

Pre-crime and pre-punishment: a health warning

Lucia Zedner calls for restraint.

Pre-crime is a beguiling term, long familiar to followers of Philip K Dick's cult science fiction writing and made famous by Steven Spielberg's hugely successful film *Minority Report* (based upon Dick's short story). It is no surprise that the idea of pre-crime has captured the imagination of criminologists and crime policy makers seeking to understand significant recent developments, not least the ways in which 'pre-crime ... shifts the temporal perspective to anticipate and forestall that which has not yet occurred and may never do so' (Zedner, 2007). Pre-crime chimes with a growing academic interest in crime prevention, risk, and security. It lurks behind developments in surveillance, profiling, and extensions in criminal liability for attempts, conspiracy, preparatory, and possession offences, and offences of risk creation. But before we allow pre-crime to pass unnoticed into the criminal justice lexicon, a little caution is in order. Can a concept straight from the pages of science fiction safely be used in respect of real life criminal justice? Does its use legitimise changes that interfere with individual liberties and assign liability ahead of harm or wrongdoing? Are there good grounds for thinking that pre-crime – and its associated neologism pre-punishment – should carry a health warning? Instead of adopting pre-crime uncritically, let us consider what claims it makes and what changes it licences.

Even to talk of pre-crime commits the logical fallacy of labelling as criminal that which has yet to occur. To be fair, Philip K Dick was acutely aware of this inherent contradiction, as this exchange between two key characters reveals:

Anderton said: *You've probably grasped the basic legalistic drawback to precrime methodology. We're taking in individuals who have broken no law.*

But they surely will, Witwer affirmed with conviction.

Happily they don't – because we get them first, before they can commit an act of violence. So the commission of the crime itself is absolute metaphysics. We claim they're culpable. They, on the other hand, eternally claim they're innocent. And, in a sense, they are innocent. (Dick, 1956)

Pre-crime is a claim about a future as yet unknown. In Dick's fantastical world, thanks to the predictive powers of three 'precog mutants', crime control agents can foresee future events. Yet even here the future is not fixed. Although it is their 'majority report' that licences action against putative criminals, Dick retains an alternative possible future set out in the 'minority report' of the story's title. It is ironic that what Dick was so careful to maintain has been obscured by a political and public discourse that allows itself to speak of crime as if it were predetermined. Pre-crime relies upon and fosters an implicit claim that it is unproblematic to talk of crime before

it has occurred and, it follows, to seek to identify criminals before they have committed any offence.

As a consequence, pre-crime has a tendency to validate developments that ought properly to be subject to intense debate. It licences changes in procedural arrangements, as well as in substantive law, that erode civil liberties and permit intrusive coercive measures to be imposed ahead of wrongdoing. Despite growing confidence in actuarial tools and risk profiling technologies, determining who does or does not pose a risk tests the limits of our predictive capacity (Harcourt, 2007). Yet many preventive measures are justified by implicit or explicit claims that it is possible to determine in advance who poses a risk and in what degree. At the extreme these claims underpin incapacitative measures such as preventive detention, civil detention of sexual offenders in the US (Monahan, 2006), and 'imprisonment for public protection' in the UK.

An unavoidable corollary of pre-crime is pre-punishment – a term that has spawned lively philosophical debate about the claims made in its name (New, 1992). Pre-punishment is even more in need of a health warning than pre-crime because it opens the way to censure and sanction before they

are deserved. Even to speak of pre-punishment is to ride roughshod over basic principles of criminal law and punishment. Pre-punishment tramples on the presumption of innocence by treating individuals as guilty ahead of any wrongdoing. It negates

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autonomy and denies individuals the chance to remain innocent by slamming shut the 'window of moral opportunity' to choose to do right (Smilansky, 1994).

Like pre-crime, pre-punishment relies either upon very questionable assumptions about our capacity for prediction or the dubious claim that punishing potential wrongdoers is justified. Granted pre-punishment has some merit as a means of recognising the punitive aspect of measures said to be preventive or incapacitative. But to say that a measure is painful or liberty-depriving is not

the same as saying it is justifiable as punishment. Ignoring the inconvenient fact that there is, as yet, no crime, pre-punishment assigns responsibility for malicious,

or simply wrongful, intentions before they have been acted upon, or in respect of activities so removed in time from the commission of an offence that it cannot be said punishment is justifiable.

Philosophers love to imagine worlds in which future actions are pre-determined or where it is possible to state with absolute certainty in advance what will transpire. They engage in ingenious thought experiments in which they are endowed with unusual levels of foresight or the luxury of time travel. Such devices may be conducive to philosophical speculation but when other-worldly debates about 'time and punishment' start to influence public discussion and policy making a warning should sound (Statman, 1997). In the mundane real world where complete predictability doesn't exist and outcomes are not determined, we should insist on proof beyond reasonable doubt that an individual has the necessary intention and will in fact go on to commit the substantive offence before we punish – even for attempts.

Recent developments evidence a clear trend toward the kinds of

pre-emption that pre-crime and pre-punishment betoken. ASBOs (Anti-Social Behaviour Orders), control orders, sexual offences prevention orders and serious crime prevention orders are just some of the more notorious examples of the many preventive orders that now restrict liberty in respect of harms or risks of harm that may be too barely specified, remote, or indirect to

satisfy the requirements of criminalisation. Counter-terrorism offences also have an increasingly pre-emptive aspect. The Terrorism Act 2000 S.16(2) makes it an offence for a

person merely to possess money or other property where the person 'intends that it be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism'. The Terrorism Act 2006 S.1 prohibits the making of 'a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism'. Provided the perpetrator is aware of the risk that the public may perceive it as encouragement, he or she is liable to up to seven years imprisonment. Section 5 of the same Act makes it an offence for a person with intent to commit an act of terrorism or to assist another to do so, to engage in 'any conduct in preparation for giving effect to' that intention. The conduct may be perfectly normal and non-dangerous – buying a map, a railway timetable, or a computer manual is enough – and even though these are activities well short of the minimum required for a criminal attempt the offence carries a maximum term of

imprisonment for life. And it is not only the potentially catastrophic threats posed by terrorism that new preventive offences target. The Fraud Act 2006 S.2 criminalises the dishonest making of a false representation with intent to make a gain or cause a loss – a broadly cast offence with serious ramifications.

These examples give only a flavour of the larger temporal shift in crime control now occurring. The resultant rapid expansion of criminal liability invites scrutiny of the pathologies, as well as the benefits, of prevention. Prevention makes good sense but measures that act coercively against individuals need to be subject to rigorous principled restraint. Without restraint we face a future in which the search for security tramples basic liberties. Recall that in *Minority Report* Anderton concludes: 'In our society we have no major crimes ... but we do have a detention camp full of would-be criminals.' ■

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