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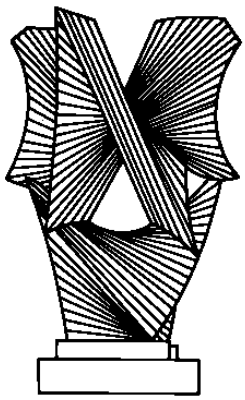

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THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

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PUNITIVE PREVENTIVE JUSTICE: A CRITIQUE

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PUNITIVE PREVENTIVE JUSTICE: A CRITIQUE

Bernard E. Harcourt[1]

In 1966, New York City's newly elected mayor, John Lindsay, took office promising to reform city government with more efficient cost-benefit budgeting—what was known at the time as Planning-Programming-Budgeting System analysis ("PPBS")—and invited the RAND Corporation to develop new strategies to prevent crime in New York. PPBS had been pioneered by Secretary of Defense Robert S. McNamara at the Pentagon starting in 1961, and Lindsay brought the new technique to New York City "to improve budgeting and operations."[2] Within a few years, mayor Lindsay had helped establish the New York City RAND Institute as a joint project of New York City and the California-based RAND Corporation.[3] The primary focus of RAND's New York City satellite would be the New York City Police Department.

At a news conference on January 8, 1969, with great fanfare, mayor Lindsay and Henry Rowen, the president of RAND and, previously, deputy assistant secretary of defense under McNamara, unveiled the new project: an initial contract with New York City worth over $600,000, a Madison Avenue office "staffed by 40 economists, sociologists, engineers, cost analysts and other researchers," and four focus areas, the most important of which was the NYPD (the other three were the New York City Fire Department, Housing Administration, and Health Services).[4] Expecting a tight collaboration with New York City, the *New York Times* predicted that "The city's relationship with RAND would be similar to the one RAND has had with the Air Force since World War II."[5]

Within a few years, the New York City RAND Institute issued a number of statistical analyses aimed at crime prevention, and both the N.Y.C. RAND Institute and the starship RAND Corporation

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[1] Julius Kreeger Professor of Law and Criminology, and Professor and Chairman of the Department of Political Science at the University of Chicago. Paper prepared for the collected volume on *Preventive Justice* edited by Andrew Ashworth and Lucia Zedner. Special thanks for comments on a prior draft to Andrew Ashworth, Markus Dubber, Antony Duff, Cecile Fabre, Doug Husak, Nicola Lacey, Ian Loader, Laurence Lustgarten, Pat O'Malley, Adam Samaha, Carol Steiker, Victor Tadros, Patrick Tomlin, and Lucia Zedner. Special thanks to Christopher Berk, Alan Chen, Maxwell Kampfner, and Patricio Martínez for excellent research and useful comments on an earlier draft.

[2] JS Light, *From Warfare to Welfare : Defense Intellectuals and Urban Problems in Cold War America*. (Baltimore, MD: Johns Hopkins University Press, 2003) 67.

[3] Ibid 68-72.

[4] R Reeves, 'City Hires Rand Corp. to Study Four Agencies' *New York Times* (New York, NY: January 9, 1968) 31; Light (n 2 above) 68-70.

[5] Reeves (n 4 above) 31.

would propose a number of preventive justice measures. The first series of reports were extremely technical, narrow operations-research reports,[6] with titles such as "A Hypercube Queueing Model for Facility Location and Redistricting in Urban Emergency Services" (Richard C. Larson, R-1238-HUD, 1973), "Response of Emergency Units: The Effects of Barriers, Discrete Streets, and One-Way Streets" (Richard C. Larson, R-675-HUD, 1971), "Allocation of Emergency Units Response Areas" (Jan M. Chaiken, P-4745, 1971), "Analysis of the Night and Weekend Arraignment Parts in the Bronx and Queens Criminal Courts" (John B. Jennings, R-1236-NYS, 1973), "Using Simulation To Develop and Validate Analytical Emergency Service Deployment Models" (Edward Ignall, Peter Kolesar, and Warren Walker, P-5463, 1975), and "Determining the Travel Characteristics of Emergency Service Vehicles" (J. Hausner, R-1687-HUD, 1975). These studies applied complex mathematical models to examine minute dispatching and routing efficiencies. They resembled the classic early applications of operations research outside the military to matters such as determining "how Post Office pick-up trucks should be routed to collect mail from deposit boxes, or whether computers should be rented or purchased, or what type of all-weather landing system should be installed in new commercial aircraft."[7]

Gradually, and interspersed in these operations-research reports, there emerged a number of studies using a "systems analysis" approach that extended operations research beyond its original narrow confines.[8] The systems analysis approach was a "method of analyzing a problem by listing the desired objectives and available resources and then detailing alternative methods of using the resources to accomplish the objectives."[9] RAND's systems-analysis studies did indeed focus on a narrow objective—

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[6] Operations research was developed during World War II as a way to "provide quantitative aids to defense decision makers" with the goal of "optimizing the operational employment of existing weapons (or other military) systems" (BLR Smith, *The Rand Corporation: Case Study of a Nonprofit Advisory Corporation* (Cambridge, MA; Harvard University Press, 1966) 6). Famous early applications of operations research were studies of the placement and use of aircraft-detection radar devices and of anti-submarine tactics involving depth-charge explosions in the early phases of the Second World War (Ibid 6-7). In a very strict sense, operations research applies a mathematical algorithm or "model" to a management problem, such as, for instance, transportation routes or stock control (ES Quade, *Systems analysis techniques for planning-programming-budgeting* (Santa Monica, CA: Rand Corp., 1966) 3); the only question is how to optimize efficiency where the measure of efficiency is clearly defined, or, as Edward Quade explained, how "to increase the efficiency of a man-machine system in a situation where it is clear what 'more efficient' means" (Ibid).

[7] Quade (n 6 above) 18.

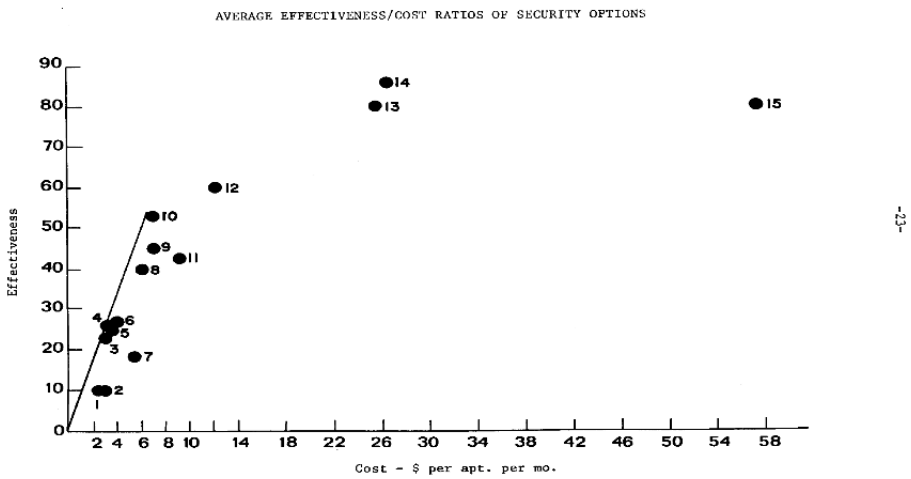
[8] Systems analysis extended the operations research approach to a broader set of problems—for instance, from the narrow issue of a weapon system to the broader question of a military defense police. Systems analysis is often confused with operations research, from which it evolved. However, operations research tends to have more elaborate mathematical models and solves lower level problems (BLR Smith, *The Rand Corporation; case study of a nonprofit advisory corporation* (Cambridge: Harvard University Press 1966) 8); in systems analysis, by contrast, the pure mathematical computation generally applies to subparts of the overall problem. Systems analysis is "less quantitative in method and more oriented toward the analysis of broad strategic and policy questions, and particularly in seeking to clarify choice under conditions of great uncertainty" (Ibid).

[9] Reeves (n 4 above) 31.

preventing crime—and would compare a wide range of different alternative policies to try to determine the most efficient. One such report, "Reducing Crime in Apartment Dwellings: A Methodology for Comparing Security Alternatives," by Michael I. Liechenstein, is illustrative.[10]

The Liechenstein study, which was sponsored by mayor Lindsay's Criminal Justice Coordinating Council, analyzed techniques for improving crime prevention and security in New York City Housing Authority buildings. It took a "broad operational view of a security system,"[11] analyzing fifteen alternative policies, including tenant training and education, tenant patrols, qualifications to live in the projects, extended recreational opportunities for teenagers, rent rebates, elaborate building-entry restrictions, locked lobbies, intrusion detectors, weapon detectors, surveillance, and increased police or guard manpower. In order to compare the alternatives, the study developed "effectiveness criteria" and then coupled those to "compatibility and cost criteria" in order to "derive estimates of an overall figure of merit (e.g., the ration of effectiveness-to-cost with a constraint on either minimum effectiveness or maximum cost)."[12] In addition to the security effectiveness and compatibility criteria, the report also listed cost-benefit criteria: "Research and development cost (equipment, maintenance, administration before production); Capital cost (equipment, maintenance, and administrative costs during production); Operating cost (equipment, maintenance, administration costs during use); Scrap value (residual value at end of use); Expected total benefit."[13] The report then generated a graph of the cost-effectiveness of all fifteen alternatives:

[10] MI Liechenstein, *Reducing Crime in Apartment Dwellings: A Methodology for Comparing Security Alternatives* (New York, NY: The New York City-Rand Institute, June 1971) P-4656 (available at http://www.rand.org/pubs/papers/2008/P4656.pdf).
[11] Id. at p. 4.
[12] Id. at p. 5.
[13] Id. at p. 6.



The fifteen different measures ranged the political spectrum—from education for low-income tenants on issues of criminal offending, preventive measures, and self-defense, to providing recreational facilities for poor urban teenagers, to offering subsidies and other positive financial incentives to poor tenants, to raising admissibility and tenure standards for housing assistance, to increasing the police presence. They included everything from education, to recreation, to target-hardening, to policing.

The most cost-effective preventive measure, it turned out, consisted of increased police presence and more guard-manning. The most efficient technique, according to RAND, had a decidedly punitive edge. The study foreshadowed a (re)turn to punitive prevention.

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Today, we are once again surrounded by punitive preventive measures. Not only punitive, naturally. We are inundated with preventive measures that can take any number of forms: public service announcements in subways and buses, educational safety and awareness campaigns about crime in your community, campus-wide public safety e-mails announcing the latest armed robbery, mandatory car-ignition-locks for habitual drinkers, "if you see something, say something" campaigns in cities and at the

airport, covert anti-terrorism domestic spying, traffic control measures,[14] even ordinary pre-trial detention, the denial of bail.[15] We are surrounded by so much prevention, in fact, that we tend to take it for granted.

As in the past, the preventive state is Janus-faced and ranges from rewards to punishments. Many of the entitlements that the state provides are extended at least in part, and often justified in whole, as preventive measures. The University of Chicago economist and Nobel-laureate, James Heckman, has had the Obama administration's ear promoting early childhood education—what we call "Head Start" in the United States—as a way to *prevent* juvenile delinquency and crime.[16] Under President Bill Clinton, the federal government began encouraging and funding local programs intended to offer enticing entertainment alternatives, like basketball games for inner-city youths—referred to as "Midnight Basketball"—again as a way to *prevent* crime.

At the other end of the spectrum are the more punitive techniques. These include the preventative detention of "violent sexual predators" after they have served their adjudicated sentence in the United States, a form of detention that the United States Supreme Court condoned in its 1997 decision in *Kansas v. Hendricks* upholding the indefinite commitment of those convicted of a sex offense who are deemed to pose a continuing threat;[17] the passage of similar measures called "*rétention de sureté*" in France in 2008, also affirmed by the *Conseil constitutionnel,* in 2008; and the advent of control orders and Terrorism Prevention and Investigation Measures (TPims) in the United Kingdom with the passage of the Prevention of Terrorism Act 2005.[18] Though less extreme, punitive prevention also includes the use of order-maintenance techniques, such as broken-windows policing in New York City, zero-tolerance approaches in France, and Anti-Social Behavioral Orders (ASBOs) and other disorder management in England;[19] the use of profiling measures, including racial profiling, on the highways and borders, to conduct searches of automobiles to interdict drug trafficking and illegal immigration; and, as seen in New York City, the stop-and-frisks of ordinary citizens on the street—a practice that, remarkably, exceeded 600,000 persons stopped and searched in 2010, and more than 685,000 in 2011.

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[14] See P O'Malley's contribution to this volume.
[15] See A Duff's contribution to this volume.
[16] J Heckman and D Masterov, 'The Productivity Argument for Investing in Young Children,' Working Paper No. 5, *Invest in Kids Working Group*, October 2004 (available at http://ideas.repec.org/p/iza/izadps/dp2725.html).
[17] *Kansas v. Hendricks*, 521 U.S. 346 (United States Supreme Court 1997).

[18] See generally L Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007) 60(1) Current Legal Problems 174. Terrorism Prevention and Investigation Measures (TPims) are due to replace control orders at the end of 2011, though critics suggest TIPMs are simply control orders rebranded (see Victor Tadros' paper in this volume).

[19] See generally A Ashworth, 'Social control and antisocial behaviour: the subversion of human rights?" (2004) 120 LQR 263-291.

It is these latter measures, what could be called "punitive preventive measures" or "punitive preventive justice," that have garnered increased attention, and concern, in Western democracies in the last three decades. The uncomfortable overlap of prevention and punishment has raised both legal and political questions that have yet to be resolved. From the more classic or formalist legal tradition, the finding of guilt for a criminal act conventionally served to justify punishment and assuage our moral and political conscience; and in the absence of a criminal act as predicate, it has generally been scientific expertise (such as a psychiatric diagnosis of mental illness in the case of the involuntary commitment of the mentally ill) or procedural protections ensured by a neutral magistrate that have satisfied our sense of justice. But where the predicate criminal act goes missing and the claim of expertise becomes more attenuated, our concerns are heightened about the dangers of punitive preventive measures.

These concerns, naturally, are not new—nor are the phenomenon themselves. Practically all of these contemporary punitive preventive practices have parallels in history, sometimes even more egregious. Eugenics and forced sterilization in the early 20th century were undoubtedly preventive measures; and many "dangerous" persons have been preventively detained in mental hospitals since the birth of the asylum in the early 19th century. In fact, many persons have been executed over the centuries because, we feared, they were not safe to be kept alive. As Andrew Ashworth and Lucia Zedner discuss, the notion of prevention goes back quite a ways. Blackstone believed that "preventive justice" was preferable to "punishing justice," but also more dangerous;[20] and, of course, the combination could only be more dangerous. The notion of the preventive state traces its genealogy to seventeenth and eighteenth century cameralism and the police sciences;[21] and there is a long history of the police state as a "preventive" agent. But the fact that these practices—and our concerns about these practices—are not new should not stop us from investigating punitive preventive measures more closely.

As an empirical matter, the purported need for punitive preventive measures is, on balance, factually overstated and generally unproven. Once all of the facts are on the table, it often appears that the stated need and consequentialist arguments in support of these measures serve as a cover for the political redistribution of societal resources. But these empirical concerns foreground a deeper theoretical problem, namely that the modern approach displaces political debate and contestation. The central problem with the modern approach to punitive prevention is its reliance, predominantly, on economic, cost-benefit

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[20] A Ashworth and L Zedner, 'Introduction' to this collection.

[21] M Dubber, 'Preventive Justice: The Search for Principles,' in this collection; see also Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York, NY: Columbia University Press, 2005); Dubber and M Valverde eds, *The New Police Science: The Police Power in Domestic and International Governance* (Palo Alto, CA: Stanford University Press, 2006).

analytic studies that serve to marginalize political decision-making. Like earlier punitive preventive interventions—whether eugenics, phrenology, or the larger "psy-" disciplines—the modern punitive preventive approach is grounded on technical, scientific knowledge that privileges efficiency over most other political values and, in the process, tends to displace politics. The modern approach claims to be objective, apolitical, and neutral. It claims to be merely pursuing the most efficient policy option given an agreed-upon narrow objective. But it inevitably reintroduces political values and choices into the analyses by privileging efficiency and bracketing other political values. The approach also obfuscates criticism by making it harder for the layman to identify the political values embedded in the technical models. For the uninitiated, and even for those with experience in the technical domain, it is an opaque method that makes it exceedingly difficult to know how or what to resist. In the end, it insidiously degrades the public sphere and masks political redistribution.

Part I explores why these types of punitive preventive measures have generally been regarded as more dangerous than ordinary punishments. Part II rehearses some of the empirical evidence—or lack thereof—regarding three significant and popular punitive preventive measures: broken-windows policing and ASBOs, profiling and stop-and-frisks, and selective incapacitation and mass incarceration. Part III offers a theoretical critique of the modern punitive preventive approach—specifically, that it displaces politics and corrodes our public sphere.

I. Why Punitive Preventive Measures Are Viewed as Different

Historically, in Anglo-American justificatory discourse, punishment and prevention have been neatly delineated and distinguished—but also carefully defended—based on the existence of a certain predicate, namely the criminal act. The adjudication of a crime traditionally served the important function of demarcating the terrain for legal punishment, but it also justified preventive measures: punishment was inextricably linked to the criminal act, but prevention was always connected to *avoiding* the possibility of a crime. In both cases, the potentiality of the criminal act did practically all the work. Though it did not, naturally, differentiate the two realms completely, it played a key function in the justificatory discourse of punishment theory—whether retributivist or consequentialist.

For the consequentialists—for whom prevention was the central purpose of punishment—the criminal act served as *the* safeguard against excess (especially against the retributivist trope that a consequentialist would be willing to convict an innocent person if it overwhelmingly benefitted others in society). For the consequentialists, punishment was forward looking: there was no way to undo the crime, so punishment had to serve either as a deterrent to future crime, as a mode of correcting the convict, or as

a way of incapacitating the convict so as to prevent any future offending.[22] In this sense, prevention was always already embedded as a part of punishment; and the criminal act was both a necessary gateway for entering the criminal justice system (only criminals are punished) and the basis of the future-oriented preventive focus (it is crime that we hope to avoid). At the same time, for the consequentialist, punishment was a central part of prevention: it was, for instance, fully justified to lengthen a sentence (to punish more) for someone who recidivated because the recidivist carried a higher likelihood of reoffending. The likelihood of future dangerousness was a cost that was to be factored into the punitive calculus and fully justified a longer sentence—even death under certain circumstances. In other words, prevention was a part of punishment, and punishment a part of prevention, but both were justified by wrong-doing.

Retributivists were the ones who traditionally had the greatest difficulty with punitive preventive measures. For them, punishment was intended to be backward looking, justifiable only in terms of dessert for a past crime. As Antony Duff writes, retributivism "justifies punishment in terms not of its contingently beneficial effects but of its *intrinsic* justice as a response to crime; the justificatory relationship holds between present punishment and past crime, not between present punishment and future effects."[23] By contrast, preventive measures were entirely forward looking, and therefore required some other justification. But generally the kind of justification that was sought *assumed* that prevention had a punitive dimension and therefore required the type of justification that would serve to legitimate punishment. It is in this sense, for instance, that Doug Husak argues in this collection that preventive justice is really no different than punishment and requires the same kind of justification—and in the end, that there can be limited uses of preventive justice.[24] That justification, often, turns on future crime. The specter of the criminal act reappears as a central justificatory mechanism. Here too, then, punishment can be a part of prevention, but when deployed, it must receive the kind of due process protections afforded the criminally accused.[25]

Overall, then, prevention can be, and often is, part of punishment—especially for those who espouse punishment theories of deterrence, correction, or incapacitation. At the same time, punishment can be, and often is, part of prevention—that is certainly the case with indefinite preventive detention in

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[22] *See generally* C Beccaria, *On Crimes and Punishments* (Cambridge: Cambridge University Press, 1995).
[23] RA Duff, *Punishment, Communication, and Community* (Oxford, UK: Oxford University Press, 2001) 19-20.
[24] [cite his piece in this collection].
[25] So in the context of preventive detention of sexual offenders, for instance, Carol Steiker has argued that the *Hendricks* measures *are* punitive, not just administrative as the US Supreme Court had held, and therefore that the due process protections afforded the criminally accused should extend to this domain. *See* C Steiker, "Foreword: The Limits of the Preventive State," *Journal of Criminal Law and Criminology*, Vol. 88, No. 3 (Spring, 1998), pp. 771-808.

administrative facilities that are no different than prisons.[26] On both sides of the divide, then, punishment theorists privilege wrong-doing. To dispense with the adjudicated crime destabilizes. It is what makes "punitive preventive measures" seem so dangerous. This dangerous slippage—away from the adjudicated criminal act—can be visualized in the following table that catalogues, incrementally, more and more problematic forms of punitive preventive detention:

CATEGORY OF DETENTION	PREDICATE	ADDITIONAL ELEMENT
Imprisonment	Adjudicated criminal conviction	
Involuntary commitment to mental hospital or asylum	Diagnosed mental illness	Diagnosed and adjudicated future danger to self or other
Public heath quarantine	Diagnosed health disease	Danger to others
Pre-trial detention	Probable cause accusation of crime	Adjudicated risk of flight or danger to witnesses
Sex offender preventive detention (USA)	Prior conviction for sexual offense	Adjudicated future danger to others
Guantanamo detention	Captured in the battlefield	Suspected of terrorist allegiances and suspected danger to others
Control orders (UK) under Prevention of Terrorism Act 2005	Suspicion of involvement in terrorist activity	Suspicion of danger to others
Preventive detention		Risk of future dangerousness to others

As we move down this table—eventually eliminating the criminal act predicate, but also watering down the additional element and related scientific expertise—our concerns about punitive preventive detention grow. Both the vertical movement down the table and the diagonal movement across the table, from predicate to additional elements, increase our apprehension about the corresponding forms of detention. The least problematic case, naturally, is when there exists the predicate of an adjudicated

[26] This is certainly the argument many made against the decisions by the United States Supreme Court and the *Conseil Constitutionnel* that these measures are administrative in nature, not punitive. *See Kansas v. Hendriks, supra*; Conseil constitutionnel, « Décision n° 2008-562 DC du 21 février 2008. Loi relative à la rétention de sûreté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental. »

criminal conviction; the most problematic is when there is nothing more than that "additional" element of future dangerousness. In between, the predicate diminishes as we go down the table, as does the reliability of the expertise associated with the additional element—and this, correspondingly, increases our apprehension.

Punitive preventive measures tend to be our most difficult cases. Often, they are justified on empirical grounds. But those empirical grounds, more often than not, prove elusive.

II. A Review of the Empirical Evidence

As I will demonstrate in this part, the consequentialist arguments for the use of punitive preventive measures tend to be overstated and often mask other political forces that are, in reality, far more salient. The consequentialist arguments for punitive prevention tend to serve as a pretext for redistribution of societal resources and as a way to shift relations of power. Let me turn to the three most significant and popular categories of punitive preventive measures.

a. Order-maintenance practices: the broken-windows theory, zero-tolerance, and ASBOs.

With regard, first, to order maintenance practices, there have been a large number of empirical studies testing both aspects of the famous broken-windows theory[27]—both the causal theory of crime (namely, that minor disorder, left unattended, causes serious crime) and the remedial theory of policing (namely, that order-maintenance policing reduces serious crime). In 2000, John Eck and Edward Maguire reviewed the empirical evidence and studies on broken-windows policing in their contribution to Alfred Blumstein's *The Crime Drop in America*, and found that there was little evidence to support the claim that broken-windows policing contributed to the sharp decrease in crime during the 1990s.[28] More recently,

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[27] In 1982, James Q. Wilson and George L. Kelling suggested in an influential article in the *Atlantic Monthly* that targeting minor disorder—loitering, panhandling, prostitution, graffiti—could help reduce more serious crime. See JQ Wilson and GL Kelling, 'Broken Windows: The Police and Neighborhood Safety' *Atlantic Monthly* (Boston, MA, March 1982) 29, 38.

[28] JE Eck and ER Maguire, 'Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence' in A Blumstein and J Wallman (eds), *The Crime Drop in America* (Cambridge; New York: Cambridge University Press, 2000) 207, 228 ("Overall, the evidence is mixed on the efficacy of generic zero-tolerance strategies in driving down rates of violent crime, though serious questions have been raised about their effects on police-community relations."). See also BE Harcourt, *Illusion of Order* (Cambridge, MA: Harvard University Press, 2001) 88 (concluding, on the basis of existing social-scientific data, that neighborhood disorder is not significantly related to more serious crimes when poverty, stability, and race are held constant); BE Harcourt, 'Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style' (1998) 97 Mich L Rev 291, 389 (challenging broken-windows policing by arguing that the alleged correlation between disorder and serious crime fails to take into account other factors that may contribute to the deterioration of a neighborhood).

Adam Samaha conducted an extensive review of the empirical literature—what amounted in effect to a Campbell collaborative evaluation—and concluded that, "Given the available evidence, a sensible conclusion is that the probability of generating a beneficial self-fulfilling prophecy with broken-windows policing is either uncertain, low, or confined in important ways."[29]

Regarding the causal theory of crime, many proponents of the broken windows hypothesis originally pointed to the research of Wesley Skogan, especially his 1990 monograph *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods*, arguing that it empirically verified the broken-windows theory.[30] Subsequent research, however, cast doubt on the conclusions that could properly be drawn from Skogan's analysis.[31] Following that, Robert Sampson and Stephen Raudenbush conducted one of the most comprehensive and thorough examinations of the causal theory, in their 1999 study, *Systematic Social Observation of Public Spaces*.[32] With regard to the disorder-crime nexus, Sampson and Raudenbush found that disorder and predatory crime were only moderately correlated, but that, when antecedent neighborhood characteristics were taken into account, the connection between disorder and crime "vanished in 4 out of 5 tests—including homicide, arguably our best measure of violence."[33] As an alternative to the broken windows theory, Sampson and Raudenbush suggested that disorder is of the same etiology as crime—being, so often, a form of minor crime—and that both crime and disorder have the same antecedent conditions. "Rather than conceive of disorder as a direct cause of crime, we view many elements of disorder as part and parcel of crime itself."[34] Thus, "a reasonable hypothesis is that

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[29] A Samaha, 'Regulation for the Sake of Appearance' Working Draft 2.9, dated September 14, 2011, 47.

[30] WG Skogan, *Disorder and Decline: crime and the spiral of decay in American neighborhoods*(New York, NY: Free Press, 1990) 120–24; GL Kelling and CM Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (New York, NY: Martin Kessler Books, 1996) 23-27; DM Kahan, 'Social Influence, Social Meaning, and Deterrence' (1997) 83 Va L Rev 349, 369; see also DM Kahan, 'Between Economics and Sociology' (1997) 95 Mich L Rev 2477, 2488 n 62 ("According to criminologists, the primary cue that crime is tolerated or expected is visible public disorder.").

[31] Harcourt, *Illusion of Order* (n 28 above) 78 (concluding that "there are *no* statistically significant relationships between disorder and purse-snatching, physical assault, burglary, or rape when other explanatory variables are held constant . . . . [Thus] the data do not support the broken windows hypothesis"); RB Taylor, *Breaking Away from Broken Windows: Baltimore Neighborhoods and the Nationwide Fight against Crime, Guns, Fear, and Decline* (Boulder, CO: Westview Press, 2001) 22 (finding that, although certain types of incivilities were associated with crime or urban decay, others were not, and concluding that a more integrated perspective, which combines the current results regarding incivilities and contemporary knowledge regarding the multiplicity of factors affecting neighborhoods over time, should be developed).

[32] RJ Sampson and SW Raudenbush, 'Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods' (1999) 105 Am J Soc 603, 637.

[33] Ibid 637 (offering results contradicting a strong version of the broken windows thesis but concluding that the role of disorder remained theoretically relevant for other purposes; disorder may have indirect, neighborhood effects on crime by influencing "migration patterns, investment by businesses, and overall neighborhood viability").

[34] Ibid 608.

public disorder and predatory crimes are manifestations of the same explanatory process, albeit at different ends of a 'seriousness' continuum."[35]

In subsequent research, Jens Ludwig and I tested the causal theory of crime using data from a unique randomized experiment conducted by the U.S. Department of Housing and Urban Development (HUD) known as Moving to Opportunity (MTO). MTO had been in operation since 1994 in five cities, including the three largest cities in the country that have adopted aspects of broken-windows policing (New York, Chicago, and Los Angeles), as well as Baltimore and Boston. Under MTO, a total of around 4,600 low-income families living in public housing communities characterized by high rates of crime and social disorder were randomly assigned housing vouchers to move to less disadvantaged and disorderly communities.[36] Our results from MTO suggested that moving people to communities with less social or physical disorder—the key intervening factor in the original Wilson and Kelling broken windows hypothesis—on balance did *not* lead to a reduction in their criminal behavior.

Regarding the remedial theory of policing, James Q. Wilson here too sparked the debate, primarily with his 1968 book *Varieties of Police Behavior*, and his research with Barbara Boland on the effects of police arrests on crime.[37] Wilson and Boland hypothesized that aggressive police patrols, involving increased stops and arrests, have a deterrent effect on crime. A number of contributions ensued, both supporting and criticizing these findings, but, as Robert Sampson and Jacqueline Cohen suggested in 1988, the results were "mixed."[38] There have been strong contributions to the literature, such as the 1999 study led by Anthony Braga, titled *Problem-Oriented Policing in Violent Crime Places*[39] and Jeffrey Fagan and Garth Davies's 2003 research titled *Policing Guns: Order Maintenance and Crime Control in*

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[35] Ibid.

[36] See L Orr, et al., 'Moving to Opportunity: Interim Impacts Evaluation' ii–iv (HUD Office of Policy Development 2003) ii-iv (describing the MTO program) (available online at http://www.huduser.org/Publications/pdf/MTOFullReport.pdf).

[37] See JQ Wilson, *Varieties of Police Behavior: The Management of Law and Order in Eight Communities* (Cambridge, MA: Harvard University Press, 1968) 281-282; See also JQ Wilson and B Boland, 'The Effects of the Police on Crime: A Response to Jacob and Rich' (1981) 16 L & Socy Rev 163, 168–69; JQ Wilson and B Boland, 'The Effect of the Police on Crime' (1978) 12 L & Socy Rev 367, 380.

[38] RJ Sampson and J Cohen, 'Deterrent Effect of the Police on Crime: A Replication and Theoretical Extension' (1988) 22 L & Socy Rev 163, 166.

[39] AA Braga, et al., 'Problem-Oriented Policing in Violent Crime Places: A Randomized Controlled Experiment' (1999) 37 Criminology 541, 571. See also AA Braga, *Problem-Oriented Policing and Crime Prevention* (Monsey, NY: Criminal Justice Press, 2002) 123.

New York.[40] But the research is unable generally to distinguish between the broken windows hypothesis and more traditional explanations of incapacitation and deterrence associated with increased police arrests, presence, contact, and surveillance.[41]

In 2001, George Kelling and William Sousa published a study asking, and answering in the affirmative, the question *Do Police Matter?*[42] Their study triggered another flurry of research—including a large quantitative study by Jens Ludwig and me which showed that, contrary to their findings, when mean reversion is included in the model,[43] increased misdemeanor arrests actually—and paradoxically—correlate with increased violent crime.[44] Mean reversion is the best explanation for the drops in crime in New York City. As we explain there, "[P]recincts that received the most intensive broken-windows policing during the 1990s are the ones that experienced the largest increases in crime during the city's crack epidemic of the mid-to-late 1980s."[45]

Another important contribution to the literature was Steve Levitt's 2004 *Journal of Economic Perspectives* review essay, in which he argued that policing practices probably do not explain much of the crime drop in the 1990s because crime went down everywhere, even in places where police departments did not implement new policing strategies.[46] Instead, Levitt attributed the massive period effects on crime throughout the United States during the 1990s to some combination of increased imprisonment, increases

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[40] J Fagan and G Davies, 'Policing Guns: Order Maintenance and Crime Control in New York' in BE Harcourt (ed), *Guns, Crime, and Punishment in America* (New York, NY: New York University Press, 2003) 191, 205.

[41] The problem is somewhat endemic to the design of these studies. As Sampson and Cohen conclude with regard to their own work, "It is true . . . that our analysis was not able to choose definitely between the two alternative scenarios." Sampson and Cohen (n 38 above) 185.

[42] GL Kelling and WH Sousa, Jr., 'Do Police Matter? An Analysis of the Impact of New York City's Police Reforms*' Manhattan Institute Center for Civic Innovation* (Civic Report No 22, 2001) 18 ("[D]espite the root-cause theories that have dominated criminological, criminal justice, and much popular thinking about crime control, police can have a significant effect on crime levels in neighborhoods and communities. One singularly important way of doing this is by restoring and maintaining order, through 'broken windows' policing.").

[43] Reversion to the mean, in this context, means an eventual return to average crime levels in each precinct. Ludwig and I were able to include earlier crime levels for each precinct as a way to control for mean reversion.

[44] See BE Harcourt and J Ludwig, 'Broken Windows: New Evidence from New York City and a Five-City Social Experiment' (2006) 73 U Chi. L. Rev. 271, 296 and 297 tbl. 3; *Errata*, 74 U. Chi. L. Rev. 407, 407 (2007) (Table 3, Row 1 should display positive coefficients for misdemeanor arrest changes in Models 2 through 5).

[45] Harcourt and Ludwig (n 44 above) 276. Another study by H Corman and N Mocan, 'Carrots, Sticks and Broken Windows' (2005) 48 J L & Econ 235, 262, found a positive effect of misdemeanor arrests on crime ("A 10 percent increase in misdemeanor arrests decreases motor vehicle thefts by 1.6 to 2.1 percent, [and] robberies by 2.5 to 3.2 percent . . . . We do not find strong evidence to support the contention that a broken-windows policing strategy affects the other crimes."). However, Jens Ludwig and I demonstrate the fallacy of their simplistic assumption of single-jurisdiction data in our "Broken Windows: New Evidence from New York City and a Five-City Social Experiment."

[46] SD Levitt, 'Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not' (2004) 18 J Econ Perspectives 163, 177, 184.

in the number of police, the ebbing of the crack epidemic that started in many big cities in the mid 1980s, and the legalization of abortion in the United States during the early 1970s.[47] In the end, as Sampson and Raudenbush remarked, the evidence suggests that "[a]ttacking public disorder through tough police tactics may thus be a politically popular but perhaps analytically weak strategy to reduce crime."[48]

Several recent studies confirm this conclusion.[49] One such study, by Richard Rosenfeld and his colleagues, finds that order-maintenance policing had a discernible effect on homicide and robbery trends over the 1990s, but that the discernible effect was at best small, accounting for between 1 and 5 percent of the total annual drop in robbery rates and between 6 and 12 percent of the total annual reduction in homicide rates. A second study, by Steven Messner and his colleagues, uses a different statistical model and finds, interestingly, that both order-maintenance policing and changes in patterns of cocaine use had a statistical effect on gun-related homicides but *not* on non-firearm homicides.[50] (There is nothing in the broken windows theory that would explain different results for gun and non-gun homicides). In contrast, crack cocaine markets were closely connected to illegal gun use. This suggests—in line with the research of Jeffrey Fagan and Franklin Zimring[51]—that order-maintenance policing, if it affected crime, did so predominantly via guns. The pathway was probably not order maintenance, but instead the gun seizures attendant to an aggressive policy of stops, frisks, arrests, and searches.

These conclusions make intuitive sense given that the crime drop in the 1990s and 2000s was a national phenomenon that affected most large cities, including those cities that resisted Giuliani-style broken-windows policing. As Richard Rosenfeld concludes, "substantial crime reductions likely would have occurred even without the growth in [order-maintenance policing]."[52] Taken together, the wealth of research provides no support for a simple disorder-crime relationship as hypothesized by Wilson and Kelling in their broken-windows theory, nor for the proposition that broken-windows policing is the optimal use of scarce law enforcement resources.

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[47] Ibid 184.
[48] Sampson and Raudenbush (n 32 above) 638.
[49] See R Rosenfeld, R Fornango and AF Rengifo, 'The Impact of Order-Maintenance Policing on New York City Homicide and Robbery Rates: 1988-2001' (2007) 45 Criminology 355, 369, 377; SF Messner, et al., 'Policing, Drugs, and the Homicide Decline in New York City in the 1990s' (2007) 45 Criminology 385, 401, 405; Magdalena Cerdá et al., 'Misdemeanor Policing, Physical Disorder, and Gun-Related Homicide: A Spatial Analytic Test of ―Broken-Windows Theory' (2009) 20 Epidemiology 533, 533.
[50] Messner, et al. (n 49 above).
[51] J Fagan, FE Zimring, and J Kim, 'Declining Homicide in New York City: A Tale of Two Trends'(1998) 88 J. Crim. L. & Criminology 1277, 1322.
[52] Rosenfeld, Fornango, and Renfigo (n 49 above) 377.

What I have come to believe is that the broken windows theory is really window dressing, and it masks or hides more profound processes of real estate development and wealth redistribution. I came to this conclusion in my ethnographic work in Los Angeles, where it became clear that the broken-windows policing by the LAPD and by private security firms were part of a gentrification effort led by several real estate developers.[53] There are, of course, studies demonstrating a link between crime rates and real estate *values*.[54] In one such study in New York City, for instance, researchers found that falling crime rates were "responsible for about a third of the post-1994 boom in property values."[55] But the direction of influence is more complicated. As these researchers argue, the simple narrative—namely, that lower crime causes increased real estate values—"ignores the revitalization of New York City's poorer communities."[56] The focus on real estate *values* does not do justice to the processual dynamics of how a neighborhood is redeveloped, gentrified, or commercialized. It does not begin to scratch at the dynamic relationship between real estate *redevelopment* and crime. There are crucial intervening steps: significant investments by commercial and residential real estate developers, political initiatives by city planners, and competing efforts by not-for-profit homeless agencies to secure housing for their clients. Crime and crime reduction may well be a cover, under which there is a tumultuous battle over real property and the economic restructuring of these disorderly neighborhoods. In this more complete story, the most important players are high-end commercial and residential real estate developers, city urban planners, and non-profit housing advocates for the homeless. The police and their policing are ancillary.

Times Square, the Bowery, the near-west side of Chicago—these disorderly neighborhoods of major urban centers were the center of heated debate and much political initiative at the turn of the twenty-first century. Some, like Chicago's near-west side, vanished—bulldozed down and re-engineered—the beneficiaries of massive urban renewal projects. In Chicago, the single-room occupancy hotels ("SROs") and flophouses were gutted, the missions and saloons were closed, and in their place rose high-end, residential apartments—such as the Presidential Towers, four 49-story modern high-security towers with over 2,300 apartments and over 900 spaces of sheltered parking.[57] Other neighborhoods, like

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[53] BE Harcourt, "Policing L.A.'s Skid Row: Crime and Real Estate Development in Downtown Los Angeles [An Experiment in Real Time]," (2005) University of Chicago Legal Forum: 325-404.

[54] A Schwartz, S Susin, and I Voicu, 'Has Falling Crime Driven New York City's Real Estate Boom?' (2003) 14 J Housing Research 101, 102 (available online at http://www.fanniemaefoundation.org/programs/jhr/pdf/jhr_1401_schwartz.pdf).

[55] Ibid 102.

[56] Ibid.

[57] For fascinating discussions of the elimination of Chicago's Near-West Side Skid Row, see R Miller, *Here's The Deal: The Buying and Selling of a Great American City* (New York, NY: Alfred A. Knopf, 1996) 3–93; A Ijomah, *The Role of Major Institutions in the Redevelopment of Chicago's Near West Side, 1940–1990* (Ph.D. dissertation)

Times Square, had radical surgery—massive, planned, precision redevelopment. While some of the landmark buildings and theatres were refurbished, office towers and corporate, commercial, and media headquarters rose in their midst. Times Square morphed from red lights to large-scale LED displays and signage, and became a vibrant and luxurious commercial, hotel, media, business, and entertainment center.[58] Still others, like Los Angeles' Downtown, are only being gentrified now, in the early twenty-first century. My sense is that this is what has really driven order maintenance: real estate development and profit, not broken-windows policing.

b. Profiling and preventive searches: highway patrol, street stop-and-frisks, and anti-terrorism

A number of economists in the United States and Great Britain have justified preventive profiling techniques, including racial profiling, as a form of 'statistical discrimination' as opposed to racial bigotry: the first uses group traits to promote more efficient policing and extends only to the point where law enforcement has maximized the efficiency of their interventions—as evidenced, for instance, in the equalization of search success rates between members of different racial groups.[59] At that point, these economists suggest, law enforcement has achieved the best allocation of resources in a non-discriminatory manner. It is only when law enforcement uses group traits *beyond the point of equality (efficiency)* that their use of race or ethnicity becomes invidious. Economist Vani Borooah has suggested, for instance, that "statistical discrimination, untainted by bigotry, is optimal from a policing perspective because it maximizes the number of arrests consequent upon a given number of persons stopped."[60]

In a lengthy and technical treatment in *Against Prediction: Policing, Profiling, and Punishing in an Actuarial Age* (Chicago 2007), I demonstrate that, contrary to the claims of the economists, statistical discrimination is likely counter-productive to the law enforcement objective of reducing crime, and

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(Milwaukee, WI: University of Wisconsin–Milwaukee, 1991); and R Miller, *The Demolition of Skid Row* (Lexington, MA: Lexington Books, 1982) 8–25. For a description of Presidential Towers, see P Gapp, 'Presidential Towers No Beauty, But It Works Like A Charm', *Chicago Tribune*, (Chicago, IL: December 22, 1985) Arts 6.

[58] For a general discussion, see J Traub, *The Devil's Playground: A Century of Pleasure and Profit in Times Square* (New York, NY: Random House, 2004); J Traub, 'Common Of Earthly Delights' *New York Times,* (New York: NY: March 14, 2004) B48.

[59] For a detailed treatment of this, see BE Harcourt, 'Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally' (2004) 71 U. Chi. L. Rev. 1275–381.

[60] VK Borooah, 'Racial Bias in Police Stops and Searches: An Economic Analysis' (2001) 17 European Journal of Political Economy 17–37, 19. In the United States, the leading works in the area include J Knowles, N Persico, and P Todd, 'Racial Bias in Motor Vehicle Searches: Theory and Evidence' (2001) 109 Journal of Political Economy 203–29; R Hernández-Murillo and J Knowles, 'Racial Profiling or Racist Policing? Bounds Tests in Aggregated Data' (2004) 45(3) International Economic Review 959–89.

therefore misguided as a preventive measure. Two problems in particular undermine statistical discrimination in the criminal justice context. First, if we assume a rational choice framework—in other words, if we assume deterrence and the general framework of economic, consequentialist models of criminal behaviour—statistical discrimination is likely to be counter-productive to the ultimate objective of law enforcement by causing *more* crime. Under the conservative assumption that the targeted population (the population with higher offending) is less responsive (less elastic) to policing than the non-targeted population, statistical discrimination will ultimately increase overall societal offending levels as the non-profiled population (more elastic) responds more sharply to the shift in policing. This will have counter-productive effects on the law enforcement objective of reducing crime. Second, if we do not assume a rational action approach and believe that people are inelastic to policing, statistical discrimination is going to lead to a ratchet effect on members of the profiled population with highly detrimental consequences on their employment, educational, familial, and social outcomes. This, in turn, will likely result, again, in counter-productive effects on crime.[61]

The bottom line is that criminal profiling is likely counterproductive to the crime fighting goal.[62] We need to know more about comparative elasticities and offending rates as between different groups in society before engaging in actuarial policing—and we know nothing about comparative elasticities today. What is even more troubling is that there are good reasons to suspect that the elasticity of the targeted may be *less* than that of the non-targeted. Elasticity is going to depend in large part on the existence of legitimate work alternatives, and, as the work of William Julius Wilson demonstrates, there is a deep and complex relation between work opportunities, race, and the inner city.[63] As a result, there is no good reason to assume that the higher-offending group is as responsive to policing as the lower-offending group. The two groups do, we presume, have different offending rates—otherwise the police would be profiling on a spurious trait. Whether the different offending rates are due to different socio-economic backgrounds, to different histories, cultures, or education, we know not—but if their offending rates are

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[61] I am taking on face value the law enforcement objectives only. Naturally, community relationships, self-respect among profiled groups, and other values should be taken into account. Most citizens do not *only* want to live in a crime-free world, but rather in a world in people feel respected and valued as members of the community. But for purposes of the argument in text, it is an internal critique that takes at face value the law enforcement objectives.

[62] In a more recent working paper, John Knowles and his co-author, Jeff Dominitz, recognize that maximizing the search success rates may lead to maximizing crime, *see* "Crime Minimization and Racial Bias: What Can We Learn From Police Search Data?" (February 18, 2005) PIER Working Paper 05-019 (available at http://ssrn.com/abstract=719981). Charles Manski also recognizes the conflict between crime minimization and hit rate maximization in his draft "Search Profiling with Partial Knowledge of Deterrence," (unpublished paper, 2005).

[63] WJ Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (Chicago, IL: University of Chicago Press, 1987); WJ Wilson, *When Work Disappears: The World of the New Urban Poor* (New York, NY: Alfred A. Knopf, 1996).

different, there is every reason to believe that their elasticity will be as well. If they are, for instance, offending more because they are socio-economically more disadvantaged, then it would follow logically that they may also have less elasticity of offending to policing because they have fewer alternative job opportunities. The bottom line, then, is that there is every reason to believe that non-spurious racial profiling would actually increase crime in society.

It is worth adding—given that so much of the preventive state is now aiming at international and domestic terrorism—that the same logic applies in the terrorism context. Surprisingly, although international terrorism is by no means a new phenomenon, there is little reliable empirical research on the effectiveness of preventive (also called "defensive") counter-terrorist measures, and there is no reliable empirical research on the use of profiling in this context. The little evidence there is on counter-terrorism measures more generally suggests that such preventive policing techniques may backfire, largely due to a phenomenon called 'substitution'. 'Substitution' encompasses two possible responses to profiling by terrorist organizations: (1) the recruitment of more individuals from non-profiled groups, which expands the overall pool of potential terrorists; and (2) the substitution of different types of terrorist attacks that are more immune to profiling and yet more devastating in terms of deaths and injuries. These potential responses raise a host of technical empirical questions that are at present entirely unresolved, but suggest that we should be wary, here too, of unsubstantiated claims of effectiveness.[64]

c. From Selective Incapacitation to Mass Incarceration

In the early 1980s, the RAND Corporation established the Habitual Offender Project with the aim of studying preventive measures aimed at recidivists. The idea originated in response to studies of California prisons that revealed, surprisingly, no real differences in prison sentences as between low and high rate offenders. The idea behind the RAND proposal, ultimately, was to efficiently reshuffle inmate sentencing: by locking up high-rate offenders for longer periods, a state could both reduce its crime rate and simultaneously decrease its prison population. The policy promised budgetary savings *and* reduced crime. The approach would eventually become known under the rubric of "selective incapacitation" and considered the single most cost-effective measure to reduce crime—a mixed technique that packed a powerful preventive punch in a punitive glove.

[64] See BE Harcourt, "Muslim Profiles Post-9/11: Is Racial Profiling an Effective Counterterrorist Measure and Does it Violate the Right to be Free from Discrimination?" in B Goold and L Lazarus, *Security and Human Rights* (Oxford, UK: Hart Publishing, 2007).

Peter Greenwood, with Allan Abrahamse, issued a RAND report in 1982 that set forth the most fully articulated plan for implementing the strategy of selective incapacitation—a strategy that had, at its heart, "the notion of preventive detention."[65] Titled "Selective Incapacitation," it studied the feasibility of predicting future dangerousness as a vehicle to lengthier sentencing. The study then tried to estimate the cost-effectiveness of selecting on dangerousness.

The researchers based their prediction research on self-report surveys from 2,100 male prison and jail inmates from California, Michigan and Texas in 1977.[66] They focused on robbery and burglary offenses, excluding more serious crimes such as murder or rape (given that low-base-rate crimes are so much more difficult to predict) and developed a seven factor test to identify high-rate offenders (focusing primarily on prior criminal record, history of drug abuse, and employment history). They assigned each offender a score from zero through seven: a positive response on any one of these seven factors resulted in one point on the offender's score. The resulting score was used to distinguish between low, medium or high rate offenders. When the researchers tested their predictions, they found that their test identified low- and medium-rate offenders with greater ability than high-rate offenders: 91 to 92 percent of those scoring 0 or 1—the lowest possible scores—turned out to be low- or medium-rate offenders; by contrast, only 50 percent of those scoring 5, 6 or 7 turned out to be high-rate burglars or robbers.[67]

Despite the poor results, Greenwood concluded the study on an up-beat note: "Increasing the accuracy with which we can identify high-rate offenders or increasing the selectivity of sentencing policies can lead to a decrease in crime, a decrease in the prison population, or both. Selective incapacitation is a way of increasing the amount of crime prevented by a given level of incarceration."[68] Even though Greenwood found that predicting future dangerousness was inexact—and five years later would revise the report and issue it with a slightly different title: "*Selective incapacitation revisited: why the high-rate offenders are hard to predict*"[69]—Greenwood nevertheless painted a rosy picture from what were not very cost-efficient conclusions.[70]

A close reading of his findings revealed that the crime reduction benefits required—in three out of four cases—*increased prison populations*. In effect, the idea of *selective* incapacitation had really just

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[65] PW Greenwood and AF Abrahamse, 'Selective Incapacitation' (Santa Monica, CA: National Institute of Justice (U.S.) and Rand Corporation, 1982) xx and 92.
[66] Ibid xii.
[67] Ibid 53.
[68] Ibid xiii.
[69] PW Greenwood, S Turner, & National Institute of Justice (U.S.), 'Selective Incapacitation Revisited: Why the High-Rate Offenders are Hard to Predict' (Santa Monica, CA: Rand Corporation, 1987).
[70] Greenwood and Abrahamse (n 56 above) xix

morphed into a theory of simple incapacitation. Nevertheless, the Greenwood report had high impact and contributed importantly to the rise and theoretical prominence of incapacitation theory and eventually to the massive increase in prison populations in the United States.[71]

Incapacitation is inevitably going to produce negative effects on the rate of crime (outside the prison).[72] The problem is that the incapacitation theory in and of itself does not set a limit on the balance between imprisonment and crime—we have to go outside that analysis to find principled limits on punishment. It will never tell us how much incarceration is appropriate. The result, in the United States, is mass incarceration, which is supported not so much because of its effect on crime (crime has been falling continuously), but for its other political economy consequences. In the United States at least, counties with prisons, feeling the economic pinch of the Great Recession of 2008, have begun to vocally oppose the closing of prisons merely because of the contributions prisons have made to the local economies.

III. A Further Critique of Punitive Preventive Measures

These empirical problems, however, pale in comparison to a more fundamental issue with the modern punitive preventive approach. The economic cost-benefit approach that typically underlies these measures inverts the relationship between politics and policy-making by transforming political values into mere instrumentalities of public policy decision-making. Instead of public policy serving as a means to ensure the efficient implementation of political visions, these modern approaches to punitive prevention influence, shape, and distort political ideals—"distort" in the sense that they affect political values without openly engaging, debating, confronting, or negotiating the very balance of political values at the heart of our *polis.*

The root of the problem can be seen in the very discourse of the RAND policy analysts of the 1960s. As Edward Quade cautioned, alternative policies are not always "obvious substitutes for one another," nor do they always "perform the same specific function."[73] Nevertheless, as Quade admitted, "education, antipoverty measures, police protection, and slum clearance may all be alternatives in combating juvenile delinquency."[74] In other words, cost-benefit analyses gives us the tools to decide whether, as Quade would write, "additional money might be better spent on space exploration or

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[71] See generally BE Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (Chicago, IL: University of Chicago Press, 2007) 88-92.
[72] BE Harcourt, 'An Institutionalization Effect: The Impact of Mental Hospitalization and Imprisonment on Homicide in the United States, 1934 – 2001' (January 2011) 40 Journal of Legal Studies 439-83.
[73] Quade (n 6 above) 7.
[74] Ibid.

economic opportunity programs;"[75] or whether to "reduce unemployment to less than 2% in two years or add a certain number of miles to the interstate highway system."[76] But those decisions obviously have important political dimensions that are not fully reflected or contested in the cost-benefit analyses themselves.

Edward Quade's pregnant remark reveals the nub of the problem with systems analysis: *"education, antipoverty measures, police protection, and slum clearance may all be alternatives in combating juvenile delinquency."* This simple statement exposes a radical inversion of politics: notice how the narrow objective—here, combating juvenile delinquency—takes priority over fundamental political values such as an educated citizenry and a robust public sphere ("education"), political and economic equality or equality of opportunity ("antipoverty measures"), political freedom, security, and civil liberties ("police protection"), as well as urban politics and planning ("slum clearance"). An innocent and narrow objective has turned these political ideals into mere instrumental goods, it has displaced political contestation, wrangling, logrolling, and debate, and it has imposed, under the veil of neutral, objective, positivistic science, a *political outcome*.

Contemporary cost-benefit analyses—which are at the core of today's punitive preventive public-policy approach—are ingenious methods for *displacing* politics. They seduce by offering the hope of avoiding the quagmire of partisan politics and by focusing our attention on narrow objectives that no one could possibly object to—reducing crime or juvenile delinquency, for instance. They ingeniously propose a "common sense" approach: Rather than get caught up in endless political debates, simply agree on more basic, measurable objectives (note that this privileges factors that can be subject to quantification), evaluate the different alternative ways of achieving those narrow objectives, and then choose the most efficient alternative. The methodology is unimpeachable: only someone who would be willing to *waste* social resources—an irrational person—would object.

The trouble is that the set of alternative policies cuts across multiple political dimensions, and as a result, the conclusions, if they are implemented, will necessarily *affect, shape, and distort* our political ideals and value systems. By selecting on easily quantifiable sub-categories—here, for instance, juvenile delinquency rates—rather than on the larger political ideals of, for instance, youth welfare, or the even larger categories of equality or political freedom, the public policy approach converts political values—an educated citizenry (education), equality (antipoverty measures), and liberty (police protection)—into mere levers, and imposes (under a veil of neutrality) political values. It shapes the political environment, and it

[75] Ibid 18.
[76] Ibid 4-5.

does so by means of recurring mechanisms that have important political effects on society and directly affect the balance of political values such as liberty, equality, wealth distribution, civil rights, etc. The public policy analysis, it turns out, *changes our political environment—it shapes our politics*. In sum, by choosing a narrow objective and then simply costing-out alternative policies, we have *shaped* our political value system without ever having explicitly engaged *politics*.

Conclusion

In January 1968, mayor John Lindsay hailed the new arrangement with the RAND Corporation to tackle crime in New York City. He declared:

> This agreement will greatly assist our introduction into city agencies of the kind of streamlined, modern management thinking that Robert McNamara applied in the Pentagon with such success during the past seven years. ... I regard this as the most important development in the search for effectiveness in city government in many, many years.[77]

History was not kind to Lindsay's mayoralty, especially not to its cost-effectiveness. The NYC RAND Institute folded in 1975 amidst significant—I might add, ironic—controversy over Lindsay's profligate spending on consultants.[78] History was also not kind to Secretary McNamara—though whether it was McNamara or President Johnson who was primarily responsible for engulfing the country in the Vietnam War remains hotly contested today.

The RAND housing security study discussed in the preface was symptomatic. Ultimately, the study found that even the most effective security measures—extensive surveillance, increased police, and posting of armed guards at each building—were too expensive.[79] As a result, the report did not recommend any of the security measures analyzed, and instead urged a different solution: more research money for RAND. "[T]he heuristic methodology that we have presented here is further testimony to the paucity of formalized design procedures for translating security goals into detailed system requirements. The present crime situation has created an undeniable demand for quantitative models which can account for behavioral and sociological phenomena which can adequately predict the impact of security measures on society, and which can clarify our presently fuzzy notions of what security really means."[80]

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[77] Reeves (n4 above) 31.
[78] Light (n 2 above) 74.
[79] Liechenstein (n 9 above) 24.
[80] Id. p. 25.

But sometimes history gets things right—at least partially. I would argue that it was, ultimately, a good thing for the NYC RAND Institute to close its doors so rapidly. The punitive preventive approach that it promoted—relying so extensively on economic cost-benefit analysis—was plagued with difficulties. And it remains so today. The approach is seductively simple and appealing, but it is an approach that maximizes the wrong thing and, in the process, dangerously displaces politics. In the end, *punitive* preventive justice should be avoided.

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