X01:300512). The recommendation of the Law Reform Commission of Victoria (1990) that the Mental Health Act 1986 (Vic.) should be amended so as to incorporate antisocial personality disorder within the concept of mental illness now appears unlikely to be adopted. Issues raised by the Garry David case touching on the nature of mental illness and psychopathy, the role of the profession of psychiatry and its relationship with the criminal justice system and the criteria and procedures to be adopted in respect of civil commitment to psychiatric hospitals have been dealt with by the present writer elsewhere (Williams 1990, p. 161), and will not be considered in the present paper. It is sufficient to state that the present writer holds to the view that psychopathy and mental illness are distinct concepts, that the Mental Health Act should not be amended as recommended by the
Law Reform Commission of Victoria and that it is a fiction that persons who are deviant and dangerous must necessarily be mentally ill.

The issue of detention of the highly dangerous is not, of course, confined to the case of persons suffering from antisocial or borderline personality disorders (psychopaths). It would, for example, be equally raised in the case of a political terrorist serving a sentence of imprisonment for murder who made it known that he or she intended to kill again for political purposes on release. In some cases the terrorist's threats would themselves amount to crimes justifying further imprisonment, but this would not always or necessarily be the case.

No general mechanism presently exists to enable the incarceration of individuals such as Garry David and the hypothetical terrorist beyond the period of their terms of imprisonment. In the case of Garry David, of course, a special Act of Parliament, the Community Protection Act 1990 (Vic.), has been passed applying only to him. Such an expedient is, it is submitted, highly unsatisfactory. The argument will be advanced in this paper that, in the interests of community protection, a carefully limited and properly regulated form of general preventive detention is warranted.

The Legal Dilemma

Few would deny the proposition that in the case of a person suffering from a personality disorder of an extreme form and representing a grave threat to the physical safety of members of the public, and in the case of a political terrorist awaiting the opportunity to commit further crimes of violence, society must be able to protect its members if necessary by depriving that person of their liberty. Such a view would be held by the overwhelming majority of members of the community, and a government that failed to respond to it would be widely and properly perceived as failing in its duty to protect its citizens.

Yet an appropriate response runs counter to traditional legal thinking as to the nature of punishment and the principles to be applied in determining the limits to be set to periods of incarceration. Such thinking proceeds from the proposition that deprivation of liberty, involving harm to the individual and the infringement of that person's rights, normally must be viewed as punishment and must be justified in terms of the legal and ethical principles applicable to punishment. Theories of punishment stipulate that a person may only be punished for that which they have done, not for that which they are likely to do. Professor H.L.A. Hart (1968, pp. 4–5), for example, explains the concept of punishment in criminal law theory as follows:

- It must involve pain or other consequences normally considered unpleasant.
- It must be for an offence against legal rules.
- It must be of an actual or supposed offender for his offence.
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- It must be intentionally administered by human beings other than the offender.
- It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

Such thinking is retributive in nature, and heavily dependent upon the concepts of individual human responsibility and moral wrongdoing. It requires both that the individual to be punished must have offended against legal rules, and stipulates a proportionate relationship between the offence and the nature and degree of punishment to be administered. The only exception to the principle of proportionality recognised by such thinking is the case of insanity. Those who commit crimes while insane act without moral culpability. They may, because of their insanity, be detained for treatment. Since such cases involve treatment rather than punishment considerations of desert and proportionality are not applicable.

The essentially retributive nature of the common law in respect of sentencing was highlighted with particular clarity by the decisions of the High Court in *R v. Veen (No. 1)* ([1979] 143 CLR 458) and *R v. Veen (No. 2)* ((1988) 62 ALJR 224). The accused suffered from alcohol induced brain damage and experienced uncontrollable urges leading him to commit violent crimes. In 1975 he was charged with murder in New South Wales, but convicted of manslaughter having regard to the defence of diminished responsibility (a defence available in that state but not in Victoria). The trial Judge, having regard to the needs of community protection, sentenced the accused to life imprisonment. The accused appealed successfully to the High Court, where a sentence of twelve years was substituted for the life term. The view taken by the majority was that while the protection of the community was a factor in determining sentence it was not a consideration which would justify what was in substance a sentence of preventive detention.

*Veen* was released after serving eight years and, tragically, killed again later that year. He was charged with murder, found guilty of manslaughter on the same basis as before, and again sentenced to life imprisonment. He again appealed to the High Court against sentence, but on this occasion his appeal was dismissed. The two cases were different in material respects; the mitigating factor of youth was no longer present, an element of provocation possibly present in the first case was absent in the second and, most notably, the accused's earlier less serious criminal record had on the occasion of the second conviction now been supplemented by the previous conviction for manslaughter. While on this occasion upholding the sentence of life imprisonment, the High Court affirmed its decision in *R v. Veen (No. 1)*. In sentencing an accused the requirement of proportionality must, the court held, be adhered to. It is only within the range of what is proportionate to the personal circumstances of the offender and the offence that regard may be had to considerations of community protection. In a joint judgment Mason CJ, Brennan, Dawson and Toohey JJ (p. 227) expressed the proper role of considerations of community protection at common law in the following terms:
It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.

The decisions in *R v. Veen (No. 1)* and *R v. Veen (No. 2)* may be regarded as a correct institutional response on the part of the courts to issues of community protection. It is properly the role of the courts to protect rights, and to focus attention upon the individual case before the court. The courts would serve their function less well if they were to allow the essentially individual focus of their attention and the consideration of issues of desert which this involves to be replaced by a primary concern for issues of community protection. It by no means follows as a proposition of logic, however, that it is not equally proper for the legislature to intervene in respect of such cases with a response which places greater emphasis on considerations of protection and less, if indeed any, emphasis on considerations of desert and proportionality. This view was expressly affirmed by Deane J in *R v. Veen (No. 2)*. His Honour (p. 237) stated:

> [T]he protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence. Such a statutory system could, one would hope, avoid the disadvantages of indeterminate prison sentences by being based on periodic orders for continuing detention in an institution other than a gaol and provide a guarantee of regular and thorough review by psychiatric and other experts. The courts will impede rather than assist the introduction of such an acceptable system if, by disregarding the limits of conventional notions of punishment, they assume a power to impose preventive indeterminate gaol sentences in a context which lacks the proper safeguards which an adequate statutory system must provide and in which, where no non-parole period is fixed, the remaining hope of future release ultimately lies not in the judgment of experts but in the exercise of a Ministerial discretion to which political considerations would seem to be relevant.

**The Community Protection Act 1990 (Vic.)**

The Community Protection Act is unique in Australian legal history as being the only occasion on which an Act of Parliament has been passed for the expressly stated purpose of enabling the detention of a named individual. The Act empowers the Minister to apply to the Supreme Court for an Order that Garry David be placed in preventive detention (s. 4). Power is granted to the court to make an interim order for detention pending a hearing (s. 6). The
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test to be applied by the court in determining whether to order preventive detention for Garry David is set out in s. 8(1) as follows:

If, on an application under this Act, the Supreme Court is satisfied, on the balance of probabilities, that Garry David:

(a) is a serious risk to the safety of any member of the public; and

(b) is likely to commit any act of personal violence to another person—

the Supreme Court may order that Garry David be placed in preventive detention.

Such Order is required to specify, inter alia, the period of detention which must not exceed six months (s. 8(2)(b)). On application by the Minister, orders for further detention may be made by the court for periods of up to six months at a time (s. 9). Upon the making of an Order, Garry David must be detained in the psychiatric in-patient service, prison or other institution specified in the Order (s. 10). Where an Order is in force, Garry David must not be discharged or released from preventive detention except in accordance with an Order of the Supreme Court (s. 12).

The Community Protection Act was expressly stated to expire twelve months after receiving the Royal Assent, that is 24 April 1991 (s. 16). Its operation was extended for a further three years by the Community Protection (Amendment) Act 1991 (Vic.).

Section 8(1) of the Act gives rise to significant problems of interpretation. The operation and relationship of the two sub-sections is uncertain. The word 'and' appearing between them clearly means that both need be satisfied. Focusing first on sub-paragraph (b), what is meant by 'likely'? Does it mean 'probable' in the sense of more likely than not, or is a higher degree of probability required? What is meant by an 'act of personal violence'? Presumably 'personal violence' is something less than 'grievous bodily harm', which is bodily harm of a really serious nature: R v. Smith ([1961] AC 350, pp. 334–5). Is it then an equivalent of 'actual bodily harm', an expression interpreted as extending to any hurt or injury calculated to interfere with the health or comfort of the victim, provided that it is something more than merely transient and trifling: R v. Donovan ([1934] 2 KB 498, p. 509); R v. Miller ([1954] 2 QB 282, p. 292). Turning to sub-paragraph (a), what is meant by 'a serious risk to the safety of any member of the public'? The concept of serious risk does not necessarily narrow the operation of sub-paragraph (b), for it would seem that the likelihood of serious risk may be independent of the likelihood of commission of an act of personal violence. Thus, if Garry David were found to be suffering from AIDS he could be said to constitute a serious risk to the safety of the public which, in combination with the likelihood of commission of an assault involving actual bodily harm, could be argued to be sufficient to satisfy the dual test laid down by s. 8.

If the test spelt out in s. 8 is found to be satisfied, it does not necessarily follow that Garry David must be detained. The power to detain remains a discretionary one which 'may' be exercised by the court if it finds the two
criteria to be satisfied. How should the court exercise such discretion? Would the court be entitled to have regard to concerns of a civil liberties nature in exercising the discretion? It may seem surprising that such a discretion should have been conferred. In the context of an Act designed to achieve the detention of a particular individual consistency would seem to suggest that if the twofold test of s. 8 is satisfied then detention should necessarily follow.

The Act is, however, open to more serious criticisms than its lack of clarity and inadequacies of drafting. It is an item of legislation which would appear to offend against both the principle of the rule of law and the doctrine of separation of powers. The rule of law requires that laws be of general application; that all members of the community be equally subject to the law. Yet this Act, penal in its effect, specifically applies only to a named individual. The shadow Attorney-General described the Bill as creating 'a process that must be compared with the historical Bills of Attainder', and characterised it as 'one of the most obnoxious Bills that has ever been introduced into Parliament' (Victoria. Parliament. Legislative Assembly 1990, pp. 10–11). The doctrine of separation of powers provides that it is for the legislature to pass general laws, for the courts to determine particular cases under them, and for the executive to make specific administrative decisions. Thus a more correct approach to the issue would have been to pass an Act giving the minister power to detain Garry David, and for that power to have been exercised on the responsibility of the minister.

In May 1990, following the upholding of Garry David's appeal by the Mental Health Review Board, the Attorney-General of Victoria, the Hon. J.H. Kennan, made application to the Supreme Court for an Order under s. 8 of the Community Protection Act that Garry David be placed in preventive detention for a period of six months at J. Ward, Ararat. The application was heard before Mr Justice Fullagar, who first made an interim Order under s. 6 of the Act which had the effect of detaining Garry David while the application was heard. The case occupied twenty-two sitting days. On 18 September his Honour delivered judgment, making an Order in the terms sought by the Attorney-General.

Mr Justice Fullagar engaged in a careful review of the facts and the medical evidence presented to the court, paying particular regard to the psychiatric evidence and the evidence of those who had been responsible for Garry David's care and supervision during his period at J. Ward. His Honour did not venture to comment on issues of principle raised by the Act, nor to any extent upon the difficulties of interpretation which it gives rise to. After a careful review of the evidence presented, his Honour concluded that the test laid down by s. 8(1) of the Community Protection Act was satisfied to the standard of the balance of probabilities. His Honour stated:

I have arrived at the clear conclusion that, if Garry David were to be released forthwith into the community, there would be a real and grave risk that within a short time he would by violent acts cause harm to members of the public and especially to members of the police force, and accordingly that he at large would constitute a serious risk to the safety of members of the public. He would be likely to commit acts of violence upon other persons. He would be likely to stage something like the scenario he planned at the outset of the [1980 shooting] incident. I think
that, despite his intelligence and his substantial rational periods, if he were now to be released he would be full of anger at a community which he would blame, if not for institutionalising him, at least for sending him out into the community in a hopeless state for managing life as a member of it, and without having made a sustained and lengthy effort to put him into a condition where he could manage as a member of society. His underlying anger and resentment would be almost certain to rise to an explosive level as soon as he felt thwarted or subjected to stress, and this would be very likely to result meditately if not immediately in causing serious harm by violence to some members or member of the public.

The court having arrived at these conclusions after the fullest consideration, it is inevitable that, in the public interest, there should be an order that the respondent be placed in 'preventive detention'.

The Order granted in Kennan v. David has now expired, and Garry David remains incarcerated pending the hearing of an application for a further period of detention. The Community Protection Act is, it is submitted, a highly objectionable piece of legislation and its use and extension as an expedient is to be regretted. If the proposition is accepted that the public is entitled to protection from persons who constitute a major threat of the order posed by Garry David, then the proper method of achieving this is by a carefully limited and controlled system of preventive detention.

**Preventive Detention as an Unavoidable Issue**

If the fiction that persons suffering from an antisocial personality disorder and constituting a significant danger to the public are necessarily suffering from a mental illness is rejected, what would appear to be a reasonably straightforward choice is presented. Such persons may be released in the ordinary way at the expiration of their sentences in the knowledge that the public is being placed at substantial risk. Alternatively, a mechanism for preventive detention can be introduced for reasons of public protection on the understanding that such action is being taken for reasons unrelated to moral culpability and that such a mechanism may properly be thought to pose a potential danger to civil liberties. In the case of dangerous offenders not suffering from antisocial personality disorder the inevitability of this choice is even more obvious.

Attempts are, however, on occasion made to avoid this choice. In their Interim Report (1990), *Inquiry into Mental Disturbance and Community Safety*, the Social Development Committee of the Victorian Parliament was strongly critical of the recommendations of the Law Reform Commission, concluding that the Mental Health Act should not be amended to include persons with personality disorder. The Committee recognised that 'a case could be made for incapacitation to apply in a small number of cases where the offender has a history of severe acts of violence and is considered to be dangerous' (p. 55). The Committee declined to make such a recommendation, however, on the basis that it 'would be a radical departure from the principles and values underpinning this state's criminal justice system', and that such a measure 'should not be introduced prior to extensive public debate' (p. 60).
The Report recommended instead that where an offender currently serving a sentence is thought to be dangerous, a range of special programs should be implemented to facilitate their re-entry into society. Further, statutory provisions should be developed to enable the Government and such offenders to establish individually negotiated agreements as to how rehabilitation and release will occur. The idea of special programs and advance planning for release is, of course, sensible and worthwhile. It is doubtful, however, if the overall scheme proposed is adequate to ensure public protection. The idea of individually negotiated agreements with such offenders is highly questionable. Psychopaths are frequently highly manipulative and are anything but consistently rational. Ultimately the point will come at which their existing sentences will have expired, at which time no basis for continued detention or further negotiation will exist. Such a scheme does not, of course, even begin to come to grips with the issue of the political terrorist approaching the end of her or his sentence and intent upon further crimes.

On occasion the attempt is made to seek a medium course between the supporters and the opponents of preventive detention by arguing in support of a system of incarceration that is said not to involve a punitive element (Wood 1988, p. 424; 1989, p. 324). The argument is put that if the system of incarceration can be classified as civil and non-punitive in nature, then the legal and ethical objections to detention based other than on desert are removed. Such an argument seems mistaken. The essence of incarceration from a punitive point of view is the deprivation of liberty, and this is in no way lessened by claiming the incarceration is civil. When a person is sent to prison following conviction for an offence, tremendous variations exist as to the nature of the institution to which he or she will be committed, and the form that incarceration will take. Ideally, the form of imprisonment will be the least harsh that can be imposed having regard to the need to prevent the particular individual from escaping or from doing further harm while incarcerated. In the case of a person said to be detained civilly, precisely similar considerations would apply. Such incarceration is, accordingly, properly classified as a form of preventive detention akin to imprisonment. To make use of less harsh sounding labels is merely to seek to escape from the gravity of the issues inevitably involved in arguing in support of preventive detention.

The Case for Preventive Detention

Faced with the choice between no effective action and a strictly and carefully limited system of preventive detention, the arguments in favour of the latter would appear the stronger. Such a decision is inevitably subjective, and involves a decision in favour of the potential victims of violent psychopaths, political terrorists and similarly dangerous individuals over the claim of persons possibly mistakenly or unnecessarily incarcerated under such a system.

Professor Nigel Walker (1981), an influential proponent of preventive detention, argues that the incapacitation of those clearly known to be dangerous should be regarded as a justification which is quite as sound as retribution, deterrence or the need for treatment (Floud & Young 1981,
p. 276). He seeks to refute the proposition that the concept of desert must always operate as a precondition to, or a limitation upon the extent of, incarceration by posing two hypotheticals, the latter of which closely parallels the Garry David case. In Situation A:

the offender to be sentenced is certain to commit a crime of serious violence unless detained for longer than the ‘just deserts tariff’ would allow. Must he be released and re-incarcerated only when he has committed the crime he was certain to commit? Or would certainty justify incarcerating him before he commits it? To be consistent the pure retributivist must insist on the former. He might protest that the case as posed is unreal and artificial; but the answer to that is that an uncompromising philosophical position must be defensible in any conceivable situation (p. 281).

In Situation B:

the violent offender declares his intention of committing further violence when he is released, and there is no reason to disbelieve him or to doubt his capacity for doing what he says he will do. Would the retributivist allow him to be kept inside any longer than the just deserts tariff permits, in order to stop him doing what he promises to do? Must his answer in this situation also be ‘No’? If so, he is in effect saying that his principles do not allow him to take any steps to save a person from becoming a victim of violence if those steps involve the extension of incarceration. If he is completely consistent he would also be unwilling to allow any non-custodial precautionary measure that would involve even inconvenience for the offender (p. 281).

Predicting dangerousness is, of course, notoriously difficult (Steadman & Cocozza 1975; Cocozza & Steadman 1976, p. 1074; Bottoms 1977; Walker 1981). Professor Walker (1981, p. 277), however, has argued that it is possible to isolate a group of offenders of which a majority will commit further violence. A higher probability can, of course, be achieved if the target group is narrowed so that only those regarded as extremely dangerous are subject to the possibility of preventive detention and it is accepted as a corollary that persons of considerable dangerousness should be released at the expiration of their sentence. Preventive detention should, it is submitted, be reserved only for the most extreme cases; the human time bombs waiting for the opportunity of exploding on release.

Systems of preventive detention which have existed in the past have been unsatisfactory, but have usually been misconceived. First, because they have defined the concept of dangerousness too widely and have properly been seen to pose unwarranted threats to civil liberties. Secondly, because they have, as with s. 192 of the Community Welfare Services Act 1978 (Vic.) (now repealed), normally involved a decision to impose an additional period of detention at the time of original sentence. Thus, they have operated in the context of the normal sentencing process which is essentially retributive in nature, and have required the judge to assess what is warranted in retributive terms and supplement that by an additional period imposed for reasons of community protection. Since the judge is required to impose the additional
term as part of, and therefore at the same time as, the original sentence, the judge is called upon to determine the risk that may be posed to the community by the offender at some considerable point of time in the future. Any such system is bound to fall into disrepute and fail.

A legislative scheme designed to provide for the further detention of highly dangerous persons after the expiration of their regular sentence would not seem impossible to develop incorporating appropriate safeguards. Such a system would come into operation at a point of time approaching the normal release date of the offender rather than at the time of original sentence. It would operate only in respect of persons who had proved their danger to the community by the commission of crimes of the most serious kind. The list should possibly be limited to murder, attempted murder and rape. Decisions made, towards the end of such offenders sentences, that there was a strong probability of further acts of serious violence on their part would, it would seem, be likely to be reliable. While potential for violence is in general extremely difficult to estimate, the issues which would be involved in such a scheme would be far more specific and the evidence available more extensive. In the case of a person convicted of a major crime of violence, who has a lengthy history of criminality, who has behaved violently while in prison and in respect of whom there is a strong body of psychiatric opinion to the effect that their propensity for violence remains undiminished and is likely to be acted upon in the future, a prediction of future violence is likely to be highly accurate.

Decisions as to the requisite degree of dangerousness should be made by a single judge of the Supreme Court, from which there should be an appeal to the Full Court. The court should be empowered to order a not insubstantial period of further detention based upon perceived risk of future violent acts.

Conclusion

The issues posed at the beginning of this paper as being raised by the Garry David case and the hypothetical case of the terrorist whose release date is approaching do not admit of easy resolution. The principle that a person should be punished on the basis of desert and not detained longer than her or his crimes warrant is deeply imbedded in our theories of criminal justice and ethics, and departures from this principle should be made only in exceptional cases. The claims of the community to adequate protection, however, are strong and should prevail in exceptional cases. The attempt should not be made to avoid these difficult issues by a pretence that persons who are deviant and violent are necessarily mentally ill or by ad hoc expedients such as the Community Protection Act. It is preferable to adopt a carefully limited and controlled system of preventive detention.

References


Steadman, H.J. & Cocozza, J.J. 1975, 'We can't predict who is dangerous', *Psychology Today*, pp. 32, 84.


