

CRIMINAL CAREERS AND "CAREER CRIMINALS"

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Purblind Justice: Normative Issues in the Use of Prediction in the Criminal Justice System

Mark H. Moore

In the workaday world of criminal justice, predictions are commonplace (Dershowitz, 1974:1-60, 781-846; Wilson, 1983a:157, 1983b:279). Moreover, they are consequential for defendants: they affect the magnitude of the criminal liabilities that defendants confront. Judges

consider the risk that a defendant will flee (or commit additional crimes) in setting bail (Dawson, 1969:80; N. Morris, 1974: 28-57; Roth and Wice, 1980; Gaynes, 1982; Blumstein et al., 1983a,b; N. Morris and Miller, 1985:12) and the prospects for rehabilitation in imposing sentences. Prosecutors weigh the gravity of the threat posed by accused offenders in deciding how much effort to put into preparing their cases and in setting the minimum acceptable plea bargains (Kaplan, 1965:174; Forst and Brosi, 1977:177-191). Police study the modus operandi of offenders to thwart future crimes and to help them identify likely suspects in current cases (Moore et al., 1983a,b).

Mark Moore, Guggenheim Professor of Criminal Justice Policy and Management, Harvard University, notes: "In producing this paper, I am principally indebted to Susan Estrich, Daniel McGillis, and William Spelman, my collaborators on the Harvard Project on Dangerous Offenders and coauthors with me of *Dangerous Offenders: The Elusive Target of Justice* (Cambridge, Mass.: Harvard University Press, 1984). Indeed, some material on the use of predictions in sentencing and bail is reproduced here exactly as it appears in *Dangerous Offenders*, and a great deal else is borrowed less directly from that analysis. I am also indebted to those on the Panel on Research on Criminal Careers who read and commented on this work, specifically, John Kaplan, Norval Morris, and James Q. Wilson. I am also greatly indebted to Andrew von Hirsch and Michael Tonry, whose sharp disagreements may have improved the quality of my arguments and whose patience in instructing me has been extraordinary. With such great assistance, it is hard to believe errors could be made. But no doubt there are many, and they are mine alone."

The widespread, consequential use of predictions in the criminal justice system prompts normative questions. If the justice of the system rests on the notion that punishment should be for past acts, not guesses about future behavior, it is wrong to impose criminal liabilities on the basis of predictions. It would be wrong even if the predictions were perfectly accurate. If they are inaccurate, however (as they inevitably will be), additional objections

come to the fore. Offenders incorrectly predicted to commit crimes in the future would be exposed to criminal liabilities that are doubly undeserved: once because they were based on predictions rather than past deeds, and twice because the predictions were inaccurate. And, to the extent that the predictions were based on characteristics of offenders that lie outside the ordinary purview of the criminal justice system or are imperfectly measured, defendants would be exposed to more intrusive investigations and greater risk of errors than would be the case if the focus of the system remained on past crimes. In short, predictions undermine the rigorous discipline essential to criminal justice in a free society.

On the other hand, criminal justice officials now rely on predictions because they seem to add to the overall justice and performance of the criminal justice system. The most obvious virtue of predictions is that, by focusing the attention of the system on those offenders who are most likely to commit crimes in the future, they allow the community to maintain tolerable levels of crime with less extensive use of imprisonment than would be possible without them. Given that it is desirable to reduce criminal victimization and to be economical in the use of the state's moral and financial resources in doing so, it seems desirable to exploit the focus on dangerous offenders that predictions make possible.

Many view this apparent virtue as a dangerous temptation—one that will lure the community into increasing its overall demands for security at the expense of the rights and liberty interests of alleged criminal offenders and, therefore, at the risk of the overall quality of justice. But even viewed from the special perspective of protecting the rights and interests of accused offenders from the community's demands for order, the use of predictions has virtues, for predictions can justify

more lenient treatment for some offenders than their acts alone would justify. If an offender's crimes seem uncharacteristic (and therefore unlikely to be repeated in the future), the current system (which is tolerant of predictions) can be lenient. This opportunity would be denied if predictions of future conduct were excluded from criminal justice decision making.

Finally, if interests in individual justice and aggregate efficiency continue to motivate and sanction the widespread use of predictions in the criminal justice system, it would be valuable to recognize the practice explicitly. That way, the society could guarantee that the predictions were made consistently, accurately, and usefully rather than on an *ad hoc* basis.

So, the question of whether consequential predictions are tolerable in our criminal justice system might not have a general answer. Some moral intuitions and ethical standards might exclude them entirely, while others would countenance them. For the ethical systems that tolerate predictions, the particular form of the prediction may matter a great deal; some predictions may be more just than others.

The central purpose of this paper is to develop moral intuitions about whether consequential predictions are tolerable in the criminal justice system, and, if they are, to establish what sorts and for what purposes. This requires an examination from several vantage points: from the perspective of moral intuitions about the fundamental values that animate the criminal justice system and their connections to different systems of ethical theory; from an analysis of the tension between ideal standards and the implicit sanction granted to current practices by virtue of their traditional acceptability; from a detailed consideration of aspects of predictions that seem to have normative significance; and from an inquiry into how the moral issues involving predictions differ

at different stages of the criminal justice system.

THE ANATOMY OF PREDICTION IN THE CRIMINAL JUSTICE SYSTEM

To fix conceptions, it is useful to delineate the basic elements of prediction in the criminal justice system. Essentially, there are four: an offense, an associated offender, a predictive rule that links characteristics of the offender to predictions of future conduct, and a discretionary decision to be made by a criminal justice official that could be influenced by predictions of future criminal activity and that affects the criminal liability of the offender.

The Offense

A criminal offense is central because it is the thing that occasions the interest of the criminal justice system. Without a crime, there are no decisions to be made. Not even the most enthusiastic advocates of predictions in the criminal justice system would advocate the imposition of criminal sanctions without a criminal offense.

The crime is also important because it constrains the decisions that will be made. A minor offense cannot be used to justify a major intrusion into the offender's life even if the predictions are very ominous. Exactly how tightly the characteristics of the crime should bind the decisions of criminal justice officials is one of the major controversies surrounding the use of predictions. Those who think that the justice of the system rests entirely on proportional and consistent responses to criminal acts seek to bind the decisions very closely to the act and to leave little room for consideration of the offender's characteristics and predictions of his or her future conduct (von Hirsch, 1985). Those who think that the overall

justice of the system requires some consideration of the character and future conduct of the offender will leave more room for these aspects to be considered in criminal justice decision making (Monahan, 1982). But no one thinks that the nature of the offense is irrelevant to the decisions of criminal justice officials.

Obviously, the offenses can vary along many dimensions. One is the gravity of the offense. It can be murder or petit larceny. It can involve serious injury to victims, threats of serious injury, or only minor property losses. A second is the certainty with which the criminal justice system has established that an offense has occurred and that a particular offender did it. This connection may have been definitively established through a criminal conviction or persuasively alleged in a criminal indictment or simply suspected as a guide to investigative activity. In general, the more serious the offense and the stronger the established connection to an offender, the greater the license criminal justice officials have to impose liabilities on offenders. Whether this includes a greater right to make and use predictions about future criminal conduct, however, remains unclear.

The Offender

The offender is also central to predictions in the criminal justice system. Without him, there is little of consequence for criminal justice officials to decide. It is most natural to think of the offender as someone who has just been convicted and is awaiting sentencing. But the offender could be at earlier stages of criminal justice system processing. He could be someone who has been indicted and is waiting to have bail set. He could be someone who has a strong evidentiary case against him and is awaiting a formal charge and indictment. Or, he could be a

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From the point of view of the criminal justice system, the most important attribute of the offender is the connection to a current offense. That is what makes him the subject of criminal justice action. But the offender has other characteristics as well. One of the most important is a criminal record. The criminal record may be nonexistent, or it may be quite extensive; it may involve only minor offenses or may include serious offenses; it may be a record of nothing more than arrests, or it may include convictions; it may be an adult record, or it may include crimes committed as a juvenile. In addition to a criminal record, the offender has such other characteristics as levels of alcohol and drug use, neighborhood ties, employment status and experience, age, race, religion, political beliefs, favorite foods, and tastes in music. These characteristics differ from one another in several ways. One concerns their moral and legal status. Some characteristics, such as prior criminal conduct and current illegal drug use, are themselves crimes and therefore of direct interest to the criminal justice system. Others, such as race, religion, and political beliefs, are the opposite: they are specially protected against being used by criminal justice officials in making decisions. Some characteristics, such as prior crimes, drug use, and perhaps employment, are thought to be under the control of the offenders and therefore expressions of their inclinations and values. Other characteristics, such as age or race, are not under the control of the offenders and consequently are of little moral significance: they cannot be expressions of a person's character although they might be good predictors of future conduct.

These offender characteristics also differ from one another in terms of how accurately they can be determined for

individuals and how conveniently they can be observed. Some characteristics, such as employment history, are relatively objective and can be established and verified for individuals through intuitively obvious, if laborious, methods. Others, such as psychopathic tendencies, may be relatively objective, but the methods used to validate them are special and arcane. Still others, such as community ties, are quite subjective and hard to establish, although one can develop operational measures of an intangible characteristic that can be objectively determined. Similarly, some of the characteristics of offenders are already known and recorded in files available to criminal justice agencies. Some can be inexpensively learned because they are recorded elsewhere or because the information is not carefully guarded by the defendant. But some characteristics can only be discovered through expensive and intrusive investigative efforts.

A Predictive Rule

The characteristics of offenders are important for they form the basis for all predictions. All predictive tests have the same structural form: if an offender has a certain specified set of characteristics, that offender is predicted to be more (or less) likely to engage in future criminal activity than offenders with different characteristics. Any particular predictive rule has certain properties that are normatively significant.

One important feature of the predictive rule is exactly which characteristics of offenders are selected to serve as predictors. As noted above, the characteristics included in the test may be acts over which the individual has a great deal of control and are themselves criminal, or they can be characteristics over which the individual has no control and, far from

being criminal, are given special protection. The characteristics included in the test may be more or less convenient and accurate to observe for individual offenders. Somewhat less obviously significant is the fact that the test can include many or few characteristics. The more characteristics included, the greater the opportunity to accommodate important individual differences among offenders. But the more characteristics, the more complicated the rule, and the greater the chance of errors.

Beyond the properties of the set of characteristics incorporated in the test, the test has other features that are normatively significant. It is more or less accurate in terms of its capacity to identify all those offenders who will, in fact, commit crimes in the future and to exclude those who will, in fact, not commit crimes in the future. The test may be designed to identify small (and therefore more unusual) segments of the offending population, or it may be less discriminating. The validity of the test may be based on common sense, elaborate statistical investigations, or clinical theories and judgments. The test can be explicitly promulgated or implicitly used. It can be authorized by a legislature, established through administrative guidelines, or sanctioned by common professional practice.

A Consequential Decision

In addition to an offense, an offender, and a predictive rule, the consequential use of prediction in the criminal justice system requires that an action be taken by a criminal justice official with respect to the offender. A sentence must be imposed; bail must be set; a plea bargain offered; or an allegation pursued with more or less zeal by prosecutors and police. The consequences of these decisions register in three quite different domains through different causal and evalua-

tive systems. The decisions obviously affect the rights and liberty interests of the individuals who are affected. These may be either enhanced or diminished by the effects of predictions. The decisions also affect overall levels of crime in the community through the mechanisms of deterrence (both specific and general), incapacitation, and rehabilitation. And, finally, the decisions affect the community's overall perception that justice is being done in terms of striking the right balance between the community's interests in security and the offender's interests in freedom, and between the desire to treat cases with consistency and at the same time acknowledge important particular differences.

The Central Ethical Issues

The central ethical question raised by the use of predictive rules in the criminal justice system is whether an offender may be exposed to additional criminal liabilities in the form of a longer sentence, higher bail, more determined prosecution, or closer police scrutiny because of characteristics indicating that he is more likely than others to commit crimes in the future. A less fundamental but equally important question given the widespread current use of predictions is what kinds of predictions are better than others. These questions can be answered directly. But it seems that views about these questions are linked to much broader and more general notions of justice and of what constitutes a worthwhile improvement in the performance of the criminal justice system. It is as though the subject of prediction in the criminal justice system raises general moral connotations as well as specific normative issues. It is worth addressing these general ideas before examining closely the specific ethical issues raised by prediction lest the influence of the moral connotations be decisive but unexamined.

GENERAL NOTIONS OF JUSTICE AND STANDARDS OF CRIMINAL JUSTICE SYSTEM PERFORMANCE

Most normative discussions of the criminal law and the operations of the criminal justice system proceed on the basis of shared intuitions about the virtues of these social enterprises. The shared intuitions are captured in a few words that stand for whole clusters of more particular ideas.

Moral Intuitions of Criminal Justice

One key virtue of criminal justice is its "fairness." At the center of the concept of fairness are notions such as the following: that citizens should know in advance what actions will be punished and how alleged offenses will be investigated (Packer, 1968:80); that the system should be consistent, i.e., treat like cases alike (Hart, 1968a:36-37, 1968b:24-25; Packer, 1968:139-145; Winston, 1974:1-39; von Hirsch, 1976:77-83; N. Morris, 1982:179-209); that criminal liability for conduct should be distributed across possible acts according to the seriousness of the offense, not the social status or power of potential offenders (von Hirsch, 1976:77-83); that people should be held responsible for things they can control and not for things they cannot control (Hart, 1968a:158-185, esp. 174, 1968b:24-25); and that the actual operations of the system in imposing criminal liability should be unbiased with respect to race, social class, and other social variables (McNeely and Pope, 1981; Blumstein et al., 1983a:8, 13-21; Klepper et al., 1983:55-128; Petersilia, 1983).

At the edges, the concept of fairness shades into the concept of justice. Indeed, the concept of justice seems to incorporate all the particular ideas associated with fairness. However, while the concept of fairness seems to emphasize

the distribution of criminal liability through the society, the concept of justice seems equally concerned about the amount of criminal liability and the intrusiveness of the means used to impose it. In a free society the concept of justice implies restraint—a sense of proportion and frugality in using the coercive power and moral indignation associated with criminal sanctions (Packer, 1968:249-260). Thus, particular ideas central to the notion of justice are those that give citizens significant rights against the state and against those who accuse them: for example, the right of citizens to be free from unwarranted searches and seizures (McNamara, 1982:26-54); to confront their accusers in open trial (McNamara, 1982:169-177); and to have adequate time to prepare a defense (McNamara, 1982:214-230). By establishing such rights for individuals, society constrains the amount and nature of state power that can be exercised against individuals on behalf of the community.

To some, the notion of justice is not restricted to concern for the rights of defendants. Arguably, justice is equally concerned with protecting the moral standing of the law and with guaranteeing that those who deserve punishment receive it (van den Haag, 1975:24-50; Weinreb, 1979:5; Carrington, 1983:15-19). Sometimes this position is described as one that protects "victims' rights" as well as "offenders' rights" (Bedau, 1977; Reiff, 1979; Carrington, 1983:10-12). Insofar as the victim is interested in righting the wrong done through retribution, this is an appropriate characterization. The criminal justice system has many practical as well as moral reasons to accommodate the victim's interests in its proceedings (Greenwood, Chaiken, and Petersilia, 1977; Blumstein et al., 1983a:41). In our system of justice, however, it seems much more accurate to describe the obligation to administer just punishment as belong-

ing to the state rather than the victim. As Aeschylus portrays in *The Eumenides*, a great moment in Western history is the moment when the concept of justice changed from private vengeance to public retribution. In that moment the state took from victims the right to punish those who had offended against them in the interests of ensuring an accurate determination of guilt or innocence and fairness and moderation in the imposition of penalties.

In a free society the desire to mete out deserved punishment must be tempered. Punishments should fit crimes, not be excessive. The process of deciding whether a person is guilty or innocent should be sufficiently deliberate to prevent passions from overwhelming evidence. And the standard of proof should be set very high to ensure that those judged to be guilty are in fact guilty, even if that means that many guilty people are found innocent. It is all of these features that distinguish public justice in a democratic state from either private vengeance in primitive societies or totalitarianism. Still, it is important to keep in mind that like private vengeance, public justice has passion and moral indignation as key ingredients. Indeed, without these features, it is almost impossible to distinguish criminal sanctions from civil sanctions (von Hirsch, 1976:48; von Hirsch and Gottfredson, 1983-1984:34).

Standing somewhat apart from these traditional notions of fairness and justice is the notion that the system should be useful and effective as well as fair and just (Blumstein, Cohen, and Nagin, 1978). To most people, this means that the system should succeed in reducing crime and should do so at the lowest possible cost (Nagel and Neef, 1977; Blumstein, Cohen, and Nagin, 1978; Silberman, 1978; Andreano and Siegfried, 1980:411-426; Wilson, 1983b). Some would add reducing fear to the utilitarian purposes of the

criminal justice system (Moore et al., 1984:9-22, esp. 15-19). Most would also probably recognize the interests in fairness and justice as important constraints on the practical pursuit of reduced victimization and fear (Blumstein, Cohen, and Nagin, 1978; Sherman and Hawkins, 1981:106). And perhaps everyone would quickly agree that, to be effective, a criminal justice system must command the active support of the community, and that that, in turn, might depend on how fair and just it seemed (Weinreb, 1979:6-12; Andreano and Siegfried, 1980:85-92).

At the edges, an interest in an effective criminal justice system thus leads one back toward a system that imposes criminal sanctions with fairness and restraint. Nonetheless, most people still see an important distinction between a criminal justice system that is animated by a concern for justice and fairness and one that is preoccupied with effectiveness. Specifically, it seems that the interest in effectiveness elevates the community interest in security over the interest in protecting the rights of the accused, allows estimates of aggregate social consequences to guide decisions that profoundly affect individuals, and leaves more room for social science and technology to be used to enhance the efficiency or effectiveness of the system's operations, even at the cost of procedures honored by long tradition. All this makes the general idea of an effective criminal justice system quite different from one animated by justice and fairness.

Ethical Theory and Moral Intuitions About Criminal Justice

The different intuitions about the virtues of a criminal justice system in a free society correspond to important differences in modern systems of moral reasoning. Modern ethical theory establishes a sharp distinction between "deonto-

logical" and "utilitarian" philosophies (Frankena, 1973:12-60). The difference between them is that deontological theories assert that an act is right or wrong in itself, regardless of its consequences. Utilitarian theories, on the other hand, assert that acts can be judged to be good or bad only in terms of their consequences.

The moral intuitions that lie behind the concepts of fairness and justice seem closer to the spirit of deontological than to utilitarian reasoning. These intuitions see virtue in the criminal justice system insofar as it acts properly with respect to accused citizens and ignores the practical consequences of its actions both for the defendant and the broader community. The intuitions that prompt a commitment to effectiveness seem much more utilitarian in spirit. The concern for effectiveness finds the virtue of acts by the criminal justice system in terms of their consequences for the future of the offender and the future security of the community.

The link between moral intuitions about criminal justice and the different modes of ethical reasoning means that the normative standing of the different moral intuitions about criminal justice is inextricably linked to the general standing of these different modes of reasoning in ethical discourse. In general, it seems that the deontological systems have greater standing. Why this should be true remains unclear since philosophers have not as yet reached a decisive conclusion in favor of deontological systems. The dominance of deontological moral systems seems to reflect a general expectation, rooted in tradition, that ethical pronouncements should take the form of rules prescribing conduct rather than ends that must be pursued. This, in turn, may be based on the notion that rules honor God or human traditions more reliably than particular calculations, which

depend so heavily on the qualities of the individual calculator; or on a prudential judgment that reliance on rules would avoid many temptations and errors that would otherwise corrupt the particular calculations; or simply on the intellectual appeal of reasoning from principles rather than concrete instances. Whatever the reasons, the general preference for deontological systems makes it hard for utilitarian arguments to be taken seriously in ethical arguments. Particularly in the criminal justice system, where the stakes for individuals seem so high and where so much of the work involves the application of substantive rules to individual cases, utilitarian arguments seem a bit shabby.

The sharp distinction between deontological and utilitarian systems of reasoning is unfortunate, for the challenge facing those who guide the operations of the criminal justice system is to integrate the values and concerns of each system of thought. In principle, this should not be difficult since our moral intuitions about the criminal justice system commingle deontological and utilitarian principles. As we have seen, fairness and justice are often defended not simply as virtues in themselves, but also as qualities that enhance the overall effectiveness of the system by drawing broad support from the community. Similarly, one can argue that the notion that the criminal justice system should be effective and economical in the use of state power and money is not simply a shabby interest of the society, but a fundamental duty of those who guide, and operate within, criminal justice institutions. It might be possible, then, to have a criminal justice system that successfully integrates the particular values that are contained within and shared among our general moral intuitions.

The difficulty is that the schism between deontological and utilitarian sys-

tems may make it difficult for us to see when a successful integration has been achieved. The integration will always look a little too unprincipled to a deontologist and a little too ineffective to a utilitarian. And each will feel free to complain about the apparent corruption of the system viewed from his or her vantage point. There may be no strong philosophical voice to step forward and say that the successful integration represents a coherent view, because the successful integration will not fit wholly within either of the two systems of thought that have become familiar.

Standards of Criminal Justice System Performance

The general notions of fairness and justice, on the one hand, and economy and effectiveness, on the other, offer alternative conceptions of the directions in which improvements in criminal justice system performance might lie: i.e., toward more consistent treatment of offenders, toward a more refined balance of community and individual interests, or toward less use of the state's limited financial and moral authority to achieve the same amount of community security. They do not in themselves define tolerable levels of criminal justice performance in the pursuit of one or the other ideals. And yet the extent to which the current system realizes any of these idealized notions may be as important in judging the overall quality of the system as which ideal it is approximating.

The most demanding standard for the criminal justice system is that it be an exact expression of an ideal system: that it be perfectly fair, perfectly just, or perfectly economical. Although no one would really hold any human institution to these exalted standards, when one is talking about the criminal justice system, one is tempted to set the minimal stan-

dards of performance very high and to be impatient with mere improvements in a basically corrupt system. The reason is that the decisions of the criminal justice system are so consequential for individuals (and for the overall character of the community) that the obligation to express the community's highest ideals is very strong. This is particularly true when one is talking about fairness and justice, for these qualities do not seem to exist in degrees. In common parlance, people conclude that the system is tolerably fair and just, or it is not. And any system of criminal justice that is unfair or unjust is intolerable. So, our moral intuitions push us toward idealism in setting standards for criminal justice, and particularly so in the areas of fairness and justice.

A different standard of justice would be whether the operations of the criminal justice system meet constitutional requirements. Often, this standard is confused with the first standard because many observers of the criminal justice system would like to believe that their idealized notions of justice are not only sanctioned by the Constitution but also required by it. Moreover, the room to make this claim often exists because the Supreme Court decisions that establish constitutional principles are rarer and less definitive than is necessary to banish ambiguity about constitutional issues. Nonetheless, one can distinguish what is clearly unconstitutional from something that is conceivably acceptable, and this provides a second standard of criminal justice performance.

A third standard is simply whether a proposed policy or program constitutes an improvement in one or another dimension of performance compared with current operations. Inevitably, all real systems of justice fall short of idealized notions. They may also sometimes fall short of constitutional standards. Consequently, it may be important to know

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whether proposed changes in criminal justice system operations are moving us toward or away from an idealized concept of the criminal justice system. If a proposal promises to smooth the rough justice that is actually meted out in the system even a little bit, it may be worth adopting even though the proposal fails to usher in a heretofore unattainable ideal.

To a degree, these standards form a hierarchy for evaluating proposed changes in criminal justice policy. The most demanding is whether the proposed change is the final step in establishing an ideal system of justice. Much less demanding is that the proposed change further the aims expressed in the Constitution. Less demanding still is that the proposed change be an improvement over current practices.

These different standards of what constitutes a valuable or worthwhile improvement in criminal justice operations are as important to keep in mind as the different intuitions about the substantive values that should guide the criminal justice system, for they, too, become part of our discussions about whether predictions are tolerable in the criminal justice system. There are many proposals that might enhance the justice, fairness, and efficiency of the criminal justice system but that could be rejected because they fail to establish perfect justice. The crucial question is whether such proposals would be worth adopting.

Once again, this important issue is affected by the difference between deontological and utilitarian systems of reasoning. In principle, both schools have their "idealists" and their "realists." But the spirit of deontological systems is more given to idealism and exacting standards. The spirit of utilitarianism, on the other hand, is quite tolerant of practical realities and keenly interested in marginal improvements wherever they can be made. This means that those who want to

hold the moral high ground by sticking to the spirit of deontological systems will tend to establish very high standards across the board. Those who are interested in encouraging small improvements in current operations might well be tarred with the brush of utilitarianism, even if the improvements they seek are in the areas of fairness and justice.

My own position is that we all have a fundamental duty to encourage improvements in criminal justice system operations in the directions of justice, fairness, and efficiency and to do so regardless of how large or small the changes. That may seem far too utilitarian, or realistic, or pragmatic to have much standing in moral discourse. And it is certainly true that this position would not only countenance but also enthusiastically embrace many proposals that seem shabby against the backdrop of an idealized system. But the weight of the duty to make improvements where they can be found can be measured by asking what we would think of a criminal justice official who knowingly abandoned some opportunity to improve the fairness, justice, or efficiency of the system without significant loss to society.

ETHICAL ISSUES IN PREDICTION IN THE CRIMINAL JUSTICE SYSTEM

The most fundamental objection to the use of prediction in the criminal justice system is that it is unjust and that any explicit or implicit use of prediction disgraces our system of justice (Dershowitz, 1973:1277-1324; N. Morris, 1974:62-73; N. Morris and Miller, 1985:65). This position is held by those who think that the most fundamental quality of the criminal justice system is justice (rather than effectiveness) and that a just system is one that holds people accountable only for acts committed in the past. This position has come to be called the "retributivist" or

"just deserts" position (von Hirsch, 1976: 124-127; von Hirsch and Gottfredson, 1983-1984:34-37; von Hirsch, 1984b: 175-194, esp. 179).

Retributivist Attacks on Prediction

A second objection to predictions of criminal activity is that they are inaccurate and that inaccuracy results in injustice to those offenders who are mistakenly predicted to commit crimes in the future and are thereby exposed to unwarranted penalties and liabilities within the criminal justice system (N. Morris, 1974:62-73; von Hirsch, 1976:21-36; N. Morris and Miller, 1985:24-36; von Hirsch and Gottfredson, 1983-1984:177). This view is often embraced also by retributivists, since it reflects their general suspicion of the reliability of social science technology, is consistent with their strong concern for individual justice for criminal offenders, and, in any case, offers an additional line of attack on proposals to use predictive methods more extensively. Nonetheless, this objection can be sharply distinguished from the first objection. The difference is that this second view does not say that it would be wrong to impose additional liabilities on those predicted to commit offenses—only that it would be wrong to do this inaccurately. "False positives" are the problem—not liability being placed on individuals for acts in the future.

The first and second objections would effectively rule out the current use of prediction in the criminal justice system: the first because prediction is ruled out absolutely; the second because current predictive techniques cannot measure up to required levels of accuracy. Consequently, unless these objections can be overcome, the discussion of prediction is at an end.

A third objection is less fundamental because it focuses on the characteristics

included in the predictive rule rather than the appropriateness of prediction in general or the requirement that the predictive rule meet a high standard of accuracy to prevent injustice to individuals. By this standard, only certain characteristics of offenses and offenders may be included in the predictive test. Appropriate characteristics are those that the individual controls and that themselves reflect criminal conduct (such as prior offending and drug abuse). These are appropriate because they establish "morally relevant differences" among offenders (von Hirsch, 1976:212-213, 1981b). Inappropriate characteristics are those over which the individual has only limited or no control, that are not in themselves criminal conduct, and that are correlated with deprived social status, such as employment status, race, or poverty. Also inappropriate are such variables as religion or political views. Indeed, it may be so important that the criminal justice system avoid any taint of bias with respect to race, income, religion, or political views that it not only resist using these variables explicitly but also avoid variables that are correlated with these especially sensitive variables (N. Morris and Miller, 1985).

At the extremes, concern about the characteristics incorporated in the predictive tests may make it impossible to construct any useful and decent test. This is particularly true if the tests must meet a high standard of accuracy and be neutral with respect to sensitive variables on a *de facto* as well as a *de jure* basis. So, scruples about the characteristics used in predictive tests may not only reduce the practical value of the tests but also rule them out completely on normative grounds (Moore et al., 1984:70-79).

Thus, from a retributivist position, the whole notion of predictions and particularly predictions that establish differences among individuals on the basis of morally irrelevant characteristics is fun-

damentally objectionable. Moreover, the objections work together. Restrictions on the characteristics to be used in tests render the tests less accurate. Less accurate tests exacerbate the problem of false positives. Both together create more injustice and reduce the practical value of the proposals. And besides, it is always wrong to have any criminal liability attached to predictions of future conduct.

Justifications from the "Modified Just Deserts" Position

The common attack on the "retributivist" position objects to its exclusive concern for a particular vision of justice and its idealism (Walker, 1982:276-289). Essentially, the argument is that the retributivist position is fine in theory, but wrong in practice (N. Morris and Miller, 1985:2). Although it is commonsensical to base a system of justice on past acts, it also makes sense to exploit opportunities to control crime more effectively when they come along. Moreover, since the community expects the system to be effective, and since criminal justice officials will respond to this demand by making predictions, it is in the interests of justice to make sure that the predictions are made as accurately and decently as possible. In effect, while it might be wrong in theory to use predictions in the criminal justice system, the system can be made to perform more effectively and more fairly than it does by explicitly introducing and managing predictive techniques (N. Morris and Miller, 1985). Although this hardly sounds like an ethical argument for the use of prediction, one can reasonably argue that we have an obligation to make improvements in current performance even if the improvements do not usher in the ideal.

This position—which has been called "modified just deserts"—honors retributive principles and keeps them in the

dominant position in its conception of the virtues of criminal justice policies, but it also leaves some room for utilitarian concerns and practical opportunities. And this, in turn, allows room for some kinds of prediction as part of criminal justice system operations. But the problem of inaccuracy in predictions and the inevitable injustice to individuals wrongly predicted to commit offenses in the future remain.

To this difficulty, those who take a "modified just deserts" position seem to have two answers. One is that predictions of future criminality should be the basis for leniency and mercy but not for enhanced punishment (N. Morris, 1974:75, 1982:179-209, esp. 203). Benign predictions can mitigate, but adverse predictions should not aggravate, criminal penalties. Thus, no offender's liability would be increased by the use of prediction. This position not only alleviates concerns that offenders might be unjustly punished but also ensures the aggregate consequence that the scope of social control would not be widened by the broader use of predictions.

Unfortunately, this answer creates other problems. To the extent that justice establishes an affirmative obligation to punish criminal acts, being merciful to those who are predicted to be safe seems no more just than being harsh to those predicted to be dangerous. Obviously, the frailties of human institutions and judgments always counsel one to err on the side of leniency when moral judgments are being made and penalties exacted, and this is what generally makes mercy a virtue (N. Morris, 1974:52). The point, however, is not that leniency and mercy are not virtues, but that they must be justified in individual cases, and there is no guarantee that the characteristics of the offense or offender that might incline one toward mercy are those that distinguish those who will be safe in the future (Moore et al., 1984:101).

Similarly, granting mercy in individual cases on the basis of predictions of future criminal activity can create problems of equity and fairness. In principle, there is no problem if our notion of just penalties remains precise and fixed, and if the bases for granting mercy are well established. But if (a) our idea of just penalties is based on current average practices, (b) we think of penalties above the average practice as being unfair, and (c) there are many people in the system who seem to deserve mercy, many offenders who receive penalties that are just when compared with the initial standard of justice will appear to be unjustly treated because they received penalties that were above the average. We may try to explain why they did not qualify for mercy but many others did and, in any case, why their punishment was deserved. But this argument still leaves them with the question of "Why me?"—a question that has some force given the apparent inequity. So, the idea of using predictive techniques to lessen but not enhance punishments may alleviate the concern that individual offenders will be excessively punished, but it increases concerns that some of those who deserve punishment will not receive it and that defendants who have committed similar offenses might be treated differently.

The second answer to the problem of false positives offered by those who hold a "modified just deserts" position is that most people have misconstrued the nature of prediction. In this view, predicting that a person is dangerous does not necessarily imply that a person will commit a criminal act; it implies only that a criminal act is more likely (Floud and Young, 1981:48–49; N. Morris and Miller, 1985:24–28). Therefore, if an offender predicted to be dangerous does not, in fact, commit an offense, the prediction was not necessarily wrong. In this view: "a prediction of dangerousness . . . is the

statement of a condition (membership in a defined group with . . . certain attributes) and *not the prediction of a result* (of future violent acts in each individual case)" (N. Morris and Miller, 1985:24). Thus, the crucial factual question in making predictions is not whether a person will commit offenses but whether that person does or does not have the attributes that qualify for membership in a particularly high-risk or particularly low-risk group. Since that factual question can typically be answered with great accuracy, there are very few errors in "prediction."

This explanation does away with worries about mistaken predictions but raises a new question: namely, why people who unambiguously have the attributes that make them members of a group predicted to be active offenders in the future should be exposed to additional penalties and liabilities from the criminal justice system. The answer to that is sometimes cast in the language of "just deserts." As Floud and Young (1981:48) observe: "the fact that if we were to set (those offenders predicted to be dangerous) at liberty, only half of those we are at any time detaining as dangerous would do further serious harm, does not mean that the other half are all in this sense *innocent* [emphasis added]." They have the qualities that make them risky and dangerous in the same sense that all unexploded bombs are dangerous even though most never explode (N. Morris and Miller, 1985:25; von Hirsch, 1985:280). And it is those qualities that justify different treatment in both moral and pragmatic terms. While this, at first, seems appealing, and while it is not hard to imagine the practical interests we have in treating such offenders differently, it is difficult to answer the question of exactly why they are not innocent. To put the matter differently, it is hard to say of exactly what offense such offenders are guilty.

To avoid this problem, the argument for treating differently offenders who have qualities that place them in high-risk groups quickly shifts to practical interests. Such offenders are risks that the society must bear. The crucial question is who will bear the costs of that risk: the offenders who must give up their freedom to protect the society or the society that must live with the risk of having dangerous people at liberty (N. Morris and Miller, 1985:24-36, esp. 28). This is considered a policy problem to be resolved by legislatures balancing social interests rather than either a constitutional question or a matter of individual justice to be decided by judges, prosecutors, or police (N. Morris and Miller, 1985:35). Once the legislature strikes the balance and defines the groups, the system can implement the policies in good conscience.

While this argument has some aspects that make it seem a principled position, the fact of the matter is that this argument pushes the justification of prediction far from the retributive perspective and puts it at the center of utilitarian concerns. In essence, the argument is the following: There is a social problem to be managed that consists of people who are inclined, or at least willing, to hurt or threaten other citizens or to take their property. This makes social life unpleasant. The society has a right to take action to protect itself from the risks. Because the risks come from other citizens, however, efforts to manage the risks must take account of their rights and interests as well. One way to accomplish that goal is to limit social control to those who have qualities that indicate they are much greater risks than others. To protect the rights and interests of those who represent greater risks, it is crucial that there be an evidentiary hearing on whether the offenders do or do not have the requisite qualities and that the scope of the state's penalties and controls be commensurate

with the magnitude of the risks such offenders represent. Ideally, legislatures rather than individual administrative officials should balance these competing interests. Obviously, this position simply drapes the utilitarian argument for prediction in the clothing of legislatively balanced risks and due process protections for those who are about to be exposed to enhanced criminal liabilities on largely utilitarian grounds.

Justifications from a Utilitarian Perspective

The most direct counterargument to retributive objections is simply to assert not only the relevance but also the dominance of utilitarian concerns in the design of the criminal justice system. In this conception the criminal justice system has not only an interest but also an affirmative obligation to use whatever is available to reduce crime and promote security (Blumstein, Cohen, and Nagin, 1978:3-14). Because it is important to enlist the support of the community, and the community is as worried about excessive state power as about criminal offenders, it is prudent for the criminal justice system to be restrained, to protect rights to due process, and to operate consistently with the community's moral interests in a just and decent criminal justice system. But the touchstone for all innovations in the criminal justice system is to enhance effectiveness in reducing crime and promoting security.

In this utilitarian conception the concern about punishing people for predicted future offenses disappears entirely—unless the means seem so grossly unjust and so bizarre as to be repugnant to the community. Similarly, the concern for “false positives” fades, but does not entirely disappear. It stays partly because even the most pragmatic utilitarian might see some moral virtue in punishing only

those who deserve it. Besides, economy in the use of both the moral and financial resources of the government would be considered a virtue by utilitarians, and there is no reason to waste those resources on people who are unlikely to commit offenses in any case. So, if one were to adopt a predominantly utilitarian position, the most fundamental objection to making criminal justice system actions contingent on predictions of future criminal conduct would be overcome. Some scruples might remain about the characteristics used in making predictions. For example, race, religion, and political views might be excluded to enhance other social purposes. But much greater room would be created for the use of predictions.

VIRTUES OF PREDICTIVE METHODS AND RULES

So far, the basic objections to the use of predictive rules in the criminal justice system have been examined from the vantage points of retributive, modified just deserts, and utilitarian ethical positions. As one moves through these different positions, more scope for prediction is created largely because concerns for "effectiveness" and some aspects of "fairness" gain in relative importance to concern for "justice." This suggests that one way of deciding whether prediction is ethically acceptable is to decide first on one's general ethical position and then see whether it allows prediction.

A slightly different way of thinking about the ethical issues raised by prediction is simply to imagine what the virtues of predictive methods might be. Obviously, if one is a strict retributivist, this exercise holds little interest since even the most virtuous system of prediction would be ruled out as unjust. Similarly, if one is a basic utilitarian, the exercise

holds little interest since the best system must be the one that produces the greatest reduction in crime for the smallest use of the moral authority and financial resources of the state. But if one is a practically minded retributivist or a principled utilitarian, identifying the virtues of a system of prediction has some appeal because it not only identifies the qualities that would make the system acceptable but also indicates where and how improvements might be made.

Attractive Qualities of Predictive Rules

In thinking about the qualities that make systems of prediction more or less acceptable or virtuous, it is worth distinguishing features of the predictive rule itself and the circumstances under which the rule is applied. At least five important qualities of the predictive test or rule can be examined.

Focus of the Predictive Test

The first important question focuses on the behavior that the rule is trying to predict and the distinctiveness of the population that is being singled out by the rule when it works well. In general the more important the behavior that is being predicted and the smaller and more distinctive the population that is being singled out, the more appropriate seems the use of the predictive rule.

This principle applies in both retributive and utilitarian ethical systems. In the retributive conception a tolerable idea might be to single out the most wicked offenders (those who are most callous and show the fewest signs of remorse) and expose them to special punishments. Moreover, this seems much more appropriate if the rule singles out only a few who are outliers in the distribution of all

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offenders, rather than a substantial minority of offenders who are much closer to the center of the distribution in terms of "wickedness." Similarly, in a utilitarian framework the value of a predictive rule goes up if it isolates the worst kinds of criminal offenses and if it identifies the worst 5 to 10 percent of offenders, rather than more ordinary offenses and offenders.

The narrow focus is desirable in both systems partly as a matter of economy in the utilization of the state's limited moral and financial capacity to punish and partly because the more serious the conduct and the smaller the population that is identified, the more plausible the argument that the offenders are at least quantitatively and perhaps qualitatively different from ordinary offenders and therefore deserving of special treatment. Thus, a narrow, discriminating focus is to be preferred on both retributive and utilitarian grounds to predictive rules that place more offenders in special categories.

Accuracy of the Predictive Test

A second important feature of the predictive rule is its accuracy. As noted earlier, two quite different notions of accuracy exist. One is the idea that the rule does in fact predict who will commit serious offenses in the future: the actual conduct of the offenders determines the truth or falsity of the prediction. The second is that an accurate assessment is made of whether an offender does or does not have the characteristics that qualify for membership in a group predicted to engage in unusually high levels of criminal activity. In this conception the actual conduct of the offenders is not considered relevant: they are "dangerous" if they have the proper characteristics. The first conception of accuracy is central to some notions of "justice" and to all utilitarian

concerns. The second is fundamental to notions of justice as fairness.

This discussion of accuracy is limited to the first notion: that the rule predicts accurately who will commit serious offenses at high rates. Obviously, accuracy in a predictive rule is a virtue in retributive systems because it minimizes the problem of exposing people who are not in fact dangerous to whatever special liabilities attach to this designation. It is a virtue in utilitarian systems because it economizes on the use of the state's resources in producing crime-reduction benefits.

The difficulties with this concept arise because a predictive rule can be inaccurate in two ways: it can incorrectly identify as dangerous offenders who are not dangerous (so-called "false positives"), and it can incorrectly identify offenders who are in fact dangerous as not dangerous (so-called "false negatives"). Liberal democratic societies, acutely aware of the frailties of human institutions, have typically treated "false positives" as much worse than "false negatives." So, a test that is attractive is not only one that makes few errors of both types but also one that distributes the errors in an appropriate way—i.e., makes many fewer errors of inclusion in the category of dangerous offenders than of exclusion. People's views differ about the proper tradeoffs between reducing errors of all types and reducing errors of one type at the expense of increasing the total number of errors of both types. So do their views about the rates at which they will trade one kind of error for the other in a world in which the total number of errors of both kinds remains constant. But everyone agrees on the directions in which improvements lie: fewer errors are better than more; errors of inclusion are worse than errors of exclusion when the offender is to be given special penalties or

control by virtue of inclusion in a group predicted to be dangerous.

Basis of the Predictive Rule

A third important quality of the predictive rule is the basis on which it is established. The standard distinctions in this area are made between rules established on the basis of "statistical" or "actuarial" methods and those established on the basis of "clinical" methods (Monahan, 1981:45-93). Norval Morris and Marc Miller (1985:18-19) have added a third kind of prediction, which they call "anamnestic," that is, a predictive rule is developed for an individual on the notion that individual behavior is repetitive and thus becomes predictable to those who know the individual very well without necessarily being generalizable to others.

At first it might seem odd that the basis of a predictive rule would hold much ethical or normative interest. Of course, we might assume some connection between the basis of the rule and its accuracy. And, to the extent that we thought accuracy was important and had views about which basis produced the most accurate rules, the basis of the rule would assume normative significance. But the significance would be exhausted by an examination of the rule's accuracy regardless of its basis. Yet many commentators seem to attach significance to the basis of the rule *beyond its implications for the accuracy of prediction* (Monahan, 1981:95-101).

On reflection, this concern seems to be tied to three features of the predictive rule that are linked to moral intuitions about the just construction of such rules. One notion is that, if predictions are to be made, they should emerge from a unique consideration and understanding of the individual (N. Morris and Miller, 1985:20). This honors the principle of individualized justice (but it sometimes jeopardizes, or at least complicates, the principle of like cases being treated alike).

By this standard, "anamnestic" and "clinical" predictions, both of which are based on detailed case information, might be preferred to "statistical" methods, which concern aggregates and abstract from individual circumstance.

A second notion is that it should be possible to state the predictive rule simply and to have it conform with ordinary common sense. This is consistent with aspirations for "fairness" in the system and for mobilizing community support for the operations of the criminal justice system. By this standard, "anamnestic" rules are once again dominant, "actuarial" rules are close behind (depending on how commonsensical they appear), and "clinical" rules appear the least attractive.

The third notion—closely related to the second—is that the development and interpretation of the rules should minimize the use of specialized professionals. This is primarily to protect the connection of the criminal justice system to the community and to tradition but also perhaps to maintain the professional dominance of lawyers over other professionals in the criminal justice system. By this standard, anamnestic predictions once again seem the best; actuarial and clinical predictions are far behind because both involve arcane methods and different kinds of professionals.

So, the basis of predictive rules seems to be important, independent of their prospects for accuracy. When all characteristics associated with the basis of rules are considered, most commentators seem to prefer statistical methods (Meehl, 1954; Floud and Young, 1981:26; Monahan, 1981:97-98; N. Morris and Miller, 1985:20). Rules established by such methods have the virtues of calibrated accuracy, simplicity of form, and consistency of application. They have the liability

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ities of being indifferent to most individual characteristics (which is the opposite side of the coin to simplicity), of being rooted in aggregate rather than individual experience, and of engaging unfamiliar techniques. Anamnestic rules, on the other hand, have the virtues of being rooted in individual experience, responsive to individual circumstances, and commonsensical. They have the liabilities of unproven accuracy and uneven application. Clinical rules have the virtue of being responsive to individual circumstance and the liabilities of being inaccurate, of being complicated to state and to apply, and of surrendering some of the powers of the criminal justice system to a (suspect) group of professionals (Stone, 1975).

Characteristics Used to Make Predictions

A fourth quality of predictive rules that bears on their fairness, justice, or efficacy is the character of the variables that are used to assign people to groups and to make predictions. This point has already been discussed. From a retributive perspective, the only appropriate variables are those that an individual can control and are themselves reflective of criminal conduct—although not necessarily the most serious forms of criminal conduct. From a utilitarian perspective, variables are appropriate to include if they are successful in predicting criminal conduct. From a mixed perspective, the challenge is to balance interests in having the characteristics used in the test be just and in predicting reliably.

There is some consensus about what variables may properly be included. Everyone agrees that the seriousness of the current offense is proper to consider in sentencing (N. Morris, 1974:73; von Hirsch, 1976: Chapters 8 and 9; Blumstein et al., 1983a:11-12, 83-84). The

main reason is that since it is the offense that justifies the punishment, the seriousness of the offense must determine the seriousness of the punishment. The seriousness of the offense is often judged not only on the objective harm done by the offender, however, but also on the state of mind of the offender (Hart, 1968b:113-135; von Hirsch, 1976:80). If the violence was particularly wanton or if the offender behaved very recklessly with respect to life and property, the penalty (and perhaps future suspicion) will be greater than if the offense was more moderate (Vera Institute of Justice, 1977). In short, the offense itself may indicate the dangerousness of the offender as well as produce the objective harm to victims that justifies intervention by the state.

Nearly everyone also agrees that the adult record of the offender may properly be included (von Hirsch, 1976:84-94, 1981a). The only people who disagree with this position are the most strict retributivists, who think the right (and the obligation) to punish is tied strictly to acts and that punishment is meted out to balance the wrongs done. In their view each act deserves a discrete penalty and to enhance the penalty for a third or fourth offense is to be unjust (von Hirsch, 1976:172; Fletcher, 1978:463-466; Singer, 1979:67-74). Other retributivists think that it might be just to enhance penalties for those with criminal records not because criminal records necessarily predict well but because they reveal the offender as unusually persistent and therefore unusually deserving of punishment (von Hirsch, 1976:84-94). Thus, while these reasons for considering criminal record are different from those held by the "modified retributivists" and the "utilitarians," many retributivists would allow criminal record to influence the extent of punishment and control asserted by the system. The utilitarians approve of the use of criminal record be-

cause it is correlated with future criminal offending (Monahan, 1981:104-105). And the "modified retributivists" accept the idea because this variable fits within the principle that the variables used to predict should be under the control of the offender and consist of conduct that is itself criminal (Monahan, 1981:104-105; N. Morris and Miller, 1985).

Virtually everyone but the hardest-core utilitarians also agree that there are some variables that should clearly be excluded from any predictive test. Such variables would be those that define groups that have special protection under the Constitution, such as religious groups, political organizations, and groups that have historically been the object of discrimination (e.g., racial groups and, perhaps, age groups). It is quite clear that the *de jure* use of characteristics such as religion, political beliefs, and race are ruled out (Wilson, 1983b:158). It is more controversial whether to countenance the use of variables that might themselves be proper but are sufficiently correlated with other characteristics to result in *de facto* discrimination if utilized (Moore et al., 1984:73). At any rate, everyone agrees that the characteristics used in predictive tests should be as far removed from any taint of political, cultural, or racial bias as possible.

These points mark out areas of agreement. The field of contention is wider, however. Some of the disagreement focuses on the degree of certainty one must have about whether an offender actually has a certain attribute to be able to use it in making predictions. This arises most sharply and obviously in the use of criminal record; the issue is whether the predictive test should be restricted to convictions or whether it might also include indictments and arrests. There is a strong argument for relying only on convictions: since they are the only criminal acts that have been confidently attributed to an

offender, they are the only acts that could justify any additional penalty or control. The argument for allowing indictments and convictions is weaker and relies much more heavily on a utilitarian justification: since indictments and arrests can only be made on the basis of enough evidence to establish "probable cause" to believe that an offense occurred and that the particular suspect committed the offense, since inclusion of information on indictments and arrests seems to improve the accuracy of predictions of future criminal activity, and since this information is already widely used in the criminal justice system, it is tolerably just to use this information. Indeed, it may be much better to rely on indictments and arrests, which have the virtues of having some relationship to criminal conduct and of being recorded relatively accurately, than to rely on characteristics (e.g., drug use or employment status) that do not necessarily reflect serious criminal conduct, are unreliably measured, and may be only imperfectly under the control of the offender.

This raises the second main area of disagreement: how close to criminal conduct must the behavior be and how confident must one be that the behavior was under the control of the individual (Hart, 1968b:174; Underwood, 1979:1432-1447). These issues arise most directly when we consider the appropriateness of incorporating variables such as drug use and employment status. Drug use seems closer to acceptability than employment status because it is closer to criminal conduct and much more under the control of the individual than employment status. But one can reasonably argue that drug use in itself is only criminal by virtue of laws that make it so; that many drug users have lost control over their use; and that, in any case, it is hard to measure accurately for individuals (Wish et al., 1981). Hence, it would be unjust to make levels

of punishment conditional on drug use. If this is accepted for the sake of excluding use of the variable, there is nothing to be gained, being unemployed is certainly a virtue to which people may have resorted to obtain this status (although it denies opportunities for the kind of investments in education that will be qualified

Perhaps the disagreement in the criminal records. On one perspective, a judge's perspective, offenses seems to be a cause it is part of a pattern indicating persistence. On the other hand, we might view offenses as less serious than offenses of intent and of offenses (Institute of Medicine, 1977:1). More rationalized this criminal response in juvenile courts, with "guilty" of specific offenses find them "delinquent," and do not use formal systems of punishment deliberately kept stigmatization a Judicial Administration. Zimring, 1978:4. Juvenile offenses are under the control of the offender; they are measured by the courts; they are unjust and unduly predictive tests.

But there is an issue that is of public interests and of social research in offending peak for ages of 18 and 20 (Wish et al., 1983b). More

of punishment and supervision conditional on drug use. And, if this argument is accepted for drug use, it would also exclude use of employment status—for there is nothing remotely criminal about being unemployed (although it is certainly a virtue to be employed) and people may have relatively little control over this status (although there may be opportunities for them to work or to make investments in themselves so that they will be qualified for employment).

Perhaps the most interesting area of disagreement involves the use of juvenile records. On one hand, from a retributive perspective, a juvenile record of criminal offenses seems appropriate to use because it is part of a criminal record indicating persistent criminal activity. On the other hand, we tend to view juvenile offenses as less under the control of the offenders—and therefore less indicative of intent and character—than adult offenses (Institute for Judicial Administration, 1977:1). Moreover, we have institutionalized this conception of diminished criminal responsibility by establishing juvenile courts, which do not find juveniles “guilty” of specific offenses, but instead find them “delinquent” or “nondelinquent,” and do so through relatively informal systems in which records are deliberately kept spare to avoid future stigmatization and labeling (Institute for Judicial Administration, 1977:250–252; Zimring, 1978:46–49, 66–69). Since juvenile offenses are conceived to be less under the control of individuals and since they are measured imperfectly, it would be unjust and unfair to use them in predictive tests.

But there is an additional part of this issue that is emphasized by utilitarian interests and concerns. Much criminological research indicates that rates of offending peak for individuals between the ages of 18 and 25 (Collins, 1978; Moore et al., 1983b). Moreover, those who are very

active and violent offenders in this period tend to have accumulated serious juvenile records (Moore et al., 1983b). Hence, if juvenile records were used as part of the predictive tests, the tests would identify the most dangerous offenders not only more accurately but also *earlier* than they otherwise would be. In fact, they could be identified during their peak years of offending. If, on the other hand, juvenile records are excluded from the predictive tests, the system will identify people as dangerous offenders less accurately and later in the individual careers of the offenders. This means that some important crime-control potential is lost (Boland and Wilson, 1978:22–35).

As in other areas of normative debate, the question of which variables are proper to use in predictive tests comes down to the balance between retributive and utilitarian principles. It seems clear that current offense and prior adult convictions can be used. It also seems clear that race, political views, and religious beliefs may not properly be used. After that, a great deal is contested. The Harvard Project on Dangerous Offenders concluded that indictments for adult offenses could properly be included since they did represent evidence of criminal conduct and were routinely used in sentencing anyway but that employment status and history should not be included (Moore et al., 1983a:132, 1984:74–75).

The Harvard project also concluded that juvenile records of serious criminal offenses could be included if the offender committed an additional serious offense shortly after graduating from the juvenile system (Moore et al., 1983b:324–327, 1984:173–176). This position was justified with both a retributive and a utilitarian argument. The retributive argument was that, while there was a presumption that juvenile offenders were not responsible for their offenses in the same way

that adults were because they did not will them, this presumption was vitiated by those few juveniles who persisted in criminal offending as adults, because their persistence gave a different meaning to their juvenile offenses. Viewed in retrospect, the youthful offenses were not indiscretions occasioned by the confluence of circumstances, peer pressure, and transient recklessness but, instead, were early signs of determined criminality. The utilitarian argument is the following: since the main reason to seal juvenile records is to relieve youthful offenders of the stigmatizing burden of past offenses and make it easier for them to stop offending, and since those youthful offenders who continue committing serious crimes have already failed to take advantage of that opportunity, no practical purpose is served by continuing to protect their juvenile records and some practical purpose is lost by not exposing their records of serious offending as juveniles. So, both retributive and utilitarian arguments line up in favor of including records of serious offenses committed as juveniles for those offenders who continue to commit crimes as adults.

The basic logic that leads to these conclusions on particular characteristics is the desire to keep the predictive rules close to retributive principles, and perhaps even to improve the justice and fairness of current operations, while at the same time exploiting some of the crime-control benefits that might come from improved predictions. Thus, characteristics involving criminal conduct were treated as more acceptable than variables describing noncriminal conduct or statuses, and concessions to utilitarian interests in crime control were made on the basis of the accuracy with which such variables were measured rather than in terms of the nature of the variables themselves. This position undoubtedly goes too far for retributivists and not far enough for utilitarians, but those features

may be the virtues rather than the vices of the position.

Auspices of the Prediction Rule

The fifth quality of a predictive rule that affects its acceptability is the auspices that establish it as a guide for criminal justice decision making: i.e., whether the rule is promulgated by a legislative body, a court, or an administrative agency. The rule has different kinds and degrees of legitimacy depending on the source that established it and the process that lay behind its establishment.

In general, we think of legislative bodies as having the broadest kinds of responsibility and legitimacy. As representatives of the people, they are competent to assess current problems, weigh alternative solutions, and balance competing social values at stake in alternative policy responses. Moreover, in reaching conclusions, they are free to consult widely—including specialists in legal reasoning, in statistical methods, and in psychiatry. Thus, in principle, when they reach a decision about a proper predictive rule, that decision should carry great weight. It can be changed only by a successful argument that an important constitutional principle was violated—a judgment that is fairly rare. In practice, though, we often worry that legislatures are too responsive to transient passions of the majority; that important traditions or rights of minorities and individuals might be overwhelmed; and that important scientific and technical issues might not be well enough understood. In effect, legislatures might have the undeniable virtue of reflecting the people's will but might fail to take advantage of institutions that embody other virtues.

Courts might be a better author of predictive rules. They typically lack the close connections to the political community that legislatures have and might well be as incompetent as legislatures in ad-

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addressing the technical issues of statistics and psychiatry that could arise in formulating a predictive rule. But they have the virtue of representing tradition and a deep concern for the rights of minorities and individuals. And since these are importantly at stake in the design and use of predictive rules, perhaps the courts are the most legitimate authors.

Alternatively, administrative agencies—either correctional systems, criminal justice planning agencies, or specially established commissions—might be the proper authors of predictive rules. While they lack the close connection that courts have to tradition and individual rights and the close connection that legislatures have to the popular will, they are assumed to have the virtue of being able to command technical expertise. And since there are a great many technical issues to be discussed and resolved in formulating a predictive rule, and since neither courts nor legislatures provide an appropriate forum for this debate, perhaps the rules should be formulated by administrative agencies.

The ideal would be a legislatively established rule, formulated through a legislative process that effectively synthesized the perspectives and expertise of professional criminal justice administrators, judges, lawyers, statisticians, and psychiatrists. Anything short of this would be distinctly inferior. But probably the worst situation is one in which either courts or administrative agencies formulate their own predictive rules without the benefit of connections to the political community or to the knowledge of technical experts. And that seems to be the most common contemporary source of predictive rules.

Attractive Qualities in Applying Predictive Rules

Obviously, predictive rules are vulnerable to a great many vices: they can be too

indiscriminate, too inaccurate, built from inappropriate methods, based on unjust characteristics, and promulgated by the wrong agencies. Perhaps some of these vices can be overcome by virtues in application.

Some commentators have suggested, for example, that some degree of inaccuracy or some flawed characteristics or some informality in the construction and promulgation of the rule might be acceptable if the action to be taken by criminal justice officials was relatively insignificant (N. Morris and Miller, 1985:20, 30–33). In effect, it is appropriate to think of a balance to be struck among the importance of the social objective being pursued through the application of the predictive test, the size of the sanction to be applied by criminal justice officials, and the requirements placed on the test itself. The more important the objective and the smaller the infringement on the interests of offenders, the less demanding the standards for the predictive test. If, for example, it was plausible that the use of predictive tests might substantially reduce the likelihood of a presidential assassination, and if the predictive test resulted in nothing more than refusing admission to a public speech by the president, a quite imperfect test could be used (N. Morris and Miller, 1985:31). If, on the other hand, the society sought to eliminate “joyriding” and wanted to do so by placing those teenagers predicted to be active joyriders under close, continuing supervision, even predictive tests that met the strictest possible standards might be unacceptable. Virtue in application comes in balancing competing interests, and the standard of what sorts of test are acceptable is somewhat elastic. A great deal depends on the size of the harm to be avoided and the magnitude of the penalties or controls exerted over those who are the subjects of predictions.

It also seems clear that predictions are more acceptable if they are made after an

offender has been convicted of a crime. The predictions of dangerousness associated with civil commitments have always been suspect (Dershowitz, 1974). The obvious deficiencies of the predictive rules in use have been justified by the assertion that civil commitment was therapeutic and in the interests of the person who was committed. As it has become apparent that the "treatment" available to those who were civilly committed was virtually indistinguishable from the "punishment" meted out to those judged guilty of crimes, however, this justification has worn thin, and the entire idea of prediction has been tainted with the hypocrisy and overreaching of civil commitment procedures (Dershowitz, 1974; Stone, 1975). On the other hand, predictions have long been tolerated—even enthusiastically endorsed—in making sentencing decisions once an offender is convicted of a crime (*Williams v. New York*, 337 U.S. 241, 247, 1949). No doubt some of this enthusiasm for prediction comes from the expectations that predictions will mitigate rather than aggravate sentences and that explicit predictions might introduce some consistency into haphazard patterns of sentencing. But the wider scope given to the use of prediction in sentencing also has a great deal to do with the fact that the liberty interests of an offender are taken less seriously by the society once he has been convicted of a criminal offense. Our laws and moral intuitions establish a fairly broad zone of discretion in limiting the freedoms of those who have been convicted of criminal offenses, and there is less objection to using prediction to fill out this zone of discretion than there is to using predictions as the sole basis for restricting a citizen's liberty—even if the purpose is terribly important.

These two principles of application—that the quality of the predictive tests or rules should be commensurate with the

significance of the harm to be reduced and the sanction to be imposed on individuals predicted to be dangerous and that prediction is more justified when it involves people who have been convicted of criminal offenses—have important and subtle implications for the appropriateness of using predictive methods at different stages of the criminal justice system. These will be discussed in detail in the next section, but it is worth beginning the discussion here.

The principle that predictive tests are more (or only) appropriate when they involve convicted offenders seems to imply that predictions are appropriate at the sentencing stage and inappropriate at any stage prior to sentencing (e.g., investigation, prosecution, or bail). After all, to use predictions before that stage is to violate the presumption of innocence and to expose innocent people to heightened state interest and control—including the loss of liberty in pretrial detention. Such actions lack even the thin justification of "treatment" available within civil commitment procedures.

To a degree, one can argue against this view by insisting that the "presumption of innocence" is an important principle to be used in criminal trials but certainly not as a guide for the agencies that investigate crimes, prosecute offenders, or seek to ensure appearance at trial. In fact, their task is generally the opposite: to develop evidence that constitutes a case showing that a given person is very likely to have committed an offense. In allocating resources and pursuing their objectives, it might be proper for them to make predictions of whether an offender is likely to be an active offender.

While this argument has some merit, it sounds a bit tendentious even to those who support proposals to use predictions of dangerousness at the stages of investigation, prosecution, and pretrial decision making. What gives the argument added

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weight, however, is the observation that predictive methods would most commonly be used at these stages for people who had been convicted for serious offenses *at some time in their careers*—and generally quite recently (at least in terms of "street time"). This raises the question of whether convictions for offenses in the past could justify exposing offenders to the use of predictive methods to vary levels of investigative and prosecutorial effort even though the current offenses of which they are suspected are so far unproven. Strict retributivists, who view the offender's liabilities as exhausted when they complete their punishment for previous acts, might object to this idea. So would some utilitarians who are interested in maximizing offenders' chances for rehabilitation and who would regard the heightened police and prosecutorial interest as antitherapeutic. But to many, the idea that a person convicted of previous crimes and plausibly accused of more recent crimes should receive greater attention from investigators and prosecutors, might even face higher bail, seems both just and commonsensical. In effect, the society reserves the right to be a little more suspicious of those who have been convicted of previous offenses and seem to be persisting in committing offenses.

So, it is by no means clear that the broader scope granted to prediction once a person has been convicted of an offense rules out predictions at earlier stages of criminal justice processing. If a person has been convicted of previous offenses recently, and the current case is serious and well supported by evidence, there may be scope in our moral intuitions, law, and current practice to increase levels of investigation, prosecution, and bail guarantees.

The principle that the quality of predictive tests should be commensurate with the significance of the social harm to be avoided and the sanctions to be imposed

on offenders also affects judgments about the appropriateness of using predictions at different stages of the criminal justice system. What the implications are depends on how one regards the significance of the actions taken at different stages of the criminal justice system for the offender. If one regards the sentencing decision as relatively insignificant—an anticlimax to the drama of the trial and its crucial judgment of guilt or innocence—one would grant relatively wide discretion to the use of predictions in sentencing and much less discretion to those parts of the system that affect the judgment of guilt or innocence at trial. On the other hand, if one regards the sentencing decision as very significant because it directly affects the length of time an offender will be imprisoned and considers decisions regarding levels of investigation and prosecutorial effort as much less significant because they have, at most, only a minor effect on the possibility of a guilty judgment at trial, one would grant much more latitude for predictions to police and prosecutors than to sentencing judges.

It is not clear which position is correct. Observers may make much of the importance of guilt or innocence, but I suspect offenders are much more concerned about sentence length than the level of police scrutiny and prosecutorial zeal they must endure. Moreover, I suspect this is particularly true for those who are most likely to be exposed to prediction methods, namely, those who have been convicted of prior offenses.

In sum, the application of predictive rules may itself have qualities that enhance or detract from the overall fairness, justice, or efficacy of the predictive rules. In fact, judiciousness in application might compensate to some degree for defects in the construction, promulgation, or character of the rule itself. In general, predictive rules are more acceptable if they are used

to manage important social problems, if the liabilities contingent on predictive rules are relatively minor, and if the predictions are made with respect to people who have already been convicted of recent criminal offenses. The implications of these principles for use at different stages of the criminal justice system are a little subtle since they turn on judgments about whether convictions for past offenses sanction enhanced investigative and prosecutorial attention, and about the relative significance of sentencing decisions versus investigative, prosecutorial, and bail decisions for the interests of accused offenders. These questions deserve further treatment, but at the outset it should be clear that predictions are not clearly excluded at investigative, prosecutorial, or pretrial stages.

PREDICTION AT DIFFERENT STAGES OF THE CRIMINAL JUSTICE PROCESS

Discussions of prediction in the criminal justice system have a certain sameness about them. As discussed, from a retributive perspective, prediction of any sort seems unethical and illicit. Yet, there are often practical reasons to make predictions—particularly if they can be made with decency and reasonable accuracy. And the explicit use of well-developed prediction methods might well enhance the quality of justice if the practical alternative is to have biased and impressionistic predictions bootlegged into the system by the thousands of criminal justice officials who are doing jobs that seem to require predictions. Besides, it is by no means clear that the best criminal justice system would be one that honored retributive principles to the exclusion of utilitarian interests in overall crime control effectiveness and in making incremental improvements in criminal justice system operations.

In discussing issues of prediction at different stages of criminal justice system processing, we cannot escape from the general shape of this argument. But the use of prediction at different stages does raise different normative issues—partly because the relevant constitutional and statutory laws are different and partly because current operational practices have accommodated the interest in prediction in different ways. The approach here will be to examine the justice of making predictions of dangerousness at the sentencing stage, in setting bail, and in developing prosecutorial strategies, and to do so from the vantage point of current practices, constitutional law, and moral intuitions.

Sentencing

For the past 30 to 40 years, the dominant philosophy and practice of sentencing has been "rehabilitative sentencing" (Blumstein et al., 1983a:60-61). The aim has been to use the process of sentencing to encourage the rehabilitation of criminal offenders. The legal authority to pursue this goal lay in "indeterminate sentencing" laws. The principal agents who operated this system were judges (aided by probation officers), who set the initial sentence, and parole and corrections officials, who decided whether a person could be released earlier than the maximum limit on his sentence and, if so, exactly when.

Although by no means widely advertised, this system was built around a core of prediction. When judges sentenced defendants under indeterminate sentencing laws and when parole boards chose to grant or deny inmates' requests for parole or early release, they were implicitly or explicitly making predictions about future offenses (N. Morris and Miller, 1985:10-12). As an operational matter, that is what it meant to gauge the rehabil-

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itative achievements and potential of a given offender. Moreover, they made these predictions not on the basis of the offenses committed by the offender (as would be recommended by retributivists) or on the basis of well-developed prediction methods (as would be recommended by utilitarians), but instead on the basis of a detailed but essentially discretionary examination of the offender's background, characteristics, and behavior while in prison.

Professional opinion among judges and correctional officials supported this form of sentencing. So did legislatures. And so did the Supreme Court. As summarized in Moore et al. (1984:107-108):

In deciding the case of *Williams v. New York* (1949), for example, the Supreme Court found that criminal sentences should be based “on the fullest information possible concerning the defendant's life and characteristics.” Similarly, in *Pennsylvania v. Ashe* [302 U.S. 51, 55, 1937], the Court decided that “for the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.”

[In understanding the Court's view of sentencing,] the *Williams* case is particularly instructive. The trial judge overruled a jury recommendation of life imprisonment and imposed the death penalty on the basis not only of the shocking details of the crime, which had been revealed, of course, to the jury, but also on the information in the presentence investigation. According to the Supreme Court's account, the trial judge “referred to the experience appellant ‘had had on thirty other burglaries in and about the same vicinity’ where the murder had been committed. The appellant had not been convicted of these burglaries although the judge had information that he had confessed to some and had been identified as the perpetrator of some of the others. The judge also referred to certain activities of appellant as shown by the probation report that indicated the appellant possessed a

‘morbid sexuality’ and classified him as a ‘menace to society.’” The Supreme Court upheld the imposition of the death penalty on this basis against a due process challenge. Noting that the “New York statutes emphasize prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime,” the Court reasoned that strict adherence to evidentiary rules limiting the basis for sentencing to testimony given in open court by witnesses subject to cross-examination would undermine the ability of judges to individualize sentences on the basis of the best available information [*United States v. Grayson*, 438 U.S. 41, 1978].

This sentencing philosophy also tapped an important moral current: the notion that justice must recognize that crimes emerged not simply from evil intentions of offenders but also from social circumstances; that there must, therefore, be mitigating facts behind many criminal offenses; and that the best form of justice would be one that tailored social responses to the guilt of the offender and gave the offender the best chance for rehabilitation. This idea drew on both retributive and utilitarian ideas. The idea that guilt might be mitigated by social circumstances is essentially an idea of justice, since it finds the agency of a crime somewhere outside the mind or conscious will of the defendant. The idea that we might do better to control crimes by rehabilitating offenders rather than simply imprisoning them is essentially a utilitarian idea. For a generation, individualized, rehabilitative sentencing was sanctioned by practice, law, and moral aspirations. It had prediction at its core.

The dominance of this philosophy was eroded by attacks by both the retributivists and the utilitarians. The retributivists attacking from the left focused on the broad discretion granted to sentencing judges and parole boards, the resulting disparities in sentences for similar offenses, and the room left for racial discrimination and other forms of unfairness

(American Friends Service Committee, 1971; Frankel, 1973). The retributivists attacking from the right focused on the degradation of both the criminal law and the broad presumption of individual responsibility (van den Haag, 1975; Szasz, 1977). The utilitarians, attacking from both left and right, focused on the apparent ineffectiveness of rehabilitative programs for offenders (Martinson, 1974:22-54). Together, these attacks weakened the popular and professional support for the concept of rehabilitative sentencing.

The current debate on criminal sentencing seeks an elusive balance of retributive and utilitarian principles. The crucial questions are not about the features of pure systems but on what terms the integration of the systems will proceed. And it is here that retributivists, utilitarians, and "mixed-system" advocates do battle.

The strongest retributive position has been advanced by von Hirsch (1976:77-88; 1981a:591-634; von Hirsch and Gottfredson, 1983-1984:34). In his conception, three crucial principles must guide criminal justice sentencing. The first is that the reprehensibility of the criminal offense for which the offender has been convicted is the essential factor that must be recognized in setting criminal penalties—not the likelihood of committing future acts or the general deterrent value of punishing the offender (von Hirsch, 1976:66-94; 1981a:592).

The second is that, while exactly how much punishment is deserved by a given criminal offense is somewhat indeterminate, it is possible to establish a rank ordering of the reprehensibility of criminal acts and that rank ordering must be rigorously preserved in the ordering of punishments meted out (von Hirsch, 1983:213-214, 221-230, 1984a:1097). Thus, someone convicted of a burglary should never receive a sentence longer than that given to someone else convicted

of a robbery, and a second-degree burglar should never receive a punishment more severe than a first-degree burglar. While this principle does not necessarily determine the size of the bands of punishment surrounding a given offense, the requirement to preserve ordinal relationships across a great many offenses within the constraints established by the ordinary lengths of human life may, in fact, require that the bands around the offenses be quite narrow.

The third principle is that people convicted of the same act should receive the same punishment unless some "morally relevant difference can be established between the offenders" (von Hirsch, 1983: 212-213, 226-227). The likelihood of committing future crimes would not be considered morally relevant, although the fact of past crimes might be (von Hirsch, 1976:84-88; 1981a:591-634).

Taken together, these principles leave little room for utilitarian interests in general deterrence or incapacitation or rehabilitation to come into play. These interests and objectives gain a purchase only within the bands established around offenses (which are narrowed by the requirement that ordinal relationships be preserved in a limited space of possible punishments), and only insofar as the differences among offenders may be made "morally relevant" to our judgment of them. A general social interest in reducing crime through deterrence or rehabilitation or incapacitation is not sufficient for treating an offender differently.

A weaker position in retributive terms, but stronger in utilitarian terms, has been advocated by such scholars as John Monahan (1982:103-113) and Norval Morris (1974:73-77, 1982:179-209; N. Morris and Miller, 1985). Monahan (1982) has called this position a "modified just deserts" position. In this conception the outer limits of punishment for given of-

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fenses are once again established by retributive concerns. On the question of how broad the range of punishments surrounding a given offense could be without doing injustice to the offender, the authors are silent. Moreover, there is no strict principle requiring the preservation of ordinal relationships to establish a sense that the bands must be tight. So, it seems that a "just punishment" in this conception may be broader than in the von Hirsch conception. Similarly, there is no rigorous statement that similar cases (defined in terms of offenses) must be treated alike. So, there is a great deal of room for utilitarian concerns to come into play.

Obviously, if the bands around offenses are sufficiently wide, and if there is no rigorous principle requiring that similar offenses be treated similarly, utilitarian concerns could determine everything within the hollow shell of retributive principles. And it is this that focuses von Hirsch's criticisms (1981b:772-789, esp. 784-785). On the other hand, the "modified just deserts" position has the virtue of allowing the criminal justice system to fit criminal liability to the varied forms of human conduct and misery that appear in the system and to the limited capacities of the system to punish (N. Morris, 1982: 190), and to do so in a way that preserves some of the society's interest in a valuable and useful criminal justice system, as well as a just one.

The strongest utilitarian position has been adopted by Peter Greenwood (1982). His argument is that the society has an interest in both minimizing crime and reducing its reliance on prisons. In a world in which rehabilitation seems to have failed, the efficacy of general deterrence remains uncertain, and general incapacitation costs too much in terms of liberty and money per unit of crime reduction achieved, it is valuable to focus

scarce prison capacity on those who are likely to commit the most crimes. This is particularly true when it seems that the differences among offenders in terms of the seriousness and rate of offending are quite substantial, and when some capacity exists to distinguish the high-rate, serious offenders from the lower-rate, less serious offenders. If the opportunity created by this situation was exploited, the society could have both less crime and fewer people in prison than it now has (N. Morris, 1974:63; N. Morris and Miller, 1985:6; Wilson, 1983b:155-156; von Hirsch and Gottfredson, 1983-1984: 22-31, 44-45; Moore et al., 1984:79-89).

Obviously, these different positions balance retributive and utilitarian concerns in quite different ways. In particular, they come to radically different conclusions about how great a role the society should grant to predictions of individual conduct in imposing criminal sentences and about how just distinctions among people convicted of similar offenses might be made. But this brief account of the history of sentencing policy indicates that there must be room for predictions in our normative conception of sentencing. It has been, and is now, sanctioned by current practice and by statutory and constitutional law. Moreover, all but the most stringent retributivists would accept predictions based on some characteristics of offenders as part of sentencing policies. There may well be limits on the use of predictions with respect to the magnitudes of the sentence increases that could be meted out and the sorts of variables that could be included. It might also be important to establish procedural devices to ensure that the characteristics of offenders relevant to sentencing were accurately assessed. But it seems strange to insist that there is no room for predictions of future criminality in sentencing.

Bail and Pretrial Decisions*

To many, the notion of jailing someone not yet convicted of a crime on the basis of uncertain judgments about the danger he presents to the community seems antithetical to our most fundamental legal traditions. And although pretrial detention is not the explicit goal of guidelines that increase bail for offenders estimated to be dangerous, that is the frequent and unlamented result.

Two objections to both preventive detention and risk-adjusted bail are commonly voiced. It is wrong to jail—and therefore punish—people who have not been convicted of crimes. And it is particularly unjust to detain them on the basis of predictions about future crimes. Stated affirmatively rather than negatively, the argument is that the state's only proper interest is to guarantee that accused individuals appear for trial. The amount of bail should be determined with this purpose in mind, and bail can hardly ever be denied on that basis. It is especially inappropriate to detain people solely to promote community security.

While compelling in principle, this position is undercut by three observations. First, the actual operations of the existing system reveal the bankruptcy of the guiding principles. The defendants who are detained are not those whose appearance at trial is of greatest concern to the state, but instead those whose financial resources are most limited. Some critics urge the release of more defendants on their own recognizance; others propose substitution of community sureties for money bail on the grounds that these would be more equally available to all

defendants (Freed, 1982). Such reforms might well lead to less pretrial detention without harming the state's interest in guaranteeing appearance at trial. But the most important implication of the present system is that we are apparently willing to detain people without a finding of guilt simply to guarantee their appearance at trial. If the right to be free before trial can be overwhelmed by the state's limited interest in guaranteeing future appearance, then the right cannot be so fundamental, and it occasionally might be overwhelmed by the state's interest in reducing crime as well.

Second, many deny that the state's interest is limited to guaranteeing appearance at trial. Some legal scholars have argued that bail and sureties were also designed to promote community security (Goldkamp, 1979:15-31; Freed, 1982). And as a practical matter, both citizens and judges clearly think it is not only appropriate but crucially important that the citizens' interests in security be reflected in pretrial detention decisions.

Finally, the Supreme Court has so far refused to establish an unlimited right to bail, nor has it been willing to limit the state's interest to guaranteeing the defendant's appearance at trial. True, the Court has not yet heard a case on the constitutionality of preventive detention because all such cases have become moot before the Court could take them up (*Pretrial Reporter* 6 (March 1982):13). And in the leading bail case, *Stack v. Boyle*, the Supreme Court did indicate that guaranteeing appearance should be the most important factor (*Stack v. Boyle*, 342 U.S. 1 (1951):5). But the constitutional right of an individual to be set free on bail based solely or primarily on the need to guarantee appearance at trial has not been established.

To many, the Court's reluctance in this area seems inexplicable, for the constitutional language seems clear and straight-

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forward. The Eighth Amendment to the U.S. Constitution asserts flatly that "excessive bail shall not be required." Unfortunately, this simple assertion can be given at least three interpretations (Goldkamp, 1979:16-17). One is that defendants have a right to reasonable bail, and the Supreme Court will determine what is reasonable. That interpretation, which would establish a right to be released on reasonable bail, has been supported by a historical analysis of bail in England (Foote, 1965:959-999; Fabricant, 1968:303-315). A second interpretation restricts the amount of bail to reasonable levels but leaves it to the states to pass laws indicating what is reasonable. No conception of a constitutional right is envisioned in this interpretation. Indeed, the states could decide that it was reasonable in some cases to deny bail. A third interpretation is that "in the absence of constitutional or statutory discretion . . . judicial discretion determines the appropriateness of bail within the bounds that it should not be excessive" (Goldkamp, 1979). This also rejects the notion of any right to bail, but it allows judges to set bail when statutes do not explicitly authorize it.

The District of Columbia enacted a preventive detention statute in 1970 that explicitly allowed offenders who were predicted to be dangerous to be detained. The constitutionality of the statute was tested in *United States v. Edwards* (No. 80-294 (D.C. App. May 8, 1981), cert. denied, 22 March 1982). The District of Columbia Court of Appeals held that the statute was constitutional, narrowly rejecting the interpretation that the Eighth Amendment guarantees a right to bail. The court reviewed the origins of the excessive bail clause and the case law pertaining to it and concluded that the aim of the Eighth Amendment was not to limit the power of Congress to deny pretrial release for specified classes of of-

fenders or offenses, but rather to limit the discretion of the judiciary in bail setting. The court also ruled that the Fifth Amendment's due process clause was not violated by the preventive detention statute. Opponents of the statute objected on grounds that it permitted punishment of the defendant prior to full adjudication of the case. The court concluded that pretrial detention is not a form of punishment but rather a regulatory action and hence permissible.

The case was appealed to the Supreme Court, but the Court declined to consider it, perhaps for reasons similar to those justifying its reluctance to consider a previous Nebraska case, *Murphy v. Hunt* (No. 80-2165, 30 Cr L 3075, 1982; *Parker v. Roth*, 278 NW 2d 106, 1979). That case involved the constitutionality of Nebraska's constitutional amendment requiring "the denial of bail to defendants charged with forcible sex offenses when the proof is evident or the presumption great" (*Murphy v. Hunt*). The U.S. Court of Appeals for the Eighth Circuit found the amendment to be an unconstitutional restriction on the right to bail and asserted that "the constitutional protections involved in the grant of pretrial release by bail are too fundamental to foreclose by arbitrary state decree" (*Hunt v. Roth*, 648 F. 2d 1148, 1981). The Supreme Court vacated the Eighth Circuit's decision and found that the case was moot because the defendant had already been convicted for rape and sentenced to prison (*Murphy v. Hunt*). The *Edwards* case might also have been viewed by the court as not presenting a "live" issue because Edwards entered guilty pleas in both cases in which preventive detention was sought. Such a ruling poses an interesting dilemma since "pretrial detention orders will almost surely not outlive the appellate process" (*Pretrial Reporter* 6 (March 1982):13). The Court could choose to treat a future case as an exception embodying the prin-

ciple of being "capable of repetition, yet evading review," and this rule was employed by the District of Columbia Court of Appeals in its review of the case (*United States v. Edwards*).

As in the case of sentencing, current practice and constitutional law both seem to sanction bail decisions (including a decision to deny bail altogether) based on predictions of dangerousness. This does not necessarily establish any affirmative reason for doing this, however, and it does seem contrary to our most important legal traditions. One justification for prediction is the community interest in controlling crimes committed by people on bail. But by most estimates, the practical effect will be small, and there are other ways of controlling crime on bail, such as special penalties or going to trial sooner (Lazar Institute, 1981:48).

Perhaps the most important reason to use prediction in making pretrial decisions is not to reduce crime on bail but to limit and rationalize the current system (Moore et al., 1984:125). Just as judicious use of prediction in sentencing convicted offenders could lead to fewer people being imprisoned, pretrial detention of dangerous offenders might lead to fewer people being detained and to the use of explicit criteria that would be fairer. A system that detained only those few who represented great risks of flight or new crimes, regardless of their financial resources, would be a welcomed relief, even if it required making explicit decisions about who was to be detained and who released. Compared with the current system, the only loss to justice would be in the explicit recognition of a community interest in controlling crime committed on bail, a principle that already seems to have some political and legal vitality despite the controversy over whether it is constitutionally recognized.

Prosecution

To some, the prosecutor seems the most powerful criminal justice official—partly because his or her decisions are consequential for defendants but even more importantly because the prosecutor has broad discretion to make the choices (Vorenberg, 1981:1521–1573). The prosecutor can quash charges, make a deal to trade information for a forgone prosecution, threaten a defendant with serious charges, and determine when a case will go to trial. Moreover, these choices are neither guided by explicit policies nor commonly reviewed.

Despite the wide discretion, professional norms and community pressures lend some consistency to prosecutorial decision making. Generally, prosecutors decide how much effort to apply to individual cases according to the seriousness of the current offense and the strength of the evidence: serious cases with strong evidence attract a great deal of prosecutorial attention; minor cases with weak evidence are screened out early or dispatched to overworked sections of the office that cannot give them anything but negligible attention (Institute for Law and Social Research, 1976a,b, 1977).

The focus on offenses and the strength of the evidence in the case can be understood from both retributive and utilitarian perspectives. It makes sense to retributivists because it ensures that prosecutorial attention will be focused on those who are likely to have committed serious criminal acts and because it imposes less liability on those whose acts are less serious or whose guilt is less likely. It makes sense to utilitarians since it seems to ensure that scarce resources will be spent where they will do the most good: in punishing those who seem to cause the worst part of the crime problem.

Although the offense-based focus of prosecutors remains the dominant principle in guiding prosecutorial discretion, in the last decade prosecutors have experimented with a new principle that would give priority attention to "career criminals" or "major offenders" (Harper and McGillis, 1977; Moore et al., 1984:137). In effect, in deciding how determinedly to pursue a case, prosecutors have decided to consider characteristics of the offender as well as the offenses and the strength of the evidence. The characteristics that qualify an offender for special treatment include a history of serious, repetitive, and persistent criminal conduct—although there are important differences among prosecutors' offices with respect to the relative weights given to the different characteristics or criminal history (Harper and McGillis, 1977; Withcomb, 1980; Rhodes et al., 1982). Some officials think a few serious crimes—even if widely separated in time—would qualify an offender for special attention; others pay much closer attention to the rate and persistence of criminality and worry less about the seriousness of the offense. The special treatment to which offenders are exposed includes special efforts to gather, preserve, and protect evidence in the case; charges filed at the highest possible level sustainable at trial; restrictions on plea bargaining; and prompt trials. The aim is to increase the likelihood that those with a serious record will be convicted and to extend sentences for those who are convicted.

This change in prosecutorial procedures can also be understood in both retributive and utilitarian terms. The retributive justification is the same as that for habitual offender sentencing laws: that offenders with long records have shown themselves to be unusually unrepentant and careless of society's val-

ues and, therefore, unusually deserving of punishment. The utilitarian justification is that offenders who have committed crimes repeatedly in the past are particularly likely to commit crimes in the future, and, therefore, it is particularly valuable to focus scarce prosecutorial time on ensuring that these unusually dangerous offenders will be punished and incapacitated.

Obviously, this focus on criminal record and characteristics of the offenders is related to the question of prediction. To the extent that a utilitarian logic motivates the shift from the focus on current offenses to past offenses and to the extent that past offenses predict future conduct well, one can argue that prediction has crept into prosecutorial decision making and is therefore sanctioned by current practice. Nonetheless, it would probably be more accurate to say that predictions of dangerousness have not yet been as systematically or as explicitly introduced into prosecutorial decision making as they have into sentencing decisions or even bail decisions. So, explicit use of predictions of dangerousness is not yet sanctioned by current prosecutorial practice. The important ethical questions are whether such methods would be constitutional and consistent with moral intuitions about the criminal justice system.

At the outset, the idea of selective prosecutions focused on those predicted to be dangerous seems to threaten the principles of equal protection and due process. Indeed, it seems even more threatening if dangerous offenders are prosecuted more determinedly for relatively minor offenses or for charges in which the evidence is relatively weak (Moore et al., 1984:141–142). As noted above, if prosecutors organized an overwhelming onslaught against a dangerous offender charged with a serious crime, or if they

kept prosecuting dangerous offenders for vagrancy or disorderly conduct, or if they kept bringing robbery cases on the basis of trumped-up evidence, they would have crossed an important line that makes our system of justice fair and restrained.

The interesting question, however, is not at the extremes but in the middle range. Should prosecutors give a slightly more vigorous and determined prosecution to cases involving dangerous offenders? A vigorous prosecution could mean enhanced effort in cases of serious crime in which the evidence was very strong—refusing to accept plea bargains, conducting extensive collateral investigations, or moving very quickly in a case in which there were strong physical evidence and eyewitnesses. It could also mean a greater willingness to prosecute less serious offenses where the evidence was strong—for example, holding out for a felony conviction in a case of gun possession when the testimony of two police officers is corroborated by a witness. Or, it could mean being willing to risk failure in prosecuting a serious crime in which the evidence was well above the constitutional standard but much less than the usual prosecutorial standard of 90 percent certainty to win at trial—for example, a robbery case in which there is no physical evidence and the eyewitness testimony is shaky. It is in these areas that a selective focus among prosecutors would operate, and it is the justice of these actions that must be considered.

As a constitutional matter, it seems fairly clear that prosecutors do have the leeway to establish principles for adjusting levels of prosecutorial effort among offenders as long as the principle serves some legitimate social purpose, and as long as the policies are not based on an unjustifiable standard (such as race, religion, or social class), the motives of the prosecutor are not vindictive, and the policies are not designed to frustrate de-

fendants in their exercise of constitutional rights, such as freedom of speech, assembly, and religion (Cardinale and Feldman, 1978:659-692; Vorenberg, 1981). While there have been a few cases in which the mere exercise of discretion was found objectionable on equal protection grounds (*Village of Fairlawn v. Fuller*, 8 Ohio Misc. 266, 221 N.E. 2d 851), the dominant court opinion has been that it was not sufficient for a defendant to show that offenders escaped punishment [*Oyler v. Boyles*, 368 U.S. (1962); *Washington v. United States*, 401 F.2d 915, 925 (D.C. Cir. 1968)]. On the other hand, where prosecutors seem to have been motivated by arbitrary, racially tainted standards, or where they seem to have been guided by vindictiveness, the courts have found constitutional violations [*Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *People v. Utica Daw's Drug Co.*, 16 A.D.2d 12, 225 N.Y.S.2d 128 (1962); *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974)]. But in showing discriminatory enforcements the courts have generally placed the burden on defendants (*People v. Utica Daw's Drug Co.*). Such cases do not affirmatively establish a license for prosecutors to vary levels of effort according to predictions of future criminality. But to the extent that such predictions were accepted by the courts as a legitimate law enforcement purpose and they were formulated in a way that avoided any taint of arbitrariness or racial bias, the courts would probably accept the policies as within the range of prosecutorial discretion. Indeed, what makes the conclusion seem particularly justifiable is not so much that the court countenances predictions as that the court has been extremely reluctant to exercise any control over prosecutorial discretion at all. As Judge (now Chief Justice) Burger wrote in *Newman v. United States*, 382 F.2d 429, 480 (D.C. Cir. 1967): "Few subjects are less adapted to

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If established legal principles are not a bar, what about moral intuitions? Here, one is once again plunged into the general discussion of deontological objections to and utilitarian justifications for prediction. The only difference is that here we are talking about "special" prosecutorial efforts, and much turns on what is meant by "special." If what is meant is nothing more than special efforts to collect and preserve evidence and to proceed quickly to trial, surely there is little objection. Although an interest in "fairness" among defenders might be violated, one can reasonably argue that offenders do not have a constitutional or even moral right to the ordinary, sloppy prosecution they receive in today's overburdened criminal justice system. And, since no due process issue is raised, this kind of "special treatment" seems acceptable.

Somewhat more worrisome are those concerns related to due process: that defendants might be overawed by zealous prosecutors, that the trial process might be contaminated if it was known that a defendant was one of those predicted to be dangerous, and that the balance between the resources available to defense and prosecution might be upset. All of these are important because they affect the substantive findings of guilt or innocence and do so in a way that violates the defendant's rights to due process and the community's interest in being sure that justice is being done.

There are answers to these concerns. Special procedures could be developed to make sure that judges and juries were unaware of the special status of the offenders to avoid the informal introduction of prejudicial information at trial. Special resources could be made available to the

defense as well as the prosecutor in cases involving those predicted to be dangerous. And by developing prediction criteria based on an extensive criminal record, we could guarantee that the defendants who were vulnerable to the special prosecution were relatively experienced offenders who would not easily be frightened by a prosecutor's bluffs and threats. But none of these answers is wholly satisfactory.

As is generally the case, the decision comes down to a balance among the community's interest in security, the defendant's interest in avoiding criminal liability, and a broad social interest in guaranteeing certain standards of justice. In striking the balance, many see special prosecutions as particularly threatening to standards of justice since they may have a decisive effect on the question of guilt or innocence. Hence, they judge the defendant's rights and interests to weigh more heavily in this regard than in sentencing decisions. And this would clearly be true if a defendant was being prosecuted for the first time. But the more interesting question is whether special prosecution would be inappropriate when a defendant has already been convicted of several offenses *and* when he is predicted to be dangerous. Arguably, this is more acceptable because it makes it less likely that the defendant will be overawed and may, in any event, diminish the defendant's rights in the same way that they seem to be diminished in determining sentences.

PREDICTION AND BLAMEWORTHINESS

After one has been through the intellectual contortions of evaluating prediction-based criminal justice decisions from retributive and utilitarian perspectives, and, as a general idea and in particular applications, one longs for a simpler

view. The very complexity of the analysis weakens its credibility.

In my view this complexity is unnecessary. It is forced on us by a recently found sophistication in reasoning about this issue. Indeed, the sharp distinction drawn between retributive and utilitarian positions that is the cornerstone of much contemporary analysis obscures a far simpler and more coherent view. This simpler view depends on seeing what is common to retributive and utilitarian views rather than what is different. The idea that emerges is unfamiliar and unconventional in today's debates, but I think it might be treated as commonplace and obvious in a world in which the current distinctions were less firmly and sharply drawn.

The contemporary view of retributive theories is that they properly focus the attention of the criminal justice system on current acts rather than the character of offenders. It is the criminal act that provides the justification for punishment. The more serious the act, the more serious the punishment.

There is much to commend this position. It connects to more primitive ideas of justice as vengeance without being hostage to the excessive passions and penalties that might characterize private vengeance. The offense is against the community and the state—not a private individual. The response is regulated by concerns for equal protection and due process—not the strength of the victim's comrades. It also turns out to be a position that limits the state's interest and surveillance to narrow areas marked by actual criminal offenses (Moore, 1983:17-42). This not only protects much of social life from government scrutiny but also guarantees that, when the state's interest is engaged, it is focused on an area in which it can do some good rather than mischief. And the focus on acts prevents the society from developing any permanent view of

the character and status of criminal offenders (von Hirsch, 1981a:599). All this seems to strike a nice balance between the community's interests in simultaneously engaging state power to protect a limited number of community values and preventing the state itself from becoming too powerful and intrusive.

Attractive as the focus on acts seems to be, however, it produces some curious anomalies when used to explain our current criminal laws. The most glaring is the importance that the criminal law attaches to the mental state of the offender at the time he committed the offense. If the act itself is so important to criminal punishment, one might expect many criminal statutes to establish strict liability for criminal offenses. In fact, however, strict liability is very rare in criminal statutes (Packer, 1968:121-131). It is generally important that some demonstration be made that the offender willed an act as well as that the act occurred. Similarly, there are many diminished-competence defenses and statuses (including mental illness, compulsion, and youth) that mitigate blameworthiness by casting doubt on whether the offender was in fact the author of the act in the sense that the outcome of the act was a complete expression of what the offender wanted. Finally, under some circumstances (defined in the law of "entrapment"), government complicity in a crime can absolve an offender. Thus, anything that drives a wedge between a criminal act and the intention of the offender tends to mitigate guilt because it confuses our capacity to infer criminal intentions from criminal acts. So, the act alone is not sufficient for criminal responsibility. The intention to do the crime—to deny the values of the society—must be shown, as well as the act.

What is even more surprising is that a harmful act is not even necessary for criminal responsibility. Laws that make attempts or conspiracies to commit

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crimes vulnerable to criminal prosecution essentially make a durable, visible intention to do a crime worthy of punishment even if the substantive offense never occurs (Packer, 1968:100-101). True, these laws typically carry less severe penalties than the completed offenses would justify. And true, some overt acts are necessary to trigger the investigation and provide proof of a durable criminal intention. But the point is that the acts are important not in themselves but only as they afford insight into the intentions of offenders, and it is the intentions alone that justify punishment.

So, even though we are accustomed to thinking of acts as the most essential focus of the criminal justice system, a harmful act is neither sufficient nor even necessary for findings of "blameworthiness." Intention, on the other hand, which seems less essential, is not only necessary for criminal responsibility, but sufficient itself! One possible implication of these observations is that it is criminal intention—the willing rejection of society's values, including that obligation to respect the life, liberty, and property of others—that justifies the punishment. The act is important not only in itself but also and most fundamentally as an objective piece of evidence about the intentions, values, and character of citizens.

If this interpretation were accepted, it would also help to explain why most people—including many retributivists—believe that it is appropriate to adjust the severity of criminal justice sanctions in response to prior criminal acts as well as to the seriousness of current criminal offenses. This is true regardless of whether the criminal justice sanction in question involves sentencing and is established through statutes (as in habitual offender statutes) or involves prosecution and is established by administrative fiat (as in the establishment of "career criminal units"). This position is problematic,

however, to a strict retributive position that ties criminal liability only to acts.

The inconsistency can be resolved in three ways. One is to point out that the series of offenses indicates that an offender is unusually resistant to learning from punishment and therefore more punishment is called for. This may make sense, but it is a utilitarian rather than a retributive argument. A second argument is that the fourth robbery is somehow worse than the first and therefore is more deserving of punishment. But that is simply an assertion. The obvious question that is unanswered is exactly what makes the fourth robbery worse.

A third argument, which seems more satisfactory, is that the criminal law adjusts penalties for offenses on the basis of what can be discerned about intention and character and that a series of offenses reveals an offender as clearly more willing to commit crimes than others and, therefore, as more deserving of punishment. We all understand that criminal offenses can be caused by circumstance and transient passion as well as by clear intention. When we look at first offenders, it is quite possible that their values and character—their commitment to the society's values—are much like everybody else's and that they were simply unlucky enough to stumble into a situation that produced an uncharacteristic offense. When we look at someone who has committed many offenses, however, the hypothesis that the offender is much like everyone else in terms of his values must yield to the alternative hypothesis that the values are different: the offender is less solicitous of and more willing to attack the lives, liberty, and property of fellow citizens. It is this increased certainty about the offender's values that justifies enhanced punishment.

So, there is a certain coherence in thinking of retributive conceptions of jus-

tice as being concerned about the intentions, values, and character of offenders as well as their acts. This is important, for if intentions and character are durable (i.e., if people have guiding values that last for at least a little while), past actions of offenders might well predict future actions. Consequently, a policy that sanctioned extra punishment for past repeated criminal acts would produce about the same results as a policy that adjusted penalties on the basis of predictions of future criminal acts. Thus, retributive and utilitarian justifications coalesce in a focus on those who have revealed their intentions and capacity to commit criminal acts through a pattern of past offenses. What ties these principles together is the argument that character—relatively durable values and intentions—is fundamental to both retributive and utilitarian justifications for punishment.

Note that to accept the idea that character is durable and fundamental to both retributive and utilitarian justifications for punishment is not to accept the idea that it is permanent. People's values and intentions can change. Even the most cynical might excuse offenders who had aged and matured before their just penalties were served and be reluctant to exact the maximum penalties from those 20-year-olds who committed many offenses, on the grounds that such offenders might change. So, we need not decide that character is permanent to decide that it is somewhat durable and relevant to criminal justice decisions.

If this interest in character provides the basis for a synthesis of retributive and utilitarian principles, why is it an unfamiliar idea? My answer is that this idea runs counter to a dominant ideology guiding criminal justice policy. Central to that ideology is the idea that moralism must be kept out of the criminal law because the passions that would be released if it were invited in are uncontrollable (Gil-

lers, 1983:402). The focus on the intentions and values of offenders—indeed the argument that it is *wrong* values as revealed by acts that justify punishment—puts values at the center of the criminal justice system and thus runs directly counter to the dominant ideology. Perhaps equally important, we have been guided by a hopeful view of human nature: human character is transient, changeable, and influenceable; guilt for current offenses is therefore always mitigated; and bright hopes for rehabilitation are reasonable. The focus on durable character treats the role of outside influence as morally irrelevant and is less optimistic about the rate at which important changes in values can occur. So, the focus on character flies in the face of ideologies that have been central to our contemporary jurisprudence.

Obviously, no one is interested in unleashing a new age of moral oppression. We value our freedom, our mobility, our ability to experiment with different values far too highly for this. But it does seem valuable to remind ourselves of some simple principles we seem to have forgotten: that the criminal law is a moral statement about the values that bind our society together by imposing minimal obligations on one another; that the society insists that people honor those laws and the values that lie behind them; and that, when a person clearly shows an indifference to those obligations through his or her actions, the society has a right to respond with indignation moderated by concerns for due process and equal protection. This set of principles sanctions an interest in character—in those who have committed offenses in the past and will do so in the future. At the same time, it limits the reach of the system to those who have committed offenses in the past. It does not try to reach for extra state control through improved techniques of prediction that provide less satisfactory

ways of exploring character than prior criminal conduct.

SUMMARY AND CONCLUSIONS

Our shared vision of the world of criminal offenses and criminal justice policy has become a great deal more complicated than it once was. We now think of criminal offenses as the result of accidents and transient passions as well as considered intentions. We think of criminal justice decision making as discretionary and relying on professional knowledge and expertise rather than automatic application of well-established principles. Simple notions of justice that combined concern for justice with ordinary prudence have become elaborate, sharply differentiated ethical theories emphasizing retributive or utilitarian aims of criminal justice policy. So, it is hard to find the thread of decency and justice in proposing criminal justice policies.

Into this tangled and overburdened world come proposals to make wider use of improved prediction techniques in targeting offenders for investigation and prosecution, in setting bail, and in imposing sentences. The appeal of such techniques comes from their apparent potential to produce greater community security from the financially (and morally) limited capacities of the state to punish, and to impose some rational order on what is otherwise a crazy-quilt pattern of discretionary decision making that leaves great room for injustice.

But there are problems with the idea of relying on predictive tests. To retributivists, it seems wrong to impose criminal liabilities on the basis of predictions of further criminal acts. To many others, it seems wrong to impose liabilities on people who are falsely predicted to commit crimes in the future. Still others worry about the characteristics that will be used in the predictive tests, thinking that it

would be wrong to use characteristics that were not under the control of the offender and were not themselves criminal in nature. And there are always the questions of exactly at what point in the criminal justice process the tests would be applied and what consequences the use of the tests would have for criminal offenders.

One can wrestle with these questions at many levels. It seems to me, however, that the easiest way through this tangle is to be guided by two principles: First, the best guide to both blameworthiness and future criminal conduct is prior criminal offenses. Second, it is a virtue to be economical in the use of the state's moral and financial capacity to punish and control.

If accepted, these principles would have the following implications:

- That predictive or discriminating tests should be designed to identify a small and distinctive element of the offending population.
- That the tests should be based predominantly on prior criminal conduct.
- That no one should be identified as, or predicted to be, dangerous who does not have repeated adult criminal convictions on his or her record.
- That juvenile records of serious offenses could be used for purposes of discerning dangerousness or predicting future crimes if a person committed serious offenses soon after graduating from the juvenile justice system.
- That the use of information on indictments and arrests *in addition to convictions* can be used in the tests and is probably to be preferred to the use of employment or marital data.
- That the required accuracy of the tests should be consistent with the size of the practical benefits of the test and with the size of the burdens imposed on defendants.
- That the tests could be used not only

for sentencing, but also for targeting investigations and prosecutions.

- That the additional liability at sentencing should be limited by the seriousness of the offense for which the person was convicted.

- That the additional liability at investigation and prosecution stages be exposure to more vigorous investigation and prosecution but within due process protections.

- That the principal justification for using improved prediction techniques at the bail stage would be to reduce the use of pretrial detention, guarantee that detention is focused on the most dangerous offenders, and rationalize the current chaotic system.

- That the tests be thought of less as prediction techniques and more as a way of focusing attention on those offenders who have revealed tendencies to be unusually dangerous through their past acts.

These proposals may have the effect of dampening some of the technocratic enthusiasm for prediction. But in my view that is their virtue rather than their vice.

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