ORIGINAL ARTICLE

Preventive detention must be resisted by the medical profession

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J Med Ethics 2002;**28**:95–98

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Revised version received 22 October 2001
Accepted for publication 6 November 2001

A policy of "preventive detention" has recently been debated in the British Parliament. Alarmed by the high-profile criminal activities of people suspected of having dangerous severe personality disorder (DSPD), the government have made clear their intention to "indeterminately but reviewably detain" people with DSPD, after diagnosis by forensic psychiatrists, even if the individuals are yet to commit an offence. Such a policy may improve the safety of the public, but has obvious implications for civil liberties. This essay criticises the morality of the government's intention and rejects the notion that the medical profession could ethically collude with such a policy.

On the 15th February, 1999, the then Secretary of State for the Home Office, Mr Jack Straw, announced to the House of Commons that, in conjunction with the Department of Health, the government intended to introduce new legislation for the "indeterminate but reviewable detention of dangerous but personality disordered individuals".[1] The statement was greeted with cautious approval by some MPs, who welcomed the government's attempts to prevent injury to members of the public resulting from the actions of people with dangerous severely personality disorder (DSPD). Other MPs,[2] together with non-governmental organisations (such as Liberty[3]) and journalists,[4] were appalled by the idea of "preventive detention", stressing the civil liberty implications of such legislation.

Preventive detention might reduce the risk of a few individuals committing some violent crimes, but is such a proposition justifiable, or even viable? This paper will unapologetically side-step the practical issues of wide scale incarceration, but, by first rehearsing the argument for detention, and then challenging the ethical basis of that argument, will attempt to explain that preventive detention for those with DSPD is merely a populist policy, being ethically both unsound and unjustifiable. In addition, this article hopes to convince members of the medical profession that they should not lend their support to the (ab)use of psychiatry as a form of social control.

AN OUTLINE OF THE ETHICAL ARGUMENTS IN FAVOUR OF PREVENTIVE DETENTION

Historically, the state, or its medical representatives, has been able to incarcerate people with severe mental disorders. "Moral defectives" were imprisoned if they had vicious or criminal propensities, and required care, supervision, or control, in order to protect others. The condition of "psychopathic disorder" was recognised in the 1959 *Mental Health Act* and is still recognised by the updated 1983 Act, such that an application could be made for involuntary treatment in order "to alleviate or prevent a deterioration of (their) condition".[5]

It has been suggested that individuals with DSPD are "just bad, not mad", and many psychiatrists agree that the condition is essentially untreatable, thus disqualifying such people from the remit of the *Mental Health Act*. However, violent crime is more prevalent amongst those individuals with DSPD. Previous violence predicts recidivism.[6] High profile legal cases, such as those of Michael Stone, who murdered Lyn and Megan Russell, and Robert Oliver, a "predatory paedophile", have served to increase public demand for better protection from dangerously personality-disordered individuals.

The government then, faces a moral dilemma. On the one hand, it has legal and moral duties both to protect citizens from potentially preventable harm or death and to respect an individual's civil liberty. On the other hand, it has the same duties towards an individual with DSPD, particularly when he (offenders usually being male) has yet to commit a crime. This dichotomy is seemingly resolved by advocating social utilitarianism. The greatest good in this instance is served by the perceived protection of the general public. This occurs, however, at the expense of infringements to the autonomy and human rights of those estimated 2200 individuals nationwide who have untreatable DSPD, and who are viewed as likely to commit violent crime in the future. In an attempt to address civil liberties issues, the government has suggested regular quasi-judicial review to regularly reassess detainees' fitness for release, with the consequent restoration of their autonomy. In addition, they have cited two articles from the *Human Rights Act 1998*[7]: article 5(1)(e), which authorises "the lawful detention of persons for the prevention of the spreading of infectious diseases, *of persons of unsound mind*, alcoholics or drug addicts or vagrants", [author's emphasis] and article 2, which details the state's obligations towards the protection of an individual's life: ("Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".)

A supportive parallel could be drawn with the statutory control of certain infectious diseases. Under section 13 of the *Public Health (Control of Diseases) Act 1984*[8] (reinforced by Section 5 (1)(e) of the Human Rights Act, 1998), several public authorities are legally empowered to preventively detain non-criminals who have major communicable diseases (for example, smallpox, cholera, and plague); this is justified in the interests of public protection. It could be argued that few people would be likely to disagree with the implementation of such powers when required, even though they would lead to the temporary (but reviewable) detention of potentially large numbers of people, in much the same way that DSPD legislation would.

THE ETHICAL ARGUMENT AGAINST PREVENTIVE DETENTION

The government's proposals, however, may be challenged on several counts.

Diagnostic difficulties

Perhaps the most contentious aspect of the proposals concerns DSPD itself. Disregarding rights issues, if "innocent" people with DSPD are to be deprived of their liberty by the state, then the diagnosis of DSPD must be absolutely certain, and therein lies a problem—there does not exist a clear definition of what constitutes severe personality disorder. The characteristics of DSPD, according to the DSM-III SCID-II criteria, are highly subjective on the part of the person making the diagnosis, which causes two problems. Firstly, some of those with DSPD will be diagnosed as normal. Secondly, but more importantly, the potential for misdiagnosis is high (the diagnosis appears to be only 60% accurate). The ramifications of misdiagnosis, namely wrongful imprisonment and the consequences of inappropriate psychiatric labelling, are patently severe.

Even if a diagnosis of DSPD were 100% accurate, the policy of preventive detention continues to produce problems. For example, how dangerous does a person with DSPD have to be? By widening the application of diagnostic criteria, a situation can be envisaged whereby the liberty of people with "minimally dangerous, moderately severe personality disorder" (or other such combinations) will be challenged. Another example concerns the timing of diagnosis. In order to avoid the thorny issue of what to do with personality disordered minors, the government might decide that the formation of personality is not temporally complete until the age of 16, thus disqualifying those under 16 from the auspices of the proposed legislation. There are, however, well publicised instances of children who appear to be dangerously personality-disordered (for example, the killers of James Bulger). If the government were to accept that a proportion of those with DSPD are effectively untreatable, it would have to acknowledge that the current proposals may in future be used to support the preventive detention of personality-disordered children, which seems even more morally objectionable than preventive detention for adults.

Two other concerns are frequently expressed. Firstly, is there such a mental disorder as DSPD at all? It could be considered that those with DSPD are just "bad, not mad", and that psychiatric diagnosis is nothing more than a convenient medicalisation of a normal variant of human nature. Are we indeed presently in danger of misdiagnosing people as having DSPD in much the same way as homosexuals and unmarried mothers were misdiagnosed in the past? Secondly, the treatability of DSPD is a contentious issue.[9] The government acknowledges that "there are differing views and approaches among medical professionals about treatment of dangerous people with severe personality disorder".[10] Treatment may not necessarily be aimed at a "cure" of their personality disorder, but might allow cognitive or pharmacological[11] control of the more antisocial aspects of DSPD. If treatment does become a viable option, there is surely no case for new preventive detention legislation, as provision is already made for this by Sections 3 and 37 of the *Mental Health Act 1983* (although in practice, psychiatrists are generally reluctant to treat severe personality disorder under these provisions).[12]

The utilitarian argument

It is generally accepted that being alive is a desirable state. By extension, being healthy in life is also desirable. Society values the right of individuals not to be harmed by others. The infliction of injury by one person on another is seen as undesirable. Therefore, if society can prevent the bodily harm or murder of its citizens by, for example, the incarceration of people who have a propensity for violence, then good has been done and utility has been served. Few would argue against the incarceration of those with DSPD who have already committed a serious crime, both for punitive purposes and for such time until they are no longer considered a physical danger to the public. In the case of people displaying DSPD, this may include permanent detention, as a result of further sentencing for antisocial crimes committed whilst imprisoned, or by extensions of a Section 3 (Admission for Treatment) order, under the *Mental Health Act 1983*[13]

It is less certain, however, what the relative benefits and harms are in a situation where someone with DSPD is yet to commit an offence. As no crime has been committed, it is difficult to assess who benefits from the incarceration of that individual at the present moment. The "person affecting principle", for example, states that no wrong has been done if no one has been harmed. Agreed, there is potentiality for violence in DSPD, which may consequently lead to the injury of others, but violence is not inevitable.[14] One can argue that violence is an inherent trait in all humans, whether personality disordered or not, as demonstrated in any town centre after the pubs close on a Saturday night. It is also uncertain how the individual may choose to manifest his violent personality disorder in the future—society might even endorse his actions. For example, it has recently been suggested that Samson displayed characteristics of DSPD,[15] but history seems to have judged his single-handed slaying of 1000 Philistines, with the jaw bone of an ass, in a favourable light. It could be argued that many of the great military leaders have showed some characteristics of DSPD. In addition, expressions of violence may not be directed towards other people. It is difficult and divisive to quantify the "badness" of an offence against an object when balancing the utilitarian equation.

In contrast, it seems that a relatively great amount of harm may be done to a person with DSPD if they are incarcerated without having committed a crime. A central tenet of the legal system in the UK is that a person is innocent until proven guilty. There would be a huge sense of injustice resulting from prophylactic detention. Proportionality infers that the punishment should fit the crime, therefore, it could be considered that if no crime has been committed, no punishment should be meted out. Alternatively if no crime has been committed, one could consider preventive detention as an unduly harsh penalty for DSPD, and almost a crime in itself. By analogy, the doctor who restrains a patient who has threatened, but not actually perpetrated, violence may be guilty of assault, or be in breach of human rights conventions.

A deontological perspective

A deontologist might argue that any government has an imperative to protect its citizens from preventable harm. In the case in question, this could justifiably involve preventive detention. Although many members of the public might consider the detention to be wrong, such a course of action would be morally acceptable, in that it allows the government to fulfil its obligation to the public.

It is immediately apparent, however, that there is a conflict of obligations in this instance. In Western libertarian societies, governments also have special obligations to protect certain of the civil liberties of its citizens, notably freedom of choice and respect for autonomy. Indeed, the European Convention on Human Rights details such governmental obligations.[16] In an egalitarian judicial system such as ours, the law allows for revocation of these freedoms when an individual has committed a crime (that is, has failed to fulfil his or her obligations to society), but does not allow the indiscriminate detention of an innocent person.

The conflict of obligations, at first glance, seems irresolvable—the government being morally "wrong" whichever obligation it chooses to fulfil. I would suggest, however, that when no crime has been committed, the government is

more obliged to those with DSPD than it is to the public, for two reasons. Firstly, I would agree that the government has a duty to protect its citizens from preventable harm, but would state that this isn't a supererogatory duty. For example, a governmental obligation to reduce road deaths might well be served by introducing laws that require people to wear seatbelts; it is not incumbent on the government, however, to imprison people indefinitely for refusing to wear a seatbelt. Similarly, the government has a duty to protect people from dangerously personality-disordered individuals, but not to the extent that it has to *imprison* them. Secondly, the ethical position of third parties, from whom input would be required prior to preventive detention, should be considered. Psychiatrists have already voiced concern over their proposed involvement,[17 18] abhorring the idea of their being used as agents of social control. The ethical practice of medicine has evolved around the idea of obligations to the patient. Amongst other moral duties, doctors should "first do no harm" (Hippocratic Oath[19]) and should "not countenance, condone or participate in the practice ... of cruel, inhuman or degrading procedures whatever the offence of which the victim is suspected, accused or guilty ..."(Declaration of Tokyo[20]). When Soviet abuses of psychiatry became apparent in the 1970s, the World Psychiatry Association[21] delineated the involvement of psychiatrists in human rights issues, so as to avoid the use of psychiatry as a tool to justify illegal detention and treatment. Psychiatrists, therefore, have an obligation to resist the proposals, on the basis that they would involve the unjustifiable abuse of forensic psychiatry. Furthermore, if political credibility for the proposals was to be maintained, the government might have to resort to unethical methods in order to coerce psychiatrists into compliance.

Rights

A strong component of the argument in favour of preventive detention concerns itself with the rights of individuals not to be harmed. In this instance, this equates to "protection of innocent members of the public" from harm by people with DSPD. It is suggested that, on balance, the right not to be harmed is of greater significance than the right of an innocent, though volatile, person not to be imprisoned.

Leaving aside the complex issue of whether human beings do indeed have any rights, I would question the assumption that there is any onus on a society to protect the right of an individual not to be harmed. The implications of such a right are far reaching. An absolute right not to be harmed would be unworkable. Governments would have to ban all manner of injurious activities—for example, smoking and driving. The right not to be harmed cannot equate to the elimination of all risk. One might counter by saying that there is a right not to be harmed by *other people*, but, again, this seems implausible—consider the practice of medicine, for example, or participation in contact sports. Narrowing the definition still further, one might propose that there is a right not to be *maliciously* harmed by another person. The application of such a tightly defined right is, however, problematic in the case of DSPD. It can be argued that, if DSPD is considered a mental disorder (the subcontext inferred by the government), people with DSPD are not responsible for their violent actions and lack the capacity for malign intent.

Again, the problem arises that a crime has yet to be committed, and therefore no transgression of the (putative) claim-right not to be harmed has taken place. In contrast, the civil rights of those with DSPD are seriously violated. The Western view of human rights, civico-political in nature, places a greater emphasis on individual liberty, including freedom from arbitrary arrest and detention, than the more socialist view of rights, which advocates the primacy of the state, with limitation of the rights of an individual. It is worth reiterating the comparison, at this point, between the current proposals for preventive detention and the political abuse of psychiatry by the Soviet Union in the 1950s, when thousands of political prisoners were incarcerated involuntarily in asylums after receiving dubious psychiatric diagnoses.

The government has been careful not to introduce legislation that breaches the *Human Rights Act 1998*, and has used certain of the articles (2 and 5(1)(e)) to support their proposals.[7] However, "the lawful detention of persons . . . of unsound mind . . ." (5(1)(e)) is the only recourse provided by the act (in a non-crisis situation) whereby the government might be able to legally introduce preventive detention for those with DSPD, and therefore a medical diagnosis of mental disorder is the only method by which the government might attain its aims.[22] A previous interpretation of the Human Rights Act found that detention may only occur for recognised mental disorders on "objective medical evidence" rather than for "behaviour deviating from the norms prevailing in a particular society".[23]

If one considers human rights issues, therefore, there would appear to be a stronger argument *against* preventive detention, in the case of those with DSPD who haven't committed a crime.

The slippery slope argument

Slippery slope arguments have questionable validity in ethical debate, being reliant on conjecture and the usual assumption that everything will get worse rather than better. The use of such arguments in this instance, however, does point to credible consequences for the future. I have already alluded to the small broadening of diagnosis that would allow the extended detention of violent criminals already in custody, by their being diagnosed as having DSPD. In terms of the social control of criminality, one can imagine a situation where other criminals, or potential law breakers, may be detained indefinitely on the basis of controversial "personality disordered" diagnoses. The paraphiliac rapist, the pyromaniac arsonist, the "velocimaniac" driver—all are effectively untreatable conditions (being an inherent part of the character) and all are dangerous, to both the public and themselves. Worryingly, preventive detention on the basis of personality disorder could then relatively simply be applied to non-criminals, with the diagnostic criteria expanded to include, for example, political affiliation or sexual orientation; Orwell's concept of the "thought crime" suddenly becomes real. The rapid expansion of genetic diagnosis might enable determination of personality in utero, raising the possibility of either abortion of potential DSPD fetuses or the rather sinister genetic manipulation of the fetus to produce "personality neutral" children.

CONCLUSION

Intuitively, the Home Secretary's proposals for the preventive detention of dangerously personality-disordered individuals seem morally reprehensible, being little more than a populist response to genuine public concern. In this essay, I have summarised the ethical arguments that have been advanced to support the government's position (social utility, historical example, protection of human rights), but have shown that these arguments, on closer analysis, are weak in comparison to the arguments against incarceration (which mainly concern the human rights implications of indefinitely imprisoning an innocent person on the basis of a controversial and inaccurate diagnosis of dangerous severe personality disorder). The medical profession, particularly psychiatrists, must resist colluding with the government on this matter.

The government's paper *Managing Dangerous People with Severe Personality Disorder* remains under consultation.[24]

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