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EXCHANGE

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# Replacement as a Problem for the Justification of Preventive Detention

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## Introduction

What makes Don E. Scheid's article on indefinite detention interesting is that he thinks through many of the moral issues inherent in attempting to prevent (or, rather, keep to a minimum) certain kinds of violent crime, an attempt we have come to call (however unwisely) "the war on terror." Scheid takes "war" as literally as possible, while making the reasonable assumption that this war, unlike wars generally, is not a temporary expedient responding to a moral emergency but an institution that must operate at full power for a long time, decades at least. Scheid's argument yields a long list of preconditions for *justified* indefinite preventive detention: a high standard of dangerousness ("mega-terrorism"), a reasonable standard of proof of dangerousness, as good an investigation as conditions will allow, adequate resources for the defense, a hearing before a fair and independent tribu-

nal, detention under the most comfortable conditions practical, and periodic review of the detainee's supposed dangerousness.<sup>1</sup>

To these preconditions one more should be added: *that detaining the persons in question will reduce the danger posed*. I take this additional precondition to follow from Scheid's own defense of indefinite detention, not from an independent argument. Scheid limits his argument to mega-terrorists because the scale of destruction they have already achieved (for example, destruction of the World Trade Center) shows them to be dangerous on a scale ordinary crime is not and so to invite measures of prevention beyond what seems necessary (or proper) for ordinary criminals. Scheid explicitly declines to consider the non-consequentialist argument that preventive detention is what a mega-terrorist deserves for his character or for what he has already done. Scheid's argument for preventive detention is consequentialist throughout: we may, and should, detain to prevent (or at least substantially reduce the probability of) the large-scale destruction of life that

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mega-terrorists aim at. We may justifiably deny a few, including some innocent persons, their freedom because, and only because, it makes the rest of us, the great majority, considerably safer.<sup>2</sup> The consequences of such preventive detention are (the argument concludes) clearly better than the alternatives.

My additional precondition can be defended in the same way: where there is no reduction in the danger posed, any detention is (all else equal) a net loss in happiness, well-being, or whatever reasonable measure of consequences we adopt. The end can justify the means only if the end is achieved (or, at least, has in

prospect a high probability of being achieved). Hence, a precondition of preventive detention must be a net reduction in danger posed (or, at least, a high probability of such a reduction). Where what is proposed is an institution of preventive detention, the institution must have that effect overall.

What I shall argue here is that preventive detention generally fails to satisfy this condition—and Scheid's indefinite preventive detention of mega-terrorists *always* does. An institution to prevent terrorism by detaining terrorists cannot, in practice, significantly reduce the danger terrorism poses.

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### Some Objections Put Aside

Now, it may seem obvious that if you lock up an active criminal, any active criminal, you must reduce the amount of crime of the sort that criminal is otherwise likely to commit. That, however, is seldom true. For economic crimes, say, selling illegal drugs, the imprisonment of a seller merely makes room for another seller. As long as the supply of potential sellers exceeds the opportunities to become a seller (and all else is equal), the imprisonment of one will, at most, have a temporary effect on the number of sellers. A few days may be enough to recruit and train a replacement. If so, then the selling will have returned to its old level even before the seller can be tried—and long before preventive detention can begin. *Preventing* this criminal from committing more of the crimes in question will not affect the number of crimes of that sort committed (though the arrest and

trial may have a small temporary effect on that number).

For non-economic crimes, the situation may be somewhat different. For example, we believe (perhaps correctly) that the number of potential rapists or other violent offenders is small; that the rate at which they seek opportunities to commit their sort of crime has little, if anything, to do with the rate at which other offenders will try to commit theirs; and so, all else equal, that only the arrival of a new generation would replace those now active, should they all be detained indefinitely. There are nonetheless two flaws with the consequentialist rationale for indefinite detention even of many of these criminals.

The first flaw is that detention often does not end the criminal activity of the detained, but merely moves it into the place of detention (where it generally goes unreported,

making the statistics of prevention look better than they should). The rapist may, for example, rape in prison just as he did outside, substituting weak male prisoners for the females of former days.

Second, and more important, violent offenders (like other criminals) do not commit their crimes in a vacuum. Their crimes affect the surrounding society, including other criminals, in many ways. For example, when the public learns that a serial rapist is at large, the typical response is to take unusual precautions, making it harder for other rapists (as well as the serial rapist) to find victims. Once the serial rapist is caught, the public relaxes, allowing other rapists more opportunities than before. A similar argument can (more or less) be made for most non-economic crimes.

In what follows, I shall assume that these two flaws in the consequentialist rationale for preventive detention of non-economic criminals

are not relevant to Scheid's argument. The first probably is not relevant because—so far—prison has proved a hard place to carry out the large-scale terrorist acts that Scheid classifies as "mega-terrorism." The second flaw may in fact be relevant, insofar as there is much more small-scale terrorism than large. I shall nonetheless ignore even this second flaw because I lack evidence that would allow me to make a reasonably accurate calculation of, say, the total number of terrorist-caused deaths that would have occurred if the World Trade Center had not been destroyed (to compare with the almost 3000 deaths that actually resulted from its destruction). Arguments about prevention are, in general, hostage to information we lack, especially information about what would have been if such-and-such. So, I put consideration of even this second flaw aside in what follows.

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### The Problem of Replacement

What I now want to argue is that detaining mega-terrorists is more like detaining sellers of illegal drugs than like detaining rapists. I admit that, even in a world much like this one, that might not be true. But, for now, the following is (or, at least, seems to be) true: al-Qaeda and other such groups, those Scheid identifies as "mega-terrorist," have more qualified candidates than positions to fill. They have (metaphorical) lines of applicants waiting outside their (metaphorical) offices. Though I take this claim to be obvious, I shall offer two pieces of evidence for its truth. First,

even with high casualty rates over many years in places like Iraq, Somalia, and Palestine, the number of terrorists, such as suicide bombers, does not seem to have gone down in anything like the proportion we would expect in consequence of the death or imprisonment of those committing such acts. The terrorists seem to replace losses quickly. Second, in Europe and the U.S.A., "homegrown terrorists" have at least attempted (or planned) terrorist acts without connection with any existing terrorist organization. These independents have (so far) been notably ineffective,

perhaps because they lack the training, equipment, and organization that mega-terrorists have. Even so, they are plainly available for one of the mega-terrorist organizations to recruit.

Let us then assume that any detained mega-terrorist will soon be replaced. The next question is "how soon"? If within a few days or weeks, then preventive detention cannot be justified (since nothing is prevented that would not be anyway). The arrest of the terrorist and subsequent legal process will, as a mere side effect, achieve all the prevention that can be achieved. The same is true even if we assume, more realistically, that the training period for a terrorist is between two months and a year. We can achieve that much prevention simply as a byproduct of denying bail to a terrorist until tried in an ordinary criminal court in the ordinary way. (We can justify denying bail on the grounds that the alleged terrorist is likely to go into hiding or try to flee the jurisdiction before trial if not kept in custody.) We do not need a new institution of indefinite preventive detention to achieve that much prevention.

Only if many years would be necessary to train a new recruit to replace the detainee would indefinite preventive detention *seem* to make any sense at all. Of course, from what we actually know of, for example, those who carried out the destruction of the World Trade Center, a short training period—a few months—is the norm. But, even if it were not, terrorist organizations could achieve the equivalent of a short training period by having a fair number of recruits in various stages of training (or just standing

by, as what intelligence officers call "sleepers").

But let us assume, contrary to what we think we know, that the training period for terrorists is quite long, say, a decade, and that terrorist organizations have no reserves of recruits in various stages of training. Even so, there is a definite limit to how long Scheid's argument for preventive detention will allow terrorists to be detained: effective preventive detention will end as soon as the terrorist has been replaced. If the training period is 10 years, as we have assumed, then the preventive effects of detention disappear after 10 years. After that, the terrorist, if allowed to depart, would be a supernumerary, not a significant danger. Further detention would save no one from attack but would burden the former terrorist; the detention cannot be justified (or, at least, cannot be justified within Scheid's framework).

Of course, this argument works best if we assume a stable organization, not an expanding one. If the terrorist organization is expanding, especially if it is expanding rapidly, it may well be able to find a place for any terrorist let out of prison. But, if the organization is expanding rapidly, the main problem will not be any terrorist unlucky enough to be caught and held for a decade. The main problem will be all the terrorists in training—and the underlying conditions that make reasonable the training of so many. The released detainee will be dangerous, but letting him go may still have no effect on the overall rate of terrorist acts (supposing enough trainees). Releasing him would simply save his organization the cost of training a new recruit. Similarly, if the organization

has places open because of high losses, losses so large that the training pool cannot replace them, then again the preventive effect of detaining a terrorist is likely to be small. Other means of enforcement are taking care of the problem. Should the released detainee rejoin the organization, he too is unlikely to survive long.

So, even when preventive detention can be justified, it can be justified only for a certain period, the period required to replace the detainee. Once that period has passed, the detainee would have been replaced. Without his organization to assist him, he is unlikely to become a "mega-terrorist" again. He could, of course, become an independent terrorist—but then he would be no more dangerous than many other criminals we do not preventively detain. Part of what makes mega-terrorists so dangerous is the organization that supports them, for example, by helping them find others of like mind and suitable skills for a major undertaking. Scheid's argument would not apply to a terrorist

without an organization (at least under current conditions).

Once we limit the period of detention in this way, ordinary criminal justice looks like an attractive alternative to Scheid's new institution. For most of the crimes that terrorists commit, the likely prison sentence is longer, much longer, than the likely time it would take for the organization to replace them. The only remaining attraction of Scheid's institution of indefinite preventive detention may seem to be for "terrorists" whom we cannot (using ordinary standards of proof) prove to have committed any crime or, at least, cannot prove to have committed a crime that would justify imprisonment for even the time it would take for his organization to replace him. These are, of course, generally the terrorists easiest to replace, the ones who have little or no experience, the ones who (given the preceding argument) we cannot justify detaining very long—probably no more than a few months—because the organization would by then have replaced them with minimally trained recruits.

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### Final Considerations

Of course, replacement is not the only reason that a terrorist might cease to be dangerous soon after being detained (or, at least, cease to be dangerous enough to justify preventive detention). Another reason he might cease to be dangerous is that working as a terrorist requires that one be able to move about without being recognized, especially by government officials. In this respect, terrorists are like spies, saboteurs, and other covert agents rather

than like ordinary soldiers. An ordinary soldier captured in war can return to the fighting as soon as a space opens up (something likely to happen soon enough in any combat unit in wartime). Only detaining him can keep him out of combat. That the enemy now knows the soldier by name, by photograph, or even by finger prints, retinal scan, and genotype, makes no difference to his effectiveness on the battlefield or in some support position.

A terrorist, on the other hand, may not be able to return to his unit after release from detention even if there are several places he could fill. He may not because he can no longer move as freely across international borders or even within a single state. The security services now know who he is, what he looks like, and so on. They will, of course, try to follow him in hopes of identifying his colleagues. His photo, finger prints, and so on will make it easy to identify him when he tries to cross an international border—or even use his credit card or cell phone. His former colleagues have good reason to keep a safe distance from him. His cover has been “blown.” He will have become more or less useless as a terrorist. Scheid’s argument for indefinite detention will no longer apply to him.

Scheid seems to have something like this criticism in mind when he notes:

*there are reports of any number of actual terrorism prisoners who have been released only to rejoin jihad and their fight against the west. For instance, one Guantánamo detainee, Abdullah Ghulam Rasoul, was transferred to Afghanistan in 2007 and then released by the Kabul government. According to reports, he is now the commander of operations for the Taliban in southern Afghanistan. Another detainee, Said Ali al-Shihri, was returned to his native Saudi Arabia in 2007 and is now reportedly a leader of al-Qaeda’s affiliate in Yemen.*<sup>3</sup>

The trouble with these reports (including the ones only hinted at) is that they do not seem to concern terrorists in the relatively strict sense that Scheid (quite properly) adopts: “[those who engage in] the deliberate and illegal use of violence that targets non-combatants (‘innocent civi-

lians’) for political purposes.”<sup>4</sup> Rasoul and Shihri, though labeled terrorists by the U.S. government, seem to have been something else. Rasoul was an (irregular) soldier captured while fighting an invading army. Unless we simply assume that all Taliban and al Qaeda fighters are, by definition, terrorists, Rasoul was not a terrorist (much less a mega-terrorist)—at least on the evidence available.<sup>5</sup> He was, instead, an ordinary prisoner of war. Therefore the report that Scheid cites concerning Rasoul does not concern a “terrorism prisoner” (in the appropriate sense) who was able to return to terror after being released.<sup>6</sup> Prisoners of war are not a problem that Scheid addresses—or need address. We already have institutions in place to deal with them. They can be held until the war ends, according to the relevant Geneva Convention, under conditions not much different from those Scheid argues for.<sup>7</sup>

Shihri is a more difficult example. He is now a member of al Qaeda. But whether he was a member before his arrest at the Pakistan border in December 2001 is an open question. He claimed never to have heard of al Qaeda until he arrived in Guantánamo. He never changed his story despite 6 years in detention subject to the harsh interrogation that became routine (what most of us might call “torture”). All the U.S. government eventually charged him with was the following: that he traveled from Saudi Arabia to Afghanistan, after September 11, 2001, with \$1,900 that he planned to give to the Red Crescent charity; that he was an “al Qaeda travel facilitator” who funded other fighters and guided them on how to cross the Iran–Afghan

border; that he was on a watch list because he was suspected of helping Saudis acquire false travel documents for traveling to Afghanistan; that he trained at the Libyan camp north of Kabul; that a fatwa instructed him to assassinate someone (but he never took action); and that he was wounded during the American aerial bombardment of Afghanistan. He was, in short, connected with the military side of al Qaeda when detained—if he was connected with al Qaeda at all. He was not then a mega-terrorist. What he has done since his release is not easy to establish. We have “reports” but not much corroboration. Only two things seem clear. First, he did not return to his old organization in Afghanistan but (after a period of inactivity) started over in Yemen. Second, if he in fact

aspires to be a “mega-terrorist” in Yemen, he has so far not succeeded.<sup>8</sup>

Scheid argues for preventive detention because the status of “prisoners of war” fails in some way—perhaps because the persons detained are not actually prisoners of war but civilian detainees. Scheid may be right about the failures of prisoner-of-war status. That is a question for another paper. What he tries to do in this paper is provide a sound argument for the claim that a morally permissible preventive detention of terrorists would prevent enough terrorism to be worth the cost. But, as I have shown, the good consequences supposed to follow from indefinite detention of mega-terrorists are *insufficient* to justify that institution; indeed, the good consequences appear to be (almost) *entirely* absent.

## Notes

1 Don E. Scheid, “Indefinite Detention of Mega-terrorists in the War on Terror,” *Criminal Justice Ethics* 29 (2010): 1–28.

2 *Ibid.*, 9. This is where he suggests that this argument might justify even detaining 10 innocent people (indefinitely) for every actual mega-terrorist. I find Scheid’s tolerance for such a high error rate hard to accept. Perhaps our disagreement has something to do with our experience. Scheid does not look much like a “mega-terrorist”; apparently, I do, at least at airports. Whenever I traveled during the Bush years, I wondered whether I might be mistaken for someone else, whisked away to Guantánamo, and be lost to friends, family, and colleagues for several years (under very unpleasant conditions). For that reason, if no other, I prefer the saying, “Better 100 mega-terrorists go free than that one innocent person be detained indefinitely.” Of course, the higher the number of false positives Scheid’s institution gener-

ates, the harder it will be to justify, all else equal, since detaining the innocent is a high cost. Scheid does not make it easy to justify institutionalizing indefinite detention.

3 *Ibid.*, 7.

4 *Ibid.*, 3. The definition would be more accurate if it read “for political, religious, or other public-spirited purposes.” Some terrorists have religious reasons, some moral, and so on. They all differ from the ordinary criminal whose motive is self-interest or just meanness.

5 See [http://en.wikipedia.org/wiki/Abdullah\\_Gulam\\_Rasoul](http://en.wikipedia.org/wiki/Abdullah_Gulam_Rasoul) (accessed June 3, 2010).

6. A *mega-terrorist* is, according to Scheid, “a person intent on committing one or more acts of catastrophic terrorism.” Except for scale, a mega-terrorist is just a terrorist. Scheid, “Indefinite Detention of Mega-terrorists,” 5.

7 For the text of that relevant section of the Geneva Convention, see <http://www1.umn.edu/humanrts/instree/y3gctpw.htm> (accessed June 1, 2010).

8 See [http://en.wikipedia.org/wiki/Said\\_Ali\\_al-Shihri#2005\\_Summary\\_of\\_Evidence\\_memo](http://en.wikipedia.org/wiki/Said_Ali_al-Shihri#2005_Summary_of_Evidence_memo) (accessed June 3, 2010).