

Future threat: pre-crime, state terror, and dystopia in the 21st century

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question whether pre-crime approaches work.

It will end the check and balance system. Pre-crime will no longer be an independent agency. The Senate will control the police, and after that They'll absorb the Army too. (P K Dick, 1956, *Minority Report*)

In Dick's 1950s science fiction a police pre-crime unit predicts murders and incapacitates future killers *prior* to the foretold deadly crime. Anticipating threats and pre-empting crimes fit with contemporary preoccupations with security and the future in the 'risk society'. While pre-empting threats was a well-established trend within criminal justice prior to 9/11 contemporary counter terrorism measures have taken it to a new level. The current wave of pre-crime counter terrorism measures has its antecedents in United States led wars on drugs and crime. Contemporary counter-terrorism measures also closely resemble colonial counter-insurgency strategies used by imperial powers in efforts to defeat nationalist movements (McCulloch and Pickering, 2005). A key feature of pre-crime frameworks is the merging of criminal justice and national security systems to produce what have been called 'crimefare states' (Andreas and Price, 2001). This hybrid crime/war system gives rise to major tensions between the ideal of impartial criminal justice and the highly partisan practice of national security.

The pre-emptive strategy linked to counter-terrorism legislation establishes a 'pre-crime' criminal justice framework involving a shift in focus from individual offending

towards identifying potential threats and intervening before they emerge (Zedner, 2007). Domestic pre-crime counter terrorism measures are based on the same logic as the pre-emptive military strategy articulated by George W. Bush prior to the invasion of Iraq. Pre-crime is directed at monitoring, detaining, disrupting, and, in some cases, charging and prosecuting groups and individuals considered to present a future threat. The criminal law has traditionally been post crime in its focus. Major exceptions to this were offences aimed at acts and plans preceding a substantive offence, such as attempted murder and conspiracy to murder. These offences make it an offence to attempt or engage in a conspiracy to commit crime. In addition to this the criminal law has long targeted associations considered conducive to crime. However, such association offences were traditionally minor offences only. The bulk of the counter-terrorism laws enacted post 9/11 are targeted at crimes that have not occurred, have not been attempted, and for which there is no specific plan (such as required under the law of conspiracy) and attached serious criminal penalties to associations of particular kinds.

Pre-crime can be broken down into two categories. The first are laws and the police and security agency powers attached to them that expand the remit of the criminal law beyond the extant offences of conspiracy and attempts. Such legislation typically includes activities or associations that are deemed to precede the substantive offence that is being pre-empted. People have been

charged with conspiring to engage in these pre-crime offences, creating *pre-pre* crime offences. The second category of pre-crime measures are those criminal justice or security measures involving substantial and continuing coercive police or state action without a legally required link to criminal charge, prosecution, or conviction. The controversial control order regime falls within this category along with preventive detention and the power of security agencies and police to detain for extended periods without charge (McCulloch and Pickering, 2009).

Pre-crime's anticipatory logic is the antithesis of the temporally linear post-crime criminal justice process that commences from the presumption of innocence and progresses through a number of discrete stages involving investigation, charge, and trial and, in the case of a guilty verdict, punishment. Punishment under pre-crime counter-terrorism frameworks may come before and without crime.

Counter-terrorism is uniquely suited to advancing the pre-crime trend because the concept of 'terrorism' is inherently pre-emptive. Formally, only a court can determine who is a criminal, because the courts are the space in which verdicts are reached. The label 'criminal' refers to a person's past conduct and is ascribed after a court process. Politics and politicians, on the other hand, essentially determine in advance who is a terrorist and what constitutes an act of terrorism independently of the courts. The labels 'terrorism/terrorist' are fundamentally political constructs that exist apart from criminal justice processes.

Counter-terrorism pre-crime is rationalised on the basis that terrorism is an exceptional threat that warrants what has been called a 'new paradigm in prevention'. The logic is simple. Terrorists aim to create mass casualties and therefore must be stopped before they act because the human costs are too high to risk an attack. The logic of prevention is unassailable and we have no argument with the idea that preventing mass casualty attacks,

with all the human tragedy that follows, should be the primary objective of counter-terrorism law. However, pre-crime and the pre-emptive logic that drives it are not synonymous with prevention. Prevention is an outcome while pre-crime and pre-emption are strategies. Pre-empting threats through pre-crime laws translates into prevention only if the laws are effective. There is almost no empirical data to test claims about the effectiveness of counter-terrorism laws in preventing attacks or contributing to broader strategies aimed at preventing attacks. The research that is available suggests that some counter-terrorism measures do not achieve the outcomes sought and others are counter-productive (Lum et al., 2006). It is unsafe to *assume* that counter-terrorism laws are successful in preventing attacks.

Intelligence on threats is particularly important in the context of pre-crime laws. Many of the changes to law have expanded the capacity of police and security agencies to gather intelligence. Intelligence agencies and the production and use of intelligence, traditionally linked to national security, are increasingly embedded in criminal justice. Counter-terrorism laws necessarily involve gathering political intelligence because terrorism is, as argued previously, a political construct. Security intelligence agencies and their counterparts amongst law enforcement agencies have always gathered intelligence on ethnic, non-government, and political groups on the basis that these groups could be fronts for terrorists or that they might at some future time engage in ideologically motivated violence themselves. The difference in the pre-crime counter-terrorism context is that such intelligence may be gathered coercively (as opposed to simply covertly). It may also trigger coercive interventions such as control orders, or be used to prosecute pre-crime offences.

The effectiveness of risk prediction using intelligence relies on accurate information on the variables associated with threat.

Counter-terrorism is linked to 'crime science', a profitable and expanding field. There has, however, been little headway made in efforts to establish relevant variables and no evidence that the 'profiles' developed to predict threats are effective. Nevertheless, 'race', religion, politics, and ethnicity continue to be seen and used as proxies for risk (Cole and Dempsey, 2006). The counter-terrorism pre-crime project relies less on joining the dots or putting the pieces of a puzzle together – metaphors that suggests an underlying pattern – than the distinctly unscientific practice of crystal ball gazing.

If pre-crime can't be said to have been successful in prevention it has produced other results. Pre-crime mobilises prejudice around identity and intensified politicisation of policing and law. Pre-crime has profited police and security intelligence agencies, which have gained prestige, powers, and resources. Pre-crime counter-terrorism legislation profits politicians by enabling them to appear 'tough on terrorism' while simultaneously promoting a sense of insecurity, amplifying their kudos as 'strong' leaders. On another level pre-crime produces 'terrorism'. In a pre-crime world, offenders, victims, and the crime themselves are spectres, tangible only through counter-measures. While race, ethnicity, and religion are used as proxies for risk, counter-measures are proxies for terrorism. Recurring references to terrorist threats and plots based on intelligence, linked to police action, or referred to in debates over new laws conjure images of outrageous acts of mass murder, bombings, and general catastrophe. Prosecutions for terrorist-related offences likewise work to produce a sense of imminent threat that stands in the place of the acts themselves, though overwhelmingly these prosecutions are not linked to completed, attempted, or planned mass casualty attacks. While pre-crime is publicly promoted as a prevention strategy this stated agenda may obscure other hidden agendas related to domestic and foreign politics and the vested

interests of police and security agencies. As Giorgio Agamben warns, 'the security reasons that are invoked should not impress us: they have nothing to do with it' (2004).

The term 'pre-crime' captures the key problematic of counter-terrorism laws. Pre-crime suggests that no crime has been committed, while *simultaneously* evoking the crime that has not happened. Crime and pre-crime exist together as matter to shadow. Imagination animated through prejudice and stereotypes, rather than objective fact or evidence that points to those facts, form the basis of police and security intelligence action and prosecution under counter-terrorism pre-crime frameworks. Dick well understood that the promise of a crime-free society was also a threat. His story, centred on the police pre-crime unit, is a vision of a dystopian world of state power and the fate of an individual caught in its trap. ■

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References

- Agamben, G. (2004), 'No to bio-political tattooing', *Le Monde* (Paris), 10 January.
- Andreas, P. and Price, R. (2001), 'From war fighting to crime fighting: Transforming the American national security state', *International Studies Review*, 3, pp.31–52.
- Cole, D. and Dempsey, J. (2006), *Terrorism and the Constitution: Sacrificing Civil Liberties in the name of national security*, New York: New Press.
- Lum, C., Kennedy L. and Sherley, L. (2006), 'Are counter-terrorism strategies effective? The results of the Campbell Systematic Review on Counter-Terrorism Evaluation Research', *Experimental Criminology*, 4(2), pp.489–516.
- McCulloch, J. and Pickering, S. (2005), 'Suppressing the financing of terrorism: Proliferating state crime, eroding censure and extending neo-colonialism', *British Journal of Criminology*, 45, pp. 470–486.
- McCulloch, J. and Pickering, S. (2009), 'Pre-crime and counter terrorism: Imagining future crime in the "War on Terror"', *British Journal of Criminology*, 49(5), p.628.
- Zedner, L. (2007), 'Pre-crime and post-criminology?', *Theoretical Criminology*, 11, pp.261–281.