1971

Preventive Detention during Riots

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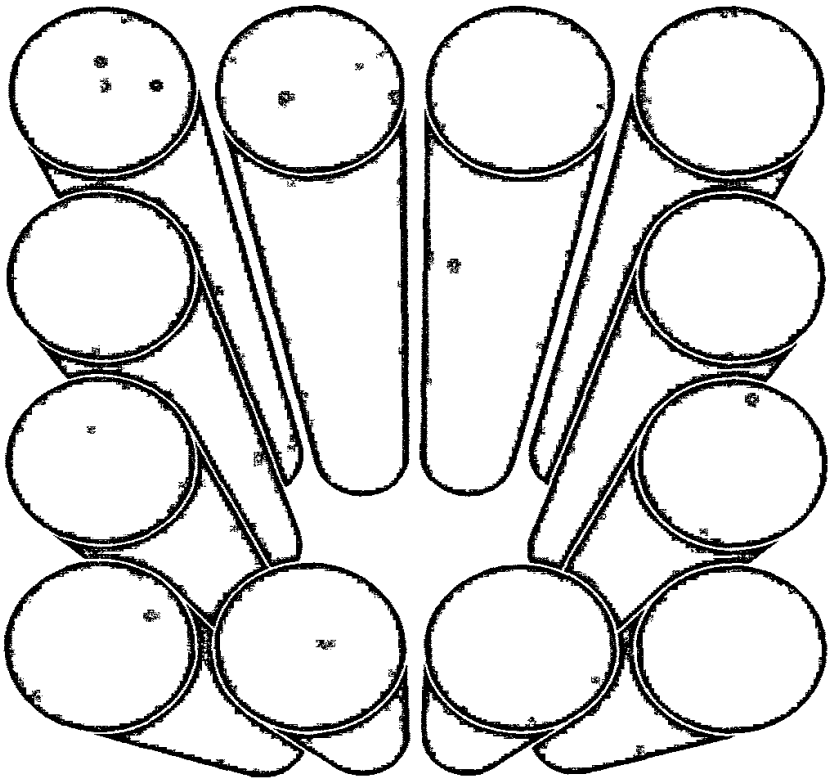
Publication Information & Recommended Citation

Israel, Jerold H. "Preventive Detention during Riots." In *Preventive Detention*, 194-202. Chicago: Urban Research Corporation, 1971.



PREVENTIVE DETENTION

Urban Research Corporation

Library of Congress Catalog Card Number 77-122458.

In addition, we were reminded forcefully and eloquently of the deeper cancer of society: the injustice in the total system working to the constant disadvantage of minorities, and which consequently causes our legal and judicial institutions to lose legitimacy for these groups. The raising of these larger questions might well cause us to wonder whether perhaps, to quote Senator Sam Ervin, we "have caught the wrong sow by the ear" in placing emphasis on a preventive detention bill as a partial solution to the problem of crime.

We would like to express our appreciation to the participants in this conference whose remarks are the substance of this book. In addition, we acknowledge gratefully the work of Lucy Ann Marx, who put the conference together; Sue Cullen, who edited the material; and Eunice Schatz, who has held everything together since.

John Naisbitt
President
Urban Research Corporation

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program, farm subsidies, oil depletion allowances, and all the rest. I'd rather give them up, and then we can pay for the alternatives like speedy trials and maintain the principle of liberty.

If you review history (and at one time in my career I did a sociology of revolutions at this university), I think you will find that vulnerable and unattractive groups are usually the occasion for making inroads on the tradition of liberties. Today that vulnerable and unattractive group is the presumed dangerous offender and the drug addict. Tomorrow, who knows who it will be? Anyone who is present at a riot scene is apt to look vulnerable and unattractive. In the fear and panic of the response to a riot our courts are already resorting to preventive detention under cover of law. I am speaking of prohibitively high bail. Should we give them the substance of law as well? Well, I'll listen to the proponents of preventive detention, but I'll be awfully hard to convince. So now you know at least where I stand quite clearly, and I make no pretense about it.

administration of justice during riots

JEROLD H. ISRAEL [Professor of Law, University of Michigan]: Various studies of the administration of justice during riots establish that persons arrested during riots generally have been detained for substantially longer periods than persons arrested during nonriot situations. This "extra" period of pretrial detention has been the product of quite different practices in different cities, and these practices have been based on several different administrative policies including, but not limited to, preventive detention.

"extra" period of pretrial detention found

In several cities, extra-lengthy detention resulted from a general judicial policy of setting extraordinarily high bail for the duration of the riot. A prime example was Detroit, where 70% of the bail initially set was in excess of $5,000, and few people gained their release until the judges reexamined their bail decisions and began to release persons on their own recognizance after the disorder had substantially subsided.

punitive use of high bail

Other cities required somewhat lower bonds, but at amounts still extraordinary in light of nonriot practices. In Baltimore, for example, bonds for curfew violators were originally set at $500. Although available evidence indicates that these high bonds were set for the very purpose of preventing persons from obtaining their release, courts were not always concerned primarily with preventive detention—that is, detaining persons because of the fear that they would return to the streets and commit crimes following their release. Very frequently, the judges indicated a desire to use pretrial detention in a basically punitive fashion. Judges in several cities suggested that a policy of high bail (in effect, a policy of nonrelease) would tend to deter other persons from violating the law. They felt that the "word" would get around—"if you are arrested, you will automatically spend a few days in jail under very uncomfortable circumstances, so you had better play it safe and stay off of the streets."

bondsmen unavailable or unwilling to write bonds until matters "cooled off"

In a few cities, extra-lengthy detention was probably an unintended product of following normal bail practices. Judges in these cities set bail at normal levels, but bondsmen were simply unavailable or unwilling to write bonds until matters "cooled off." As a result, many persons arrested in these communities often stayed in jail almost as long as persons arrested in communities following high bail policy.

In other areas, extra-lengthy detention was as much the product of administrative difficulties at the police and prosecutor level as any judicial policy. In Detroit, the prosecutor sought to check the record of each arrested person before any individual bail recommendation would be made. Under this approach, even if local courts were willing to release arrested persons on their own recognizance where they were charged with a minor offense and had a "good" record, those persons might be detained two or three days before their police and employment record could be checked and such information could be conveyed to the court.

need for extensive control of bail practices during riots

Extra-detention based on administrative difficulties or the punitive use of high bail raises numerous problems that are worthy of treatment in a separate conference on that subject alone. Our primary concern here is with preventive detention, and I mention detention based on these other grounds only to put our problem in its proper perspective, and to indicate the need for extensive control of bail practices during riots irrespective of one's position on preventive detention.

case made for limited preventive detention during riots

With respect to preventive detention, I hope to make a single point; even if one assumes that preventive detention in the normal situation is both unwise and unconstitutional, it does not necessarily follow that preventive detention should also be rejected in the riot situation. The pragmatic and legal considerations relating to preventive detention during riots are sufficiently different so that a quite distinct, and perhaps stronger, case can be made for at least limited preventive detention during such disorders.

Let me start by noting some of the pragmatic considerations. First, how likely is it that persons arrested during riots will commit crimes upon being released? The available statistics are rather limited, but they suggest that the likelihood is not very great. The rate of rearrest in Washington, for example, was 3.1% for all persons arrested during the civil disturbance, 2.9% for persons arrested for noncurfew offenses. Admittedly, such statistics are open to attack on several grounds. The rate of rearrest, of course, may not indicate the rate of recidivism. Also, the available statistics were all based on release programs that were substantially more restrictive than those applied in normal situations. In Washington, for example, although 42.7% of noncurfew arrestees were released on their own recognizance, the court accepted the D.C. Bail Agency recommendation for release under nonfinancial conditions in 25 to 30% fewer cases than in normal times. There are

will persons arrested during riots commit crimes upon being released?

other factors, however, that tend to support the implications of the Washington statistics. In many jurisdictions, almost half of the persons arrested had no criminal record. It seems unlikely that those persons, having undergone the traumatic experience of arrest, detention, and initial presentment before a magistrate, would immediately return to the streets and engage in criminal activities. The same would also be true, in large part, for the 20 to 40% who had a record of only petty misdemeanor offenses.

In sum, the present evidence on recurring offenses by persons arrested during riots is not as complete as we might hope; but, if one starts with the assumption that preventive detention is an extraordinary measure that should only be adopted upon a strong showing of need—as I do—the current evidence provides a quite sufficient basis for opposing present adoption of a general program of preventive detention.

Very few people, however, have seriously urged wholesale preventive detention of all persons arrested during riots. Several prosecutors, speaking during the height of the riot, have made statements that might support such a position, but further explanation (or reassessment) has usually revealed a position advocating limited preventive detention—for example, detention of persons arrested on more serious charges, such as arson, or inciting to riot, and persons with substantial records who have been charged with breaking and entering.

Similar proposals, although somewhat more limited, have been advanced by several commentators who are much farther removed from the heat of the battle. Probably the most detailed proposal of this type is that advanced by Colista and Domonkos in the Journal of Urban Law [45 J. Urban Law 815, 1968]. They suggest a limited preventive detention system which would go into effect upon the declaration of an emergency (involving an actual and continuing disorder) by

proposals for limited preventive detention system examined

the governor. Preventive detention for the duration of the disorder could then be ordered by a court, after an individual hearing, for persons who have been charged with incitement to riot or some crime involving the threat of safety to others, or who have a criminal record evidencing "violent or destructive anti-social behavior." All other persons would be entitled to "reasonable bail" based upon an individual determination. This restriction supposedly would prevent the courts from seeking to impose a general preventive detention upon all arrested persons by simply setting bail at a point where it cannot be made.

A limited preventive detention proposal along the lines suggested by Colista and Domonkos certainly could find far greater support than the general detention of all persons arrested during a riot. Yet, is there a sufficient showing of need with respect to even those persons that fall within the categories suggested by Colista and Domonkos?

Statistics concerning the response of such persons to release are simply unavailable because those persons generally have not been released. In Detroit, for example, bail for persons charged with arson or incitement to riot exceeded $25,000. (A bond for an alleged sniper was set at $200,000.) It has been suggested that persons who engage in acts like incitement to riot or arson are not "spur-of-the-moment" criminals, but persons who are highly antagonistic toward society and therefore very likely repeaters. Others argue, however, that this will depend largely on the individual case and is often difficult to determine even when the evaluation is based on considerable background information besides the grounds for arrest. They also stress that, in several judisdictions, many of the persons charged with very serious offenses have either been acquitted or convicted of lesser offenses. In Detroit, for example, 22 out of 28 prosecutions for incitement to riot and 21 out of 34 prosecutions for

arson were dismissed. They suggest that in terms of predicting future criminality, the Administration's bill provides for a much more reliable procedure, and, if that procedure is not sufficiently reliable to justify preventive detention in normal times, an even less reliable procedure should not be accepted in riot legislation.

Proponents of limited preventive detention might offer several points in reply to this position (assuming arguendo that the Administration's proposal has been rejected as unsatisfactory). First, one might contend that an ongoing riot poses such a severe threat to society that it requires taking greater risks in terms of predicting potential criminality than we would be willing to take during normal periods. This would be especially true where the individuals involved are charged with offenses that tend to promote and lend renewed vigor to a riot—such as incitement to riot, arson or sniping. It could also be suggested that many of the points made against preventive detention in normal situations are not as well taken as applied to the riot situation.

One argument advanced against preventive detention generally is that a person detained in prison cannot prepare his case and therefore will be at a disadvantage in presenting his defense at trial. Preventive detention during riots, however, will not last longer than the period of the riot, and one could rarely go out and prepare his defense (locating witnesses, etc.) even if he were released during that period.

The suggestion is made also that preventive detention during normal periods is not necessary because we have alternative devices such as third-party custody, peace bonds, and part-time release. These alternatives are largely nonexistent during a disorder. Third parties can't be found, peace bonds are impossible to enforce, and jails are too crowded and personnel too busy with other matters to start releasing people during the day and bringing them back at night.

grounds on which limited preventive detention could be justified

In sum, I suggest that one could well argue that even though preventive detention is not justified during normal times, a limited system of preventive detention, such as that suggested by Colista and Domonkos, could be justified on the grounds that (1) there is greater need for preventive detention during riots because the riot situation presents a greater threat to society, (2) the period of detention, lasting the duration of the riot, is shorter and less costly to the individual, and (3) alternative devices for preventing potential repetition of serious offenses are not available.

On the other hand, one must acknowledge preventive detention during a riot does have its own special drawbacks as compared to preventive detention during normal periods. As I have already noted, proposals for limited preventive detention during riots may call for individual determinations of the need for detention, but the pressure of time will make such determinations much less complete and potentially inaccurate than the hearings required, for example, under the Administration's bill. Also if preventive detention is dehumanizing during normal periods, it must be doubly so during the riot when jails are likely to be extremely overcrowded and persons may be detained, at least temporarily, in most inadequate facilities.

constitutionality of limited preventive detention

These then are some of the basic factors that must be considered in determining whether limited preventive detention is justified. As for the constitutionality of such a proposal, I believe that the current state of precedent and doctrine is sufficiently fluid so that these factors will likely be controlling on that score also.

In analyzing the constitutional issue, let us assume arguendo that the Eighth Amendment grants an absolute right to bail in all noncapital cases and that bail must be set with regard only to the individual's likelihood of appearance at trial. Does it necessarily follow that preventive detention during riots is invalid? I think not. There

are at least two and possibly three lines of related precedent which might justify bypassing the assumed Eighth Amendment right to bail during a riot.

relevant martial law cases

The first line of authority is a series of cases, at the state and federal level, interpreting the scope of martial law. Before analyzing the more relevant martial law cases, it is necessary to draw some distinctions between types of problems that have been presented in such cases. First, we should distinguish those cases involving complete martial law—that is, martial rule during a period of actual or immediately pending invasion. Those cases most clearly recognize that martial law can override normally applicable constitutional rights, but also stress that the exercise of total martial law must be clearly justified. This would not be the case in the typical riot situation. The courts and legislature would not be inoperative, and there would be no justification for their replacement by the military.

At the most, the typical riot may require the imposition of so-called qualified martial law, where the military takes over the law enforcement function only, and all prosecutions still are brought in the civil courts. At times, appellate courts have spoken in extremely broad terms of the scope of qualified martial law. Most of these opinions, however, mean very little as applied to the preventive detention problem. They were concerned with attacks on martial law that did not involve the suspension of individual rights; rather the major objection presented usually was based on the exercise of executive power (through martial law) to impose economic restrictions that had not been approved by the legislature (although the restrictions were clearly within the general scope of government power).

decisions dealing with suspension of individual rights

There are several decisions, however, that do deal with the suspension of individual rights. Most of these cases arose out of labor violence during the 1920's and 1930's and a few upheld

preventive detention. Probably the most significant is the United States Supreme Court decision in Moyer v. Peabody in 1909. Moyer arose out of martial rule imposed in areas of Colorado following the outbreak of violence in connection with a bitter labor dispute.

Moyer case

The governor, after determining that Moyer, a labor leader, "had been, and . . . would continue to be an active participant in fomenting and keeping alive the condition of insurrection," ordered that he be arrested by the military and detained without trial "during the . . . continuing condition of affairs" in the area. Although the courts apparently were operating at the time and Moyer petitioned for writ of habeas corpus, his application was denied. After his release by the military authorities, he brought suit for damages against the governor, alleging that he had been deprived of liberty without due process in violation of the Fourteenth Amendment.

The United States Supreme Court, in an unanimous opinion, affirmed the dismissal of his action. Justice Holmes, speaking for the Court, noted that, since the executive could direct the military to restore order even by killing those that resisted, he certainly could use the milder measure of "seizing the bodies" of those whom he considered likely to stand in the way of restoring order.

I have always had some difficulty with Holmes' logic. On the firing-line, the executive must of necessity make a prompt decision, without any form of hearing, as to whether deadly force is needed to repel a person who is forcibly resisting law enforcement; but I have difficulty understanding why this justifies arrest of a person who may cause trouble in the future, and, even so, why the executive's decision on that point should automatically be accepted by the judiciary. In any event, Moyer is somewhat suspect today if for no other reason than its date of decision and the subsequent development of a more sympathetic approach, at least in the Supreme Court, to

the rights of the individual. (It should be noted, however, that Frederick Bernays Wiener suggested in a recent article in the ABA Journal that Moyer was still quite reasonable authority.

Perhaps a more promising source for sustaining a limited preventive detention program is Korematsu v. United States. In Korematsu, the Supreme Court upheld an important aspect of the Japanese relocation program of World War II as a proper exercise of military power. It should be recalled that this program did not simply involve relocation; many of the people moved were originally kept in detention camps. Also, the individuals involved initially were not given an individualized hearing to determine their loyalty to the country. Because some Japanese might be disloyal, all Japanese were excluded from their West Coast homes and a substantial number were put in these camps and kept there till they could be relocated. In many respects, the restraint imposed was far more severe than that involved in a limited preventive detention program during a riot.

Korematsu case

In Korematsu, the Supreme Court upheld the order excluding persons of Japanese ancestry from the West Coast area. Although the Court found it unnecessary to consider the validity of the detention camp program, various statements in the majority opinion might well have been extended to justify at least the initial detention of excluded persons as a necessary means of implementing the exclusion order. Moreover, the majority opinion in Korematsu was written by Justice Black and was joined by Justice Douglas—two Justices renowned as defenders of individual liberties. (Interestingly, the dissenters included two Justices, Roberts and Jackson, who have generally been viewed as somewhat less sympathetic to the protection of individual rights.)

Still another line of authority that might support limited preventive detention is derived from

constitutional provisions authorizing suspension of writ of habeas corpus

the constitutional provisions—both state and federal—authorizing suspension of the writ of habeas corpus under limited circumstances. I have considerable difficulty in replying upon such authority, however, because: (1) I doubt that a riot will meet the conditions specified for suspending the writ—for example, the "rebellion" requirement of the federal constitution; and (2) suspension of the writ, which admittedly is the basic procedural remedy for contesting illegal detention, does not in itself justify detention—that is, elimination of the remedy does not necessarily eliminate the right.

I do feel, however, that cases like Moyer and Korematsu afford ample precedent for supporting limited preventive detention if it can be justified in light of the policy factors I mentioned earlier. For myself, if I were presented with a statute that authorized preventive detention along the lines suggested by Colista and Domonkos, but also abolished all money bond requirements for release of curfew violators, misdemeanants, and felons not subject to preventive detention and required their prompt presentment for release, I would support that bill as a reasonable approach that would result in the unnecessary detention of far fewer persons than current practices.

would support the bill if ...

RICHARD BUXBAUM [Professor of Law, University of California, Berkeley]: My teaching and writing specialties are corporation law and antitrust, and only peripherally involvement in student activities. I was not sure just what I was supposed to do here. But listening to the challenge put by Mrs. Wald to Mr. Santarelli that if the problem was one of people committing crimes during an extensive period out on bail, why didn't we face first the issue of trying to obtain fast expedited trials before we go all the way to preventive detention, I suddenly realized the value of corporation law here too. We have the problem of the security-for-expense provision in