HEINONLINE

Citation: 98 Nw. U. L. Rev. 1 2003-2004

Content downloaded/printed from
HeinOnline (http://heinonline.org)
Fri Jul 27 15:54:07 2012

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0029-3571

DiscoverArchive

Retrieved from DiscoverArchive,
Vanderbilt University's Institutional Repository

This work was originally published in
98 Nw. U. L. Rev. 1 2003-2004

Copyright 2003 by Northwestern University School of Law
Northwestern University Law Review

Printed in U.S.A.
Vol. 98, No. 1

Articles

A JURISPRUDENCE OF DANGEROUSNESS

Christopher Slobogin[*]

INTRODUCTION

> Leroy Hendricks is on the verge of release from prison after serving his fifth sentence for child molestation. He candidly tells his court-appointed evaluators that, if released, the only sure way he will stop molesting children is "to die."[1]

> Garry David, diagnosed with anti-social personality disorder, is nearing the end of his 14-year sentence for shooting a woman and two police officers, conduct that occurred just after being released from prison for a previous violent offense. While in prison, he assaulted more than 15 inmates and guards, conduct which increased his sentence. A court found that, if released, "[h]is underlying anger and resentment would be almost certain to rise to an explosive level as soon as he felt thwarted or subjected to stress."[2]

> Zacarias Moussaoui, a French-Moroccan known to have trained in Osama bin Laden's camps in Afghanistan, tried to pay $8,000 for flying lessons prior to September 11, 2001, stating that he was only interested in learning how to handle an aircraft (not take-off or land). He also made several telephone calls to some of the individuals eventually involved in the hijackings of September 11th, although the contents of those calls are not known.[3]

Dangerousness determinations permeate the government's implementation of its police power. To name a few examples, death penalty determinations,

---

[*] Stephen C. O'Connell Professor of Law, University of Florida Fredric G. Levin College of Law. For their comments on this Article, the author would like to thank Wayne Logan, John Monahan, Douglas Mossman, Michael Perlin, and participants in workshops at the University of California, Hastings and the University of Florida Levin College of Law.

[1] Kansas v. Hendricks, 521 U.S. 346, 355 (1997).

[2] The Garry David case is described in C. Robert Williams, *Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the* David *Case*, 16 MONASH UNIV. L. REV. 161, 162, 170–78 (1990). Out of concern that, if released, David would go on another violent crime spree aimed particularly at police, the Parliament of Victoria took the extraordinary step of passing special legislation (euphemistically called the "Community Protection Act of 1990"), the sole purpose of which was to authorize prevention detention of David after his release from prison. *Id.* at 175–76.

[3] Vivienne Walt, *French Investigator Tackles Terrorism's "Cancer,"* USA TODAY, Nov. 8, 2001, at 11A.

HeinOnline -- 98 Nw. U. L. Rev. 1 2003-2004

non-capital sentencing, sexual predator commitment, civil commitment, pretrial detention, and investigative stops by the police often or always depend upon dangerousness assessments.[4] This Article examines the legitimacy of these interventions, which all result in some form of preventive detention.

The best place to start is with an analysis of long-term, "pure" preventive detention. Pure preventive detention is defined in this Article as a deprivation of liberty that is based on a prediction of harmful conduct and that is not time-limited by culpability or other considerations (such as a pending trial). Under traditional theory, only people with serious mental illness may be subjected to long-term pure preventive detention.[5] Under traditional theory, therefore, none of the three individuals described above could be detained unless the government charged them with some (new) crime.[6] Hendricks, David, and even Moussaoui may have diagnosable mental disorders, but not disorders that support preventive commitment as classically conceived.[7]

In recent years, the U.S. Supreme Court has undermined this traditional view regarding pure preventive detention, but the extent to which it has done so is not clear. In *Kansas v. Hendricks*,[8] involving the constitutionality of a so-called "sexual predator" statute, the Court permitted indeterminate confinement of dangerous individuals who have completed their sentences and have committed no new crime even when they are *not* seri-

---

[4] For a description of the many contexts in which dangerousness determinations play a role in the criminal process, see Christopher Slobogin, *Dangerousness as a Criterion in the Criminal Process*, *in* LAW, MENTAL HEALTH & MENTAL DISORDER 360–63 (Bruce Sales & Daniel Shuman eds., 1996).

[5] *See* Foucha v. Louisiana, 504 U.S. 71, 83 (1992) (White, J., writing for a plurality of the Court) (holding invalid the continued commitment of a dangerous person who had been found not guilty by reason of insanity but who was now no longer mentally ill and stating that the state's position "would . . . be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law"); *see also* Developments in the Law, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1229–33 (1974) (noting that "unlike other members of society, the mentally ill may be incarcerated for the protection of the community because of their potential for doing harm rather than because of the harm which they have caused" and discussing the possible rationales for this differential treatment).

[6] Moussaoui is charged with conspiracy, although the basis for this charge is somewhat vague. Viveca Novak, *How the Moussaoui Case Crumbled*, TIME, Oct. 27, 2003, at 33, 35 (reporting that, while the original indictment against Moussaoui recounted behavior that paralleled that of the 9/11 perpetrators, "direct contact" between them and Moussaoui "was never alleged," and indicating that, if the case proceeds, reference to 9/11 may have to be dropped).

[7] In *Hendricks*, the Kansas Supreme Court found that Hendricks was not committable under traditional standards. Matter of Care & Treatment of Hendricks, 912 P.2d 129, 138 (Kan. 1996) ("[N]either the language of the Act nor the State's evidence supports a finding that 'mental abnormality or personality disorder' as used in [the sexual predator law] is a 'mental illness' as defined in [the Kansas civil commitment statute]."). Likewise, David was not eligible for traditional commitment. *See* Williams, *supra* note 2, at 172–74 (describing the "amendment" of the Victorian Mental Health Act's definition of "mental illness" to include anti-social personality disorder and thus ensure David's detention).

[8] 521 U.S. 346, 350 (1997).

HeinOnline -- 98 Nw. U. L. Rev. 2 2003-2004

ously mentally disordered—as long as they have a personality disorder that renders them unable to adequately control their anti-social conduct.[9] The Court recently affirmed its willingness to uphold the institutionalization of non-psychotic people who meet this "inability-to-control" threshold in *Kansas v. Crane.*[10] These holdings are clearly meant to permit the preventive detention of people like Hendricks, whose commitment was affirmed by the Court.[11] Whether they would authorize preventive detention of someone like David, who may not exhibit the type of inability to control that is popularly associated with sex offenders, remains an open question, and pure preventive detention of someone like Moussaoui is undoubtedly not authorized by the Court's case law to date.[12]

Despite the relatively limited reach of the statute upheld in *Hendricks*, the Court's opinion occasioned a storm of criticism. The attacks on *Hendricks* focus on two aspects of that decision, which I will call the *psychological criterion* and the *prediction criterion.* The psychological criterion describes the psychological traits that distinguish those dangerous people who may be committed from those who may not be. The prediction criterion describes the level of risk that must be shown before preventive detention may take place. The first criticism of *Hendricks* inveighs against its endorsement of the inability-to-control notion as the appropriate psychological criterion for preventive detention.[13] Those who voice this criticism argue instead for some version of the traditional view that only serious mental dysfunction (i.e., psychosis or irrationality) permits confinement based on dangerousness. The second criticism concerns the Court's belief, implicit in *Hendricks* and explicit in other cases, that enough evidence can be procured to meet the prediction criterion.[14] Critics of this stripe contend that predicting which individuals will offend with a level of certainty sufficient to justify long-term confinement is impossible, or only possible in a small percentage of cases, and thus invalid detentions and abuse are likely.[15]

Much of this Article is devoted to assessing the claims and counterclaims made about the psychological and prediction criteria for preventive

---

[9] *Id.* at 356–58.

[10] 434 U.S. 407, 411–13 (2002).

[11] *Hendricks*, 521 U.S. at 371.

[12] *See infra* text accompanying notes 143–50.

[13] *See infra* notes 153–66 and accompanying text.

[14] Although *Hendricks* did not directly address this issue, it implicitly endorsed commitments based on such predictions. *See Hendricks*, 521 U.S. at 357–58, 371. Other Supreme Court decisions have made clear that dangerousness predictions, whether made by experts or laypeople, may form the basis for deprivations of liberty. *See, e.g.*, Jurek v. Texas, 428 U.S. 262, 275 (1976) (upholding dangerousness as an aggravating factor supporting the death penalty, largely on the ground that "prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system"); Schall v. Martin, 467 U.S. 253, 278 (1984) ("[F]rom a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct.").

[15] *See infra* text accompanying notes 212–13.

HeinOnline -- 98 Nw. U. L. Rev. 3 2003-2004

detention. It concludes that both *Hendricks* and its critics are wrong about the appropriate psychological criterion, but that *Hendricks* is closer to getting it right than those who believe preventive detention should be reserved for people who suffer from psychosis or similarly severe mental disorders. It also concludes that the controversy over the prediction criterion requires significant rethinking.

More specifically, with respect to the psychological criterion, I argue that the core trait that normatively distinguishes the dangerous person who may be preventively detained from the dangerous person who may not be is imperviousness to criminal punishment, or what I shall call *undeterrability*. This condition clearly describes the severely mentally ill person who is oblivious to societal mores or who is irrationally convinced that his criminal actions do not violate them. But it might also describe the extremely impulsive individual who, like Hendricks or David, is willing to commit crime despite a very high likelihood of apprehension. It may even apply to someone like Moussaoui, who suffers from neither a major mental disorder nor a volitional dysfunction, but who wants to commit crime so badly he is willing to die for it.[16] When the dangerous person is undeterrable in this sense, society is presumptively entitled to impose preventive detention rather than or in addition to punishment, because then the commands of the criminal justice system not only do not work (a state of affairs presumably descriptive of almost every criminal act), they *cannot* work.

This Article also assesses the prediction criterion: the degree of dangerousness necessary to justify preventive detention.[17] The debate on this issue between those who emphasize individual liberty and those who focus on public security has been vigorous, but the two sides often seem to be talking past one another, given their starting points. I do not try to define the prediction criterion precisely, but I do propose two principles on which both sides should be able to agree. The *proportionality principle* requires that the degree of danger be roughly proportionate to the proposed government intervention. Thus, for instance, greater proof of dangerousness is needed to impose the death penalty than to conduct a law enforcement frisk. A further, less obvious consequence of the proportionality idea is that preventive detention would be subject to durational limitations, because the longer the government seeks to detain someone preventively, the more proof of dangerousness it would need to produce. The *consistency principle* requires that the prediction criterion applied in the preventive detention context be consistent with analogous manifestations of the government's police power, in particular the implementation of criminal justice. Thus, for

---

[16] *See infra* text accompanying notes 200–03.

[17] I address elsewhere the equally important questions of whether we can prove dangerousness with the requisite level of certainty, *see* Slobogin, *supra* note 4, at 372–79, and how we might do so, *see* Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97 (1984); *see also infra* notes 35–36.

HeinOnline -- 98 Nw. U. L. Rev. 4 2003-2004

instance, the degree of dangerousness required for incarcerative preventive detention ought to be roughly equivalent to the degree of dangerousness that permits conviction for inchoate crimes such as conspiracy, reckless endangerment, and driving while intoxicated, because both preventive detention and these provisions of criminal law authorize significant deprivations of liberty to protect third parties.

As this last comment suggests, application of the proportionality and consistency principles could have significant implications for both preventive detention *and* the law of crimes. Under these two principles, one could argue that preventive detention based on dangerousness could, at least initially, be justified on a relatively low risk of harm (such as that associated with the crime of driving while intoxicated). Conversely, with some of the most inchoate crimes, such as vagrancy and possession of certain types of contraband, confinement may not be justifiable under any reasonable interpretation of these principles, because the degree of danger posed by such crimes is so minimal.

This Article develops the psychological and prediction criteria in more detail, as well as their implications for the criminal law. Before doing so, however, it explores at length a fundamental predicate issue. Assuming the prediction criterion is met, why should society want to impose any additional limitations on the government's authority to incapacitate dangerous individuals? Certainly a primary function of government is to prevent harm to its citizens, and laws that incapacitate individuals simply upon evidence that they are likely to cause such harm would seem to be one effective manner of doing so. An explication of why that development should not occur is necessary to set the stage for the rest of the Article.

Accordingly, Part I of this Article discusses the plausibility of a preventive detention regime that jettisons the psychological criterion requirement and instead focuses solely on the prediction criterion. It first concludes that the standard objections to preventive detention—that we cannot predict the future, that preventive detention is an underhanded way of more easily imposing punishment, or that it violates the legality principle because of definitional conundrums—are all rebuttable. But it also concludes that such a regime would violate the fundamental tenet, derivable from deontological, utilitarian, and ethical reasoning, that autonomous individuals who commit criminal acts have a *right to punishment*. If government chooses to preventively detain an individual rather than punish him, it must show the person is not eligible for the right to punishment. Thus, government must demonstrate not only dangerousness, but also that the person is so lacking in the capacity or willingness to adhere to society's most basic prohibitions—in other words, so undeterrable—that punishment is not warranted. Although I recognize an *effect exception* to this proposition—which would permit preventive actions in the absence of psychological impairment if they are consistent with the right to punishment—sound policy

HeinOnline -- 98 Nw. U. L. Rev. 5 2003-2004

reasons support a prohibition on long-term deprivations of liberty based on dangerousness, unless the psychological criterion is also met.

On that assumption, Part II explores the possible alternatives to the psychological limitation and makes the case for undeterrability as the appropriate inquiry. Part III then examines the prediction criterion, and more fully describes the proportionality and consistency principles. Finally, Part IV briefly sets out the implications of these criteria for the criminal law, and in particular the law of inchoate and anticipatory offenses. My goal is to describe and justify a jurisprudence of dangerousness governing the state's implementation of its police power.

I. DANGEROUSNESS AS THE SOLE CRITERION FOR STATE INTERVENTION

Sex offenders are not the only criminals who might routinely recidivate. Burglars, check forgers, and even killers can be repeat offenders. Certainly the state has a compelling interest in protecting its citizens from these types of crimes. Why shouldn't the state be empowered to take preventive action against any individual who is likely to wreak havoc on society?

There are at least four objections to such a preventive regime. The unreliability objection is that we lack the tools to predict criminal behavior with a sufficient degree of certainty. The punishment-in-disguise objection is that a preventive detention regime will allow government to avoid the rigorous procedural protections of the criminal law and perhaps eventually replace criminal justice altogether. The legality objection is that we cannot define the state's power to detain for preventive reasons sufficiently precisely to provide notice and avoid official abuse. The dehumanization objection is that deprivations of liberty based on future behavior offend basic precepts of our civilization.

Each one of these objections suggests limitations on preventive detention. None of them, however, requires prohibition of such detention under all circumstances. The following discussion elaborates on these conclusions.

A. The Unreliability Objection

This objection to preventive detention rests on two assumptions. First, government should not be able to deprive a person of liberty on dangerousness grounds unless it demonstrates a high degree of certainty that the person will offend in the near future. Second, such proof is impossible to obtain.

The first assumption expresses a preference for certainty that is analogous to the criminal law requirement that the government prove the essential elements of crime beyond a reasonable doubt. Such a preference is understandable, but it is misguided for three reasons. First, imposition of the reasonable doubt standard is overly stringent when the state's goal is to

HeinOnline -- 98 Nw. U. L. Rev. 6 2003-2004

prevent rather than to punish. Second, the belief that the criminal law permits conviction only when there is no reasonable doubt about blameworthiness is based on a misconception about the reliability of assessments made in criminal cases; in fact, the culpability determinations that provide the primary basis for criminal punishment are subject to serious inaccuracy. Third, requiring a high degree of danger is inconsistent with the fact that many of the crimes that penalize dangerous activity require very little in the way of predictive validity. Each of these propositions is discussed further below.

The preference for establishing guilt beyond a reasonable doubt in criminal trials is often expressed through the adage that our system would prefer to let ten guilty people go free than permit one innocent person to be convicted. But assume that six of these hypothetical ten guilty individuals will commit a crime if not confined. Michael Corrado has pointed out the different calculus that exists when the state seeks to prevent rather than convict. The outcome of a crime cannot be changed; in the latter context, as he states, "[t]he only dangers are those of convicting an innocent person, on the one side, [and] . . . of letting a guilty person off without his proper punishment."[18] In contrast, if we could identify a group of ten people, among whom six will kill in the near future, "surely the likelihood that four will lose their freedom must be weighed against the likelihood that six will lose their lives."[19] Despite the fact that we can reasonably doubt whether any particular person in this group will commit homicide, preventive detention of the entire group may well be justified given the cost of not doing so.[20]

In any event, the belief that the reasonable doubt standard demands more than this level of certainty is badly mistaken. Every criminal law professor knows the difficulty of differentiating premeditation from ordinary intent, or recklessness from negligence. Even if agreement can be reached as to the precise definition of these concepts, independent judges and juries applying them are bound to arrive at different results on the same facts; for instance, disagreement is highly likely in deciding between first and second-degree murder, unprovoked and provoked killing, and voluntary and involuntary manslaughter.[21] These disparities are an inevitable aspect of a

[18] Michael J. Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778, 793 (1996). A similar type of analysis may justify permitting stop and frisks on lesser suspicion than is normally required for a search. Professor Sundby has argued that the reason this police investigative technique requires only reasonable suspicion (as opposed to probable cause) is because it is aimed at prevention of danger. *See* Scott Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 423–25 (1988).

[19] Corrado, *supra* note 18, at 794.

[20] For more on this line of reasoning, see *infra* text accompanying notes 227–29.

[21] Not surprisingly, empirical research indicates that lay views on the culpability of specific criminals vary enormously. *See, e.g.*, PAUL ROBINSON & JOHN DARLEY, JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 226 (1995) (noting that, in 20 percent of the scenarios that subjects were asked to rate in terms of culpability, the standard deviation on culpability ratings exceeded 3.50, a number suggesting extremely low agreement); NORMAN J. FINKEL, COMMONSENSE JUSTICE:

HeinOnline -- 98 Nw. U. L. Rev. 7 2003-2004

system that relies on moral judgments about invisible, internal mental states.[22]

In social science terms, this high degree of inter-rater inconsistency (or unreliability) cannot help but indicate a high degree of inaccuracy (or invalidity) as well.[23] The assertion that we can know, beyond a reasonable doubt, that a person "deserves" a particular verdict and punishment expresses a hope rather than a reality. And the costs of inaccuracy are huge—a finding of premeditation can result in the death penalty rather than a 20-year sentence; a conclusion that a defendant's belief was "unreasonable" can mean the difference between conviction and acquittal. If we are willing to countenance a criminal system based on this degree of uncertainty, we may be hard-pressed to criticize a preventive detention regime on unreliability grounds.

The final reason a high level of certainty may not be necessary in the preventive context rests on the assertion that, when the criminal law punishes conduct because it is dangerous, the degree of danger required is often minimal, especially with respect to crimes such as reckless endangerment, possession, and vagrancy. In other words, as developed in more detail in Part III of this Article,[24] a requirement that predictions of anti-social conduct meet the reasonable doubt standard in the preventive detention context would be, in effect, a more rigorous proof standard than is often found in

---

JURORS' NOTIONS OF THE LAW 134, 166, 248 tbl.13.1, 252 tbl.13.2 (finding significant disagreement among study subjects on scenarios involving mens rea, felony murder and self-defense); HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 56 & tbl.11 (1971) (finding disagreement between judges and juries sitting on the same criminal case in 24.6 percent of the cases studied). In fall 2001, I gave nine six-person "juries," composed of students in my criminal law class (who had all studied homicide law), the facts of *People v. Anderson*, 447 P.2d 942 (Cal. 1968), involving the grisly murder of a 10-year-old girl. Five out of the nine juries convicted Anderson of first-degree murder (the verdict at the trial court level), three convicted him of second-degree murder (the resolution of the California Supreme Court), and two were hung, but leaned toward manslaughter. In another study, the same nine juries were asked to sentence Leroy Hendricks without considering his dangerousness or rehabilitative potential. They split evenly between 10 to 15 years, 15 to 25 years, and 25 years to life.

[22] *Cf.* Bethea v. United States, 365 A.2d 64 (D.C. 1976) ("The concept of mens rea involves what is ultimately the fiction of determining the actual thoughts or mental processes of the accused. It is obvious that a certain resolution of this issue is beyond the ken of scientist and laymen alike."); Mark Fondacaro, *Toward an Ecological Jurisprudence Rooted in Concepts of Justice and Empirical Research*, 69 UMKC L. REV. 179, 187 (2000) ("[T]he difficulties of substantiating with empirical evidence such fine-grained conceptual distinctions [e.g., between premeditation and recklessness] is plainly apparent to research-oriented behavioral scientists."). Even staunch advocates of retributivism recognize this point. Jeffrie Murphy, *Moral Epistemology, the Retributive Emotions, and the "Clumsy Moral Philosophy" of Jesus Christ*, *in* THE PASSIONS OF LAW 149, 157 (Susan Bandes ed., 1999) (noting that it is hard to know another's mind, much less whether they acted from a "hardened, abandoned and malignant heart"). I have tried to explicate why accurate information about past mental states is so difficult to come by in Christopher Slobogin, *Doubts about* Daubert*: Psychiatric Anecdata as a Case Study*, 57 WASH. & LEE L. REV. 919, 927–32 (2000).

[23] On reliability and validity, see JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 54–55 (4th ed. 1998).

[24] *See infra* text accompanying notes 240–55.

HeinOnline -- 98 Nw. U. L. Rev. 8 2003-2004

the criminal context. This observation does not necessarily justify government intervention based on low degrees of danger. It does suggest, however, that a regime that permitted various sorts of preventive action against low risk individuals would be consistent with our current law of crimes.

Even if a "real" reasonable doubt standard must be met when making predictions of danger, the U.S. Supreme Court is unwilling to accept the assertion that this high level of proof is impossible to meet, a position which substantially undermines the second (impossibility-of-proof) assumption underlying the unreliability objection. In *Jurek v. Texas*[25] the Court held that the death penalty—which to be valid requires proof of an aggravating circumstance, presumably beyond a reasonable doubt[26]—may be based on predictions of future violence.[27] In *Barefoot v. Estelle*,[28] it reaffirmed this position and indicated that even if such predictions are wrong more often than they are right, the adversarial process can be counted upon to expose erroneous views.[29] If executions may be based on evidence acknowledged to be this potentially flimsy, presumably preventive detention may be as well.

Although the Court's views on this issue have justly been attacked,[30] its apparent confidence in our ability to predict is not completely misplaced. Due to a number of methodological difficulties in measuring prediction validity, we may never know precisely how accurate the various modes of prediction are.[31] But we can say that prediction science—in particular, methods that utilize actuarial tables or structured interviews—has improved to the point where clear and convincing evidence of dangerousness, if not proof beyond a reasonable doubt, is available for certain categories of individuals.[32] If, as Part III discusses in more detail,[33] the level of proof neces-

---

[25] 428 U.S. 262, 275 (1976).

[26] Zant v. Stephens, 462 U.S. 862, 876 (1982).

[27] *Jurek*, 428 U.S. at 275–76 (holding that jury prediction of future violence is "no different from the task performed countless times each day throughout the American system of criminal justice").

[28] 463 U.S. 880 (1983).

[29] *Id.* at 901 (asserting that the adversary system can be trusted to differentiate credible from incredible evidence, "at least as of now").

[30] *See generally* Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, Psychiatric Testimony in Death Penalty Cases, and the Power of Symbolism: Dulling the* Ake *in* Barefoot's *Achilles Heel*, 3 N.Y.L. SCH. J. HUM. RTS. 91, 108–21 (1985); Slobogin, *supra* note 17, at 146 ("[T]he state should not be allowed to introduce dangerousness testimony unopposed by a defense expert unless it can show that the testimony proffered possesses a high degree of validity.").

[31] The difficulties include obtaining complete information about the extent of anti-social activity after predictions are made, and the associated fact that a prediction of dangerousness virtually always results in incapacitation, treatment, or both, making follow-up data about recidivism ambiguous. *See generally* JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 52–60 (1981).

[32] *See, e.g.*, JOHN MONAHAN, RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF VIOLENCE AND DISORDER 127 (2001) (describing a technique "[u]sing only risk factors commonly available in hospital records or capable of being routinely assessed in clinical practice" which placed individuals into "five risk classes for which the prevalence of violence during the first 20 weeks following discharge into the community varied between 1% and 76%"); VERNON L. QUINSEY ET AL., VIOLENT

HeinOnline -- 98 Nw. U. L. Rev. 9 2003-2004

sary to justify exercise of the state's police power need not reach the reasonable doubt level for some types of detention, then our capacity to make legally valid predictions increases significantly.[34]

The unreliability objection, in short, does not dictate a prohibition on preventive detention. Juxtaposition of preventive detention with the other liberty-depriving manifestation of the police power—the criminal law—suggests several reasons why the threshold necessary to support such detention need not be set at the reasonable doubt level, and that whatever quantum of proof is required, courts assume it can be met, an assumption that current research tends to support for at least some types of individuals. On the other hand, the unreliability objection does counsel caution when making predictions of anti-social behavior. Only the best prediction methods should be used,[35] and perhaps other adjustments should be made to compen-

---

OFFENDERS: APPRAISING AND MANAGING RISK 148–51 & fig. 8.1 (1998) (discussing the ability of the Violence Risk Appraisal Guide (VRAG) to identify groups of offenders with a 55 percent, 75 percent and 95 percent likelihood of recidivism); Grant T. Harris et al., *Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients*, 26 LAW & HUM. BEHAV. 377 (2002) (a prospective study using the VRAG that accurately identified clusters of patients with a 71 percent and 100 percent recidivism rate); William Gardner et al., *A Comparison of Actuarial Methods for Identifying Repetitively Violent Patients with Mental Illness*, 20 LAW & HUM. BEHAV. 35, 41–42 (1996) (describing a "regression tree" that identified a small group of patients—3 percent of the sample population—who committed violent acts at the rate of 2.75 incidents per month); Marnie E. Rice et al., *An Evaluation of a Maximum Security Therapeutic Community for Psychopaths and Other Mentally Disordered Offenders*, 16 LAW & HUM. BEHAV. 399 (1992) (reporting that 77 percent of those who scored higher than 25 on the Psychopathy Checklist-Revised committed a violent offense despite treatment); Jay Apperson et al., *Short-Term Clinical Prediction of Assaultive Behavior: Artifacts of Research Methods*, 150 AM. J. PSYCHIATRY 1374 (1993) (reporting a 25 percent false positive rate); Thomas Litwack & Louis Schlesinger, *Assessing and Predicting Violence: Research, Law, and Applications*, *in* HANDBOOK OF FORENSIC PSYCHOLOGY 205, 224 (Irving Weiner & G. Hess eds., 1987) (asserting that "clear and convincing evidence" of future violence exists if there is (1) a recent history of repeated violence; (2) a more distant history of violence together with evidence that the complex of traits that led to violence still exist and the circumstances that led to past violence will reoccur; or (3) an unequivocal threat or other like evidence of serious intentions to commit violence).

[33] *See infra* text accompanying notes 240–55.

[34] A number of different predictive techniques have yielded false positive rates between 30 percent and 50 percent. *See, e.g.*, Charles Lidz et al., *The Accuracy of Predictions of Violence to Others*, 269 JAMA 1007 (1993) (47 percent false positive rate); Deidre Klassen & William O'Connor, *A Prospective Study of Predictors of Violence in Adult Male Mental Health Admissions*, 12 LAW & HUM. BEHAV. 143 (1988) (40 percent false positive rate); Diana Sepejak et al., *Clinical Predictions of Dangerousness Two Year Follow-Up of 408 Pre-Trial Forensic Cases*, 11 BULL. AM. ACAD. PSYCHIATRY & L. 171 (1983) (44 percent false positive rate).

[35] The single most important advance in this regard might be a requirement that courts consider actuarial information in combination with "structured" clinical risk assessment. *See, e.g.*, GARY MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 290–92 (2d ed. 1997) (advocating an "anamnestic" approach that uses actuarial data as a baseline and clinical assessment as a method of individualizing predictions); Kevin S. Douglas et al., *Evaluation of a Model of Violence Risk Assessment Among Forensic Psychiatric Patients*, 54 PSYCHIATRIC SERVICES 1372 (2003) (finding that "structured" clinical decisionmaking improved on pure actuarial prediction).

HeinOnline -- 98 Nw. U. L. Rev. 10 2003-2004

sate for the inevitably speculative nature of prediction.[36] For the remainder of this Article, I will assume that, under such conditions, dangerousness can be proven with the requisite degree of certainty. That assumption allows focus on the conceptual objections to preventive detention.

B. *The Punishment-in-Disguise Objection*

In *Allen v. Illinois*,[37] the Supreme Court presaged *Hendricks* by holding that proceedings under a statute that permits "commitment" of sex offenders in lieu of criminal prosecution do not implicate the privilege against self-incrimination, because such hearings are not "criminal" in nature and thus do not involve incrimination.[38] Similarly, in *Hendricks*, the Court held that because such special track sex offender proceedings are not "punitive" in intent, post-sentence commitment of sex offenders does not violate the double jeopardy clause's ban on multiple punishments for the "same offense."[39] Such reasoning might also permit courts to declare that the Sixth Amendment's guarantees of counsel, public jury trial, and confrontation during "criminal prosecutions" do not apply in such proceedings.[40]

In his dissent in *Allen*, Justice Stevens expressed concern that the Court's willingness to label preventive detention laws "civil" rather than "criminal" would encourage a proliferation of such statutes.[41] Eventually, he speculated, a shadow criminal code could develop that would give prosecutors the discretion to detain preventively a wide array of dangerous

---

[36] I have argued that, given its relatively weak probative value and its prejudicial nature, clinical prediction testimony should not be admissible on behalf of the state unless the defendant decides to rely on it as well. Slobogin, *supra* note 17, at 148–49. Many authors have made other suggestions, ranging from the manner in which prediction evaluations should be conducted to the way in which prediction information is communicated to the fact finder. *See generally* R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment*, 4 PSYCHOL. PUB. POL. & L. 50, 67 (1998) (describing three approaches to risk assessment: the "empirically guided clinical approach, the pure actuarial approach, and the adjusted actuarial approach"); Donald G. MacGregor et al., *Violence Risk Assessment and Risk Communication: The Effects of Using Actual Cases, Providing Instruction, and Employing Probability Versus Frequency Formats*, 24 LAW & HUM. BEHAV. 271 (2000) (exploring "probability," "frequency," and "categorical" methods of communicating risk). The requirement, which I argue derives from the legality principle, that only people who have committed a crime or obviously risky conduct should be subject to preventive intervention, *see infra* text accompanying notes 87–117, might further improve the accuracy of prediction and would at least limit those cases in which speculation occurs.

[37] 478 U.S. 364 (1986).

[38] *Id.* at 370.

[39] Kansas v. Hendricks, 521 U.S. 346, 369 (1997).

[40] *Cf.* Markey v. Wachtel, 264 S.E.2d 437 (W. Va. 1979) (no right to jury at civil commitment hearing); Ted McGraw et al., *Civil Commitment in New York City: An Analysis of Practice*, 5 PACE L. REV. 259, 290–91 (1985) (commitment courts routinely allow hearsay testimony that would probably be prohibited in a criminal case on right-to-confrontation grounds).

[41] 478 U.S. at 380 (Stevens, J., dissenting).

HeinOnline -- 98 Nw. U. L. Rev. 11 2003-2004

offenders.[42] In his eyes, this alternative code would lead to "evisceration of the criminal law and its accompanying protections."[43]

To date, Justice Stevens's prediction that government will routinely use preventive detention laws to evade the strictures of the criminal law has not come to pass. After *Hendricks* gave the green light to full scale, post-sentence preventive detention for sex offenders, the legislative enthusiasm for such schemes rose momentarily but has since abated,[44] and prosecutors in most states with such laws have not rushed to abandon the criminal process in favor of "easier" petitions for commitment.[45] In any event, were such a movement to develop, preventive detention would not thereby be rendered illegitimate, for the Court is right that preventive detention, properly structured, is not criminal punishment.

Much has been written about the criminal-civil distinction.[46] That literature will not be rehearsed here. The strongest argument in favor of the Court's position can be expressed through a simple syllogism. Criminal punishment is based solely upon a conviction for an offense and can occur only if there is such a conviction. Preventive detention is based solely upon a prediction concerning future offenses and can occur only if there is such a prediction. Therefore, preventive detention is not criminal punishment. Indeed, the concept of "punishment" for some future act is incoherent.[47] Accordingly, to the extent procedural protections depend upon characterization

---

[42] *Id.*

[43] *Id.*

[44] W. Lawrence Fitch & Debra A. Hammen, *The New Generation of Sex Offender Commitment Laws: Which States Have Them and How Do They Work?*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS 27, 33 (Bruce J. Winick & John Q. LaFond eds., 2003) (table showing that, while approximately ten states passed sexual predator laws between 1997 and 1999, no state has done so since then).

[45] *Id.* at 32 (noting that in California, prosecutors are bringing approximately 750 petitions each year and in Florida there were over *9,000* petitions in the first two years of the statute's existence; however, as of fall 2001, in the nine states whose post-*Hendricks* sexual predator laws had gone into effect by then, including California and Florida, only 473 individuals had been committed, with the average commitment rate per state amounting to roughly fifteen to twenty annually); *see also* John Q. LaFond, *The Costs of Enacting a Sexual Predator Law*, 4 PSYCHOL. PUB. POL. & L. 468, 492 (1998) ("Though it is too early to tell with certainty, it is likely that in the not-too-distant future, these sexual predator laws will be used less frequently," given the higher sentences being meted out to sex offenders).

[46] Relatively recently two journals have devoted entire issues to the subject. See *The Civil-Criminal Distinction*, 7 J. CONTEMP. L. ISSUES, No. 1 (1996) and *Symposium, The Intersection of Tort and Criminal Law*, 76 B.U. L. REV. 1 (1996) (symposium covers issues nos. 1 & 2).

[47] Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1432 (2001) ("[I]t is impossible to 'punish dangerousness.' . . . [P]unishment can only exist in relation to a past wrong."); *see also* Christopher Slobogin & Mark Fondacaro, *Rethinking Deprivations of Liberty: Possible Contributions from Therapeutic and Ecological Jurisprudence*, 18 BEHAV. SCI. & L. 499, 504 n.24 (2000) ("Punishment is a reaction to a past act, not an attempt to prevent a future one.").

HeinOnline -- 98 Nw. U. L. Rev. 12 2003-2004

of a proceeding as criminal, they are not required in preventive detention proceedings.[48]

If a liberty deprivation pursuant to a prediction fails to adhere to the logic of preventive detention, however, then it can become punishment. The Supreme Court recognized as much in *Jackson v. Indiana*,[49] when it declared, "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[50] In *Jackson*, that principle mandated that the duration of the government's authority to commit an individual who has been found incompetent to stand trial be limited to that period reasonably necessary to restore him to competency or to determine that he is unrestorable.[51] In the preventive detention context, the reasonable relation principle requires that the commitment match the state's interest in preventing harm.

That general limitation suggests three specific restrictions on preventive detention. First, the *duration* of the commitment must be reasonably related to the prevention of the harm predicted. This restriction requires release once the individual no longer presents the level of danger necessary for preventive detention. A mental hospital must discharge the mentally ill person who is "cured"; a police officer must release a person subject to investigative detention if no further suspicion develops during questioning. Just as importantly, the duration limitation requires the state to provide treatment that will reduce dangerousness.[52] The Supreme Court, although

---

[48] It is worth noting, however, that the due process clause still applies to any system that deprives people of liberty. Case law in the civil commitment context has established that the due process clause guarantees a number of rights at such proceedings, including the right to notice, counsel, confrontation, and, in some jurisdictions, public jury trial. *See generally* MICHAEL PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL 322–41, 353–58 (2d ed. 1998). Many have noted that these rights are not always implemented. *See, e.g.*, Serena Stier & Kurt Stoebe, *Involuntary Hospitalization of the Mentally Ill in Iowa: The Failure of the 1975 Legislation*, 64 IOWA L. REV. 1284 (1979) (finding that, despite reforms importing criminal process rights into commitment hearings, the process was non-adversarial in nature). But it should be recognized that this phenomenon is primarily due to the low visibility of civil commitment proceedings. When the stakes at the prevention detention proceeding are higher, as they are in sexual predator proceedings, these rights are vigorously exercised, *see* LaFond, *supra* note 45, at 485 (comparing such proceedings to death penalty trials), just as, in the criminal system, constitutional rights tend to become more important in more serious cases. *See generally* Maureen Mileski, *Courtroom Encounters: An Observation Study of a Lower Criminal Court*, 5 LAW & SOC'Y REV. 473, 484–85 (1971) (describing the procedural informality of misdemeanor courts).

[49] 406 U.S. 715 (1972).

[50] *Id.* at 738.

[51] *Id.*

[52] This is not to say that the state must prove an individual is treatable before he may be preventively confined. As *Hendricks* stated, "incapacitation may be a legitimate end of the civil law . . . we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others." Kansas v. Hendricks, 521 U.S. 346, 366 (1997). The issue is probably moot in any event, because even the most incorrigible offenders are in some sense "treatable." *See* PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR 359–462 (Theodore Millon et al. eds., 1998) (containing six articles from different authors relying on different therapeutic perspectives that acknowledge the difficulty of treating psychopathy and other "untreatable" patients, but nonetheless indi-

HeinOnline -- 98 Nw. U. L. Rev. 13 2003-2004

reticent about announcing a full-blown right to treatment in this setting, has held that a committed person's "liberty interests require the State to provide minimally adequate or reasonable training to ensure . . . freedom from undue restraint."[53] It has also continued to recognize the viability of a due process claim against preventive detention that does not offer treatment.[54] These decisions should be read to confirm that confinement of a treatable individual without providing treatment is unreasonably prolonging detention, in violation of *Jackson*.[55]

The second essential feature of preventive detention—or what might more aptly be called *preventive intervention*—is that the *nature* of the liberty deprivation must bear a reasonable relationship to the harm feared. While confinement may be necessary to prevent some individuals from causing harm, conditional release and other less restrictive mechanisms can also be effective at realizing that goal, especially after a period of treatment.[56] Most commitment systems provide for alternatives to institutionali-

---

cate that it can be done). By the same token, proof of treatability should not somehow ease the state's burden in proving the other requisites for preventive detention, contrary to Justice O'Connor's insinuation in *Foucha v. Louisiana*, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring) (suggesting that if there were some "medical justification" for doing so, preventive detention of dangerous and sane individuals should be permissible). I discuss the latter issue more fully in Slobogin, *supra* note 4, at 369–70.

[53] Youngberg v. Romeo, 457 U.S. 307, 319 (1982).

[54] Seling v. Young, 531 U.S. 250, 265 (2001) (rejecting claim that sexual predator statute as applied to petitioner was not "civil," but recognizing that a *Jackson* due process claim might lie if conditions of confinement do not bear a reasonable relationship to the reasons for confinement and noting that the statute provided for confinement *and* treatment).

[55] As my co-authors and I argue elsewhere, the above quoted language in *Youngberg* "could easily be parlayed into a robust right to treatment necessary to reduce prolonged confinement." Christopher Slobogin et al., *A Prevention Model of Juvenile Justice: The Promise of* Kansas v. Hendricks *for Children*, 1999 WISC. L. REV. 185, 213; *see also* Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 358–59 (2003) (arguing that *Youngberg* "embodies . . . the police power right to treatment" and also arguing that "a strong right to treatment can be derived from the *Jackson* principle that the duration of confinement must be reasonably related to the purposes of confinement"); Note, *The Supreme Court: 1981 Term*, 96 HARV. L. REV. 62, 84 (1982) ("[T]he Court's reasoning [in *Youngberg*] implies the existence of expansive rights that protect the patient's principal liberty interest—the interest in release from involuntary confinement. . . . [T]he majority's liberty-based rationale suggests that mental patients have a constitutional right to habilitative rather than merely protective treatment."). For supportive cases, see *Wyatt v. Rogers*, 985 F. Supp. 1356 (M.D. Ala. 1997) (holding that state was continuing to violate due process by treating patients in overly restrictive conditions); *Cameron v. Tomes*, 783 F. Supp. 1511, 1526 (D. Mass. 1992) (holding that *Youngberg* requires the state to ensure professional assessment of sex offender's access to community programs); *Clark v. Cohen*, 613 F. Supp. 684 (E.D. Pa. 1985), *aff'd*, 794 F.2d 79 (3d Cir.) (finding *Youngberg* and substantive due process violated when patient was deprived of training in community living despite professional judgment that she should be released from the institution).

[56] *See, e.g.*, Jeffrey Rogers et al., *After Oregon's Insanity Defense: A Comparison of Conditional Release and Hospitalization*, 5 INT'L J.L. & PSYCHIATRY 391 (1982) (describing a post-insanity acquittal commitment system that relies on a multi-disciplinary board to implement treatment plans using conditional release and close monitoring, and reporting a recidivism rate of only 6 percent); W.L. Marshall et al., *A Three-Tiered Approach to the Rehabilitation of Incarcerated Sex Offenders*, 11 BEHAV. SCI. & L. 441 (1993) (describing a model criminal justice-based program that could easily be implemented as preventive detention).

HeinOnline -- 98 Nw. U. L. Rev. 14 2003-2004

zation.[57] If, however, the paucity of such alternatives results in incarceration of those who do not need to be confined, the detention becomes punitive, a position the Supreme Court has tangentially recognized.[58] As Professor Kahan has demonstrated, incarceration is usually equated with punishment in the public eye;[59] unconditional confinement of "dangerous" individuals, especially where treatment is not provided, potently expresses a goal of condemnation, not of prevention.

To ensure that the duration and nature limitations are taken seriously, the third essential component of a preventive system is *periodic review* of the detention, perhaps every six months and at least annually.[60] Further, the burden should be on the state to demonstrate both the need for continued liberty deprivation and that treatment efforts are being made. Outside of the insanity acquittee context, where special considerations may be present,[61]

---

[57] For instance, at least 47 states require that involuntary patients be committed to treatment in the least restrictive setting. Ingo Keilitz et al., *Least Restrictive Treatment of Involuntary Patients: Translating Concepts Into Practice*, 29 ST. LOUIS UNIV. L.J. 691, 709 (1985).

[58] *See supra* note 55. Also relevant here is *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), where the Court held that, under the Americans with Disabilities Act:

> States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Id. at 607; *see also* Lewis v. N.M. Dep't of Health, 94 F. Supp. 2d 1217 (2000) (relying on *Olmstead* and the due process clause in holding that governor's failure to facilitate accessibility to services in the community states a claim under § 1983). *See generally* Michael L. Perlin, *"What's Good is Bad, What's Bad is Good, You'll Find Out When You Reach the Top, You're on the Bottom:" Are the Americans with Disabilities Act (and* Olmstead v. L.C.*) Anything More than "Idiot Wind?"*, 35 U. MICH. J.L. REFORM 235, 256 (2002) ("Lower federal courts and state courts have cited *Olmstead* for the proposition that 'the ADA in fact prohibits segregation of persons with disabilities and requires states to make reasonable efforts to place institutionalized individuals with disabilities into the community' in the most integrated setting to fit their needs."). Of course, these latter holdings do not directly address constitutional limitations on the state's police power. What they do recognize is that federal law does not permit avoidable and unnecessary institutionalization.

[59] Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 652 (1996) ("Because of the value of liberty in our culture, imprisonment unequivocally conveys society's denunciation of wrongdoers. . . . [while] conventional alternatives . . . express condemnation much more ambivalently.").

[60] *Hendricks* emphasized this aspect of the sexual predator statute in finding that it was not punishment. Kansas v. Hendricks, 521 U.S. 346, 363–64 (1997).

> Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment . . . . If, at any time, the confined person is adjudged "safe to be at large," he is statutorily entitled to immediate release. . . . The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year.

Id. Similarly, in *Connecticut Department of Public Safety v. Doe*, 123 U.S. 1160, 1164 (2003), the Court strongly suggested that, when dangerousness is the basis for a state deprivation of liberty, a hearing is required to prove "current dangerousness."

[61] In *Jones v. United States*, the Court appeared to hold that, in post-insanity acquittal commitment hearings, the state may impose the burden of proof on the acquittee, because commitment follows "only if the *acquittee himself* advances insanity as a defense and proves that his criminal act was a product of his mental illness." 463 U.S. 354, 367 (1983).

HeinOnline -- 98 Nw. U. L. Rev. 15 2003-2004

the Supreme Court has adhered to the sensible rule that the state must show why preventive detention is necessary.[62]

In sum, a preventive detention regime requires efforts at treatment, alternatives to institutionalization, and periodic review. If any one of these three conditions are unmet, then the deprivation of liberty fails to bear a reasonable relationship to the purpose of preventing harm and either must end or be justified through the criminal process. Otherwise, as Justice Stevens feared, preventive detention statutes would become an extension of or replacement for criminal punishment without criminal adjudication.

These limitations may strike some as too few and too easily circumvented. In effect, if not in theory, those who are committed may be confronted with a presumption of dangerousness that will be hard for them to overcome.[63] The concept of "treatment" is so vague that the state might plausibly argue even minimal efforts in that regard are sufficient.[64] The expense and relatively less secure nature of institutional alternatives can act as a practical brake on their creation and use.[65] Periodic review may be pro forma, a mere rubber stamping of opinions proffered by state doctors.[66]

Despite these potential problems with implementing the duration, nature, and review limitations on preventive detention, some civil commitment systems manage to adhere to them successfully.[67] The popular new therapeutic courts—drug courts, mental health courts, and the like—also operate on preventive principles, with little obvious abuse.[68] In any event, if pragmatic objections are to rule the day, then similar objections can be levied at the main competitor to preventive detention, a system of sentencing

---

[62] *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979) (holding that burden of proof must be on the state in civil commitment proceedings).

[63] *Cf.* Hanson, *supra* note 36, at 51 (noting that "there is much more evidence to justify committing offenders than there is for releasing them," because there is much more empirical information about "static" risk factors, such as past offenses, than "dynamic" risk factors, such as compliance with treatment and alcoholism).

[64] John Q. LaFond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 696 (1992) (describing the "so-called treatment" provided for individuals committed under Washington's predator commitment law).

[65] For a description of the inadequacies of community treatment even during a period when society was much more committed to it than it is today, see Lawrence Scull, *A New Trade in Lunacy: The Recommodification of the Mental Patient*, 8 AM. BEHAV. SCIENTIST 741 (1981).

[66] *See* discussion concerning the length of commitment under sexual predator statutes *infra* note 217.

[67] For a description of two such programs, see sources cited *supra* note 56.

[68] *See generally* Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 846–48 (2000) (describing rapid development of drug courts and the constant re-evaluation of their process and efficacy); Steven Belenko, *Research on Drug Courts: A Critical Review*, 1 NAT'L DRUG CT. INST. REV. 1, 23–24 (1998) ("[D]rug courts generate savings in jail costs[,] . . . probational supervision, police overtime and other criminal justice costs . . . [, as well as] victimization, theft reduction, public assistance and medical claims costs . . . ."); Amy Watson et al., *Mental Health Courts: Promises and Limitations*, 28 J. AM. ACAD. PSYCHIATRY & L. 476 (2000).

HeinOnline -- 98 Nw. U. L. Rev. 16 2003-2004

based on just deserts and determinate sentencing. As noted earlier, such sentencing may well be no more "accurate" than one based on prediction.[69] Further, in the eyes of many, determinate sentencing is unduly harsh, perhaps to make up for its inability to individualize.[70] Finally, in practice, if not in theory, it results in a considerable amount of disparity and discrimination.[71] In other words, any attempt to exercise the police power is bound to fall short of the ideal. Real-life deficiencies should not sound the death-knell for any particular approach unless it will clearly produce more negative consequences than other approaches.

C. The Legality Objection

Let us assume that some sort of preventive detention is permissible in theory, because it is coherently separable from the criminal justice system and because we can predict dangerousness at least as well as we can assess culpability. Many controversies yet remain. Some of the more important swirl around the definition of "dangerousness." The legality objection to

---

[69] *See supra* text accompanying note 21–23; *see also* Michael H. Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, AM. J. CRIM. L. (forthcoming 2003) ("It makes no sense to deride the [prediction required by dangerous offender statutes] when the default we defend is overwhelmingly less informed, less careful, less analytical, and routinely productive of astoundingly high recidivism rates."); SEYMOUR HALLECK, THE MENTALLY DISORDERED OFFENDER 199 (1987) ("[I]ndeterminate programs have usually released offenders earlier than determinate programs, and they have almost always provided greater numbers of offenders with greater opportunities for freedom."); John Clear et al., *Discretion and the Determinate Sentence: Its Distribution, Control, and Effect on Time Served*, 24 CRIME & DELINQ. 428 (1978) (concluding that Indiana's determinate statute has been a failure because it continues to allow prosecutorial and judicial discretion and permits "untenably heavy penalties"). Although insanity acquittees are sometimes confined as long or longer than similarly charged felons, in many states acquittees are, on average, released earlier. *See* MELTON ET AL., *supra* note 35, at 188–89.

[70] The usual proposed alternative to preventive detention is a recidivist statute that enhances sentences based on the number of crimes committed. *See* LaFond, *supra* note 64, at 697–98 (suggesting "extended incarceration, including lifetime imprisonment, for repeat sex offenders"). This general incapacitation approach is likely to inflict heavier periods of confinement on more people than the selective incapacitation represented by preventive detention. *See generally* FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION 67–70 (1995) (comparing general and selective incapacitation and concluding that the former is at least as problematic as the latter). Recidivist statutes have also been described as "irrational, internally inconsistent, and racially discriminatory." Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 719 (1995); *cf.* Lockyer v. Andrade, 123 S. Ct. 1166 (2003) (upholding two consecutive terms of 25 years to life for theft of tapes worth about $150 and prior convictions for nonviolent offenses); Ewing v. California, 123 S. Ct. 1179 (2003) (upholding minimum sentence of 25 years for conviction of three "serious" felonies, the last of which involved theft of $1,200 of golf clubs).

[71] HALLECK, *supra* note 69, at 202 (the preventive approach "is less discriminatory, imposes less pain on offenders as a group, and is especially merciful toward selected offenders who can be released when they are judged to be nondangerous to society"). The most famous experiment with determinate sentencing, the federal sentencing guidelines, has been lambasted as particularly arbitrary. *See generally*, Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 903 (1991) ("[T]he pursuit of equality through sentencing guidelines often has yielded nonsense rules and inequalities.").

HeinOnline -- 98 Nw. U. L. Rev. 17 2003-2004

preventive detention is that the meaning of dangerousness cannot be satisfactorily cabined, thus allowing the state too much power. Although this objection is probably overstated, it does force careful thought about the scope of preventive detention and places at least minimal limitations on both the types of danger the state may prevent and the situations in which the state may intervene to prevent them. In doing so, it helps deal with some conundrums that have vexed those who have wrestled with the preventive detention question.[72]

1. Defining Danger.—The principle of legality, famously dubbed the "first principle" of the criminal law by Herbert Packer,[73] means roughly that the government may neither convict nor punish an individual for an act unless that act was previously defined as criminal by law.[74] The constitutional version of this principle is vagueness doctrine, which as a matter of due process requires invalidation of statutes that do not sufficiently define the offending conduct.[75] The purposes of vagueness doctrine are to ensure citizens have notice of the government's power to deprive them of liberty and concomitantly to protect against the official abuses and the chilling of innocent behavior that can occur if government power is not clearly demarcated.[76]

Vagueness doctrine should govern the scope of preventive detention laws even if it is assumed, consistent with discussion in the previous section, that such laws are not "criminal" in nature. Indeed, the classic judicial statement of vagueness doctrine came in a civil case.[77] Furthermore, within the criminal setting the vagueness prohibition has been most potent when applied to laws that are, in effect, preventive detention statutes in disguise. Courts most commonly use the doctrine as a justification for invalidating vagrancy statutes that attempt to remove from the streets "undesirables" who might be up to no good.[78] Courts have also declared void on vagueness

---

[72] *See* in particular *infra* text accompanying notes 100–05 and note 117.

[73] HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79–80 (1968).

[74] *Id.*

[75] John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985) ("[T]he vagueness doctrine is the operational arm of legality [and] requires that advance, ordinarily legislative crime definition be meaningfully precise—or at least that it not be meaninglessly indefinite.").

[76] *Id.* at 212 ("The evils to be retarded [by the rule of law implemented through vagueness doctrine] are caprice and whim, the misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria of selection. The goals to be advanced are regularity and evenhandedness in the administration of justice and accountability in the use of government power.").

[77] In *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), the Court stated that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

[78] *See, e.g.*, Chicago v. Morales, 527 U.S. 41 (1999); Kolender v. Lawson, 461 U.S. 352 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

HeinOnline -- 98 Nw. U. L. Rev. 18 2003-2004

grounds criminal laws that prohibit particularly amorphous dangers, such as a statute that penalizes "conspiracy to commit any act . . . injurious to public morals."[79]

The legality argument against more explicit (non-criminal) forms of preventive detention is that a statute that permits liberty deprivation based solely on dangerousness is inevitably vague. Consider a law that permits detention of those who are "dangerous to others" or "likely to cause substantial harm to others," with no further definition of dangerousness or harm. This type of language (sometimes still found in civil commitment statutes, albeit always combined with a mental illness predicate[80]) is at least as empty as the phrase "injurious to public morals." It provides no information as to the type of danger a person must pose in order to be committed.

Next consider a law that permits preventive detention of those who are likely to cause "emotional harm" to another. That phrase is commonly used in civil litigation and in connection with child neglect petitions. In these contexts, courts generally reject vagueness challenges.[81] Even so, emotional harm, whether qualified by the word "serious" or something similar, is such an open-ended concept that it should not survive a vagueness challenge in the preventive detention setting.[82] Far too much legitimate behavior—ranging from breaking up a relationship to lectures about the meaninglessness of life—could be chilled by a law that permitted the government to deprive people of liberty simply because their actions might cause someone else "serious emotional harm."[83] The latter phrase could easily be construed

---

[79] State v. Musser, 223 P.2d 193 (Utah 1950); State v. Bowling, 427 P.2d 928 (Ariz. Ct. App. 1967).

[80] *See, e.g.*, ALA. CODE § 22-52-10.4(a) (2003) (permitting commitment of those who are mentally ill and present a "real and present threat of substantial harm to self and/or others").

[81] State v. Williams, 451 N.W.2d 886 (Minn. Ct. App. 1990) (finding that a statute prohibiting intentional use of unreasonable force or cruelty which causes "substantial emotional harm" to a child was not unconstitutionally vague, despite legislative failure to define the phrase); Marchand v. Superior Court, 246 Cal. Rptr. 531, 545 (Cal. Ct. App. 1988).

> [P]ermitting recovery for serious emotional distress . . . is consistent with the common law development of recovery of damages for wrongful infliction of emotional distress [which] carefully delimits the actionability of claims of emotional distress in a manner that ensures that the courts will not be flooded with a myriad of spurious and trivial claims and that defendants will not be subjected to vague and open-ended liability for consequential emotional harm.

Id.

[82] Iowa is one of the few states that explicitly permits civil commitment for "serious emotional injury." That criterion is defined as "[i]njury which does not necessarily exhibit any physical characteristics, but which can be recognized and diagnosed by a licensed physician or other qualified mental health professional and which can be causally connected with the act or omission of a person who is, or is alleged to be, mentally ill." IOWA CODE § 229.1(14) (2003). That definition makes dangerousness dependent upon the subjective, ever-changing, and inconsistent diagnostic preferences of the mental health professions. *See* In Interest of J.P., 574 N.W.2d 340 (Iowa 1998) (rejecting commitment based on "emotional trauma").

[83] *See* Kramer v. Price, 712 F.2d 174 (5th Cir. 1983) (invalidating statute that punished as harassment any communication that "annoys or alarms the recipient," largely because of the lack of a sufficiently restrictive definition of these terms). On the other hand, emotional harm might provide sufficient grounds for preventive detention (or punishment) if serious effort is made to limit its scope. For a su-

HeinOnline -- 98 Nw. U. L. Rev. 19 2003-2004

to include, for instance, suicidal thoughts, frequent nightmares, and general depression.

The most obvious starting point in solving these types of problems would be to describe the danger in terms of harms sanctioned by the criminal law. That move would provide relatively specific guidelines to the public and the government.[84] It has the added advantage of incorporating into the definition of dangerousness those harms society considers serious enough to warrant application of the police power.

But incorporation of criminal law harms into preventive detention laws should only be the starting point. Allowing preventive detention for dangers associated with *all* crimes, including minor ones, is likely to be unnecessary. Reflecting that insight, many involuntary hospitalization statutes define danger in terms of serious bodily injury.[85]

Note that this latter type of adjustment does not stem from legality concerns; minor harms can be defined as precisely as serious ones. Rather, they flow from application of the *Jackson*/due process analysis discussed in the previous section.[86] If the perceived danger is merely minor damage to property, for instance, then the nature and duration of the government's intervention should be correspondingly minimal, if it occurs at all. In short, both the procedural (vagueness) and substantive (*Jackson*) components of due process are needed to cabin government efforts at defining the scope of preventive detention.

2. *Defining the "Point" of Intervention.*—A second legality problem arises in defining the trigger point for preventive detention. Many preventive detention rules require an overt act before detention may take place. Sexual predator laws, for instance, require at least a probable cause belief that the subject has committed a sex offense.[87] The typical civil commitment statute, however, does not address this issue, while those commitment laws that do usually merely require proof of an otherwise undefined act that

perb attempt in this regard, see JOEL FEINBERG, OFFENSE TO OTHERS (1985).

[84] *See* Alan Dershowitz, *Dangerousness as a Criterion for Confinement*, 2 BULL. AM. ACAD. PSYCHIATRY & L. 172, 176 (1974) (wondering why legislatures do not address the "fundamental question" about what harms justify commitment in the same way they address the harms prohibited by the criminal law).

[85] *See, e.g.*, MASS. GEN. LAWS ch. 123, § 1 (2003) (permitting commitment of those who are mentally ill and pose "a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them."); FLA. STAT. ANN. § 394.467(2) (West 2002) (requiring "substantial likelihood" that person "will inflict serious bodily harm on . . . another person").

[86] *See supra* text accompanying notes 52–59; *see also infra* text accompanying notes 230–34 and 253–54 (discussing how the proportionality and consistency principles might limit the dangers that can lead to preventive detention).

[87] For instance, to be eligible for commitment under the Kansas statute at issue in *Hendricks* (discussed *supra* text accompanying notes 8–10), a person must have been convicted of an offense, acquitted of an offense on mental defense grounds, or found incompetent to stand trial. KAN. STAT. ANN. § 59-29a03(a) (2002).

HeinOnline -- 98 Nw. U. L. Rev. 20 2003-2004

evidences the danger to be prevented.[88] Vagueness doctrine may have some impact here as well.

The closest criminal analogue is the typical endangerment statute, which prohibits conduct that either recklessly or negligently endangers others. An example comes from the Model Penal Code, which penalizes a person who "recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury."[89] Because the Code defines conduct simply as an act or omission,[90] reckless endangerment under this provision could be based on *any* act or failure to act that creates the requisite danger. Yet these statutes are routinely upheld against vagueness challenges by the courts.[91]

At the same time, the endangerment laws contain their own notice requirement. Reckless endangerment statutes require that the individual be aware of the risk,[92] and negligent endangerment requires proof that a reasonable person would be aware of the risk.[93] Thus, conduct that would not be evidently risky to a reasonable person cannot form the basis for such crimes.

The same should be true in the preventive detention context. Unless the individual engages in conduct that causes legally-defined harm or that is otherwise obviously risky, the government should not be permitted to intervene preventively. Only in such situations is the individual functionally (as opposed to officially) on notice that he may be subject to government intervention, and only in such situations is the government's police power adequately cabined.

Consider in this regard a not-so-hypothetical situation in which the prediction of dangerousness is based on relatively innocuous variables, such as marital status, age, gender, education, employment, and place of residence.[94] Assume further that the government publishes this list of variables,

---

[88] RALPH REISNER ET AL., LAW & THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 679 (3d ed. 1999).

[89] MODEL PENAL CODE § 211.2 (1962).

[90] *Id.* § 1.13(5).

[91] *See, e.g.*, Miller v. State, 449 N.E.2d 1119 (Ind. Ct. App. 1983) (finding that Indiana's criminal recklessness statute is not unconstitutionally vague on its face or in its application); People v. Lucchetti, 305 N.Y.S.2d 259 (1969) (stating in a memorandum decision that New York's reckless endangerment in the second degree statute is neither unconstitutionally vague nor indefinite); State v. Hanson, 256 N.W.2d 364 (N.D. 1977) (holding that North Dakota's reckless endangerment statute is not unconstitutionally vague).

[92] Under the Model Penal Code, recklessness requires proof that the person "consciously" disregards a substantial and unjustifiable risk. MODEL PENAL CODE § 2.02(2)(c) (1962).

[93] In Montana, one of the few states with a negligent endangerment statute, *see* MONT. CODE ANN. § 45-5-208 (2002), negligence is defined as either conscious disregard of a risk or disregard of a risk "of which the person should be aware." *Id.* § 45-2-101 (42).

[94] All of these factors correlate to some extent with violence. MONAHAN, *supra* note 31, at 69–76 (examining correlations with respect to first five factors); R.J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918 (1997) (showing a significant correlation between concentrated poverty and crime).

HeinOnline -- 98 Nw. U. L. Rev. 21 2003-2004

so that it could be said the public is officially on notice as to when preventive detention may take place. Even with such legally sufficient warning (and putting aside the objection that some of these variables do not amount to "conduct," an issue to be considered below[95]), the fact that these variables *are* so innocuous should make such a statute void for vagueness.

The Supreme Court's decision in *Lambert v. California*[96] is relevant here. *Lambert* reversed on due process grounds a conviction under a statute that criminalized any felon's failure to register his presence in Los Angeles within five days of arrival in the city; in reaching this holding, the Court mentioned an array of considerations, including Lambert's ignorance of the registration statute, the lack of affirmative misconduct, the absence of criminal intent, and the possibility the statute would be abused by police or prosecutors.[97] As Professor Jeffries states, "[t]he meaning of [*Lambert*] is subject to infinite disputation."[98] He goes on to assert, however, that it most sensibly "stands for the unacceptability in principle of imposing criminal liability where the prototypically law-abiding individual in the actor's situation would have had no reason to act otherwise."[99] The argument from *Lambert*, then, is that a person who avoids acts that a reasonable person would perceive as risky cannot be subject to liberty deprivation even when a statute authorizes it, because a law-abiding individual would behave the same way and literally "would have no reason to act otherwise." Preventive detention based on innocuous predictors that the individual is unlikely to perceive as indicative of dangerousness is a violation of this precept (which, because it is rooted in due process, applies here as well as in criminal cases).

The proposition that preventive detention is not permissible unless and until harm or otherwise obviously risky conduct has occurred raises three subsidiary issues. The first, alluded to just above, is whether proof of *conduct* is necessary, if sufficient risk is present. This issue conjures up the scenario (so far one that occurs only in Hollywood)[100] in which the basis of the government intervention consists solely of risk-predictive "characteris-

---

[95] *See infra* text accompanying notes 100–05.

[96] 355 U.S. 225 (1957).

[97] *Id.* at 229 (noting that the violation of the ordinance was "unaccompanied by any activity whatever," that "circumstances which might move one to inquire as to the necessity of registration are completely lacking," that the ordinance was "a law enforcement technique designed for the convenience of law enforcement agencies," that Lambert was given no opportunity to register once she learned of the ordinance, that "actual knowledge of the duty to register or proof of the probability of such knowledge" should be required, and that the failure to register was not "blameworthy").

[98] Jeffries, *supra* note 75, at 211.

[99] *Id.* at 211–12.

[100] In the movie *Gattaca* (Columbia/Tristar Studios 1997), the government is able to predict, simply through DNA analysis, a person's propensities. At present, we do not have that ability, at least with respect to anti-social behavior. *See* ADRIAN RAINE, THE PSYCHOPATHOLOGY OF CRIME: CRIMINAL BEHAVIOR AS A CLINICAL DISORDER 79 (1993) ("A very tentative and global estimate for the extent of heritability for crime is that genetic influences account for about half the variance in criminal behavior . . . .").

HeinOnline -- 98 Nw. U. L. Rev. 22 2003-2004

tics," such as a "violent gene," an inability to empathize, or a biological addiction (all of which might be measurable physiologically, without any reference to behavior).[101] Perhaps these traits are not "obviously risky." But even if they were, detention in this case would run afoul of the legality principle. As Packer asserted, "[i]t is important, especially in a society that likes to describe itself as 'free' and 'open,' that a government should be empowered to coerce people only for what they do and not for what they are."[102] Accordingly, he argued, the law should require proof of an act, "a point of no return beyond which external constraints may be imposed but before which the individual is free—not free of whatever compulsions determinists tells us he labors under but free of the very specific social compulsions of the law."[103] If the state's preventive detention power is not limited by the requirement that it prove some affirmative act that is predictive of a legislatively defined danger, then the government, not the individual, controls if and when the government intervenes. Putting this idea another way, conditions, dispositions, and thoughts, even if highly predictive of danger and identified as such, cannot be the "point of no return" described by Packer because there is no identifiable "point" at which they can be avoided.[104]

Perhaps the government could avoid this trap by alerting the person to his or her dangerousness *and* demanding that the person take preventive

---

[101] The latter two characteristics are clearly correlated with violence. *See, e.g.*, Eric Silver et al., *Assessing Violence Risk Among Discharged Psychiatric Patients: Toward an Ecological Approach*, 23 LAW & HUM. BEHAV. 237, 245 (1999) (finding that people diagnosed with psychopathy and alcohol or substance abuse disorders were "significantly more likely" than those without these diagnoses to commit violence; 33.9 percent of the first group and 22.5 percent of the second group were violent during follow-up period).

[102] PACKER, *supra* note 73, at 74.

[103] *Id.* Although Packer's comments would seem to apply to any exercise of state power, he made them while analyzing the scope of the criminal law, "that most coercive of legal instruments." *Id.* The Supreme Court seems to have made the same distinction in *Robinson v. California*, 370 U.S. 660 (1962). There it held that conviction of a person for being an addict is cruel and unusual punishment, the same as punishing a person for the "'crime' of having a common cold." *Id.* at 667. Yet the Court also suggested that, if necessary to promote "the general health and welfare," the state could impose "compulsory treatment, involving quarantine, confinement, or sequestration" on addicts, people with mental illness, or those afflicted with leprosy or venereal disease even, apparently, in the absence of any specific conduct. *Id.* at 666. The Court's distinction makes sense as a matter of Eighth Amendment jurisprudence—because preventive treatment is not punishment and therefore cannot violate that amendment's prohibition—but it cannot stand in the face of legality concerns, for the reasons discussed in the text.

[104] Indirect support for this point of view also comes from the Supreme Court's First Amendment jurisprudence, indicating that political speech may not be criminalized unless it incites imminent violence. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (finding that penalizing mere advocacy and assembly for the purpose of advocacy, when purpose is not incitement of imminent violence, is a violation of the First Amendment). *But see* Scales v. United States, 367 U.S. 203 (1960) (holding that the state may penalize a person for active membership in organization preaching violent overthrow of government); Dennis v. United States, 341 U.S. 494 (1951) (upholding conviction for conspiracy to advocate overthrow of U.S. government by violent means).

HeinOnline -- 98 Nw. U. L. Rev. 23 2003-2004

steps; if the person does not, *that* is the point of no return. Some commentators trying to reconcile a preference for criminal punishment with a desire to protect society against dangerous people have proposed what is, in effect, the same approach: we could, they suggest, alert dangerous people to their dangerousness and then convict them for reckless endangerment if they refuse to take preventive action.[105] At least from the legality perspective, however, this move is a sleight of hand. It allows the government to achieve its precise aim regardless of what the individual decides; if he declines to take the preventive action, the government takes it for him. In effect, intervention is predicated not on a choice by the individual, but on a choice by the government, which is precisely what the legality principle is designed to prevent.

The second subsidiary legality issue concerns the temporal relationship between the triggering event and the detention. For instance, people subjected to post-sentence sexual predator commitment may not have engaged in any anti-social conduct for a long period. Should this fact invalidate post-sentence preventive detention on legality grounds? Probably not. Functional notice of the *specific* nature of possible state intervention may well be lacking.[106] But the individual in this situation surely knew his sex offense could trigger some sort of serious government reaction, which is all that vagueness doctrine demands in terms of notice.[107] Further, so long as the act is criminal or obviously risky, it prevents the kind of arbitrariness the legality principle abhors by providing a clear demarcation between when the government may intervene and when it may not.[108]

A final legality issue, which may well be the most important, concerns whether the harm or obviously risky conduct that can act as a trigger for preventive detention must be criminal. If the danger to be prevented is to be defined with reference to the criminal law, one might reasonably assume

---

[105] Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 152 (1996); *cf.* Corrado, *supra* note 18, at 806–11.

[106] *Cf.* Harris v. State, 27 Fla. L. Weekly D946 (Fl. Dist. Ct. App. 2002) (finding that the state is barred from seeking sexual predator commitment of a defendant who pleads guilty to underlying sexual offense, unless it notifies the defendant at the time of the plea of the possibility of post-sentence commitment).

[107] *Cf.* Bryan v. United States, 524 U.S. 184, 189–90 (1998) (upholding a conviction for selling firearms without a license and registration despite ignorance of law claim because offender's conduct made clear he knew he was engaging in legally questionable conduct). In a similar context, the Supreme Court has held that when an offender is or should be aware that the prosecution can appeal his sentence under a special offender law, he has no legitimate expectation in the finality of the sentence. United States v. DiFrancesco, 449 U.S. 117, 137–39 (1980).

[108] A clear legality problem does arise, however, when the government releases the individual from prison and, after a hiatus, tries to commit the individual despite no further misconduct. In that situation (which is essentially the *Lambert* facts), the individual is entitled to assume he has suffered the full consequences of his anti-social conduct. *Cf. In re* Young, 857 P.2d 989, 1008–09 (Wash. 1993) (requiring new evidence of dangerousness before a person released from prison may be committed under the sexual predator law).

HeinOnline -- 98 Nw. U. L. Rev. 24 2003-2004

that the triggering criteria should be as well. Yet some obviously risky conduct is not criminal. Numerous examples of this fact come from emergency civil commitment cases involving persons alleged to be dangerous to others.[109] Moreover, the Supreme Court has approved investigative stops based on suspicious activity that does not amount to a crime. In the well-known case of *Terry v. Ohio*,[110] for example, the Supreme Court approved an investigative frisk of individuals who appeared to be "casing" a storefront and mumbled responses to a police officer's questions about their conduct, activity that was concededly not criminal.[111]

Note, however, that both of these situations involve conduct that, like the conduct associated with the crime of reckless endangerment, suggests anti-social behavior is imminent. What if the conduct is more attenuated from the potential harm? Consider on this score the case of Zacarias Moussaoui, described at the beginning of this Article. Moussaoui apparently paid for flying lessons to learn how to pilot planes, but was uninterested in learning how to land or take-off.[112] That conduct does not qualify as either a crime or obviously risky behavior (he may already have known how to take-off and land, or he may have wanted to take one thing at a time). But we also know Moussaoui trained in Osama bin Laden's camps and that he communicated with the participants in the attack on the World Trade Center on September 11, 2001.[113] That intelligence, combined with the flying lessons information, should provide enough evidence of risky behavior in any reasonable person's eyes. Whether it constitutes the crime of conspiracy, on the other hand, may depend on the content of the communications with the WTC attackers.[114]

If conspiracy can*not* be proven, may the government still preventively detain Moussaoui (assuming the psychological and prediction criteria are

---

[109] *See, e.g.*, George Dix, *Acute Psychiatric Hospitalization of the Mentally Ill in the Metropolis: An Empirical Study*, 1968 WASH. U. L.Q. 485, 504–57. Dix describes 45 commitment cases, several of which illustrate the point in the text. For instance, Illustration 5 involved a patient who believed he was an F.B.I. agent, carried at least one weapon, and accused his wife of being a "spy" and his mother-in-law of poisoning him. Contrast that case to Illustration 29, where the patient had reportedly threatened members of the family and, on the morning of the hearing, had thrown a cup of coffee on her sister.

[110] 392 U.S. 1 (1968).

[111] *Id.* at 22 ("[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions.").

[112] *See supra* text accompanying note 3.

[113] *Id.*

[114] Conspiracy requires an agreement among two or more individuals to carry out a crime. *See* WAYNE LAFAVE, CRIMINAL LAW 622 (2003). Although the agreement can be tacit and proven by inference from subsequent course of conduct, *id.* at 622–23, mere proof that a communication took place is unlikely to be sufficient. That may prove to be a significant problem in Moussaoui's case. *See* John Gibeaut, *Prosecuting Moussaoui*, 88 A.B.A. J. 36 (2002) (quoting commentators who question the prosecution on the ground that there is no obvious act by Moussaoui on which to base the charge).

HeinOnline -- 98 Nw. U. L. Rev. 25 2003-2004

met)? In answering this question, it is important to remember that the principle of legality is meant to implement *two* important objectives. In addition to assuring functional notice, which is presumably present in Moussaoui's case, the legality principle is meant to control government discretion. If the triggering act for preventive detention is not an immediate precursor to the predicted harm (as with emergency commitment and investigative stops), it must be linked to a statutorily defined crime, or the potential for government abuse becomes enormous. The version of the Moussaoui case described above may tempt one to depart from that precept. But the government's (over)reaction to the events of 9/11, including preventive detention of American citizens who remain uncharged,[115] provides a potent counter-reason for applying the same legality constraints on preventive detention that apply to inchoate crimes. Rules such as the agreement requirement in conspiracy and the conduct-beyond-mere-preparation requirement for attempt crimes ought to apply in the preventive context as well.[116]

In conclusion, legality and other due process concerns prohibit the state from depriving a person of liberty on preventive grounds unless the person has engaged in conduct that causes serious (physical?) harm or otherwise obviously evidences risk of serious (physical?) harm.[117] Outside of emergency situations, this precept requires the commission of criminal conduct. The notion that harmful or obviously risky conduct must precede preventive government intervention is substantially bolstered by the final objection to preventive detention.

---

[115] *See* Editorial, *Terror and the Constitution*, CHRISTIAN SCI. MONITOR, Aug. 4, 2003, at 8 (describing confinement of Yaser Esam Hamdi, Jose Padilla and six Yemeni men from Buffalo, all American citizens, the first two labeled "unlawful enemy combatants" and held incommunicado with no lawyers and no specific charge, the Yemeni convicted after pleading guilty because they "were petrified they would be declared unlawful enemy combatants and sent to a military jail").

[116] On the agreement requirement, see *supra* note 114. The actus reus for attempt, variously defined as conduct that puts the actor in dangerous proximity to committing the crime, conduct that unequivocally indicates criminal intent, or a "substantial step" toward committing the crime, must generally go beyond "mere preparation" to meet the act requirement for attempt. *See* LAFAVE, *supra* note 114, at 588–93. Given the identical triggering point, the question arises as to when the state may pursue preventive detention rather than punishment. *See infra* text accompanying notes 118-42 & note 197.

[117] Note that the legality principle also identifies a distinction between the person with an infectious disease and the predator known to be dangerous, a distinction that has eluded commentators who want to maintain quarantine, but who are not sure about preventive detention. *See, e.g.*, Ferdinand D. Schoeman, *On Incapacitating the Dangerous*, 16 AM. PHILOSOPHICAL Q. 27, 34 (1979) ("If there is something worse about civil preventive detention . . . than there is about quarantine, not only have we failed to locate it, but whatever it is that makes the distinction is nowhere to be found in the literature."); Corrado, *supra* note 18, at 811–15. As soon as the infected person goes into the community, he has engaged in obviously risky conduct that is an imminent threat to others. The same cannot be said for the predator.

HeinOnline -- 98 Nw. U. L. Rev. 26 2003-2004

D. The Dehumanization Objection

Suppose that the state is able to prove by clear and convincing evidence that a person will engage in criminal conduct if not preventively detained, based on conduct obviously evidencing dangerousness. Assume further that the state is prepared, if commitment occurs, to offer rehabilitation in the least restrictive environment consistent with public safety, with periodic review. Is there any ground for prohibiting such detention, in light of the state's compelling need to protect its citizens?

The dehumanization objection to preventive detention is that, even if all of the other objections are met, a regime that deprives people of liberty based on what they will do rather than on what they have done shows insufficient respect for the individual. On this view, preventive detention is, in effect, either an assertion that the person does not possess the capacity to choose the good or an assertion that, having such capacity, the person will not do so. Both assertions, the dehumanization objection posits, are deeply denigrating to the person's status as a self-governing, autonomous human being.

1. Preventive Detention's Ambiguous Insult to Autonomy.—The first possible meaning of preventive detention—that the individual so detained does not have the capacity to choose the good—is easiest to see as dehumanizing. The capacity to choose one's course is an essential aspect of our notion of what it means to be human. To say that a person lacks that capacity is to treat him like an automaton. For this reason, whatever science may suggest about how "determined" we are by biological or environmental forces, the law, and our society at large, assumes we have "free will" (for lack of a better shorthand term). Again, Professor Packer put it well:

> People may in fact have little if any greater capacity to control their conduct . . . than their emotions or their thoughts. It is therefore unrealistic or hypocritical, so the argument runs, to deal with conduct as willed or to treat it differently from personality and character. This attack is, however, misconceived. . . . The idea of free will in relation to conduct is not, in the legal system, a statement of fact, but rather a value preference having very little to do with the metaphysics of determinism and free will.[118]

One dehumanization argument against preventive detention, then, is that it is the legal manifestation of the humanity-denying belief that those detained cannot control their fate.[119]

---

[118] PACKER, *supra* note 73, at 75.

[119] Morse, *supra* note 105, at 151 ("[P]ure preventive detention threatens to dehumanize the detainee, treating him as if he were simply a dangerous animal."); JEAN E. FLOUD & WARREN YOUNG, DANGEROUSNESS AND CRIMINAL JUSTICE 44 (1981) ("[P]eople do not simply expect or hope to be treated as harmless; they have a right to be so treated, even if it is more probable than not that they do intend harm; just as they have a right to be treated as innocent even if it is more probable than not that they are guilty."); *see also infra* note 126.

HeinOnline -- 98 Nw. U. L. Rev. 27 2003-2004

Perhaps, however, preventive detention can be characterized as an assertion that the detained individual has free will but is predicted to exercise it in the wrong direction. This conceptualization of preventive detention appears to avoid Packer's complaint, because it leaves intact the dogma that we control our fate. Consider, for instance, these comments from Ferdinand Schoeman:

> People who have bad eating, smoking, exercise or work habits . . . can be sincere in protesting that they will not do something which we have excellent inductive grounds for claiming that they will. . . . [W]ithout assuming compulsions or anything at all of a pathological nature, and without denying autonomy or choice to individuals, we can see how it is that we might come to discount people's own sincere assertions and resolutions about what they will do. Hence to make such predictions about people and deal with them on that basis does not necessarily involve us in changing our image of what it is to be a person . . . .[120]

In response, the dehumanization objection might be reframed by emphasizing the assumption that autonomous individuals, even "dangerous" or self-harmful ones, always have the potential for choosing the good, an assumption that also underlies such criminal law doctrines as the mere preparation and abandonment defenses in attempt jurisprudence.[121] Characterizing preventive detention as a prediction that a person will freely choose harm may avoid the automaton image, but continues to assert that the individual will ignore society's clearly stated norms under all circumstances, and thus is internally contradictory. It denies the possibility of autonomous choice while pretending the detained individual is autonomous.

Whether one is persuaded by these arguments depends on one's allegiance to the autonomy value. Even as someone who thinks that value important, I am only half persuaded by the dehumanization objection in the abstract, precisely because of its abstractness. What I do find palpably dehumanizing, however, is preventive detention that occurs *when both punishment and preventive detention are options*, and the state decides to use the second form of social control rather than the first. In that instance, illustrated by the sexual predator regime, the case against preventive detention is much stronger, for reasons suggested below.

2. *The Right To Be Punished.*—As established in the discussion about legality, preventive detention may not take place unless the individual has either caused harm to another or has engaged in conduct that evidences

---

[120] Schoeman, *supra* note 117, at 34.

[121] On the mere preparation doctrine, see *supra* note 116. On the abandonment defense, see MODEL PENAL CODE § 5.01(4) (1962) (recognizing a defense to attempt "under circumstances manifesting a complete and voluntary renunciation of . . . criminal purpose"); LAFAVE, *supra* note 114, at 609 (noting that "on balance, the arguments in favor of recognizing voluntary abandonment as a defense to a charge of attempt are more persuasive than the arguments against the defense" because, *inter alia*, renunciation "'tends to negative dangerousness'").

HeinOnline -- 98 Nw. U. L. Rev. 28 2003-2004

obvious risk. In cases involving long-term preventive detention, that conduct will virtually always also amount to a crime, either a completed offense or an inchoate one, such as attempt or conspiracy. When, if ever, may the state respond to this conduct through preventive detention rather than criminal punishment? Putting this question another way, under what circumstances, if any, may the state be forced to rely on criminal punishment rather than preventive detention in achieving its police power goals? The short answer is that the state must choose the punishment route unless, consistent with the two situations just described, it can show that the individual lacks the capacity or lacks the willingness to adhere to society's basic norms.

The view that punishment must be imposed on the typical wrongdoer was succinctly voiced by Hegel, when he contended that punishing the criminal vindicates "the formal rationality of the individual's volition."[122] According to Hegel, respect for the criminal entails a *right* to be punished, because through punishment "the criminal is honoured as a rational being."[123] Conversely, the criminal "is denied this honour . . . if he is regarded simply as a harmful animal which must be rendered harmless, or punished with a view to deterring or reforming him."[124] Several other thinkers in the deontological tradition similarly argue that offenders have the right to be punished.[125]

Within this concept of the right to be punished lies what I consider the most persuasive version of the dehumanization objection to preventive detention. If a person who commits a criminal act is not punished, we fail to treat him as an autonomous human being.[126] If we not only fail to punish

---

[122] G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 126 (Allen W. Wood ed. & H. B. Nisbet trans., Cambridge U. Press 1991) (1821) (emphasis deleted).

[123] *Id.* (emphasis deleted).

[124] *Id.*

[125] For instance, Kant believed that punishment is designed to serve the individual's ends, namely recognition of and respect for the individual's humanity. *See* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100–02 (John Ladd trans., 1965) (1797). *See generally* LEO KATZ ET AL., FOUNDATIONS OF CRIMINAL LAW 83–96 (1999) (including excerpts from Herbert Morris and Michael Moore and concluding that "retributivists like Kant, Morris, and Moore . . . believe that criminals have a *right* to be punished"). Scholars who prefer utilitarian arguments have strongly contested this explanation for punishment. *See* David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1642–57 (1992). I make the utilitarian argument against dual track regimes below. *See infra* text accompanying notes 128–30.

[126] The modern retributivist literature tends to avoid use of the word "autonomous" and substitute for it other words, such as "responsible moral agent" or "rational actor." *See, e.g.*, R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUSTICE 1, 11 (1996).

> [T]he objection [to incapacitative punishments] is that such people are detained not for what they have done but because of what they might do if not detained; but if we are to treat citizens with the respect due to them as responsible moral agents, we must leave them free to choose whether to obey the law, and subject them to the coercive attentions of the law only if and when they choose to break it.

Id. None of these phrases is self-defining; I try to pour some content into them in Part II.

HeinOnline -- 98 Nw. U. L. Rev. 29 2003-2004

him, but simultaneously deprive him of liberty, then, to use Hegel's words, we are treating him simply as a harmful animal. As *Hendricks* and other Supreme Court decisions have held, preventive detention is not criminal punishment.[127] Thus, when the government confronted by a criminal actor chooses the former means of liberty deprivation over the latter, it declares in a very real way that the individual so detained is not a person in the full sense of that word, but rather much closer to Hegel's "harmful animal." Sexual "predator," the label Kansas legislators chose to affix to those committed under the statute at issue in *Hendricks*, brings home the point quite nicely.

The right to punishment advanced by Hegel and others rests on deontological claims about the maintenance of human dignity. The utilitarian might arrive at a similar result, because preventive detention in a dual track regime could *exacerbate*, rather than reduce, the public danger, in two ways. First, when the government chooses to label a miscreant a "predator" or "dangerous person" in lieu of punishing him as a "criminal offender," as sexual predator statutes do, it very powerfully announces that the individual either cannot or will not control his behavior. Research on motivation suggests that this type of labeling might become a self-fulfilling prophecy. The individual shunted into the "predator" system will come to believe that, unlike those who are punished as volitional actors, he is incapable of acting differently. That belief in turn could well make him more dangerous.[128] Additionally, the person who knows he is being confined based on speculation about what he will do, while his fellow wrongdoers are instead being confined for what they have done, could easily come to believe the system is corrupt.[129] That kind of loss of respect for the legal system also correlates positively with noncompliant attitudes toward the law and with recidi-

---

[127] *See supra* text accompanying notes 37–40.

[128] After reviewing a large number of studies on motivation, Professor Winick concluded:

> People who believe they lack the capacity to control their harmful conduct because of an internal deficit that seems unchangeable predictably develop expectations of failure. As a result, they may not even attempt to exercise self-control, or may do so without any serious commitment to succeed.... Labeling sex offenders as "violent sexual predators" therefore may reinforce their antisocial sexual behavior.

Bruce J. Winick, *Sex Offender Laws in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 534, 539 (1998); *see also* John Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 RUTGERS L. REV. 719, 723 (1973) ("[T]he individual who perceives himself as free and responsible behaves very differently than the individual who believes that he lacks choice and responsibility. In general, the direction of this difference is toward a higher level of awareness, initiative, achievement, independence and complexity for those who perceive themselves as freely choosing to behave in certain ways and as responsible for the behavior.") (citation omitted).

[129] *See* Vernon L. Quinsey, *Review of the Washington State Special Commitment Center Program for Sexually Violent Predators*, 15 U. PUGET SOUND L. REV. 704, 705–07 (1992) (reporting that residents of sexual predator programs "perceive the law to be arbitrary and excessive," and have more disciplinary violations than they did in prison because of, *inter alia*, "[r]esident bitterness concerning the indeterminate nature of their confinement and its imposition at the end of their sentence").

HeinOnline -- 98 Nw. U. L. Rev. 30 2003-2004

vism.[130] Although these concerns do not give the individual a "right" to be punished rather than preventively detained, they do provide consequentialist support for such a right.

Virtue ethics, a third perspective on the police power of the state, may also be hostile to a separate system of preventive detention. To a proponent of this point of view, criminal punishment is a means of inculcating virtue.[131] It can do so only by identifying, through communal deliberations carried out by the jury, those who are at fault because they have engaged in flawed practical reasoning and by insisting, through conviction of these individuals, that they are responsible for the character traits that lead to crime.[132] In a system where one offender can be subjected to preventive detention based on dangerousness while another who causes the same type of harm is subjected to punishment based on fault, the law's expressions about good and bad character are obscured; the first individual is likely to be viewed, and likely to view himself, as someone who is not responsible for his personality traits. Again, therefore, punishment is necessary, both as a "right" of the offender to be treated as someone who can control formation of his character and as an obligation of society to educate its citizens about virtuousness.

What I take from this brief discussion of deontological, utilitarian, and ethical reasoning is that a two-track system that differentiates "offenders" from "predators" or "dangerous beings" infringes the right of autonomous humans to be punished for their criminal conduct. In a dual track regime, those diverted to the "dangerous offender" track are clearly treated as lesser humans, are more likely to live out the predator prophecy, and are less likely to be perceived as individuals who are responsible for their character. That is my version of the dehumanization objection to a separate system of preventive detention.

3. *The Effect Exception to the Right To Be Punished.*—Not all liberty deprivations based on dangerousness have the impact just described. Some types of preventive detention do not trench on a person's right to be punished for criminal acts, because they do not in fact deprive the person of such punishment. These types of preventive detention can be said to fall

---

[130] *See* TOM TYLER, WHY PEOPLE OBEY THE LAW 63–68 (1990) (summarizing research findings to the effect that compliance with law is based as much on perceived legitimacy as on deterrence and other factors); Edward Zamble & Frank Porporino, *Coping, Imprisonment, and Rehabilitation*, 17 CRIM. JUST. & BEH. 53, 59 (1990) (finding correlation between little respect for system and recidivism).

[131] Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 1029 (2000) ("[T]he inculcation of virtue is the criminal law's justifying purpose."). Huigens is the most prolific recent adherent of this approach.

[132] *Id.* (under the virtue ethics approach, "[t]he question before the jury is whether the acts of the accused in the particular circumstances of the alleged crime displayed inadequate or flawed practical reasoning, including the deliberations on ends that have gone toward establishing and maintaining his standing dispositions"); *cf.* Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1447–48 (1995) (describing the Aristoleian view that people are responsible for their character).

HeinOnline -- 98 Nw. U. L. Rev. 31 2003-2004

under an *effect exception* to the right to punishment. Other types of preventive detention after criminal conduct are clearly inconsistent with punishment, but are nonetheless legitimate because the psychological characteristics of the person divest him of the right to be punished. This section focuses on the effect exception, while Part II of this Article examines the psychological criterion for preventive detention.

Numerous species of preventive detention do not foreclose criminal punishment or do not create a dual track system and therefore fit with the effect exception I am proposing. For instance, when police stop an individual on the street upon reasonable suspicion he is contemplating commission of a crime, they are engaging in preventive detention. Usually, however, the individual has yet to commit a crime, so criminal punishment is not yet an option. In any event, this investigative procedure is merely the first step toward punishment, not a substitute for it.

Other types of pretrial preventive detention may be permissible for the same reason. In *United States v. Salerno*,[133] the Supreme Court held that pretrial preventive detention of an arrestee, in lieu of bail, does not violate the due process clause, primarily because the duration of the detention is limited (by speedy trial rules) and the intent behind it is not "punitive."[134] The Court's result in *Salerno* is correct, although neither of its rationales should be dispositive. Any preventive detention of an accused person, however long and whatever its "intent," is suspect if it denies the person the right to contest his guilt and the right, if found guilty, to be accorded the respect and dignity inherent in punishment for that act. Typically, however, pretrial detention does not deprive the person of these rights (although it may become illegitimate if its length renders criminal adjudication a sham because, for instance, it exceeds the usual punishment for the offense).

Whether *post*-criminal adjudication dispositions based on dangerousness come under the effect exception depends upon whether one adopts a strong or weak view of the right to punishment. The strict deontological position forecloses all use of dangerousness assessments in this context. For instance, as indicated above, Hegel would have prohibited any punishment that is imposed "with a view to deterring or reforming" the offender.[135]

But one can also defend a "weak" view of the right to punishment.[136] The weak view still prohibits preventive confinement when criminal punishment is an option, but does not automatically bar punishment designed to accomplish consequentialist ends. Recall the definition of punishment given earlier.[137] Criminal punishment is based solely on a conviction for an

---

[133] 481 U.S. 739 (1987).

[134] *Id.* at 747–48.

[135] *See supra* text accompanying note 124.

[136] *See, e.g.*, H.L.A. HART, THE MORALITY OF THE CRIMINAL LAW 31–32 (1964); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 88, 182–83, 231–35 (1968).

[137] *See supra* text accompanying notes 47–48.

HeinOnline -- 98 Nw. U. L. Rev. 32 2003-2004

offense and can occur only if there is such a conviction. A weak version of the right to punishment might posit that so long as the disposition occurs *because* the individual has been labeled a criminal through the appropriate process and with the requisite degree of culpability, the right to punishment has been preserved. That the length of punishment might vary depending upon other factors (such as dangerousness or general deterrence objectives) does not change the fact that the individual has been found to have autonomously chosen to cause harm.[138]

Under the weak version of the right to punishment, therefore, a criminal sentence that falls within the range dictated by retributive considerations would clearly be permissible even if the length of the sentence is calibrated solely through predictions of behavior, as sometimes occurs in sentencing systems that have maintained parole.[139] The retributive range announces and demarcates the punishment for the offender's crime. It thus accords the criminal sufficient respect as an autonomous being.

More difficult to categorize is a criminal sentence that is based entirely on dangerousness, the so-called "indeterminate sentence."[140] Functionally, this regime is very similar to a pure preventive detention regime. But two significant traits save it from infringing the right to punishment in its weak form. First, in contrast to a purely preventive regime, in the indeterminate sentence setting the government officially declares that the individual is guilty of a criminal act and that he must be punished for it, a declaration that sounds in retribution, not in dangerousness. Second, in contrast to preventive detention schemes such as the sexual predator laws, which exist *in addition to* criminal sentencing, it avoids the autonomy-denigrating impact associated with assigning the individual to a "dangerous person" track rather than the "offender track," because there is only one track.

The same cannot be said, however, of preventive detention that exists in lieu of criminal punishment, as is authorized under most sexual predator statutes.[141] Nor can it be said of preventive detention that *follows* criminal

---

[138] Both the utilitarian and virtue ethics perspectives are easily reconciled with this weak right to punishment. If a person who commits anti-social conduct is adjudicated guilty and sentenced at a criminal trial, he will not be saddled with the debilitating predator label. Likewise, once a person has been identified as a person with flawed practical reason through the criminal adjudication, society's interest in publicly defining virtue through the jury has been achieved. *Cf.* Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387, 392, 441 (2002) (asserting that the jury's job is to determine "fault," while the sentencing judge's job is to impose a "just sentence" after considering a number of factors, including incapacitation and rehabilitation).

[139] Norval Morris was one of the first to make such a suggestion. *See* Norval Morris, *Predicting Violence with Statistics*, 34 STAN. L. REV. 249, 253 (1981) ("[W]e may, with justice, [enhance a sentence based on dangerousness], provided the upper sentence limit has been defined other than in relation to such predictions.").

[140] Indeterminate sentences were quite popular in this country and in Great Britain until the mid-1970s. *See generally* DAVID GARLAND, THE CULTURE OF CONTROL 34, 53 (2001).

[141] For instance, under the old version of the sexual predator laws—the "mentally disordered sex offender" statutes that were popular until the 1970s—commitment substituted for punishment. *See* George

HeinOnline -- 98 Nw. U. L. Rev. 33 2003-2004

punishment, like that imposed on Hendricks under the Kansas sexual predator law. The right to punishment may seem to be preserved in the latter situation, for punishment for the criminal act does take place. But here—as with preventive detention that functions as a substitute for punishment, and in contrast to indeterminate sentencing—there are two tracks, the punishment track and the predator track. The individual who, unlike his colleagues in crime, is committed after his sentence is served is again singled out as someone who is less than human, confined not for what he chose to do but for what he is, a predator. Whatever respect for the person comes with punishment dissipates the moment the state preventively detains him in a regime that is separate from criminal punishment, a reality that is not likely to be lost on the newly designated "predator" himself.[142]

Under the "weak" version of the right to punishment theory, then, preventive detention after criminal conduct is permissible in a wide range of situations where it does not foreclose criminal punishment, but is generally impermissible if the government uses it as a substitute for or in addition to such punishment, because in the latter situations the individual's status as an autonomous human actor is impugned, a fact which is also likely to increase recidivism. Even in the latter situations, however, preventive detention is permissible if the individual should *not* be treated as an autonomous being, for then the "harmful animal" label is more apposite and is likely to have less behavioral impact (because it is, or at least seems to be, closer to the truth). Defining the scope of this psychological exception requires more elaborate treatment.

II. THE PSYCHOLOGICAL CRITERION FOR PREVENTIVE DETENTION

The majority opinion in *Kansas v. Hendricks* indicated, more than once, that dangerousness alone is an insufficient basis for long-term preventive detention. Although the Kansas statute at issue in that case only required proof of a "mental abnormality or personality disorder which makes the person likely to engage in predatory acts of violence,"[143] the Court construed this language to require proof of a disorder that "prevents [the sex offender] from exercising adequate control over [his] behavior."[144] At other points, the Court defined the requisite impairment as an abnormality that "makes it difficult, if not impossible . . . to control . . . dangerous behavior"[145] and as a condition that renders the offender "unable to control his

---

E. Dix, *Special Dispositional Alternatives for Abnormal Offenders*, *in* MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 133, 142–44 (John Monahan & Henry J. Steadman eds., 1983).

[142] *See supra* note 129.

[143] KAN. STAT. ANN. § 59-29a02(a) (2002).

[144] Kansas v. Hendricks, 521 U.S. 346, 362 (1997).

[145] *Id.* at 358.

HeinOnline -- 98 Nw. U. L. Rev. 34 2003-2004

dangerousness."[146] The Court also stated that it was Hendricks' "admitted lack of volitional control" that "distinguishe[d him] from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings."[147] In *Kansas v. Crane*,[148] decided in 2002, the Court reiterated that preventive incarceration must generally be accompanied by "proof of serious difficulty in controlling behavior,"[149] although it left open the question of whether dangerousness due to "emotional" impairment might also legitimately form the basis for detention.[150]

The critics of *Hendricks* have argued that the Court's inability-to-control criterion is either meaningless or overbroad. The most commonly proposed alternative psychological criterion is some form of serious mental disorder, akin to that which is required for an insanity defense.[151] That tack would render the typical sexual predator commitment invalid, as most sex offenders, Hendricks included, do not meet traditional insanity tests.

My position is somewhere between the Court's and the critics'. The Court's inability-to-control standard is vacuous to the extent it suggests the state must show some type of "involuntary" behavior or criminal impulse caused by overwhelming urges. At the same time, traditional insanity formulations, although adequate at defining autonomy for the purpose of assessing criminal responsibility, are too narrow when the goal is delineating the psychological criterion for preventive detention. I suggest the focus should instead be on the individual's undeterrability, a standard that would allow preventive detention of some people who are not seriously mentally ill. At the same time, it would stop short of authorizing such detention for all, or even most, who have impulse disorders. In short, the formulation proposed here would encompass people who are lacking in autonomy due to mental disability and the like, as well as that small category of people who are not insane but who can nonetheless be denied the right to punishment because of their manifest obliviousness to society's most important criminal prohibitions.

---

[146] *Id.* at 358, 364.

[147] *Id.* at 360.

[148] 534 U.S. 407 (2002).

[149] *Id.* at 413.

[150] *Id.* at 415 ("The Court in *Hendricks* had no occasion to consider whether confinement based solely on 'emotional' abnormality would be constitutional, and we likewise have no occasion to do so in the present case.").

[151] For a sampling of the commentary in this vein, see Stephen Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1026–27 (2002) (arguing that sexual predator commitment should be limited to those who are "non-responsible"); ROBERT F. SCHOPP, COMPETENCE, CONDEMNATION, AND COMMITMENT 149–50, 165–66 (2001) (arguing that police power commitment is permissible only for those who lack "retributive competence" and comparing the latter concept to insanity); Eric Janus, Hendricks *and the Moral Terrain of Police Power Civil Commitment*, 4 PSYCHOL. PUB. POL'Y & L. 297, 298 (1998) ("Properly understood, the *Hendricks* decision will limit civil commitment to those who are 'too sick to deserve punishment.'" (quoting Millard v. Harris, 406 F.2d 964, 969 (D.C. Cir. 1968))).

HeinOnline -- 98 Nw. U. L. Rev. 35 2003-2004

A. *The Inability-to-Control Formulation*

Although the Court never clearly provides it in either *Hendricks* or *Crane*, there is at least one plausible rationale for permitting preventive detention based on proof of volitional impairment and dangerousness. It builds, as previous discussion has already suggested, on the right to punishment theory. That right exists because we want to treat people as autonomous beings who will choose to avoid commission of crime. If an individual's urge to commit crime is so strong that he is unable to control it, one can argue that he has demonstrated he is not an autonomous being; a person who is "dangerous beyond [his] control,"[152] to use the Court's words, is closer to Hegel's "harmful animal" than to a volitional human actor.

Despite its intuitive appeal, the Court's approach is problematic to the extent it relies on the concept of volitional impairment. Truly "involuntary" acts are rare. Illustrated by epileptic seizures and perhaps some dissociative states,[153] they require a disjunction between mind and body that seldom occurs even in people with severe mental illness, much less in sexual predators and like offenders.[154]

If instead the concept of volitional impairment is meant to refer to conscious control over bodily movements that nonetheless are "compelled" by "irresistible impulses," then as Stephen Morse, Robert Schopp, and others have demonstrated, the concept becomes meaningless, or so expansive that it could include most criminal behavior.[155] Even conduct that the actor perceives to be the product of strong urges is "willed," in the sense that the actor decides to engage in it. The addict who steals to feed a habit, the sexual predator who molests a child, and the psychotic individual who kills all intend, and often plan, their actions. Further, they all probably could have avoided those actions, in the sense that they knew of and were able to choose other options.[156] Finally, for many of these individuals the criminal

---

[152] Kansas v. Hendricks, 521 U.S. 346, 358 (1997).

[153] *See* MELTON ET AL., *supra* note 35, at 203–04 (discussing the involuntary act defense).

[154] The Model Penal Code defines involuntary acts to exclude everything but reflexes and convulsions, bodily movement during sleep, conduct during hypnosis, and other "bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual." MODEL PENAL CODE § 2.01(2) (1962).

[155] *See* Stephen Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1619–34 (1994) (arguing that internal coercion is either insufficient to excuse or so debilitating that it amounts to irrationality and thus is unnecessary as an independent excusing condition); ROBERT SCHOPP, AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL INQUIRY 165–74 (1991) (arguing that the concept of volitional impairment as an excuse is "either unnecessary and irrelevant or . . . vacuous").

[156] *See* HERBERT FINGARETTE, THE MEANING OF CRIMINAL INSANITY 162 (1972) (noting that regardless of how impaired a person is, it is still "the person himself who initiates and carries out the deed, it is his desire, his mood, his passion, his belief which is at issue, and it is he who acts to satisfy this desire, or to express this mood, emotion, or belief of his"); SCHOPP, *supra* note 155, at 181 ("[A]ccepting the proposition that individuals cannot control . . . intrusive urges and fantasies . . . does not entail that they cannot refrain from acting on these mental events."); E. Michael Coles, *Impulsivity in Major Men-*

HeinOnline -- 98 Nw. U. L. Rev. 36 2003-2004

act is pleasurable, rather than a method of avoiding psychological pain, or is at least a combination of the two.[157] For all of these reasons, identifying precisely how such actions are "compelled" is difficult. While such people may seem to have overwhelming urges, they still choose to act on those urges and they do not seem to be compelled in the same way a person acting with a gun pointing at his head is compelled.

Even if one can make sense of the compulsion notion in the abstract, it seems to sweep too broadly in practice. As Michael Moore has noted,[158] all behavior is caused by something not directly in one's control, whether it is biological, environmental, or characterological. Thus, a case can be made that volition is always "impaired." Attempting to draw the line between those who are "compelled" and those who are merely "caused" creates daunting problems. For instance, despite popular perceptions and the Supreme Court's own assumptions,[159] evidence that the impulses experienced by addicts, sexual offenders, and people with psychosis are stronger than those that lead people to commit more typical crimes is hard to come by; burglars recidivate at least as much as sex offenders,[160] and white collar criminals are probably just as likely to be "driven" by urges, albeit for things like wealth, fame, or power rather than (or perhaps in addition to) drugs or sex.[161]

The breadth of the inability-to-control concept has been recognized by researchers and clinicians alike. Representative is the claim by social scientists Plutchik and van Praag. In their paper "The Nature of Impulsivity," they note that impulsivity has been associated with borderline personality disorder, anti-social personality disorder, hyperactive syndrome, alcohol-

---

tal Disorders, *in* IMPULSIVITY: THEORY, ASSESSMENT AND TREATMENT 180, 189 (Christopher D. Webster & Margaret A. Jackson eds., 1997) ("With the obvious exceptions of delirious and comatose individuals . . . the expression of a socially unacceptable impulse invariably reflects some control."); Morse, *supra* note 155, at 1605 (concluding that "out of control agents should sometimes be excused, but not because they do not choose to do what they do").

[157] Morse, *supra* note 155, at 1624 ("[F]or many people affected by the so-called paraphilias, some impulse disorders, and drug dependence, satisfying the desire produces positive pleasure as well as the avoidance of pain.").

[158] Michael Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563, 1665 (1980) ("Everyone is undoubtedly caused to act as they do by a myriad of environmental, physiological, or psychological factors. Yet to say that any actions caused, for example, by an unhappy childhood, a chemical imbalance, or a belief that it is raining, is not to say the actions are compelled.").

[159] *See* Kansas v. Crane, 534 U.S. 407, 412 (2002) (speaking of distinguishing "a dangerous sexual offender subject to civil commitment" from "other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings" (quoting Kansas v. Hendricks, 521 U.S. 346, 360 (1997))).

[160] The recidivism rate for burglary (31.9 percent) is four times higher than that for rape (7.7 percent). David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 572 (1994).

[161] Morse, *supra* note 155, at 1631 ("There is simply no scientific or clinical evidence that 'abnormal' desires are necessarily stronger than 'normal' desires and thus that abnormal desires uniquely threaten unbearable dysphoria and produce a consequently harder choice.").

HeinOnline -- 98 Nw. U. L. Rev. 37 2003-2004

ism, substance abuse, brain damage, anorexia nervosa, violent behavior, neurological "soft signs," rage and aggression, homicide, sexual assault, risk taking, error-prone information processing, bipolar disorders, kleptomania, pyromania, addictions, perversion, and some sexual disorders.[162] Any concept that encompasses such a broad array of behavior and conditions is close to useless as a meaningful legal limitation.

In any event, gauging the strength of criminal desires, or the weakness of the will to resist them,[163] is a scientific impossibility at this point. Despite repeated attempts to develop instruments that measure impulsivity, there is no generally accepted, or even partially accepted, formulation of the construct.[164] In contrast to prediction of risk, where major advancements have occurred, instruments for assessing volitional impairment are in a very primitive state.[165]

In short, predicating preventive detention on a showing that a person's dangerousness is something he cannot control appears to be a theoretical and practical dead end. It will involve courts in the quagmire of trying to distinguish the impulse that was irresistible from the impulse that was not resisted.[166] The psychological criterion for preventive detention should rest on a sounder conceptual basis.

---

[162] Robert Plutchik & Herman M. van Praag, *The Nature of Impulsivity: Definitions, Ontology, Genetics, and Relations to Aggression*, *in* IMPULSIVITY AND AGGRESSION 7–8 (Eric Hollander & Dan J. Stein eds., 1995); *see also* Coles, *supra* note 156, at 187 (speaking of "the status of impulsivity as a primary, if not universal, criterion of every mental disorder that is clearly anti-social and/or irrational").

[163] One of the reasons this area of inquiry is so difficult is that we do not know how to distinguish which of these two possibilities, if either, is in operation during "impulsive" action. *See generally* P.S. Greenspan, *Genes, Electrotransmitters, and Free Will*, *in* GENETICS AND CRIMINAL BEHAVIOR 243, 248 (David Wasserman & Robert Wachbroit eds., 2001) (noting that "[i]nstead of looking at the element of internal threat—the urges that arguably overcome the will to resist and hence make action less than fully voluntary—we might shift our explanatory focus to the will itself, the psychological resources that enable an agent to resist: what is commonly called 'strength of will,'" and then exploring the difficulties of doing so).

[164] One review of the methods used to measure impulsivity concluded that "researchers need to be very cautious when selecting impulsivity measures," because the different measures "appear to be assessing very different constructs," even when they use the same methodology. James D.A. Parker & R. Michael Bagby, *Impulsivity in Adults: A Critical Review of Measurement Approaches*, *in* IMPULSIVITY: THEORY, ASSESSMENT AND TREATMENT, *supra* note 156, at 142, 154–55; *see also* Judy Zaparniuk & Steven Taylor, *Impulsivity in Children and Adolescents*, *in* IMPULSIVITY: THEORY, ASSESSMENT AND TREATMENT, *supra* note 156, at 158, 174 ("[S]tudies of adults, adolescents, and children show that impulsivity measures are often uncorrelated with one another, and that impulsivity is a multidimensional construct. There have been too few studies to determine the nature of the underlying factors.").

[165] *Id.* For instance, one instrument used in insanity cases measures volitional impairment by asking the evaluator to use a six criteria template, ranging from whether the individual "was in complete control of his/her behavior and chose to commit the crime" to whether the individual "was completely out of control of his/her behavior throughout all of the criminal act." Slobogin, *supra* note 22, at 947 n.124 (describing the R-CRAS instrument).

[166] *See* AM. PSYCHIATRIC ASS'N, STATEMENT ON THE INSANITY DEFENSE 11 (Dec. 1982) ("The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk."), *quoted in* A.B.A. CRIMINAL JUSTICE STANDARDS COMM., A.B.A. CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 341 n.49 (1989).

HeinOnline -- 98 Nw. U. L. Rev. 38 2003-2004

B. The Insanity Formulation

A promising candidate in this regard is simply to equate the psychological criterion with insanity.[167] The insanity defense is meant to define those who lack criminal responsibility, which describes a group that would seem to coincide perfectly with those who can be preventively detained because their lack of autonomy forfeits the right to punishment. Further, because most modern versions of it focus simply on cognitive impairment,[168] the insanity inquiry is relatively straightforward compared to the assessment of volitional impairment required under *Hendricks*.[169]

Some insanity tests have included a volitional impairment prong as well.[170] If that prong were a necessary component of the insanity defense, then equating the psychological criterion for preventive detention with insanity might rejuvenate all of the conceptual and practical difficulties just discussed. But most jurisdictions have rejected the volitional prong.[171] Furthermore, as Morse has demonstrated, many cases of volitional impairment can be re-characterized as deficits in cognition.[172] For instance, the kleptomaniac who steals for no apparent reason (because he merely hides what he steals without attempting to make money from it) could be said to have an irrational thought process, as could the person with mania who carelessly

---

[167] For those who have proposed this solution, more or less, see *supra* note 151. I have endorsed this approach as well, *see* Slobogin, *supra* note 4, at 364–66, although in this Article I refine that position.

[168] Most jurisdictions today have adopted either the *M'Naghten* test or a truncated version of the Model Penal Code test; about twenty still retain a "volitional" prong. *See* RITA J. SIMON & DAVID E. AARONSON, THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA 251–63 (1988). The *M'Naghten* test asks whether the offender's mental disease or defect made him unable to know the nature and quality of his act or that it was wrong. The Model Penal Code test focuses on whether a person's mental disease or defect made him substantially unable to appreciate the wrongfulness of his act or substantially unable to conform his behavior to the requirements of the law. The "truncated" version of the Model Penal Code test, which governs in federal courts and several state jurisdictions, eliminates the latter, volitional prong of the defense. *See generally* REISNER ET AL., *supra* note 88, at 522–27 (explicating these tests further).

[169] *See* AM. PSYCHIATRIC ASS'N, *supra* note 166, at 11 ("Many psychiatrists . . . believe that psychiatric information relevant to determining whether a defendant understood the nature of his act, and whether he appreciated its wrongfulness, is more reliable and has a stronger scientific basis than, for example, does psychiatric information relevant to whether a defendant was able to control his behavior.").

[170] *See supra* note 168.

[171] In addition to the difficulty of assessing volitional impairment, another reason for this position may be that "the exculpation of pyromaniacs [and others with so-called impulse disorders] would be out of touch with commonly shared moral intuitions." Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 197 (1983).

[172] Morse, *supra* note 155, at 1626 ("[I]t is difficult to envision a case in which the defendant was suffering from a severe mental disorder with marked 'coercive' features, but was substantially rational. Virtually all cases that would justify acquittal by reason of insanity or partial responsibility mitigation demonstrate that marked irrationality infected the practical reasoning that motivated the criminal conduct.").

HeinOnline -- 98 Nw. U. L. Rev. 39 2003-2004

spends money in grandiose schemes because of inaccurate beliefs about himself and the world.

Under a cognitively-focused insanity defense, the psychological criterion would be defined by such factors as the actor's ability to distinguish right from wrong, the intelligibility and consistency of his desires and beliefs, and the nature of his thought process.[173] These are not easy assessments. But they are more sensible and more manageable than the volitional inquiry.[174] Further, calling such people "dangerous" is not likely to increase their recidivism, either because the label means little to them or because they can attribute their dangerousness to a "disease," which generally can be treated.

Making insanity the psychological criterion for preventive detention thus appears to satisfy both right to punishment theory and the desire for a meaningful standard. Nonetheless, this simple equation does not work, if it means that people who are sane may never be subject to long-term preventive detention. That is because it fails to encompass the second of the two situations in which the right to punishment does not apply—when the actor, though sane, signals a desire to ignore society's most significant norms regardless of the circumstances. The next section explores this objection more fully.

C. Back into the Quagmire: The Undeterrability (Unawareness or Recklessness) Formulation

Despite its incoherence, the Supreme Court's inability-to-control formulation does capture a widely shared view that some individuals—including some sex offenders—are sane under the traditional cognitive impairment tests, yet seem to be lacking a fundamental aspect of autonomy. If Hendricks is to be believed, only his death would prevent him from molesting children, despite his acknowledgement that such activity is criminal and would subject him to punishment.[175] This type of dysfunction, whether it is labeled a mental abnormality or simply described in terms of its effects, smacks more of conditioned, animal behavior than human conduct.

For reasons already discussed, trying to describe this intuition in terms of impulse control is futile. Taking a cue from Morse, another way of get-

---

[173] The precise focus would depend, of course, on the insanity formulation adopted. Traditional tests focus more on distinguishing right from wrong. *See supra* note 168. An irrationality test would focus more on the consistency of desires and beliefs. *See* MICHAEL S. MOORE, LAW & PSYCHIATRY: RETHINKING THE RELATIONSHIP 100–08 (1984). Schopp's formulation would concentrate on the thought process. SCHOPP, *supra* note 155, at 185–98. I have proposed abolition of the special defense of insanity, replacing that inquiry with one focused on the extent to which mental illness supports subjectively defined mens rea and justification defenses. Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199 (2000).

[174] *See supra* text accompanying notes 162–64.

[175] *See supra* text accompanying note 1. Additionally, Hendricks stated that "he hoped he would not sexually molest children again." Kansas v. Hendricks, 521 U.S. 346, 355 (1997).

HeinOnline -- 98 Nw. U. L. Rev. 40 2003-2004

ting at the "dangerous beyond control" concept is by focusing on cognition—the desires and beliefs that motivate the behavior and the process by which they are formed. But Morse's specific proposal—that claims of volitional impairment should be reanalyzed in terms of the "rationality" of the motivating desires and beliefs[176]—may not get us very far. As Morse himself admits, while "there is something more than a little wacky about wanting anything 'too much,'... how much is 'too much' will of course depend on the circumstances, including social conventions."[177] To many people, the person who seems to act impulsively, against his own apparent interests, will always be irrational. Indeed, many commentators have noted that impulsivity and irrationality are all but synonymous.[178] If that is the outcome of Morse's proposal—if child molesters, addicts, and people with bad tempers are all seen as irrational[179]—that concept may be as vacuous as control formulations.

---

[176] *See* Morse, *supra* note 151, at 1036 ("Lack of capacity for rationality is a genuine and limiting non-responsibility standard that would meet substantive due process requirements for the justification of involuntary civil commitment of sexual predators.").

[177] Morse, *supra* note 155, at 1632.

[178] For instance, according to Ronald Blackburn, "labels implying 'compulsion' are ... applied when neither the perpetrator nor an observer can account for the behaviour in terms of motives which are current, popular, or culturally sanctioned." RONALD BLACKBURN, THE PSYCHOLOGY OF CRIMINAL CONDUCT: THEORY, RESEARCH, AND PRACTICE 74 (1993). He continued:

> [Impulse control disorders are] explanatory fictions introduced when people are unable to attribute their repeated deviant acts to an "acceptable" or "rational" cause. ... While there is a case for subdividing particular forms of repetitive deviant behaviour according to categories of motive (or reinforcer), a classification which effectively rests on arbitrary distinctions between "rational" and "irrational" has no scientific utility.

Id. Consider also this comment:

> Most commentators recognize that behavior deemed impulsive is, in various combinations and degrees, associated with the timing and tempo of one's comportment, failure to reflect, impetuosity, lack of self-restraint, irrationality, explosiveness, unpredictability, nonutilitarianism, and other such qualities. Yet, on reflection, not only are these various descriptors inescapably mired in cultural expectations and social biases, but there is little evidence that they collapse into anything approaching a discrete cluster with systematic, stable, or measurable properties.

Robert Menzies, *A Sociological Perspective on Impulsivity: Some Cautionary Comments on the Genesis of a Clinical Construct*, *in* IMPULSIVITY: THEORY, ASSESSMENT AND TREATMENT, *supra* note 156, at 42, 54. Morse himself seems to recognize this problem when he states that "[a]lthough I am sympathetic to claims that the rationality of desires or ends is difficult to assess, I am finally convinced, by malignantly circular reasoning perhaps, that it must be irrational to want to produce unjustified harm so intensely that failure to satisfy that desire will create sufficient dysphoria to warrant an excuse." Morse, *supra* note 155, at 1634.

[179] Morse contemplates that all of these people might behave irrationally, although he thinks such cases will be very rare. Morse, *supra* note 151, at 1074 ("[A] small number of sexual predators may have a rationality defect that extends generally over the domain of sexual behavior.... Leroy Hendricks may have presented precisely this case."); Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251, 263 (2000) (stating that "'addictions,' so-called 'pathological' or 'compulsive' gambling, 'deviant' sexual desires, and the like" do not involve problems of compulsion "but in some cases the desire may be so intense that it undermines the capacity for rationality"); Morse, *supra* note 155, at 1649 (suggesting that "crimes of 'passion,' committed in heightened emotional states, such as fear and rage, ... may seal off access to the ordinary desires, beliefs, and intentions that permit volitions to resolve the inevitable conflict by being properly responsive to ... background factors"); *id.* at 1636

HeinOnline -- 98 Nw. U. L. Rev. 41 2003-2004

I propose, instead, that we should answer the question of "how much is too much" with reference to the most conspicuous and powerful "social convention," the criminal law. If a person wants to commit serious crime so badly that he is willing to be deprived of liberty or suffer similarly serious consequences for it, then he should be eligible for preventive detention, whether the desire stems from mental illness, subliminal "drives," or cold calculation. This type of person is truly "undeterrable" by the criminal law, and thus is precisely the person who should be subject to its alternative: preventive detention. In contrast, the person who is not willing to suffer punishment in order to achieve his desires is deterrable, and we should respect his autonomy by assuming he will be deterred.

Justice Scalia may have been hinting at this notion in his dissenting opinion in *Crane*, when he tried to defend sexual predator laws by stating that "[o]rdinary recidivists *choose* to re-offend and are therefore amenable to deterrence through the criminal law; those subject to civil commitment under the [sexual predator act], because their mental illness is an affliction and not a choice, are unlikely to be deterred."[180] Although this moves toward an undeterrability criterion, Justice Scalia's manner of expressing it, like the inability-to-control formulation in *Hendricks*, is incoherent. The Justice is right that mental illness is "not a choice." But the behavior that flows from it usually is. Furthermore, recidivists, even "ordinary" ones, are by definition "unlikely to be deterred."

Preventive detention should be aimed at the truly undeterrable. This notion is most meaningfully expressed not in terms of lack of control, irrationality, or the "likeliness" of being deterred, but rather in terms of two other psychological tendencies: either (1) *unawareness that one is engaging in criminal conduct*; or (2) *extreme recklessness with respect to the prospect of serious loss of liberty or death resulting from the criminal conduct*. The person who is truly undeterrable by the criminal law is one who characteristically either commits criminal conduct not believing it to be criminal or commits the conduct knowing it is criminal but willing to suffer the consequences in order to accomplish his criminal aims. Like the irrationality formulation, the language of ignorance and recklessness avoids problematic talk about compulsion; it does not deny that criminal actors generally choose their actions, while aware of their options. But unlike an irrationality test, this language focuses precisely on the desires and beliefs of the actor that make the person undeterrable.

Note that the lack of awareness subcategory of the undeterrability concept is similar to, if not synonymous with, the cognitive prong of the insanity defense, which traditionally has focused on knowledge of the nature and quality of the act and knowledge of whether the act was wrong. A person who experiences delusions or hallucinations that lead him to think he is

(wondering whether psychopaths should be excused on irrationality grounds).

[180] Kansas v. Crane, 534 U.S. 407, 420 (2002) (Scalia, J., dissenting) (emphasis in original).

HeinOnline -- 98 Nw. U. L. Rev. 42 2003-2004

shooting a tree rather than a person,[181] or that an individual who wants to shake his hand is attacking him,[182] will not be affected by the relevant prohibitions of the criminal law. Numerous other distorted perceptions of reality could render perpetrators oblivious to the criminal implications of their actions or convinced that there are none.[183] An added advantage of the unawareness formulation is that it would permit commitment of those who successfully assert an unconsciousness defense (as in sleepwalking and epilepsy cases).[184] Currently this group of people causes significant problems for the criminal justice system because, having been acquitted on grounds other than insanity, there is no provision for their post-trial commitment.[185] Yet these people should be subject to preventive detention if their unconsciousness is likely to cause further harm, because in that state they are truly undeterrable.

The recklessness subcategory of undeterrability describes an entirely different set of people—"sane" people who know they are committing a crime and are aware of a significant risk of apprehension and long-term deprivation of liberty, but who commit it anyway. The old policeman-at-the-elbow test puts the matter succinctly.[186] A person who is likely to commit a crime while observed by law enforcement officers or in situations similarly likely to lead to apprehension is, by definition, on the far end of the undeterrability spectrum. In contrast, the typical recidivist will avoid committing a crime under such conditions.

In short, the recklessness subcategory of undeterrability identifies people who prefer crime to freedom.[187] I would also require, however, that the

---

[181] *Cf.* People v. Wetmore, 583 P.2d 1308 (Cal. 1978) (involving a person suffering from schizophrenia who was found in another person's apartment wearing that person's clothes and cooking his food and who was shocked and embarrassed when told apartment was not his).

[182] *Cf.* M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843) (involving a person suffering from paranoid schizophrenia who believed target of assassination was attempting to have him killed).

[183] Whether the unawareness formulation described in the text encompasses all who would be excused under the Model Penal Code's popular "appreciation of wrongfulness" insanity test, MODEL PENAL CODE § 4.01 (1962), would depend on how the latter test is interpreted. For the record, the unawareness group would be broader than the group that I would exculpate from crime, because I believe exculpation is based on assessments of blameworthiness, not undeterrability, and some people who meet the Model Penal Code test are still blameworthy in my view. *See* Slobogin, *supra* note 173, at 1202–08 (advocating exculpation only of those whose mental illness leads to the absence of mens rea or a motivation for the crime that sounds in justification, duress, or "general ignorance of the law").

[184] *Cf.* MODEL PENAL CODE § 2.01(2) (1962) (excusing involuntary acts such as "reflex or convulsion; a bodily movement during unconsciousness or sleep; conduct during hypnosis or resulting from hypnotic suggestion; [and] a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual").

[185] *See* Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 285 (2002) ("In contrast to defendants determined to be insane, defendants with automatism and unconsciousness receive an unqualified acquittal and do not face the possibility of being institutionalized.").

[186] For a description of this test, see *United States v. Kunak*, 17 C.M.R. 346, 357–58 (C.M.A. 1954).

[187] This formulation does not necessarily exclude offenders or potential offenders who try to avoid apprehension. Even people with very strong desires to commit crime will try to avoid detection before

HeinOnline -- 98 Nw. U. L. Rev. 43 2003-2004

anticipated/ignored loss of freedom be substantial. That caveat ensures that the person is truly undeterrable, as opposed to someone who could be deterred with significant enough disincentives.

Very few people would fit in the recklessness category so defined, but those who do might be divided into two types. The first group would be composed of those who commit the crime primarily to achieve their own ends. These would include the individual with mania whose grandiosity leads him to commit rape in full view of the public,[188] the individual who rapes while being actively pursued by the police,[189] and the individual (like Hendricks?) who routinely commits sexual acts in situations where it is "almost inevitable" (to use the phrasing of one court wrestling with this issue) that he will be caught.[190] These examples, taken from actual cases,[191] all involve sex offenders. But cases involving other types of offenders can be imagined; in particular, individuals who routinely engage in homicidal assaults in public fora, like Garry David (described at the beginning of this Article), are apparently unaffected by a very high likelihood of apprehension.[192] All of these people can be considered undeterrable, even though they are not insane under traditional definitions, because their desire for the "benefit" they receive from crime is demonstrably greater than their fear of significant punishment.

The second group that might be said to be undeterrable because of recklessness toward the prospect of punishment commits crime to achieve

---

they commit their act; otherwise, they will not be able to commit it. And after the act is complete and their desire is sated, they will presumably try to elude detection. This formulation does require, however, that the individual is the type of person who commits crime while aware of a very substantial risk that he will be caught and subjected to a serious deprivation of liberty or death. That is what distinguishes these people from the typical burglar, murderer, rapist, or car thief. Given a choice between punishment and foregoing crime, the typical criminal would choose the latter option.

[188] *See* case of Seth Hedges, in MELTON ET AL., *supra* note 35, at 563–67.

[189] *See In re* Kunshier, No. C7-95-1490, 1995 Minn. App. LEXIS 1422 (Minn. Ct. App. Nov. 21, 1995), *reported in* Alan Held, *The Civil Commitment of Sexual Predators—Experience Under Minnesota's Law*, *in* THE SEXUAL PREDATOR: LAW, POLICY, EVALUATION AND TREATMENT 2-1, 2-19 (Anita Schlank & Fred Cohen eds., 1999).

[190] *See In re* Crocker, No. C0-95-2500, 1996 Minn. App. LEXIS 495 (Minn. Ct. App. Apr. 23, 1996), *aff'd* (Minn. Jan. 21, 1997), *reported in* Held, *supra* note 189, at 2–19. It is not clear from the facts reported by the Court whether Hendricks would meet the recklessly undeterrable test, although it appears that several of his crimes were committed under circumstances in which detection was a foregone conclusion. *See* Kansas v. Hendricks, 521 U.S. 346, 354 (1997) (recounting that Hendricks was convicted for molesting two young boys while working at a carnival, was paroled after two years, rearrested for molesting a 7-year-old girl, spent five years in prison and then "shortly thereafter" molested two more children).

[191] *See supra* notes 188–89.

[192] Another example may be people who are subject to "automatisms." For instance, apparently people who suffer a "Limbic Psychotic Trigger Reaction" can "commit an out-of-character, emotionless, homicidal act as a result of an external stimulus that triggers painful memories of stressful past events and propels the patient into a series of regressive, well recalled, and automatic actions." Denno, *supra* note 185, at 293 n. 90.

HeinOnline -- 98 Nw. U. L. Rev. 44 2003-2004

goals that are largely unselfish. Into this category might fall those who want to kill abortion clinic doctors,[193] assassinate prominent political leaders,[194] or commit terrorist acts in full view of others, knowing escape is unlikely.[195] These people are neither mistaken about the prohibitions of the law nor forgetful of them, but rather believe them to be irrelevant. They know they will either be caught or die, but believe their ideological agenda justifies their actions and glorifies their punishment or death.[196] These people, like those who choose crime over freedom for selfish ends (and unlike those who are insane), will generally be punished for the triggering act required by the principle of legality. But if, after punishment, they remain reckless toward its imposition, preventive detention should be an option.[197]

Although both groups of reckless offenders are undeterrable in the strict sense developed here, preventive detention in lieu of or in addition to criminal punishment is likely to be more strongly resisted in connection with the second group. As noted above, those who choose crime over freedom for their own ends seem remarkably similar to conditioned animals. In contrast, those who choose crime over freedom to achieve political or ideological goals seem to be acting more "volitionally." To use Morse's language, the latter group appears to be more "rational." Thus, the argument might go, the dehumanization objection (which I have assumed is valid at least in a dual-track regime) should apply to preventive detention of this second group.

Recall, however, that preventive detention eludes the dehumanization objection if the government can show the individual so detained lacks autonomy *or* it can show he will exercise his autonomy in the anti-social di-

---

[193] *Cf.* Tom Kuntz, *From Thought to Deed: In the Mind of a Killer Who Says He Served God*, N.Y. TIMES, Sept. 24, 1995, at 7 (recounting case of Michael Griffin, who argued a combination temporary insanity/necessity defense, but was convicted of shooting physicians outside abortion clinics in Florida).

[194] *Cf.* Mark C. Alexander, *Religiously Motivated Murder: The Rabin Assassination and Abortion Clinic Killings*, 39 ARIZ. L. REV. 1161, 1161–63 (1997) (recounting case of Yigal Amir, who killed Israeli Prime Minister Yitzhak Rabin and argued at trial that the killing was necessary to save Israeli Jews from Rabin and his peace plan).

[195] Consider, for example, the events of September 11, 2001.

[196] Note that anyone who raises a defense of necessity could fit in this category. *See, e.g.*, State v. Dorsey, 395 A.2d 855 (N.H. 1978) (defendants charged with trespass at a nuclear power plant asserted that danger posed by plant warranted a choice of evils defense). In the typical political protest case, however, even the most enthusiastic protester will not commit the type of crime that could lead to serious liberty deprivation, which is the gravamen of the recklessness component of undeterrability.

[197] As a bow to the right to punishment, and to help address the uncertainty problem mentioned below, the government could be *required* to punish before considering preventive detention when both punishment and detention are an option. A sufficiently long sentence might obviate the need for subsequent detention. But sentences based primarily on just desert need not be long, even when the crime involved is serious, as it would be here. *See* ANDREW VON HIRSCH, CENSURE AND SANCTIONS 36–46 (1993) (proposing a five year maximum for homicide and a three year maximum for all other crimes). In such cases, preventive detention may be a viable option and, at the same time, alleviate some of the pressure to ratchet sentences upward on general incapacitation grounds.

HeinOnline -- 98 Nw. U. L. Rev. 45 2003-2004

rection regardless of circumstance.[198] Proof of this second type of undeterrability can never be certain, but neither can we be sure a person lacks autonomy;[199] if a showing of insanity is a good enough proxy for an absence of autonomy, proof of a commitment to harm others even when it brings substantial harm to oneself should be a good proxy for the recklessness component of undeterrability. In short, those who are willing to choose extremely serious crime over freedom might also be said to forfeit their right to be punished, regardless of how we evaluate their "volitionality" or "rationality."

Consider in this regard those who executed the attack on the World Trade Center. They were probably not insane. But they were undeterrable, in that they preferred crime to life itself. The same might be said of Moussaoui, the alleged "twentieth hijacker."[200] Moussaoui has declared himself a "slave of Allah," who prays for the destruction of the United States and wants to "fight against the evil force of the federal government."[201] In court papers filed in March 2003, Moussaoui stated "I will be delighted to come back one day to blow myself into your new W.T.C. if ever you rebuild it."[202] That people like Moussaoui are committed to ending innocent lives in disregard of international legal principles and any threat to their own life distinguishes them from the "deterrable" common criminal.[203]

---

[198] *See supra* text accompanying notes 118–21.

[199] We also cannot be sure that a person lacks rationality or any of the other placeholders for this concept. *See supra* note 173 and text accompanying notes 177–79.

[200] *See supra* text accompanying note 3.

[201] Gibeaut, *supra* note 114, at 38.

[202] Philip Shenon, *Man Charged in Sept. 11 Attacks Demands that Qaeda Leaders Testify*, N.Y. TIMES, Mar. 22, 2003, at B12.

[203] Given the fact that Moussaoui was charged with conspiracy, *supra* note 6, one might wonder what value the additional authority to detain him preventively might have for the State. If the prosecution fails because the government cannot show the agreement necessary for conspiracy, preventive detention should be barred as well, on legality grounds. *See supra* text accompanying notes 112–16. However, if legality concerns are not present, double jeopardy would not bar a subsequent attempt to detain Moussaoui preventively. *See* Kansas v. Hendricks, 521 U.S. 346, 369 (1997) ("[A]s commitment under the Act is not tantamount to 'punishment,' Hendricks' involuntary detention does not violate the Double Jeopardy Clause."). If, instead, Moussaoui is convicted, he may receive the death penalty. *See* Novak, *supra* note 6, at 32–33 (reporting that the trial judge has prohibited the government from seeking the death penalty because it has denied Moussaoui access to witnesses, but noting that the ruling is being appealed and that the case could still be transferred to a military tribunal where the death penalty could be sought). But if someone like Moussaoui is sentenced to something short of a life sentence, he could be preventively detained after his sentence is completed, if the undeterrability and prediction criteria are met. Finally, in future cases like Moussaoui's, the government could proceed with preventive detention in lieu of punishment, although I would argue that option should not be available. *See supra* note 197.

Another issue raised by cases like Moussaoui's is how preventive detention principles relate to prisoner-of-war principles. Clearly enemy combatants may be preventively detained. *Ex parte* Quirin, 317 U.S. 1 (1942). That outcome is consistent with the principles developed in this Article. First, enemy combatants are both dangerous and undeterrable, given their orders. Second, their preventive detention does not raise dehumanization concerns, because the danger they pose stems solely from the existence of war conditions, not from explicit or implicit assumptions about their psychological condition.

HeinOnline -- 98 Nw. U. L. Rev. 46 2003-2004

D. Summary

Undeterrability, as I have defined it, is the characteristic tendency to be "unaffected by the prospect of punishment."[204] It comes in two forms.[205] Undeterrability through mistake bears a close resemblance to the cognitive insanity tests. It identifies those individuals who are characteristically unaware of the prospect of punishment for contemplated anti-social action because they misperceive its anti-social nature. Undeterrability through recklessness essentially restates the traditional policeman-at-the-elbow test, without the mental illness predicate. It identifies those who would choose crime despite the high likelihood of a significant loss of freedom or death if the crime were committed and includes both those who act for their own ends and for the ends of others.

The undeterrability predicate for preventive detention is fully consistent with the view that punishment is necessary to show respect for those who commit crime. While most wrongdoers can be said to possess the "right" to punishment, that right can justifiably be denied to the subset of wrongdoers who lack autonomy or who will choose the bad regardless of the consequences. The mistake and recklessness components of undeterrability capture precisely these two concerns. Although subjecting these people to preventive detention in lieu of or in addition to criminal punishment may treat them as less than human, that treatment is justified by their demonstrated inability or unwillingness to make the right choice.

The undeterrability formulation is also superior to the "gap-filler" justification that is sometimes advanced in support of preventive detention. As expressed by Professor Schulhofer,[206] this justification exists "when the state has a compelling interest that cannot be met through the criminal process."[207] His preeminent example of gap-filling through preventive detention is the commitment of people with serious mental illness, who cannot be punished and thus who could harm society in the absence of such commit-

---

[204] This is the language used by the student authors of the *Harvard Law Review* note that remains one of the best treatments of the state's authority to commit its citizens. Developments in the Law, *supra* note 5, at 1233.

[205] In *Crane*, Kansas argued that commitment under the sexual predator law should be permissible whether based on "volitional" or "emotional" impairment. Kansas v. Crane, 534 U.S. 407, 414 (2002). As noted earlier, *supra* note 150, the Court declined to address "whether confinement based solely on 'emotional' abnormality would be constitutional." *Id.* at 415. This Article argues that it should be, assuming "emotional abnormality" is coextensive with the mistake category of undeterrability.

[206] Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69 (1996); *see also* Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 160 (1996) (advocating a "principle of criminal interstitiality" that states that "[t]he state may use civil commitment to deprive a person of liberty only when that person's mental disorder situates the state's compelling interests in the interstices of the criminal law").

[207] Schulhofer, *supra* note 206, at 87.

HeinOnline -- 98 Nw. U. L. Rev. 47 2003-2004

ment.[208] But this type of thumb-in-the-dike justification proves too much. For it would also permit commitment of any dangerous felon who has served his sentence and can no longer be confined through the criminal process, something Schulhofer clearly does not endorse.[209] The undeterrability criterion better describes the "gap" population that cannot be addressed by the criminal law—those people who are impervious to its dictates.

As noted earlier, this undeterrability formulation of the psychological criterion for preventive detention is narrower than the Court's inability-to-control criterion and broader than the insanity formulation. It would significantly limit the types of offenders who could be committed under sexual predator statutes because most are neither mistaken about the criminality of their actions nor willing to flaunt them brazenly. For the same reason, it might reduce the number of people subject to police power commitment under traditional civil commitment laws, which normally define mental disorder relatively expansively, as a "substantial disorder of the person's emotional processes, thought or cognition which grossly impairs judgment, behavior or capacity to recognize reality."[210] At the same time, because of the ubiquity of this latter definition, most of these traditional civil commitment laws do not permit commitment of non-mentally ill people who are undeterrable in the recklessness sense, a small group likely to be comprised of sex offenders, psychopaths, and terrorists; in fact, some statutes expressly preclude commitment of individuals who exhibit only personality disorders.[211] The concern behind these limitations may be that these latter individuals do not belong in a mental hospital. That concern is understandable. But the state should not be precluded from preventively detaining truly undeterrable individuals in some type of facility, if they meet the prediction criterion.

III. THE PREDICTION CRITERION

Debate over the degree of dangerousness the state must prove before it may preventively detain an individual has been heated. Representative is an exchange between Professor Alexander Brooks and Professor John LaFond. Professor Brooks stated that even if the risk of violent recidivism is only 50 percent, preventive detention is permissible, because "[a] mistaken decision

---

[208] *Id.* at 96 ("The civil commitment power is an essential weapon in society's arsenal of social protection measures, and it must remain available to permit incapacitation of dangerous individuals . . . .").

[209] *Id.* at 94–96 (arguing against commitment of sexual predators who are not seriously mentally ill). Schulhofer also makes clear that he would impose a second limitation on preventive detention, beyond the gap-filler rationale: it should only be applied to those wrongdoers who are not autonomous. *Id.* at 90–91. But then the gap-filler rationale becomes a redundancy and should not be advanced at all, given its above-described potential for abuse.

[210] *See generally* MELTON ET AL., *supra* note 35, at 307 (describing definition of mental disorder under state civil commitment statutes).

[211] *Id.* at 307–08.

HeinOnline -- 98 Nw. U. L. Rev. 48 2003-2004

to confine, however painful to the offender involved, is . . . simply not morally equivalent to a mistaken decision to release. . . . One is much less harmful than the other."[212] Professor LaFond responded:

> Suddenly, the fundamental assumption of American criminal justice that it "is far worse to convict an innocent man than to let a guilty man go free" has been transformed into a first principle worthy of George Orwell's 1984. Now, according to Professor Brooks, it is far better that at least half, and maybe more, of the people confined to a psychiatric prison indefinitely be harmless in order to "incapacitate" those who may commit a future crime. Even better, why not convert our criminal sentencing system into a game of chance? Release from prison could be decided by a flip of a coin. At least this lottery will be more accurate than the one Professor Brooks embraces.[213]

If the psychological criterion for preventive detention is undeterrability, defined as a characteristic ignorance that one's criminal activity is criminal or a characteristic willingness to commit crime despite certain and significant punishment or a high risk of death, then the individual's dangerousness will often seem evident. However, whether the person with such characteristic beliefs or desires will translate them into action still requires prediction. Various psychological and situational variables, including the strength of the beliefs or desires, the availability of targets, and the effect of constraints other than liberty deprivation must be considered.[214] If the psychological criterion is defined more broadly, as with the Court's inability-to-control formulation, then dangerousness is even less apparent, and false positives are more likely.[215] Finally, in many situations (e.g., stop and frisk, pretrial detention, sentencing), no psychological criterion is or should be required. In these latter situations, the prediction may be even more vulnerable to attack.

In the following discussion I do not reach definitive conclusions as to how likely the risk of anti-social conduct must be before preventive detention in all of its variations is permitted. I do propose two principles for guiding debate on this issue, however. The first is the *proportionality principle*, which states that the degree of dangerousness required for preventive detention should be roughly proportionate to the degree of liberty depriva-

---

[212] Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 753 (1992).

[213] LaFond, *supra* note 64, at 698–99.

[214] *See, e.g.*, MONAHAN, *supra* note 31, at 115 (indicating that dangerousness evaluation must consider sources of future stress, whether contexts in which violence occurred in the past will reoccur, the likely victims of violence and their availability, and the means the person possesses to commit violence).

[215] People with serious mental disorders are no more likely to recidivate than other offenders. *See* James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, *in* PSYCHOL. BULL. 123, 139 (1998) (concluding that major predictors for violent recidivism were same for mentally disordered offenders as for nondisordered offenders; clinical or psychopathological variables were either unrelated to recidivism or negatively related). Thus, a broad psychological criterion will not facilitate the predictive process.

HeinOnline -- 98 Nw. U. L. Rev. 49 2003-2004

tion the state seeks. The second is the *consistency principle*, which states that the degree of dangerousness required for preventive detention should be similar to the degree of dangerousness sufficient to authorize like liberty deprivations associated with other manifestations of the state's police power, in particular criminal dispositions.

A. The Proportionality Principle

Government interventions based explicitly on dangerousness vary enormously both in nature and duration. Commitment as a sexual predator involves confinement in a prison-like setting[216] that is renewable periodically and that will often also be long-term; indeed, it may amount to a lifetime disposition, given the relative untreatability of some of these offenders.[217] Pretrial preventive detention of suspects occurs in jail, and is limited by speedy trial laws, but can still easily last for 100 days even when the defendant pushes for trial.[218] Typical civil commitment of those with serious mental illness occurs in a less confining institution and is both much shorter, on average, than either sexual predator commitment or pretrial detention and much less likely to be renewed, primarily because treatment is more efficacious at reducing the danger.[219] Police stops occur in a public setting and should last no longer than fifteen or twenty minutes.[220]

Generally, the law requires a lesser showing of dangerousness as one moves down this hierarchy of interventions. Sexual predator statutes usually require proof beyond a reasonable doubt,[221] pretrial detentions require proof by clear and convincing evidence or some similar standard,[222] civil

---

[216] For instance, persons in the Illinois sex offender program are housed in a wing of the maximum-security prison complex. *See* Allen v. Illinois, 478 U.S. 364, 372 (1986).

[217] In Minnesota, which has had a statute similar to Kansas's since 1939, "[n]ot one person committed since 1975 has been discharged from a final sex offender commitment," although one was provisionally discharged and five others were put in state nursing homes. Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 206 (1996). As noted earlier, see *supra* text accompanying notes 49–62, preventive detention governed by *Jackson* would not function this way. Nonetheless, even under a well-run preventive regime some sexual offenders would stay incarcerated for a very long period unless other limitations, such as those discussed herein, are imposed.

[218] Under the federal Speedy Trial Act, for instance, trial need not start until 100 days after arrest, 18 U.S.C. §§ 3161(b), (c)(1) (2000), and delays are quite common. *Cf.* 18 U.S.C. § 3161(h)(1)-(9) (2000) (listing exemptions to speedy trial requirement).

[219] The average length of stay for acutely ill patients is probably less than two weeks, although "chronic" patients may spend months or years in the hospital. *See* PINELLAS COUNTY ACUTE SERVICES: MENTAL HEALTH AND SUBSTANCE ABUSE EMERGENCIES (February 27, 2002) (on file with author) (showing average length of hospital stay in nine community inpatient units ranging from 4.3 to 10 days).

[220] *See* United States v. Sharpe, 470 U.S. 675 (1985) (upholding a twenty-minute stop, but suggesting this length was permissible only because suspect was responsible for its duration).

[221] *See, e.g.*, KAN. STAT. ANN. § 59-29a07(a) (2002).

[222] *See, e.g.*, Federal Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (2000) (pretrial detention on dangerousness ground authorized if judge finds by clear and convincing evidence that "no condition or combination of conditions will reasonably assure . . . the safety of any other person and the commu-

HeinOnline -- 98 Nw. U. L. Rev. 50 2003-2004

commitment also requires clear and convincing evidence,[223] short-term (e.g., 48-hour) commitment pending the commitment proceeding may be based on probable cause,[224] and police investigative stops require reasonable suspicion.[225] In general, this proportionality approach is sensible.[226] It hides two important problems, however.

The first has to do with the interaction of the standard of proof and the definition of dangerousness. One might think that proof of dangerousness beyond a reasonable doubt requires a showing that the individual is extremely likely to engage in crime if not detained. Some statutes define dangerousness in less absolute terms, however, speaking instead of whether the person is "likely to" engage in anti-social conduct.[227] This definition has the effect of lowering the state's burden, because it only requires that the government demonstrate by the requisite standard (beyond a reasonable doubt, clear and convincing evidence, etc.) that the person is likely to offend.[228] An analogous approach, made popular with the advent of actuarial approaches to prediction, is to label a person "dangerous" if the state can show by the relevant standard of proof that the person belongs to a particular group for whom a specific likelihood of risk can be identified, even if that likelihood is relatively low.[229] Both of these moves are sleights of hand to the extent they purport to require a high level of proof that the person will offend.

---

nity"); FLA. STAT. ANN. § 907.041(4)(c)(5) (West 2002) (requiring "substantial probability . . . [t]hat the defendant poses the threat of harm to the community").

[223] Addington v. Texas, 441 U.S. 418 (1979).

[224] Actually, most states do not specify a standard of proof in these circumstances. *See* REISNER ET AL., *supra* note 88, at 736. *But see* CAL. WELF. & INST. CODE § 5150 (West 2003) (emergency detention requires a finding of probable cause that person is mentally disordered and, as a result, dangerous to others).

[225] Terry v. Ohio, 392 U.S. 1, 27 (1968).

[226] *Cf.* McNeil v. Dir., Patuxent Inst., 407 U.S. 245, 249–50 (1972) (substantive and procedural limitations on commitment increase as the length of commitment increases). I have argued for the same approach in analogous circumstances when interpreting the Fourth Amendment reasonableness requirement. *See* Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 68–75 (1991); Christopher Slobogin, *Let's Not Bury* Terry: *A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053 (1998).

[227] *Cf.* ALASKA STAT. § 47.30.705 (2002) ("likely to cause serious harm to . . . others"); 405 ILL. COMP. STAT. 5/1-119 (1999) ("reasonably expected to inflict serious physical harm upon . . . another in the near future"); MASS. ANN. LAWS ch. 123, § 1 (Law. Co-op 1989) ("a substantial risk of physical harm to other persons").

[228] This observation was first made in John Monahan & David Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 LAW & HUM. BEHAV. 37 (1978).

[229] *See, e.g.*, John Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 WASH. & LEE L. REV. 901, 910 (2000) ("As the field has moved in a more actuarial direction, professional consensus has shifted from the question of 'how accurate are clinicians in general at predicting violence' to 'how valid are specific risk factors, or specific combinations of risk factors, for assessing violence risk'?"). Legal scholars have accepted the same reasoning. *See* Corrado, *supra* note 18, at 792 (arguing that even when risk is low, if the detained person belongs to the designated risk group, "there is a one hundred percent chance that person presents a risk of harm").

HeinOnline -- 98 Nw. U. L. Rev. 51 2003-2004

The second problem with the hierarchical approach to proof of dangerousness is that the hierarchy itself is not as clear as it seems at first glance. I have assumed, for instance, that commitment of sexual predators is longer than typical civil commitment. Yet some individuals subjected to civil commitment are as resistant to treatment as the "incorrigible" sex offender is.[230] Some sex offenders, in contrast, may be rendered less dangerous through chemical treatments or cognitive therapy programs.[231] To a very large extent, in other words, the length of confinement depends, or at least should depend, on the individual rather than the state or a statutory provision. Thus, the standard of proof the state must meet should not be based solely or even predominantly on the type of commitment, but should instead depend primarily on its length.

This conclusion has important implications for the scope of preventive detention. Although each new commitment at the periodic review need not be preceded by a new anti-social act (both because, if effective, the intervention should prevent such acts, and because the justification for preventive detention is dangerousness, not behavior), it should be permitted only upon increasingly more stringent proof of dangerousness, whether the setting is criminal or civil commitment. Evidence of resistance to treatment, recent overt acts, and other new indicia of dangerousness can meet this burden under some circumstances. At some point, however, release should be required simply because the requisite certainty level demanded by the proportionality principle has become so high it cannot be met by any type of evidence. That proposition might require, for instance, automatic release after a certain period unless new evidence of dangerousness is forthcoming.[232]

Another important implication of this reasoning concerns sentencing. Dangerousness is no longer a major consideration under most sentencing

---

[230] For instance, some psychoses are particularly resistant to treatment. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 298–99 (4th ed. 1994) (describing delusional disorder, persecutory type—a condition in which the person feels "conspired against[,] resentful and angry" and which can lead the person to "resort to violence against those they believe are hurting them"—as "chronic" and having relatively poor prognosis).

[231] Judith V. Becker & William D. Murphy, *What We Know and Do Not Know About Assessing and Treating Sex Offenders*, 4 PSYCHOL. PUB. POL'Y. & L. 116, 127–31 (1998) (discussing biological and cognitive therapies and their efficacy).

[232] I have made a similar suggestion in the context of juvenile justice. *See* Slobogin et al., *supra* note 55, at 210. There I suggested that a durational limit has three other advantages:

> First, of course, it minimizes the harm caused by an erroneous prediction. Second, a time limit known to the offender avoids the demoralization that can occur in an indeterminate regime. Third, such a limit can have a positive therapeutic effect because it gives the [individual] a specific behavioral goal to achieve (that is, no antisocial activity within the specified period in order to obtain release).

Id. The time limit need not, and probably should not, be tied to the sentence associated with the triggering crime, but it may have a similar effect; the theory would be that, had the prediction that led to preventive detention been correct, the crime would have been committed and the person subject to a sentence, at the end of which the state would release him.

HeinOnline -- 98 Nw. U. L. Rev. 52 2003-2004

schemes and is considered irrelevant in many (at least in theory).[233] However, when dangerousness *is* a legitimate sentencing criterion, as in indeterminate sentencing regimes, the proportionality principle should apply in this setting as well. In light of the liberty deprivation to which prisoners are subjected, that means that a relatively high degree of dangerousness must be proven before a sentence may be imposed, and that, as with commitment, release should be required after a certain period of time, unless the state can demonstrate a new basis for a dangerousness finding or the sentence is based on additional considerations such as deterrence or just dessert. On the same ground, the death penalty should never be based on a finding of dangerousness,[234] unless the prediction can be made with virtual certainty.

B. The Consistency Principle

The consistency principle works in tandem with the proportionality principle. The proportionality principle provides a method of *graduating* the prediction criterion, through assessment of the nature and length of the preventive detention. The consistency principle provides a *baseline* for the prediction criterion, through assessment of the proof required to sanction other government interventions based on dangerousness.

The most obvious place such intervention occurs is in the criminal justice system where, either explicitly or implicitly, assumptions about dangerousness are pervasive. Thus, application of the consistency principle would require that the prediction criterion for preventive detention conform to the prediction criterion in criminal law provisions that contemplate liberty deprivations. In making this inquiry, consistency analysis would look solely at comparisons with crimes that do not require proof of any particular harm, for once harm occurs other considerations besides dangerousness come into play.[235] The somewhat surprising outcome of this way of think-

---

[233] ZIMRING & HAWKINS, *supra* note 70, at 3–14 (arguing that, despite the just deserts and deterrence focus of the reforms that led to the determinate sentencing that predominates today, restraint to prevent future crime has been the overriding goal of public policy).

[234] At least five states make dangerousness an aggravating factor in capital cases. 2003 Idaho Sess. Laws ch. 19, §§ 2515(9)(h), (g)(8); OKLA. STAT. tit. 21, § 701.12(7) (2002); TEX. CRIM. PROC. CODE ANN. § 37.071(b)(2) (Vernon 1981); VA. CODE ANN. § 19.2-264.4C (2000); WASH. REV. CODE ANN. § 10.95.070 (West 2002).

[235] Of course, dangerousness can play a role in defining result crimes as well. For instance, Justice Holmes believed that "the test of murder is the degree of danger to life attending the act under the known circumstances of the case" and proceeded to illustrate this point by asserting that a workman who killed someone by throwing a stone off a roof should be guilty of murder, unless he first shouts a loud warning, in which case he should only be convicted of manslaughter. OLIVER WENDELL HOLMES, THE COMMON LAW 48–51 (1881). At the same time, Holmes does not suggest that, had no harm occurred in these cases, the penalty should be the same as when death occurs, despite the fact that the "danger" would appear to be the same. Presumably, something besides dangerousness explains this conclusion. *Cf.* Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 5 J. CONTEMP. LEGAL ISSUES 299 (1994) (exploring the debate between "objectivists" who believe harm

HeinOnline -- 98 Nw. U. L. Rev. 53 2003-2004

ing about the prediction criterion is that preventive detention might be justifiable, at least as an initial matter, upon a minimal showing of risk.

Among the most conspicuous illustrations of crimes that do not require harm but that do incorporate a risk assessment are the classic "inchoate crimes," attempt and conspiracy. These offenses do not occur unless there is sufficient conduct to show the ultimate harm is likely to be committed. For attempt, as noted earlier, mere preparation is insufficient and something akin to "dangerous proximity" to the completed act is often required.[236] For conspiracy, an agreement and, in many jurisdictions, an overt act in furtherance of the agreement, are required.[237] More importantly, the government must show the alleged attempter or conspirator intended to carry out the criminal act; mere awareness that the act will occur is usually insufficient.[238] In combined effect, these actus reus and mens rea requirements mean that, to obtain conviction, the state must show the act would have occurred had it not been for the incompetence of the perpetrator or the competence of law enforcement. In short, proof of a high degree of danger is incorporated into the definition of inchoate crimes.[239]

If attempt and conspiracy were the *only* crimes based on a dangerousness assessment, endorsement of the consistency principle might require a very high likelihood of harm before preventive confinement could occur. But these inchoate offenses are not alone. Other non-result crimes, which might be called "anticipatory" offenses, allow conviction upon proof of a much lower risk of harm.

Consider first vagrancy statutes. Older versions of these statutes permitted conviction based on acts such as a refusal to identify oneself or standing on a street corner with no apparent purpose, acts which have only

---

is the principal focus of criminal law and "subjectivists" who believe that evilness is the principal focus and noting that, despite the supposed triumph of the latter point of view in some modern codes, harm still plays a major role in crime definition). Given the complicated and ambiguous role of dangerousness in connection with completed crimes, this Article focuses solely on those crimes where the dangerousness requirement is more explicit.

[236] *See supra* note 116. *See also* RICHARD J. BONNIE ET AL., CRIMINAL LAW 225–29 (1997) (reviewing the various conduct formulations for attempt and noting that the proximity tests require that the person come "dangerously close to accomplishing the harm ultimately feared," while the res ipsa loquitur test requires more of a prediction, and the Model Penal Code test requires that the conduct be "strongly corroborative of criminal purpose" but still beyond "mere preparation").

[237] LAFAVE, *supra* note 114, at 574–79 (conspiracy usually requires "an agreement between two or more persons" and an overt act in furtherance of the conspiracy).

[238] *Id.* at 540 (attempt); *id.* at 567 (conspiracy).

[239] A retributivist might say that these actions are criminalized solely on the ground that the actor's decision to engage in anti-social or risky conduct demonstrates sufficient blameworthiness. *See, e.g.*, Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1170 (1997) (arguing that purpose is the appropriate mens rea for inchoate crimes because the formation of such purpose is itself a culpable act, not because it demonstrates dangerousness). Even so, the backward-looking retributive judgment cannot be made without an assessment of the harm or risk occasioned by the decision, either from an objective standpoint or as perceived by the actor. For further discussion of this point, *see infra* text accompanying notes 256–57.

HeinOnline -- 98 Nw. U. L. Rev. 54 2003-2004

a tenuous relationship to public harm of any sort.[240] For related reasons, these laws have usually been found invalid on vagueness grounds.[241] However, newer versions of these statutes, which prohibit conduct such as loitering within 30 feet of a cash machine or congregating in areas known for drug-trafficking, have withstood such challenges even when a *mens rea* requirement is absent, perhaps because they are more obviously associated with a real public menace.[242] Even so, that association is usually trivial; certainly, the chance that any person standing near a cash machine or in a high crime area will cause serious harm to others is negligible.[243]

Even more explicit in their reliance on suspect dangerousness assessments are endangerment laws. Here too the degree of dangerousness required does not approach that required for attempt or conspiracy. Under the Model Penal Code, as noted earlier, a person commits a misdemeanor if he "recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury."[244] The words "may place . . . in danger" contemplate a less-than-rigorous standard of proof with respect to risk.[245] Along the same lines is the popular crime of driving while intoxicated.[246] The chance that a drunk driver will actually kill or hurt someone is fairly low. Once again, the dangerousness requirement inherent in this type of crime is minimal.

A final type of anticipatory offense is possession, a crime that comes in many varieties. In most states, for instance, it is a crime to possess burglary tools and, in some jurisdictions, this offense occurs even if the only items possessed are more likely to be used innocently than criminally, such as

---

[240] *See* Kolender v. Lawson, 461 U.S. 352, 353 n.1 (1983) (ruling a statute void on vagueness grounds that penalized any person "who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to do so"); Chicago v. Morales, 527 U.S. 41 (1999) (holding void for vagueness an ordinance that penalized anyone who is a member of a "criminal street gang," who remains in one place "with no apparent purpose," and who refuses to disperse after being ordered to do so by a police officer).

[241] *See supra* note 240.

[242] *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 622–24 (1997).

[243] The "danger" these statutes are trying to prevent appears to be deterioration in the quality of life. *See* GARLAND, *supra* note 140, at 181 (although "no one in particular is harmed by the conduct in question, this does not prevent the invocation of a collective victim—'the community' and its 'quality of life'—that is deemed to suffer the ill-effects that must always flow from prohibited behaviour, however trivial"). Until "damage to the quality of life" is made a crime, however (and the legality principle should prevent that), the danger prevented by these laws is so diffuse as to be non-existent, *unless* they also require proof of intent to do harm to person or property, as some of them do. *See* Livingston, *supra* note 242, at 622 n.337.

[244] MODEL PENAL CODE § 211.2 (1962).

[245] *Cf.* Payne v. State, 7 S.W.3d 25, 28 (Tenn. 1999) (noting that the Model Penal Code's formulation of reckless endangerment "supports a broad interpretation" that a "mere possibility" of danger is sufficient for conviction).

[246] *See, e.g.*, FLA. STAT. ANN. § 316.193 (West 2002).

HeinOnline -- 98 Nw. U. L. Rev. 55 2003-2004

crowbars and screwdrivers.[247] In contrast to inchoate offenses such as attempt and conspiracy, conviction for this type of crime does not require proof of intent to commit any particular harm, but rather only knowing possession under "suspicious" circumstances.[248] Similarly, in simple drug possession cases, the prosecution often only needs to show knowing possession (and sometimes not even that); it never needs to show that the perpetrator's possession of the drug will cause some identifiable harm.[249] In gun possession cases, conviction is usually automatic if the possessor is a felon or an alien, or does not have a license; in none of these three situations is "good moral character" or something analogous a defense.[250] All of these crimes are based on explicit or implicit dangerousness assessments, and none require demonstration of a high degree of danger. Indeed, with respect to possession of a small amount of drugs and possession of a gun without a license, one is hard put to identify what third party interests the state is attempting to protect.[251]

In short, a large number of crimes not only do not require proof of any harm, but are based on very weak predictions of harm. That suggests that if the state's police power were to be consistently instituted, initial preventive detention could justifiably be based on very weak predictions as well. A closer look at these anticipatory crimes suggests a more nuanced conclusion, but ultimately also suggests that this general statement is correct.

Anticipatory crimes seem to fall into one of three categories, illustrated by the three types of offenses just described. The first category—exemplified by vagrancy laws—carries trivial penalties.[252] If this were the only baseline, application of the consistency principle might lead to the

---

[247] *See* CAL. PENAL CODE § 466 (West 2002) (defining crowbars and screwdrivers as burglars' tools); *see also* Dotson v. State, 260 So.2d 839 (Miss. 1972) (conviction for possession of screwdriver and a large bolt); People v. Diaz, 244 N.E.2d 878 (N.Y. 1969) (screwdriver wrapped in newspaper).

[248] Markus Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 859 (2001) (describing the mens rea element of possession offenses and concluding that "many possession statutes, particularly in the drug area . . . are so-called strict liability crimes").

[249] *Id.* at 860 ("Simple possession itself can, but need not, require proof of actual or constructive awareness . . . .").

[250] *Id.* at 926.

[251] Recent television advertisements suggest that drug possession crimes harm those who are killed and assaulted by the cartels that grow and distribute the drugs. Of course, the cartels would not exist if drug use were legal or regulated differently. In any event, the causative link between possession of a small amount of marijuana and a killing in Columbia is tenuous at best.

[252] The typical vagrancy statute is a misdemeanor and usually results simply in removal from the area, sometimes via a night in jail. For instance, the detainee in *Kolender v. Lawson*, 461 U.S. 32 (1983), was stopped for loitering 15 times in two years, but was apparently never put in jail. *Id.* at 32. Under the Model Penal Code, loitering is a "violation," MODEL PENAL CODE § 250.6 (1962), which "does not constitute a crime," may not result in incarceration, and "shall not give rise to any disability or legal disadvantage based on conviction of a criminal charge," *id.* § 1.04(5).

HeinOnline -- 98 Nw. U. L. Rev. 56 2003-2004

conclusion that the government should not have the option of preventively depriving people of liberty when the risk of it occurring is low.

But that conclusion fails to take into account the second and third categories of anticipatory crimes. The second group of such offenses—exemplified by drunk driving and reckless endangerment—is more likely to bring significant incarceration,[253] even though it too may be associated with minimal risk. Thus, application of the consistency principle might permit preventive detention in similar low risk situations. At the same time, what distinguishes this second category of anticipatory offenses is that it is aimed at avoiding significant, imminent harm. That suggests, under consistency reasoning, that low risk individuals may be preventively confined only when the harm feared is very serious and near at hand, two elements that, together, place substantial limitations on the threshold for intervention.[254]

Still left to consider, however, is the third category of anticipatory crimes. Illustrated by possession crimes, it can lead to significant sentences,[255] even though the feared harm is unlikely to occur *and* is neither imminent nor serious. Under the consistency principle, this suggests that, at least initially, preventive detention can be based on a showing of moderate or even minimal risk regardless of the nature of the harm threatened. Only as the confinement becomes prolonged would the proportionality principle require proof of a high level of danger.

A retributivist might argue that using the level of dangerousness inherent in criminal statutes as a baseline for preventive detention in the manner just described is nonsensical, because crimes are by definition backward-looking assessments. When defining crime, the retributivist may contend, the focal point of the inquiry is culpability, not the degree of dangerousness inherent in particular acts.[256] As a result, the fact that certain anticipatory crimes might not require a high level of dangerousness is not a pertinent in-

---

[253] *See, e.g.*, FLA. STAT. ANN. § 316.193 (West 2002) (providing for imprisonment of not more than six months after first drunk driving offense); MODEL PENAL CODE §§ 211.2; 1.04(3), (4) (1962) (providing that reckless endangerment is a misdemeanor, which generally can result in imprisonment of up to one year).

[254] Alexander Brooks proposed that dangerousness be broken down into "four component elements: (1) magnitude of harm; (2) probability that harm will occur; (3) frequency with which the harm will occur; and (4) imminence of harm." ALEXANDER D. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 680–82 (1974). He then noted that:

> A person can be characterized as 'dangerous' or not, depending on a balancing of these four components. For example a harm which is not likely to occur, but which is very serious, may add up to 'dangerousness.' By the same token, a relatively trivial harm which is highly likely to occur with great frequency might also add up to dangerousness. On the other hand, a trivial harm, even though it is likely to occur, might not add up to dangerousness.

Id. at 680.

[255] Dubber, *supra* note 248, at 859 ("New York boasts no fewer than 115 felony possession offenses, all of which require a minimum of one year in prison; eleven of them provide for a maximum sentence of life imprisonment.").

[256] *See supra* note 239.

HeinOnline -- 98 Nw. U. L. Rev. 57 2003-2004

dicator of the state's police power interest. The only important factor is whether the perpetrator recognizes, or should recognize, the danger that does exist or, under the most subjective approaches, whether the perpetrator *thinks* the danger exists, regardless of whether it actually does.

The problem with the retributivist argument is that, under any of the anticipatory crimes just discussed, subjective awareness of the degree of risk is virtually or entirely irrelevant. A person will be convicted of gun or drug possession, drunk driving, or vagrancy if he meets the act requirement, regardless of whether he was aware of the risk he created (or lack thereof). Even in a reckless endangerment prosecution, where awareness of risk *is* relevant, the degree of risk actually created is likely to play a much more significant role than the risk perceived by the actor.[257] The gravamen of these crimes is not what the person thought, but the objective risk posed. In many cases, that risk is not very high, and in some it is non-existent, but the state exerts its police power anyway.

A second argument against adopting the consistency principle is based on the practicality that crimes must be defined legislatively. Given this fact, one might contend, we *must* allow prosecution and conviction of people who do not cause any identifiable harm and are not obviously dangerous (e.g., the harmless vagrant or gun owner) to ensure that we also nab the really dangerous loiterer or weapons possessor; criminalizing the behavior of the first group is the inevitable consequence of a preference for generalized, before-the-fact rule-making. In the preventive detention context, on the other hand, we are able to individualize the dangerousness assessment, and thus we should do so, despite the likelihood that we will end up requiring greater proof of danger than we do in analogous criminal adjudications. To my mind, this is not an argument against the consistency principle, but rather an indictment of how we think about defining crime.

IV. IMPLICATIONS FOR THE CRIMINAL LAW

The logic of the consistency principle does not dictate that the degree of risk required for preventive detention correlate with the currently low levels associated with many anticipatory crimes. It could just as easily be used to reform crime definition. Because preventive detention forthrightly and conspicuously bases liberty deprivation on predictions of dangerousness, courts have traditionally required the government to demonstrate a high degree of risk in that setting. In contrast, as just discussed, the criminal law blithely permits conviction and punishment of individuals who have caused no harm and are not very dangerous. Perhaps that should change.

[257] The typical endangerment statute requires that the danger be real, not merely perceived. *See, e.g.*, TENN. CODE ANN. § 39-13-103 (1997) (requiring that the victim be placed "in imminent danger of death or serious bodily injury"); CONN. GEN. STAT. § 53a-63 (2001) (requiring "a risk of serious physical injury to another person").

HeinOnline -- 98 Nw. U. L. Rev. 58 2003-2004

Putting this point another way, a proactive use of the consistency principle might help deal with the overcriminalization phenomenon that has upset many commentators.[258] Two recent papers highlight the more or less constant proliferation of suspect criminal statutes over the past century. William Stuntz, in an article describing the "pathological" institutional relationship between legislatures, prosecutors, and courts, argues that "the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones."[259] Spurred by the perceived need to keep prosecutors as well as constituents happy, legislators have added easy-to-prove crimes (e.g., possession, endangerment, and three strikes laws) to those that are harder to establish (e.g., use and harm-creation laws).[260] That in turn has simplified prosecutors' jobs, making guilty pleas, multiple charge indictments, and harsh sentences easier to obtain.[261] Judicial deference to these developments, demonstrated by an unwillingness to use vagueness doctrine and other due process constraints to strike down duly enacted legislation,[262] has left prosecutors in control of who gets convicted and for how long, with often discriminatory results, especially in terms of class and race.[263]

Markus Dubber has been even more critical of the criminalization phenomenon. He excoriates the "depersonalization" of the criminal law that has occurred through the passage of criminal provisions that carry minimal act and mens rea requirements (again, his principal example is possession).[264] To him, these laws not only are victimless, they are often offenderless, in the sense that the mere proximity of a drug or gun to the alleged offender is enough to merit conviction; no affirmative act is required, and mens rea is often presumed if the person is found near the contraband item.[265] Dubber suggests that for crimes such as unlicensed gun possession,

---

[258] *See, e.g.*, Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999) (arguing that harmless wrongdoing is now routinely criminalized); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967).

[259] William Stuntz, *The Pathological Politics of the Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

[260] *Id.* at 529–33.

[261] *Id.* at 533–38.

[262] *Id.* at 542 ("[I]f two competing interpretations of criminal statutes are at issue, and one is much more likely to attract hostile legislative attention than the other . . . appellate judges will tend to avoid conflict and follow the (perceived) legislative will.").

[263] *Id.* at 575–76 (noting that in enforcement of possession laws, "class-based, and hence to some degree race-based, enforcement remains common. . . . Perhaps one reason support for drug criminalization remains so high—and surely one reason why the scope of drug criminalization remains so broad—lies in legislatures' ability to prohibit without fear that prohibition will be applied equally everywhere.").

[264] Dubber, *supra* note 248, at 934 ("By reducing everyone to a potential threat to the state, possession offenses are symptomatic of an apersonal regime of criminal administration in which persons have a role only as sources of inconvenience, as nuisances to be abated, as objects of regulation.").

[265] *Id.* at 908 (defining possession crime as "an offense designed and applied to remove dangerous in-

HeinOnline -- 98 Nw. U. L. Rev. 59 2003-2004

possession of drugs or vagrancy, the real offense is "disobedience" to the state, not any threat to its citizens,[266] an offense for which only the politically powerless are likely to be prosecuted.[267]

Stuntz despairs of any significant solution to overcriminalization that involves either curbing prosecutorial discretion or depoliticizing the legislative process.[268] Two of his own solutions, ensuring functional notice of crimes and repealing unenforced laws,[269] are similarly unlikely to have any major impact on the problem.[270] But he also proposes that judges, under the aegis of due process analysis, be authorized to second-guess prosecutorial decisions. Thus, he is willing to countenance judicial inquiries into whether marijuana possession merits jail time, whether certain types of fraud are really harmful, and whether any particular sentence is unduly harsh, as counterpoints to prosecutorial attempts to encourage guilty pleas through charging trivial crimes or stacking charges.[271] Stuntz's justification for this admittedly radical proposal is that judicial authority to nullify should be as broad as the jury's.[272]

Dubber wants change that is even more fundamental. While Stuntz does not believe that legislatures can be coaxed into changing their practices of increasing and broadening the scope of the criminal law, Dubber is more optimistic. He wants legislatures to adhere to rigorous actus reus and mens rea requirements that make crimes only out of intentional or reckless conduct that harms or is highly like to harm real (as opposed to hypothetical) people.[273]

---

dividuals even before they have had an opportunity to manifest their dangerousness in an ordinary inchoate offense").

[266] *Id.* at 926 (noting the current law of possession suggests that "the core of the possession offense is not the prevention of harm, but the chastisement of disobedience").

[267] *Id.* at 918 ("[T]he potential offenders who suffer the incapacitation are predominantly poor blacks with no political power . . . .").

[268] Stuntz, *supra* note 259, at 579 (noting that, of the three possible solutions—limiting prosecutorial discretion, ending legislative monopoly on crime definition, or constitutionalizing criminal law—only judicial activism "has any chance of working").

[269] *Id.* at 588–94.

[270] Reinvigorating *Lambert* and a functional notice requirement, *see supra* text accompanying notes 96–99; 106–08, would not affect very many prosecutions (if only because the government can make sure functional notice is present) and eliminating crimes that have gone unenforced for some time will affect even fewer.

[271] Stuntz, *supra* note 259, at 591–96. Some of these pages contain Stuntz's discussion of disuetude (the repeal of unused laws), but the way he would use that authority amounts to judicial nullification based on an assessment of whether the prosecution is pretextual (e.g., a prosecution of a person under an under-used law who is not likely to harm others but who is a target for some other, illegitimate reason).

[272] *Id.* at 596.

[273] According to Dubber, in the course of the "war on crime,"

> [t]he two fundamental principles of [the common law], actus reus and mens rea, proved so malleable and ungrounded . . . that they were easily accommodated to the new demands of emergency management. The mens rea requirement either simply disappeared, or was easily circumvented through evidentiary presumptions. The actus reus requirement likewise went quietly, as the concept of act proved flexible enough to provide at least the sheen of legitimacy to the paradigmatic offense of the war on crime, possession.

Dubber, *supra* note 248, at 994–95.

HeinOnline -- 98 Nw. U. L. Rev. 60 2003-2004

I am sympathetic to both of these efforts. My only contribution to this commentary is to suggest, very briefly, how the law of preventive detention might contribute to limitations on the criminalization phenomenon. In *Addington v. Texas*,[274] the Supreme Court held that the loss of liberty associated with civil commitment requires clear and convincing evidence of dangerousness. While *Addington* rejected the reasonable doubt standard as unnecessarily stringent where non-punitive confinement is concerned,[275] it also repudiated the lower preponderance of the evidence standard of proof in that setting.[276] If the consistency principle is applied proactively, that conclusion should have significant implications for the criminal law. Indeed, in explaining why the preponderance standard is insufficient for civil commitment, the Court seemed to presage the concerns that Stuntz and Dubber describe. The Court noted that "the preponderance standard creates the risk of increasing the number of individuals erroneously committed"[277] and that "[l]oss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior."[278] Most importantly, *Addington* stated that "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."[279]

If civil commitment, which *Addington* confirms is a less onerous burden on liberty than criminal conviction, requires proof that a person is more likely than "more-likely-than-not" to cause harm to another, criminal laws that base liability and incarceration on danger rather than harm should, at the least, require the same.[280] Judges implementing Stuntz's due process nullification proposal should demand proof of a high degree of dangerousness from prosecutors pursuing inchoate and anticipatory crimes, or dismiss charges and reduce sentences. Legislatures following Dubber's recommendations should avoid vagrancy, possession, and endangerment formulations that do not demand similar proof. Whether implemented judicially or legislatively, actus reus elements should require conduct that is clearly risky, and

---

[274] 441 U.S. 418 (1979).

[275] *Id.* at 432.

[276] *Id.* at 432–33.

[277] *Id.* at 426.

[278] *Id.* at 427.

[279] *Id.*

[280] To the same effect are arguments that society's attempts to commit dangerous individuals are analogous to an individual's attempts to protect him or herself against danger. Larry Alexander, *A Unified Excuse of Preemptive Self-Protection*, 74 NOTRE DAME L. REV. 1475, 1477 (1999) ("Self-defense, therefore, is preemptive action . . . analogous to civil commitment of the dangerous, gun control, 'no contact' orders, preemptive military strikes, and other practices in which the future dangerousness of others, not their past transgressions, is taken to justify depriving them of life, liberty, or property."); Randy Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. REV. 157, 160–61 (1996). Because we require a high degree of danger for self-defense (i.e., imminent threat of serious physical harm), we should do the same for those situations in which the state engages in self-defense, whether it is through anticipatory crimes *or* civil commitment.

HeinOnline -- 98 Nw. U. L. Rev. 61 2003-2004

mens rea elements should likewise require intent to cause harm (as the attempt and conspiracy offenses do) or at least willful blindness to the risk. That would be the legacy of proactively applying the consistency principle.

CONCLUSION

Preventive detention is a pervasive, routine occurrence in our society. Its most conspicuous guise may be the relatively new sexual predator laws. But it is also the key feature of civil commitment and police stops on the street, as well as a significant component in many criminal sentences and an intrinsic element of crimes such as possession and endangerment. Given their ubiquity, courts and lawyers need to pay much more attention to how and why we justify these deprivations of liberty based on dangerousness.

This Article has explored some of the commonalities and distinctions between these various exercises of the state's police power in the hopes of furthering their rational implementation. The jurisprudence of dangerousness it has advanced is based on three significant assertions. The first is that potential abuses associated with a preventive detention system can be minimized—or at least reduced to a level no higher than exists in any alternative police power regime—through periodic review, rules requiring treatment and detention in the least restrictive manner feasible, a threshold requirement of obviously risky conduct, and increasingly heavier burdens of proof as the detention lengthens. The second assertion is that, while preventive detention is generally inconsistent with a preference for autonomy when criminal punishment is an option, it is acceptable both for those who are unaware of the criminality of their actions *and* for those who are committed to crime and are aware that this commitment will very likely mean a significant loss of freedom or death.

The final assertion underlying the jurisprudence of dangerousness described here is that we can predict danger adequately for legal purposes. That assertion is based in part on improvements in prediction science, but stems mostly from the belief that we cannot justifiably demand more accuracy in the preventive detention setting than we do in the criminal law. This same idea, however, could also lead to the position that we should demand more certainty than we currently do in making those predictions sought by the law of crimes.

These conclusions would require significant change in both the law of preventive detention and the law of crimes. The scope of *Hendricks* and *Crane* would be cabined, the threshold and conditions of commitment would need to be revamped, and possession and other anticipatory crimes would need to be redrafted or at least subjected to more intense judicial scrutiny. Perhaps most importantly, the law would recognize that a jurisprudence of dangerousness is an essential aspect of regulating government power.

HeinOnline -- 98 Nw. U. L. Rev. 62 2003-2004