The criminal justice system has traditionally been seen as in the business of doing justice: punishing offenders for crimes committed. Yet, the past decade has brought a shift from punishing past crimes to preventing future crimes through the incarceration and control of dangerous offenders. Habitual offender statutes, like "three strikes" laws, sentence repeat offenders to life imprisonment. Jurisdictional reforms lower the age at which juveniles may be tried as adults, increasing the available terms of imprisonment beyond those of juvenile court. Gang membership and recruitment are criminalized. "Megan’s Law" statutes require community notification of a convicted sex offender. "Sexual predator" statutes provide for civil detention of offenders who remain dangerous at the conclusion of their criminal term. Sentencing guidelines increase the sentence of offenders who have a prior criminal history, for these offenders are seen as the most likely to commit future crimes.

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

How Strong is the Need for Increased Prevention?

Every society must have a right to defend itself. And our present society has good reason to feel it needs protection. Even with the most recent declines, the violent crime rate remains more than three times higher than during the decade following World War II, when the baby-boomers, now the civic and political leaders, were growing up. Today’s aggravated assault rate is nearly four times what it was then.
News reports commonly celebrate that current crime rates are back to the levels of the late 70's, failing to note that by the late 70's the long road of unbroken annual crime increases had already tripled the rates over those of the 50's. Given the erupting epidemic of juvenile crime, the unknown effect of the coming wave of crack babies, and a host of other predictable or unpredictable changes, the decreases may not continue. But even if they did, the declining crime rate of the last eight years would have to continue unbroken for another three decades before we returned to the crime levels the baby-boomers enjoyed as children.

And even if crime rates continued to drop every year for the next three decades, people still would have reason to be dissatisfied. The past three plus decades of crime increases have caused people to seriously alter their life style. We no longer let our children walk home from school. We dead bolt on our doors, put "The Club" on our cars, and live in security-staffed apartments and "gated" communities. Current crime rates are as high as they are despite these precautions, and would be even higher without them. A return to the security of life we had when we were children would require not only a reduction to the 1950's crime rates but such reduction with the freedom of action we had back then. The seeming impossibility of regaining these earlier freedoms only highlights how much we have lost to crime since the 50's.

From this perspective, it is understandable that citizens should demand greater protection and that legislators should seek new ways to provide it. Yet the trend of the last decade – of shifting the criminal justice system toward the detention of dangerous offenders – is a move in the wrong direction, I will argue.

The difficulty lies not in the laudable attempt to prevent future crime but rather in using the criminal justice system as the vehicle to achieve the goal. That approach, I argue here, perverts the justice process and will undercut the criminal justice system’s effectiveness in controlling crime. At the same time, the basic features of the criminal justice system necessarily make it a costly yet ineffective preventive detention system.

What is preferable is a segregation of the punishment and prevention systems. Punishment, especially through imprisonment, happily produces a collateral effect of incapacitation. If preventive detention is needed beyond the prison term of deserved punishment, it ought to be provided by a system that is open about its preventive purpose and is specifically designed to perform that function. Punishment and prevention are different functions that logically use different criteria and call for different procedures. Trying to use a single system to perform both functions ensures that neither will be performed effectively. Today's mixed system, in which preventive detention is cloaked as criminal justice, suffers problems both in doing justice and in protecting society.
The Justice Problems

Each of the prevention-based reforms of recent years provides its own distortion of justice. Lowering the age of adult prosecution increases the number of cases in which a young offender who lacks the capacity for moral choice nonetheless is held criminally liable. There is little dispute that many young offenders, especially those below the age of fifteen, lack the cognitive and control capacities of normal adults. Some may not appreciate the enormity of the consequences of their acts. Other may lack the normal behavior control mechanisms.

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

A more common and more damaging problem derives from the use of "three-strikes" and other habitual offender statutes and the use of prevention-oriented sentencing guidelines that dramatically increase criminal terms for offenders with a prior criminal record, which correlate with future dangerousness. Instances of long-term imprisonment for a minor offense are well known, such as the life sentence for a third minor check fraud in the Supreme Court case of *Rummel v. Estelle*.

But the more pervasive but less obvious problem appears in every case in which a habitual offender statute or guideline is used: the sentence imposed exceeds that deserved as punishment for the offense committed, albeit to a less dramatic effect than life imprisonment for minor check fraud. Indeed, that is the point of such statutes: they significantly increase the sentence over what it would be for the offense — that is, the sentence deserved for the offense — because a prior record may predict future offenses. But the effect of such a policy is to have the criminal justice system regularly impose sentences that exceed the punishment deserved.

One can construct a justice argument that more punishment is deserved for an offense if it is a repeat offense. The new violation suggests a certain "nose-thumbing" at the system, a damaging public display of the offender's disregard for the community's norms. But by all accounts, such nose-thumbing is at most one of many possible factors that may aggravate an offense, like the use of needless violence or the targeting of a particularly vulnerable victim. One would hardly argue that the nose-thumbing is more blameworthy than the offense itself. A rape is a terrible crime. It
may be more condemnable when committed by someone who has committed a previous offense, but the nose-thumbing is hardly more condemnable than the rape itself. Yet, the new preventive doctrines -- "three-strikes" and other habitual offender statutes and prevention-oriented sentencing guidelines -- can double, triple, or quadruple a sentence based upon a prior criminal record.

Although less common, a prevention focus instead of a justice focus can have the opposite effect, of giving an offender less punishment than he deserves. For example, some states follow the Model Penal Code in giving a defense for an attempt that is "inherently unlikely" to succeed and the offender does not otherwise present a danger. The bed-ridden man with AIDS who spits at another believing he can thereby cause the other’s death may not be dangerous but has demonstrated his willingness to cause another’s death. That the offender has failed in his attempt to murder may call for the normal discount we give to an unsuccessful attempt as compared to a completed murder, but there seems little reason from a justice perspective to reduce his punishment any further than that. Lack of dangerousness does not vitiate blameworthiness.

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

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

Such deviations from desert not only fail the goal of doing justice, which is its own value, but also cause longer-term damage to the crime-fighting effectiveness of the criminal justice system. There is much social science research to suggest that social norms, more than the fear of official sanction, produce law-abidingness. A criminal law that earns moral credibility with the public by making it clear that its goal is to do justice is a criminal law that can harness the enormous power of social norms. If it speaks with moral authority, it can effectively stigmatize offenders, it can help shape moral norms, such as those against drunk driving or domestic violence, it can authoritatively signal the existence of a moral norm in areas where the wrongfulness may not be obvious, as in insider-trading.

In contrast, a criminal law that is seen as pursuing some goal other than doing justice – even a laudable goal like preventing future crimes – cannot gain moral credibility in its judgements. As the system shifts its focus from blameworthiness to
dangerousness, people will come to understand that criminal liability does not necessarily suggest a defendant's moral blameworthiness for past condemnable conduct; it may simply reflect a prediction of future conduct. Note that we may shy away from mentally ill persons or persons with a contagious disease who are civilly committed, but we typically do not see their detention as an indication of their moral blameworthiness. The effects of losing moral credibility with the public can be devastating to the criminal justice's system's ability to fight crime. A criminal justice system without moral authority cannot stigmatize by imposing liability, cannot help shape moral norms, and cannot signal morally condemnable conduct that is not obviously so on its face.

The Prevention Problems

It is ironic that the perversions of justice suffered in the name of prevention produce a seriously flawed prevention system. The difficulties arise primarily because of the felt need to cloak the preventive measures as doctrines of criminal punishment so as to appear less out of place in what is presented as a criminal justice system. Why should this be so? If reformers wanted to detain dangerous offenders, why didn't they simply adopt a system that was open about its preventive detention nature, to fill in where criminal justice incarceration left a need? Most jurisdictions allow civil commitment of persons who are dangerous due to mental illness, drug dependency, or contagious disease. Why the reluctance here to preventively detain offenders who remain dangerous at the conclusion of their deserved criminal term of imprisonment?

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

But the 1960’s preventive detention legislation was controversial in large part because it provided pretrial preventive detention. In contrast, most of current reforms provide preventive detention only after trial and conviction, an important difference. On the other hand, part of pretrial preventive detention's bad reputation stems from an objection to "'Alice in Wonderland' justice" in which the sentence precedes the trial. That same objection can be made of present day post-conviction preventive detention, because detention for longer than the deserved term of imprisonment is justified as preventing predicted future crimes. It is not only punishment for an offense for which the detainee has not yet been convicted, but punishment for an offense that he has not yet committed!
Yet this is the genius of the current system's cloaking of preventive detention as criminal justice. By obscuring the preventive nature of the liability and sentence, by making it seem as though it is not too entirely different from what people might see in a criminal justice system of deserved punishment, the preventive detention controversy can be avoided altogether.

But the effect of such cloaking is to seriously impede the system's preventive effectiveness. For example, instead of examining each offender to determine the person's actual present dangerousness, the current cloaked system uses prior criminal record as a stand-in for dangerousness. Prior record has some correlation with dangerousness and, thanks to the cover of the "nose-thumbing" theory, has plausible-denyability as to its perverting justice. But prior record is only a rough approximation of actual dangerousness and will guarantee errors of both inclusion and exclusion.

Indeed, this particular cloaking device stands good prevention on its head. All indications are that criminality is highly age related. Whether due to changes in testosterone levels or something else, the offending rate drops off steadily from its peak in the early twenties. The prior-record cloak has us ignore younger offenders' future crimes when they are running wild, but then has us begin long term imprisonment, often life imprisonment under "three strikes," just when natural forces would normally rein in the offenders as they age. The offenders with their criminal careers before them are not detained because they have not yet built up their criminal resumes, while offenders with their criminal careers behind them are detained because they have the requisite criminal record. That produces a costly prevention system of prisons full of geriatric life-termers, and simultaneously ineffective prevention, as the system does little during the period when the need for preventive detention is at its greatest. A more rational and cost-effective preventive detention system would more readily detain young offenders through their crime-prone years and release them for their crime-free older years. Yet the need to cloak the preventive detention as if it were deserved punishment prompts use of prior record as a substitute for actual dangerousness.

An equally counterproductive aspect of the cloaked system is the early decisions and fixed ("determinate") sentences it logically mandates. In determining the length of a deserved sentence, everything relevant is known at the time of sentencing – the nature of the offense and the personal culpability and capacities of the offender. Thus sentencing judges determining deserved punishment have little reason to impose anything other than a fully determinate sentence (that is, one that sets the actual release date) immediately after trial. A system that does otherwise -- that allows a subsequent reduction of sentence, as by a parole board -- undercuts deserved punishment. Citizens become cynical that a just sentence will later be undermined by a less public early release. It is this cynicism that gave rise to the cry for "truth in sentencing" and to the
popular legislative move to determine terms and to the abolition of early release on parole.

To keep its justice cloak, then, the preventive system must live by this same practice of determinate sentences imposed soon after trial. But the practice is highly inappropriate and ineffective for effective prevention. It is difficult enough to determine a person's present dangerousness – whether he would commit an offense if released today. It is that much more difficult to predict an offender's future dangerousness – whether he would commit an offense if released at the end of the deserved punishment term two, ten, or thirty years from now. It is still more difficult, if not impossible, to predict today precisely how long the future preventive detention will need to last. Yet that is what determinate sentencing demands: the imposition now of a fixed term that predicts the needs of prevention far in the future.

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

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

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

Similar distortion occurs is determining the incarceration conditions. A criminal punishment term is meant to impose suffering, within the bounds of human dignity;
punitive conditions are entirely consistent with a punishment rationale for the incarceration. But when an offender has served the portion of his sentence justified by deserved punishment and continues to be detained for entirely preventive reasons, punitive conditions become inappropriate. When we civilly commit persons for the protection of the community – persons with contagious diseases, drug dependencies, or mental illness – we try to avoid punitive conditions (although finances do not always make civil commitment conditions as different from criminal punishment as reason suggests they should). An offender who has served his deserved term of punishment ought similarly to be subject to non-punitive conditions during any preventive detention.

Finally, and in the same vein, an offender being preventively detained logically ought to have a right to treatment, especially if it can reduce the length or intrusiveness of the preventive detention. This is simply a specialized application of the general principle that we ought not restrict one individual’s liberty, to benefit of others, more than is necessary to achieve the benefit. If treatment can reduce the individual sacrifice called for, then it ought to be provided. In contrast, a person serving a term of deserved punishment would seem to have no greater claim to free treatment than any other citizen.

The Solution: Segregating Justice and Prevention

It is common that real world problems present us with conflicting interests that cannot be accommodated but only compromised. We typically we have little choice but to strike a balance between the two competing interests. The natural conflict between fair trials and a free press cannot be resolved; they must be balanced. Each must give some to accommodate the other. Our interest in effective investigation of a crime competes with our interest in privacy. Fourth Amendment analysis, the standard forum of resolution, typically strikes a sometimes complex balance between the two.

In the present instance, however, the news is better. There is no need to compromise one to advance the other, for the conflict between justice and prevention can be avoided by simply segregating the two functions: by having a criminal justice system that focuses exclusively on imposing the punishment deserved for the past offense, no more, no less, and having a post-sentence civil commitment system that looks only to protecting society from future offenses by the dangerous offender.

The sticking point in this proposal is not in having a criminal justice system that is guided only by justice. That is what most lay persons assume the criminal justice system has always sought to do. The difficulty comes, instead, with the open recognition of a system of preventive detention.
There is some precedent for preventive detention. As noted, all states presently have some form of civil commitment operating to protect society. Further, providing a more direct precedent, many states presently have post-criminal-incarceration civil commitment of "sexual predators." Under these civil commitment systems, the government can attempt to detain an offender at the conclusion of his criminal term if it can show continuing dangerousness.

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

To summarize the arguments above, the community is better off because such a system offers both more justice and better protection from dangerous offenders. Giving the criminal justice system a better chance of doing justice is valuable for its own sake and also means greater moral credibility for the system, thus greater long-term crime-control power. Better protection is offered because an explicit preventive detention system, which can look directly at a person’s present dangerousness, more accurately predicts who is and is not dangerous. Greater accuracy is enhanced further by periodic re-evaluations, rather the present system's need to make a single prediction of dangerousness years in advance. Greater accuracy means more detention of the dangerous, for better protection, and less detention of the non-dangerous, saving resources.

A segregated system also benefits the potential detainees, for many of the same reasons. Better accuracy in prediction means less detention of non-dangerous offenders. Periodic re-evaluation means detention more frequently limited to periods of actual dangerousness. Acknowledgment of the preventive nature of the detention also logically suggests a right to treatment, non-punitive conditions, and the principle of minimum restraint, meaning greater freedom among those who are detained.

Beyond the new limitations imposed on it, an open system of preventive detention ought to be preferred precisely because it is open rather than cloaked. No one can guarantee that a legislature or court will not attempt to abuse its power. But an open system makes it harder, not easier, to abuse the system. The openly preventive nature of the system subjects it to closer scrutiny, as it should, a scrutiny the present cloaked system escapes. Instead of the current debates -- which typically reduce to disagreements about, for example, whether "three strikes" sentences are "too long" -- the debate would shift to the many aspects of preventive detention that cry out for debate: What is the reliability of the predictions of dangerousness? Is the threatened danger sufficient to justify the extent of intrusion on personal liberty? Are there less
expensive or less intrusive measures that would as effectively protect the community? Under the current cloaked system, these issues escape examination and debate.

Imagine a legislature trying to pass an explicit preventive detention statute that would provide life preventive detention upon a third conviction for a minor fraud offense, the disposition provided by the statute in *Rummel*. Such legislation would be difficult to defend and unlikely to find support in any political quarter. Indeed, imagine the Supreme Court’s review of *Rummel* if Rummel were being preventively detained. Life terms without possibility of parole may be common and acceptable in a criminal justice system, where horrible crimes can deserve severe punishment. But life commitment, with no further dangerousness review, in a civil preventive detention system would be preposterous on its face.

If there is a danger of governmental abuse of preventive detention, it is at its greatest when that preventive detention is cloaked as criminal justice.

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