

Sexual Predators, Extended Supervision, and Preventive Social Control: Risk Management Under the Spotlight¹

*Warren J Brookbanks*²

Introduction

In 2004 New Zealand introduced legislation aimed at managing the long term risks posed by child sex offenders in the community. In this regard it was responding to widespread public apprehension about the special dangers posed by this group of offenders, the new “monsters” in our demonology of society’s most despised members.³ The vehicle for achieving this in New Zealand is a post-sentence supervision order known as “extended supervision”, which enables the Department of Corrections to monitor medium-high and high-risk child sex offenders for up to ten years following release from prison.

The legislation, the Parole (Extended Supervision) Amendment Act 2004, came into force in July 2004. Its expressed statutory purpose is to “protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing sexual offences against children or young persons.”⁴ The Act provides that the Chief Executive of the Department of Corrections may apply to the sentencing court (which may be either the District Court or the High Court) for an extended supervision order (ESO) in respect of an eligible offender. Factors including the level of risk posed by the offender, the seriousness of harm that might be caused to victims and the likely duration of risk must be considered. The application must also be accompanied by a health assessor’s report addressing the likelihood of future sexual offending by the offender, his ability to control his sexual

1 An earlier version of this paper was delivered by Professor Brookbanks at the ‘Comparative Mental Health Law Seminar’ hosted by the Law School, Northumbria University in October 2005.

2 Professor of Law, University of Auckland, New Zealand.

3 M Perlin, “Symposium: ‘There’s no success like failure/ and failure’s no success at all’: Exposing the Pretextuality of *Kansas v Hendricks*” (1998) 92 *Northwestern University Law Review* 1247.

4 Parole Act 2002, s 107 I (1), as inserted by the Parole (Extended Supervision) Amendment Act 2004.

impulses, the offender's predilection and proclivity for sexual offending and his acceptance of responsibility and remorse for past offending.

The extended supervision model imitates the responses of legislatures in other jurisdictions to the unique challenges presented by child sex offenders, although it must be said that at this stage of its legislative development the New Zealand response to the problem is significantly less draconian than the typical US 'sexual predator' statutes.⁵ However, beyond the particular *form* the legislation takes, there is a more pressing concern. This is the fact that the legislation represents a shift in focus from punishing criminal conduct to regulating the danger potentially inherent in the individual⁶. More importantly, as a form of preventive detention, the legislation is objectionable because it permits detention after the expiration of the offender's sentence, thereby undermining settled principles of criminal process.⁷

The purpose of this article is to assess the legitimacy of this model of preventive detention in light of the legislative response to sex offenders in other jurisdictions, notably the United States and England. I will argue that the growing legislative practice of imposing administrative detention post-sentence represents a dangerous trend in criminal justice and disguises a largely undeclared agenda to isolate and demonise sex offenders as a class. It also has implications for other offender groups who may be targeted because the particular class is perceived as presenting a particular type of risk. Since the empowering legislation is often passed in haste and without due consideration of its long term impacts, it bears the hallmarks of a pre-reflective, "at least we're doing something," response to the problem of sex offending. It also provides a context for pretextual and sanist judicial values to operate, permitting distorted and ill-informed judicial decision-making, particularly where judges' thinking is infected by populist punitive approaches. Invariably, such legislation and the policy surrounding it, fails completely to address fundamental causal patterns underlying sex offending phenomena.

I suggest that in order to address these phenomena squarely, it will be necessary to abandon the current tendency towards isolating sex offenders and refocus our energy on traditional responses of retribution, reform and rehabilitation within conventional principles of criminal process.

Assessing Extended supervision

It is still too early to assess the impact of the New Zealand legislation on patterns of offending and, more importantly, recidivism. According to Department of Corrections publicity, the implementation of the legislation is "progressing well."⁸ As at 21 January 2005, ten applications for ESOs had been granted by the courts, with a further 32 applications in progress. It is now clear that New Zealand judges are using the new option with increasing frequency, viewing it as a useful means of protecting children and young persons from the risk of future sexual abuse by recidivist offenders.⁹ While such an approach is unobjectionable *per se*, the concern which is at the heart of this discussion is that the normalisation of the use of post-sentence detention undermines cherished principles of criminal procedure and exposes offenders to an increasing risk of executive punishment.

In this regard the New Zealand extended supervision model exemplifies important philosophical and

5 See eg EW Fitch, *Sex offender commitment in the United States: legislative and policy concerns* (2003) *Ann NY Acad Sci* 989, 489-501; J S Levenson, "Reliability of Sexually Violent Predator Civil Commitment Criteria in Florida" (2004) 28 *Law and Human Behaviour* 357.

6 B McSherry, "Indefinite and preventive detention: From caution to an open door" (2005) 29 *Crim LJ* 94.

7 *Ibid.*

8 *Corrections News*, February 2005, at p 6.

9 See *Chief Executive of the Department of Corrections v Subritzky* 26/10.05, HC Auckland, CRI 2004 404 98, Lang J, at para 9.

policy developments in Western jurisdictions which indicate major changes in both the *perception* and *management* of dangerous offenders. The new focus, as has been noted by other commentators, is now upon the criminal actor rather than the crime committed, an approach which is inconsistent with the prevailing offence-oriented stance of modern penal legislation. In the Australian case of *Kable v DPP (NSW)*¹⁰ the High Court of Australia held that specially crafted legislation¹¹, which was designed specifically to preventively detain a nominated dangerous offender, in order to protect the public, compromised the integrity of the judicial system because it obliged the Supreme Court of New South Wales to exercise a non-judicial function. One judge held that because the legislation required the court to perform a non-judicial function in making a preventive detention order when there was no offence and no finding of guilt, it diminished public confidence in the integrity of the judiciary.¹²

While such judicial commentary identifies serious constitutional concerns about the nature of such legislation, it is clear that developments in the use of post-sentence detention are manifestations of a reactive stance in penal policy which threatens a dangerous (con)fusion of preventive, punitive and therapeutic mandates. The likely outcome of these developments are negative long term changes in criminal justice and penal values, with a growing focus on *preventive* (crime control) at the expense of *due process* (human rights) values.

In order to test these claims I will briefly examine the sexual predator laws with reference to particular examples in the US, comparing these to the model currently employed in NZ. I will then comment on the ‘preventive’ model of criminal justice advocated by Christopher Slobogin, in a recent article in the *Vanderbilt Law Review*¹³. Next I will consider the ‘anticipatory containment’ concept in relation to proposed legislation for dangerous psychopaths in the UK and Scotland. Finally, I will offer some suggestions as to the management of sex offenders, which may be less restrictive of their personal rights and freedoms, using the “inclusive” theory of criminal justice advocated by David Cornwell.¹⁴

Sexual predator laws

Sexual predator statutes, now increasingly popular in the US, exemplify the new generation incapacitation regimes springing up across jurisdictions, that represent a major departure from traditional punishment models of liberty deprivation. Previous models of indeterminate preventive detention, such as that currently employed in NZ penal legislation¹⁵, invariably followed conviction for a fault-defined antisocial act and usually required a minimum term in prison as part of a retributive penalty.¹⁶ However, the new sexual predator statutes, operating in at least 20 US jurisdictions, permit long-term post-sentence confinement based on a finding of dangerousness. While these statutes require that the dangerousness result from a “mental abnormality” affecting volitional or emotional capacities, and predisposing the person to sexual offending, the triggering mechanism is not an incapacity-based mental disorder, but rather a mental *abnormality* or personality disorder that makes the offender likely to commit another crime. Thus targeted offenders (predominantly paedophiles) may be indefinitely detained in a therapeutic setting *as though* they were mentally disordered when, in strictly clinical terms, they are neither mentally

10 (1996) 189 CLR 51; 70 ALJR 814.

11 See the *Community Protection Act 1994 (NSW)*.

12 *Kable v DPP (NSW)* (1996) 189 CLR 51; 70 ALJR 814, per Toohey J, at 98 and see discussion of the case in B McSherry, “Indefinite and preventive detention legislation”, *supra*, n 4, at 99-100.

13 C Slobogin, “*The Civilization of Criminal Law*” (2005)

58 *Vand. L. Rev.* 121.

14 See D J Cornwell, *Criminal Punishment and Restorative Justice: Past, Present and Future Perspectives*, (Winchester: Waterside Press, 2006).

15 See *Sentencing Act 2002(NZ)* s87

16 C Slobogin, “*The Civilization of the Criminal Law*” (2005) 58 *Vand. L. Rev.* 121,123.

ill nor treatable. As well as contributing to the social rejection of sexual offenders, this legally dubious process confuses the boundaries between therapy and punishment, while creating a pretext that such persons are being detained for “treatment”. The hidden agenda is, however, indefinite secure incapacitation.

The pretextual nature of these legislative models has been noted by a growing number of critical commentators. Amongst the most outspoken of these is Michael Perlin, an American mental health law academic, who has written of the pretextual character of the decision of the US Supreme Court in *Kansas v Hendricks*¹⁷, in which the Court upheld the constitutionality of the Kansas sexual predator statute. Perlin’s principal criticism is that the majority decision supports a statutory scheme that has the potential of transforming psychiatric treatment facilities into de facto prisons, while using mental health treatment as a form of social control, and endorsing the “medicalization of deviancy”.¹⁸ Yet he warns,¹⁹ America’s social policy in dealing with individuals like Leroy Hendricks has been a total failure. New legislation like the Kansas Sexually Violent Predator Act, designed to remedy failures in social policy, is labelled a success, in the absence of a complete lack of supporting empirical evidence, while attracting significant popular support.²⁰

Perlin’s claim of the pretextuality of much sexual predator legislation is based on the view that the legal system accepts dishonest testimony unthinkingly and regularly subverts statutory and case law standards. Of equal concern is his claim that the mental disability law system often deprives individuals of liberty disingenuously and for reasons that have no relationship to case law or to statutes. While it is unlikely that this claim could be sustained in relation to judicial decisions around extended supervision in New Zealand, which are typically closely aligned to statutory criteria and clear reasons, it stands as a stark critique of the attitudes of some judges involved in this area of law and practice.

Eric Janus, writing in the *Lancet*, has also criticised sexual predator laws on the basis that they are legally and morally controversial because they incarcerate individuals in anticipation of future predicted crimes, while using psychiatry and allied mental health professions as a central prop of legitimacy.²¹

Of particular concern is the criticism that judgments made by professionals in sexual predator cases are largely political. Professionals are required to judge whether the individual meets the legal criteria for a diagnosis based on mental condition and level of risk. Such experts are then asked to measure their estimates against the legal threshold for risk which, as Janus notes, are expressed qualitatively using heuristic terms such as “likely” or “highly likely”. However, because these legal concepts are so indeterminate, medical professionals are effectively required to make political judgments to determine the balance between public safety and individual liberty.²²

By “political”, Janus is suggesting that sexual predator laws effectively commandeer the traditional power of state mental health systems and put it in service as a core function of the criminal justice system. On this view the “transposition” of civil commitment has forced psychiatry to legitimate and arbitrate

17 117 S.Ct 2072(1997)

18 See M L Perlin, “Symposium: ‘There’s no success like failure/and failure’s no success at all’: Exposing the Pretextuality of *Kansas v Hendricks*” (1998) 92 NW U.L Rev. 1247, 1269.

19 *Ibid*, 1253.

20 *Ibid*, 1249. The judgement that New Zealand’s Extended Supervision legislation is “progressing well” is difficult to

evaluate in the light, similarly, of an almost complete absence of evaluative empirical data. However, it must be assumed that “progressing well” is a reference to the implementation of the legislation rather than a statement about its effectiveness as a measure of penal control.

21 E S Janus, “Sexually violent predator laws” psychiatry in service to a morally dubious enterprise” (2004) 364, *The Lancet* 50.

22 *Ibid*.

“the boundaries of an aggressive and highly contested form of state coercion”. Thus, according to Janus, sexual predator laws are constructed to imitate civil commitment in order to achieve constitutional and moral legitimacy.²³

Another face of the pretextuality of sexual predator laws is shown by an article which appeared in the New York Times in 2003.²⁴In it the writer, Laura Mansnerus, discussed the case of a New Jersey man, Robert Deavers, one of 287 “sexually violent predators” in the state. Deavers had served 15 years in prison, following conviction for two rapes, before being committed as a sexually violent predator. At the time of publication of the article Deavers had been subject to a sexual predator declaration for 5 years and was facing his third review hearing in an attempt to be released from the sexual predator order. The article states that he “quickly lost hope” when he heard the state psychiatrist, who had never met him but had reviewed his records, note that he tended to be self-righteous and had been “overconfident” in group therapy. Evidence about his having “bumped into” a female guard was evidently determinative of the judge’s decision that he was too dangerous to be released.

Mansnerus notes that Deavers case is typical of other “sexually violent predators”, only a handful of whom have been released, and comments on the view held by critics of the legislation, that it is merely an exercise “rigged to keep sex offenders locked up for a lifetime”.²⁵

The pretextual character of sexual predator legislation and the hearings that often accompany them is well illustrated in a scenario occurring at the end of a review hearing for one William Anderson, discussed in Mansnerus’ article. Anderson had pleaded guilty to two felonies - the rape of a 21 year old woman and the aggravated assault on a 12 year old girl - and had served 7 years in prison. Eventually, the Judge announced her decision, having considered the weight to be given to evidence of events that had occurred ten years earlier. She noted a detail from Anderson’s record, namely, that he had fathered 5 children by age 18, “only three in wedlock.” The Judge concluded : “That does clearly indicate a maladaptive pattern of behaviour”, noting that she did not find any evidence “given denials, rationalizations and blame-shifting, that the respondent’s treatment has in any respect diminished his risk”.

Examples abound in the judicial rhetoric surrounding these hearings of such meretricious and flawed judicial responses.

However, there is an even more disturbing feature of this legislative model. It has been noted that unshackled from the traditional mental illness and sentence-range limitations, the emergence of the dangerousness criterion as a basis for confinement could spell the end of the criminal justice system as we know it. Its logic could, conceivably, be applied to a range of antisocial conduct, including drink-drivers, domestic abusers, and drug users. Indeed, as Justice Stevens observed in his dissenting judgment in *Allen v Illinois*²⁶ such laws presage the development of a “shadow” criminal code that permits the state, after nabbing a perpetrator, to choose between punishment for a crime or incapacitation based on danger.²⁷ It is this feature that I wish to focus on with reference to the newly-articulated “preventive” model.

23 *Ibid.*

24 See “Questions Rise over Imprisoning Sex Offenders Past their Terms” *New York Times*, 17 November, 2003.

25 *Ibid.*

26 478 US 364 (1986).

27 *Ibid.*, 380. Cited in C Slobogin, “The Civilization of the Criminal Law” (2005) 58 *Vand L Rev.*121126(Hereafter “Civilization”).

Slobogin's 'preventive' model

In an article in the *Vanderbilt Law Review*,²⁸ Christopher Slobogin explores the jurisprudential and practical feasibility of what he has called a "preventive" regime of justice. The philosophical forebears of this new model are thinkers such as Barbara Wooton, Sheldon Glueck and Karl Menninger who, decades earlier, had envisioned a system that is triggered by an antisocial act, but pays no attention to desert or general deterrence. Slobogin notes that like the sexual predator regimes, the only goal of the system they proposed, was individual prevention through assessments of dangerousness and the provision of treatment designed to reduce it. It is this model that Slobogin now embraces as appropriate for the management of sexual predators. But unlike current sexual predator models, the regime envisioned would not involve a 'two-track' system of "punishment" and "commitment", but instead the intervention would take place immediately after the antisocial act, rather than at completion of the sentence²⁹.

In such a system, gradations of culpability are irrelevant at both the threshold of intervention and the dispositional stage, the theory being that freed from the "obsession" with punishment, courts would be at liberty to deal with lawbreakers in a manner best calculated to discourage future lawbreaking.³⁰

According to Slobogin, the "preventive" model would neither slight human dignity nor undermine the general-deterrence and character-shaping goals of the criminal law. He argues, in addition, that such a regime would be much better at assimilating the proliferation of scientific findings that call into question humans' abilities to control their actions – the principal premise of a punishment system based on desert.³¹

The adoption and advocacy of this "preventive" model is a remarkable about face by a scholar who, on his own admission had, until very recently, rejected as "repugnant" the so-called "two-track" regime of criminal justice, exemplified in the sexual predator models.³² His ability to now embrace the preventive model evidently proceeded from the premise that the dehumanisation objection attaching to the preventive model would not obtain if intervention based on dangerousness were the government's *only* liberty-depriving response to antisocial behaviour. In such circumstances, "invidious comparisons" with a second autonomous group worthy of blame simply cannot occur and the new system of liberty with dangerousness as the sole predicate for intervention becomes "constitutive" of the renewed criminal code.³³ In other words risk assessment is substituted for culpability determination as the paradigm mode of assigning accountability for antisocial behaviour.

Although he acknowledges the very controversial nature of these proposals Slobogin is committed to them as a significant step towards "civilizing" the criminal law.³⁴

Risk management

The renewed focus of this model upon risk assessment and risk management, is in contrast to the punitive stance of the desert and deterrence - based approaches of the present criminal justice system. According to Slobogin, risk management aimed at dealing with individual substance abuse, mental disorder and antisocial behaviour patterns is more likely than a punishment model to prevent further crime amongst those offenders who perceive no risk of apprehension or have no thought about the likely punishments for their crimes³⁵. Slobogin's optimism in improvements in prediction science occurring in the last

28 "Civilization", *supra*.

29 *Ibid*, 127.

30 *Ibid*.

31 *Ibid* 130.

32 *Ibid*, 126.

33 *Ibid*, 127.

34 *Ibid*, 168.

35 *Ibid*, 142.

22 years leads him to conclude that the vagaries in scientific investigation associated with the risk management approach are “trivial compared to the calibration chores that afflict a retributivist regime bent on ascertaining degrees of culpability, a deterrence-based system that purports to modulate the penalty based on cost-benefit analysis, or a virtue ethics scheme that tries to measure fault for character.”³⁶

By contrast, risk management, through focussing on highly individualized interventions, based on the need to deal with specific risk factors, is structured to achieve the precise aims of the prevention model.³⁷ Because, under a prevention regime, review is usually constitutionally mandated and risk constantly monitored, community dispositions may be both legally and pragmatically necessary; and where risk management is itself linked to new and emerging “experimentalist” courts like drug courts, according to this model, offers the prospect of modifying dispositions to maximize behaviour change, even in sexual predator programs.³⁸

Whatever the perceived advantages of the “preventive” model may be, the principal objection to it as applied to sex offenders, is the risk of enduring indeterminate detention while public officials debate the risk calculus applicable to the individual offender. It is a model that exudes a profound uncertainty as to the conditions and length of detention, effectively disguising “the possibility of cruelty and injustice without end”.³⁹ Further, as CS Lewis warns, such models of justice remove sentences from the hands of jurists, “whom the public conscience is entitled to criticise,” and puts them into the hands of “technical experts” to whom the categories of “rights” and “justice” are irrelevant.⁴⁰ He continues:

“ To be taken from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of “normality” hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I have grown wise enough to cheat them with apparent success – who care whether this is called Punishment or not? That it includes most of the elements for which any punishment is feared - shame, exile, bondage, and years eaten by the locust - is obvious. Only enormous ill-desert could justify it; but ill-desert is the very conception which the Humanitarian theory has thrown overboard.”

If we were to substitute “Preventive” for “Humanitarian” in the above quotation, it captures precisely the dilemma faced by sex offenders under current sexual predator laws. Yet however bad the behaviour which such legislation aims to address, the marginalisation of notions of guilt and responsibility implicit in such statutes is a matter of serious concern. In particular, any legislative model which allows for the detention of an unconvicted individual, ostensibly to eliminate the risk of future serious offending, runs a high risk of breaching fundamental human rights, for example the prohibition against unlawful detention or rights to liberty and security.⁴¹ Nevertheless, it is precisely such models that are in contemplation as governments strategise to control the dangerous behaviours of sex offenders and other ‘at risk’ populations.

In the United Kingdom the approach of enacting new powers in civil and criminal proceedings for the indeterminate detention of unconvicted dangerous severe personality disordered individuals (DSPD) has

36 *Ibid*, 147.

37 *Ibid*.

38 *Ibid*, 149.

39 CS Lewis, “ *The Humanitarian Theory of Punishment*” 6 *Res Judicata* 224.

40 *Ibid*, 226.

41 See *New Zealand Bill of Rights Act 1990*, s 22 (Right not to be arbitrarily arrested or detained); *European Convention on Human Rights*, Article 5.

been investigated in response to the activities of a small group individuals with personality disorders who are said to be responsible for a disproportionate amount of violent and sexual crime.⁴² This legislative response has been termed “anticipatory containment”.

Anticipatory containment

“Anticipatory containment” bears some similarities to the “preventive” model proposed by Slobogin, in that it would permit the detention of unconvicted persons on the basis of an assessment of risk alone, regardless of questions of culpability. Professor JK Mason has drawn attention to the dangers of anticipatory containment, in the context of evaluating what were the English proposals for a dangerous severe personality disorder order (DSPD order), which in theory could have been applied whether or not the individual had committed any offence.⁴³ The legislation would not have specifically targeted sex offenders, although such persons, provided they had a serious personality disorder, would have been eligible for containment under the proposed legislation. In effect the proposed legislation would have allowed the detention of an unconvicted person with a personality disorder if there was a significant risk of future serious offending. The legislation was not passed in its original form, despite the Government’s claim that the DSPD proposals were fully compliant with the Human Rights Act 1998⁴⁴. However the changes to the Mental Health Act 1983 proposed by the Mental Health Bill 2006 have borrowed from the DSPD ‘model’ by leaving the door open to the use of commitment powers for essentially untreatable persons with personality disorders^{45 46}. Undoubtedly, sexual psychopaths - the sorts of people who would have fallen within the ‘sexual predator’ net in the US and New Zealand’s extended supervision regime – will become a focus of concern, and at risk of indeterminate detention for *being* sex offenders.

Professor Mason notes that the original proposal was driven by the government’s determination to protect the public and would have permitted the detention of dangerous seriously personality disordered people for the whole time that they represented a serious public risk. To this extent the model is indistinguishable to that proposed by Slobogin.

A criticism of Professor Mason’s is the fact that the government’s DSPD proposals depended crucially upon evidence of dangerousness derived from members of a variety of disciplines who, in his view, may not have had the necessary expertise to make such assessments.⁴⁷ A more hard hitting critique of the proposals was offered by Prof Paul Mullen, who viewed them as a pretextual system for locking up men and women who frighten officials.⁴⁸ Significantly, he saw the proposals as, in effect, proposals for preventive detention, not far removed from the dangerous offender and sexual predator laws of North America.⁴⁹ Both writers agreed, however, that there was something seemingly sinister in these proposals that took them far beyond being simply advocating mental health services for severely personality disordered individuals. As Professor Mullin rightly observes, they invoked a sense of foreboding.⁵⁰

42 A Feeney, “Dangerous severe personality disorder” (2003) 9 *Advances in Psychiatric Treatment* 349, 356.

43 See JK Mason, *The Legal Aspects and Implications of Risk Assessment* (2000) 8 *Medical Law Review*, 69, 81.

44 Feeney, *supra*, note 39, at 356.

45 P s Appelbaum, “Law & Psychiatry: Dangerous Severe Personality Disorders: England’s Experiment in Using Psychiatry for Public Protection” (2005) 56 *Psychiatric Services* 397-399.

46 Although four DSPD units have been set up to provide

assessment and treatment for ‘DSPD’ individuals, the two hospital-based units function within existing mental health legislation. The other two are prison-based and thus ‘outside’ mental health legislation.

47 *Ibid*, 81.

48 P Mullen, “Dangerous People with Severe Personality Disorder” (1999) 319 *Brit Med.J.*1146.

49 *Ibid*.

50 *Ibid*.

A dangerous synergy?

There is a common element in all these proposals that should be of the greatest concern to those who value human liberty and freedom. It is the fact that all the proposals discussed treat the human subjects of such state-sanctioned intervention *instrumentally*, as objects to be *made* to conform, rather than as persons to be *held* accountable, whether or not they *choose* to conform. A similar point is made by CS Lewis in his classic essay.⁵¹ Lewis suggests that when we cease to consider what the criminal *deserves* and only consider what will *cure* him or *deter* him (essentially Slobogin's "preventive" model), we tacitly remove the person from the sphere of justice. "Instead of a person, a subject of rights, we now have a mere object, a patient, a 'case'.⁵² The instrumentalism of many modern criminal justice models dictates that offenders are often viewed as observable phenomena capable of technical manipulation producing conformity, not people whose lives may be changed for the better by moral persuasion. Furthermore, the detention of individuals solely for public protection lacks reciprocity, in that the detainee has a right to some benefit in exchange for the loss of his/her freedom.⁵³ Accordingly, there is a risk that measures designed to reduce the risks to the public may actually alienate the target group, ultimately leading to increased risk.⁵⁴

The problem with the new "preventive" or "anticipatory containment" models, whether or not they represent a "two track" or a unitary system, is that they abandon a justice-based approach in favour of a technocratic model, which has yet to prove its true worth. Furthermore, it is not clear that most people have made the ideological leap in their own thinking and values that would lead them to embrace this new wave of scientific special pleading, as scholars like Slobogin and others seems to think they ought. As Mason warns, the trend (at least in the UK) towards using high security hospitals as places of detention, backed by "the wave of popular and political sentiment that is as much antagonistic to those with personality disorder as it is in favour of public safety"⁵⁵, threatens to amplify the doctor's role of gaoler, at the expense of his private duty as therapist.⁵⁶ This is undoubtedly the case with the US sexual predator laws, and may well prove to be true of new generic legislation, such as New Zealand's Parole (Extended Supervision) Amendment Act. Insofar as all these models are based on assessments of dangerousness, we can expect that the role and powers of assessing 'experts' will be enhanced, and likely to be much more coercive, be they medically trained or not.

Appelbaum has noted that there is also a question of fairness.⁵⁷ He suggests that in contrast with persons who are transferred to new units from prisons, people who are committed from the mental health system may never have been convicted of a crime. Yet, on the basis of a prediction of "uncertain validity" about their future behaviour, they are at risk of indefinite detention without a strong prospect of therapeutic gain. "Psychiatry's collaboration with this process risks corrupting its treatment orientation and making the field subservient to the government's public safety agenda".⁵⁸

51 6 Res Judicata 224.

52 *Ibid*, 225.

53 Feeney, *supra*, at 356.

54 *Ibid*.

55 Mason, *supra*, 84.

56 *Ibid*.

57 Appelbaum, *supra*, note 43, at 399.

58 *Ibid*.

A way forward – the “Inclusive” theory

Writing in *Criminal Punishment and Restorative Justice* (2006) David Cornwell has suggested a case for an “inclusive” theory of criminal justice, capable of accommodating all the justifications for punishment, but in a manner that has relevance for contemporary societies and the need to reduce crime within them.⁵⁹ According to Cornwell, an inclusive theory of punishment needs to provide a moral and operational reconciliation of the necessity that offenders are sanctioned for *committing* offences and maximise the likelihood that they will refrain from future offending.⁶⁰ However, it is impossible to reconcile with the “preventive” model considered here, which applies, as we have seen, to unconvicted persons. The preventive model also fails to reflect other criteria suggested by Cornwell favouring an inclusive theory, in that it cannot reflect the extent of the harm done (no harm has been done) and should not be manifestly excessive in pursuit of the secondary aim of crime reduction (it is clearly manifestly excessive because it punishes in the absence of any crime having been committed)⁶¹. Furthermore, the preventive model of criminal justice appears to completely disregard the requirements of the imperative of proportionality (restriction of the extent of punishment to the harm done) because it neither concedes that the preventively detained offender is being punished nor that there need be a ‘harm’ to which punishment must be related.

As Cornwell urges, if our concept of punishment is to be “universal” or “inclusive”, it must be able to demonstrate a potential to deal with all offenders with equal clarity of purpose and with a morality that is beyond question.⁶² Regrettably, both of these pillars of punishment are observed in the breach when preventive social control is in contemplation.

For these reasons I would suggest that sexual predator and extended supervision legislation represent a backward step in the development of enlightened penal policy. As a response to the demands of populist punitiveness, such legislative models are excessively focussed on the offender as a *potential* risk-bearer, while seemingly unconcerned about the requirement for objectively verifiable criminal conduct as a minimum condition of criminal culpability. To the extent that we permit such models to gain a foothold in penal practice, we stand in danger of severely compromising cherished ideals of criminal justice, while assigning the offending population to the uncertainties and vagaries of a forever changing stream of penal innovation and experimentation.

59 Cornwell, *supra*, note 12, at 97.

61 *Ibid.*

60 *Ibid.*, 98.

62 *Ibid.*, 100.