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### Neither Desert nor Disease

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## NEITHER DESERT NOR DISEASE

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Why do we fear preventive detention and believe that it requires special justification? Citizens in free, democratic societies are accustomed to substantial limitations on liberty that are justified morally and politically by the “common good.” Avoiding serious danger is a greater good than most, but the power of the state to confine dangerous people or to reduce danger by equally oppressive intrusions is considered especially fearsome. The usual, and generally uncontroversial, justifications given for such deprivations of liberty are that the person has culpably committed a criminal offense or that the agent is not responsible for the danger he or she presents. Criminal imprisonment and various forms of civil commitment, for example, which preempt potentially dangerous conduct by incapacitation, are considered reasonable deprivations of liberty in such cases. But in neither case is the state confining on *purely* preventive grounds a responsible agent who has done no wrong. In contrast, pure preventive detention is an anathema, we believe, because polities devoted to liberty and autonomy have no moral or political warrant to confine or similarly oppress innocent, responsible agents. What could justify such a vast intrusion on the liberty of such agents to pursue their projects?<sup>1</sup>

Imagine, however, a three-time convicted armed robber who threatens, completely believably, to commit a fourth crime. Or consider an extremely

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1. I recognize that the state has an uncontroversial right to quarantine innocent, responsible agents if such agents have communicable diseases and no less intrusive intervention will prevent infection of others. Although many forms of communicable disease can be spread by conduct, the justification of pure quarantine requires no action or potential action. It is a purely public health measure directed toward microorganisms that has the undesirable effect of limiting freedom of action. This article addresses only the preemption of dangerous conduct, which might in some cases include the transmission of disease. See *generally* Michael Corrado, *Punishment, Quarantine, and Preventive Detention*, 15 CRIM. JUST. ETHICS 3 (Summer/Fall 1996).

angry and provoked person with an unblemished record who buys a gun and threatens to harm the provoker. Or suppose there is an identifiable group of responsible agents within a society for whom the statistical risk of serious, future harmdoing is extremely high. All these cases seem to demand some type of intervention to preempt virtually certain and serious harm. In the legal world we now inhabit, however, neither civil commitment or other forms of involuntary "treatment" nor criminal conviction in the absence of at least attempted crime would be possible to prevent future dangerous conduct. Moreover, these remedies often come too late to prevent entirely predictable harms. And it is practically infeasible for state agents adequately to monitor most potentially dangerous agents, even if privacy concerns were obviated. Some form of genuinely preemptive action would be the only intervention certain to prevent harm, but we now purport to consider it an unjustifiable intrusion on liberty. Conversely, if no citizen has a right unjustifiably to harm another and if the danger threatened is sufficiently certain, why shouldn't society have a right to intervene in the lives of innocent, responsible agents to prevent the harm? Why is pure preventive or preemptive action wrong?

The thesis of this article is that society does have the right to intervene, to impose pure preventive detention or equivalent deprivations, when the risk of serious harm is grave. Part I considers the traditional justifications for the civil and criminal law's intrusions on the liberty of dangerous people. It suggests that these justifications leave a gap in the prevention of danger that only pure preventive detention can close. Part II canvasses a wide array of legally authorized public and private preemptive doctrines and practices that do not fully satisfy the usual desert or disease justifications for preventive action, but that are also not purely preemptive. I conclude from my examination of these doctrines and practices that our society already implicitly accepts substantial preventive action and that many of the doctrines and practices contain substantial, purely preemptive components, often unconvincingly justified by allegedly traditional desert or disease rationales. The presence of covert pure prevention demonstrates that the implicit need for it is powerful and that pure prevention has an expandable salient in the law's battle with potential danger.

The third part of this article addresses whether explicit, pure preventive detention would be a justifiable extension of the preemption now deemed acceptable. I conclude that principles akin to those that underwrite individual self-defense would justify limited pure preemption, but that applying it justly faces perhaps insurmountable problems. Part IV provides a case study of the futility of current preemptive doctrines and practices in a situation fraught with obvious, grave peril. A very brief Conclusion reiterates the claim that until predictive technology improves, explicit, pure preventive detention is a defective blunderbuss that will cause greater harm than good.

## I. THE TRADITIONAL JUSTIFICATION FOR PREVENTIVE ACTION

Let us begin at the beginning. Human beings are injurious and all too often lethal to themselves and others. Surely more people have been killed and injured by the acts of others and themselves than by natural disasters. Only toxic microbes are as dangerous as people. All civil societies, including the least developed, therefore create numerous public and private socializing institutions and practices to cabin the injurious propensities of their members. But these practices and techniques are never foolproof: All fail sometimes, often disastrously. All societies therefore develop further practices and institutions to respond to the failures and thus to reduce the further risk of harm the failures create.

The basic logic of prevention is quite straightforward. To some unknown degree, human beings must live in cooperative societies to survive. Such societies are viable only if, also to some unknown degree, members forbear from putting each other unreasonably at risk. Within the limits of viability, how much risk is unreasonable is a normative, moral, and political question, but all societies that survive surely place limits on risk and will act to prevent danger from those for whom socialization has apparently failed. This story can be told in the crudest evolutionary biological terms, but in more politically and philosophically sophisticated societies, these necessary preventive practices are the subject of rich theoretical analysis, usually from a consequential or a rights perspective. Broadly speaking, two types of stories, each rooted in a theory of the person, inform these perspectives: "Good bacteria, bad bacteria"; and "Taking people seriously."

Let us begin with the short form of the former, abbreviated here because it is rejected by all but the most extravagantly hard-nosed consequentialists. According to this account, we could treat each other like bacteria. Some bacteria that inhabit our gastrointestinal system, our gut, are crucial to the smooth operation of the system. They are the good bacteria. We try to enhance their survival and do nothing to inhibit their growth. On occasion, alas, our guts are invaded by bacteria that interfere with the proper operation of the system, causing various unseemly ailments and, in extreme cases, death. These are the bad bacteria. We try to prevent these critters from entering our gut in sufficient numbers to overwhelm the body's natural defenses, and if the natural defenses fail, we try with various techniques, such as antibiotics, to kill the offensive, bad bacteria.

Now, despite the potential of various bacteria to confer benefits and harms, as the case may be, and despite our consequential, substantial efforts to deal rationally with these bacteria, no one holds either kind of bacteria responsible for smooth or rocky gastrointestinal functioning and we would not dream of praising or blaming bacteria. Similarly, we would not dream of considering antibiotic treatment a means of punishing the bad bacteria. We treat bacteria purely as objects, and never as potentially responsible

subjects, as potential moral agents. We could, by analogy, simply treat each other like bacteria, as potentially beneficial or harmful objects, and act accordingly. This conception of people, much beloved by eliminative materialists, would support a purely predictive and preventive scheme of social organization, in which the emotional and societal response to the organism could be entirely independent of the moral goodness or badness of the person's conduct. Indeed, any other regime may appear founded on irrational dreams about our privileged place in the natural order.<sup>2</sup> It would be a regime of utterly strict liability. We do not at present have the emotional repertoire or the predictive and therapeutic technology to institute this vision very precisely or effectively, but this is a technoquibble. In principle, I suppose, it is a possible form of social organization. Indeed, in some senses we might all be "safer" and, to some, social life might appear more rational if the show ran along these lines.

The alternative, dominant story, "Taking people seriously," is familiar. It admits that, like bacteria, human beings are part of the physical universe and subject to the laws of that universe, but it also insists that, as far as we know, we are the only creatures on earth capable of acting fully for reasons and self-consciously. Only human beings are genuinely reason-responsive and live in societies that are in part governed by behavior-guiding norms. We are the only creatures to whom the questions "Why did you do that?" and "How *should* we behave" are properly addressed, and only human beings hurt and kill each other in response to the answers to such questions. As a consequence of this view of ourselves, human beings typically have developed rich sets of interpersonal, social attitudes, practices, and institutions, including those that deal with the risk we present to each other. Among these are the practice of holding others morally responsible, which includes moral expectations, attitudes of praise and blame, and practices and institutions that express those attitudes, such as reward and punishment.

The concern with justifying and protecting liberty is deeply rooted in the conception of rational personhood I have sketched. Only human beings self-consciously and intentionally decide how they should live; only human beings have projects that are essential to living a good life. Only human beings have expectations of each other and require justification for interference in each other's lives that will prevent the pursuit of projects and seeking the good. If liberty is unjustifiably deprived, a good life is impossible.

Some would attempt to collapse the two accounts, claiming that many of our seemingly retrospective, nonconsequential practices, such as holding others responsible, can in fact be justified by a fully prospective, consequential theory.<sup>3</sup> This account recognizes that evolution has designed us to be intentional, self-conscious creatures, but practices like holding others re-

2. For a recent attempt to argue this point, see Edward O. Wilson, *CONSILIENCE* (1998).

3. See, e.g., Daniel Dennett, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* 153–72 (1984).

sponsible are, allegedly, simply stimuli that increase the probability of safe (good) behavior and decrease the probability of dangerous (bad) behavior. No one, in other words, is “really” responsible. In the words of H.L.A Hart, it is an “economy of threats.”<sup>4</sup> The economy-of-threats approach does not successfully explain our practices, however, and suffers from defects of its own. Nothing in this approach would prohibit blaming and punishing innocent people if doing so would maximize the good. This is a familiar criticism, but one that has no answer if it is unjust to punish the innocent, as virtually all theories of justice, except the most unflinchingly consequentialist, hold.

Second, as Jay Wallace points out, the economy-of-threats approach fails to explain our practices, because it omits the central attitudinal aspect of blaming.<sup>5</sup> To hold an agent responsible and to blame that agent is not simply a behavioral disposition, whose purpose is the maximization of some future good. Blaming fundamentally expresses retrospective disapproval. Even if it has the good consequence of decreasing future harmdoing, our current practice is undeniably focused in large measure on past events.<sup>6</sup> In sum, many of our most important moral and political concepts depend on taking people seriously as people, as practical reasoners and potentially moral agents.

The desire to be safe ultimately conflicts with and complements the desire to be free. People who live in constant terror of dangerous neighbors do not feel free or cannot enjoy their freedom, even if their society is politically liberal. But achieving the safety that makes freedom possible inevitably requires substantial infringement on the liberty of dangerous agents. Because we take people seriously as people, however, we believe that it is crucial to cabin the potentially broad power of the state to provide protection by depriving people of liberty. Thus our polity has imposed two fundamental legal limits on the state’s power to intervene: The agent must be dangerous because he or she is suffering from a disease (especially a mental disorder) or because the agent is a criminal.<sup>7</sup>

For people who are dangerous because they are disordered or because they are too young to “know better,” the usual presumption in favor of maximum liberty yields. Because the agent is not rational or not fully rational, the person’s choice about how to live demands less respect, and he or she is not morally responsible for his or her dangerousness. The person can therefore be treated more “objectively,” like the rest of the

4. H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 43–44 (1968).

5. R. Jay Wallace, RESPONSIBILITY AND THE MORAL SENTIMENTS 55–58 (1994).

6. Finally, the economy of threats approach makes the world entirely too “safe for determinism.” The determinist anxieties that seem inevitably to arise cannot be banished so easily, without doing violence to our conceptual concerns. A full, satisfying account of responsibility and blaming, paradoxically, should be subject to anxieties about determinism.

7. I have explored the civil–criminal distinction as a basis for confinement elsewhere and will therefore provide only the briefest sketch here. See Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B. U. L. REV. 113, 116–22 (1996).

world's dangerous but nonresponsible instrumentalities, ranging from hurricanes to microbes to wild beasts. In brief, agents incapable of rationality do not actually have to cause harm to justify nonpunitive intervention. We can take preemptive precautions, including broad preventive detention, with nonresponsible agents based on an estimate of the risk they present. Justified on consequential grounds, such deprivation will be acceptable if the conditions of deprivation are both humane and no more stringent than is necessary to reduce the risk of harm. Such deprivations are forms of greater or lesser quarantine and may include "treatment," but in theory they are not punishment.<sup>8</sup>

Virtually all criminals are rational, responsible agents, however, and according to the dominant story, the deprivation imposed on them, punishment, is premised on considerations of desert. No agent should be punished without desert for wrongdoing, which exists only if the agent culpably caused or attempted prohibited harm. The threat of punishment for a culpable violation of the criminal law is itself arguably a form of preventive infringement on liberty, but it is an ordinary, "base-rate" infringement that requires no special justification. In our society the punishment for virtually all serious crimes, and thus for dangerous criminals, is incapacitation, which is preventive during the term of imprisonment. But criminals must actually have culpably caused or attempted harm to warrant the intervention of punishment. We cannot detain them unless they deserve it and desert requires *wrongdoing*. In the interest of liberty, we leave potentially dangerous people free to pursue their projects until they actually offend, even if their future wrongdoing is quite certain. Indeed, we are willing to take great risks in the name of liberty.

In sum, both the criminal and the medical/psychological systems of behavior control require a justification in addition to public safety—desert for wrongdoing or nonresponsibility—to justify the extraordinary liberty infringements that these systems impose. The story about crime and disease is, of course, not so simple. Do we really believe that responsible, dangerous agents have a right to be at liberty when their potential harmdoing is serious and quite certain? In theory we do, and "gaps"<sup>9</sup> between the disease and crime justifications for intervention remain. But in fact, the law insistently seeks to fill these gaps with both civil and criminal preemptive remedies. Part II explores how uneasy we are about danger and how willing we are to accept more purely preemptive preventive schemes.

8. The nonpunitive characterization of such interventions often justifies lesser procedural protections for the potential subject. *See, e.g.,* *Allen v. Illinois*, 478 U.S. 464 (1986) (Fifth Amendment guarantee against compelled self-incrimination does not apply in a proceeding to determine whether a person is a "sexually dangerous person" because the proceeding is not "criminal").

9. *See* 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, 90–94 (1996).

## II. PUBLIC AND PRIVATE PREEMPTION PRACTICES

This part canvasses a wide range of civil and criminal law doctrines and practices that involve preemptive action to prevent dangerous conduct. I suggest that, as a descriptive matter, our positive law already accepts substantial forms of preemption that violate the usual, liberty-protecting limits set by culpable criminality and disease. In all cases, it seems clear that public safety is the impetus. Those laws and practices that seem most problematic receive detailed consideration; more obvious examples are treated briefly. I begin with two examples from the civil law that authorize preventive confinement of apparently responsible agents and then turn to a range of criminal law illustrations that permit extensive preemptive action, often with a component of pure preemption, toward dangerous, clearly responsible agents. Many of these examples invite “epistemic skepticism”: Can we predict future danger with sufficient precision to warrant preemption? These doubts, which must be taken seriously, are addressed in Part III, but should be remembered when considering the examples.

### A. “Mentally Abnormal Sexually Violent Predator” Commitments

Consider, first, the civil law response to a class of people, so-called mentally abnormal sexual predators, who have committed no present crime and who do *not* suffer from severe mental disorder, but who appear to be and often are highly dangerous. Many states have recently adopted “sexually violent predator” laws, which permit the “civil” commitment of those who meet the criteria of mental abnormality and sexual dangerousness. I consider these laws in detail because, despite appearances and argument to the contrary, they create the potential for vast preventive detention unwarranted by the usual justifications.

Leroy Hendricks, who had been convicted of numerous charges of molesting children throughout his adult life, starkly presented the “gap” problem. Although Hendricks manifested a condition that most mental health professionals consider a mental disorder, he was fully responsible according to even the most permissive cognitive standard for criminal responsibility. Hendricks was firmly in touch with reality and knew the difference between moral and legal right and wrong. According to a volitional or control test for legal insanity, the issue is more problematic. One sensible way of describing the phenomenology of Hendrick’s condition is that it produced in him extremely strong desires or cravings to have sexual contact with children, a desire that he experienced as compelling, especially when he was under stress. Many people believe that such cases qualify for a control excuse, but many others disagree. In any



event, Hendricks was consistently found criminally responsible for his sexual offenses. In other words, numerous judges or juries decided that he deserved and could be fairly punished for those crimes, even to the extent of 10 years' incarceration for his last conviction for indecent liberties with two 13-year-old boys.

For much the same reason concerning responsibility, Hendricks was not civilly committable. Despite the vague language of the criteria for commitment in most state statutes, for decades there has been widespread agreement on theoretical and practical grounds that people with mental disorders that might contribute to the potential for dangerous conduct are not properly committable unless the mental disorder is quite severe and renders them not responsible for themselves. Lawyers and mental health professionals recognize that all mental disorders do not negate responsibility. Although Hendricks had a diagnosable mental disorder, it was not a "major" mental disorder, it lacked psychotic features, and he was fully capable of making rational decisions about his own treatment. In sum, when Hendricks had completed the condign sentence for his latest offense, he still presented a very real danger, but he deserved no further punishment and he was a responsible agent who did not qualify for traditional involuntary civil commitment.

It is paradoxical, to say the least, to claim that a sexually violent predator is sufficiently responsible to deserve the stigma and punishment of criminal incarceration, but that the predator is not sufficiently responsible to be permitted the usual freedom from involuntary civil commitment that even very predictably dangerous but responsible agents retain because we wish to maximize the liberty and dignity of all citizens. Even if the standards for responsibility in the two systems need not be symmetrical, it is difficult to imagine what adequate conception of justice would justify blaming and punishing an agent too irresponsible to be left at large. An agent responsible enough to warrant criminal punishment is sufficiently responsible to avoid preventive detention. If a state seriously believes that any mental disability sufficiently compromises responsibility to warrant civil preventive detention, then such disability should surely be part of the criteria for the insanity defense.

The Kansas mentally abnormal sexual predator statute nonetheless tried to fill the gap between traditional criminal and civil confinement for people like Hendricks who fit neither category. No one would deny that serious sexual offenses would meet the usual civil commitment criterion of "danger to others." Moreover, unlike many standard civil committees, who only threaten harms prior to commitment, sexual predators by definition must be charged with or convicted of a sexual offense. Thus, there is better evidence that sexual predators, as Kansas and like states define them, are in fact dangerous. The problem is the nonresponsibility justification. Employing criteria for mental abnormality, Kansas sought to bring the statute within the allegedly nonpunitive, civil confinement para-

digm by implying that sexual predators were not responsible for their conduct.

In *Kansas v. Hendricks*<sup>10</sup> the United States Supreme Court upheld the constitutionality of the Kansas statute that provided for potentially lifelong civil commitment for people released from prison at the end of their sentences who were mentally abnormal and presented a continuing threat of sexually assaultive conduct. Although the Court's reasoning suggested that so-called sexually violent predators could not control themselves because they suffered from mental abnormalities, the Court's reasoning was singularly unpersuasive.<sup>11</sup> Understanding that people like Hendricks can be extremely dangerous if not confined makes it easy to understand why Kansas grasped for a remedy, but not every problem has a solution that is morally, theoretically, or empirically defensible. In this case, we have purchased some public safety, but we have also threatened the precious civil liberty of legally innocent, responsible people to be left largely alone. In effect, *Hendricks* jettisons culpability and nonresponsibility as predicates for confinement and declares open season on pure preventive detention without admitting or perhaps even recognizing that it is doing this. To support this assertion, let me turn to an analysis of the criteria for mental abnormality in Kansas that the Supreme Court approved.<sup>12</sup>

Now, in creating legal criteria, states are not bound by the conceptions and definitions of any discipline. Nothing, for example, prevents a state from defining "mental abnormality" differently from traditional psychiatric or psychological definitions of mental disorder. And nothing in the abstract prevents a state legislature from finding that a class of citizens is not responsible for specific conduct, even if mental health professionals or ordinary citizens would disagree. Responsibility is a normative concept, and we empower legislators, as our representatives, to create normative standards through legal rules. But rationally to command respect and allegiance, such definitions and findings should comport with reasonable standards for conceptual coherence and empirical understanding of behavior. My claim is that the Kansas standard for "mental abnormality," which was accepted without critical analysis by the U.S. Supreme Court, falls far short of the standard for rational support, suggesting that Kansas and a complicitous Supreme Court filled the gap between criminal and civil confinement by a legal sleight of hand.

The Kansas statute defines a sexually violent predator generally as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which

10. 117 S. Ct. 2072 (1997).

11. See Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL., PUB. POL'Y, & LAW 250, 262-64 (1998).

12. The analysis of the Kansas statute that follows shamelessly cannibalizes an earlier analysis of the virtually identical Washington State statute. Morse, *supra* note 7, at 136-37.

makes the person likely to engage in the predatory acts of sexual violence.”<sup>13</sup> A “mental abnormality” is defined as a

congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.<sup>14</sup>

These provisions together are vague and even incoherent definitions of *abnormally* produced sexual danger. The former, which attempts to satisfy the critical nonresponsibility criterion for justifiable civil commitment, simply requires that an abnormality must produce the potential sexual predation. The terms “personality disorder” and “mental abnormality” must therefore do all the work. Personality disorder is a recognized diagnostic category,<sup>15</sup> but people with such disorders are seldom psychotic and rarely can avoid responsibility for their deeds. This is not a promising predicate for nonresponsibility without a great deal of conceptual reason to believe that this recognized abnormality does sufficiently compromise responsibility. Mental abnormality is *not* a recognized diagnostic term, a point recognized by friends and foes of sexual predator laws,<sup>16</sup> but as mentioned, a statutory term creates a legal criterion and need not precisely track terms from other disciplines, such as psychiatry.<sup>17</sup> The issue is whether the statutory definition makes any rational sense on its own terms. If not, it should not pass constitutional muster, even under the lax standards for rationality the Supreme Court seems willing to approve when public safety is in question.

The definition states that a person is abnormal if any biological or environmental variable caused the person’s emotional or volitional capacity to predispose the agent to engage in criminal sexual misconduct. But what else would predispose anyone to any conduct, sexual or otherwise, if not

13. Kan. Stat. Ann. Sec. 59-29a02(a) (1994). This definition and the definition of “mental abnormality” that follows in the text are almost exactly the same as the definitions that the state of Washington adopted in its progenitor, sexual predator act. Wash. Rev. Code Ann. Secs. 71.09.020(1) & (2) (West Supp. 1995). The Washington act was found constitutional by the Washington Supreme Court. In re Young, 857 P.2d 989 (Wash. 1993). On federal appeal, the United States District Court of the Western District of Washington found the act unconstitutional as a violation of due process and of the prohibitions against ex post facto laws and double jeopardy. Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995).

14. Kan. Stat. Ann. Sec. 59-29a02(b) (1994).

15. American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) 629–73 (4th ed. 1994) [hereinafter DSM-IV].

16. Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 730 (1992) (friend); John Q. La Fond, *Washington’s Sexually Violent Predators Statute: Law or Lottery? A Response to Professor Brooks*, 15 U. PUGET SOUND L. REV. 755, 762–63 (1992) (foe).

17. Alexander Brooks cogently makes this point. See, *id.* at 730. *Hendricks* confirms it (at 2081). On the general “legal ambiguity” of the mental illness concept, see Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL., PUB. POL’Y, & LAW 534 (1995).

biological and environmental variables that affect their emotional and volitional capacities? In other words, the definition is simply a description of the causation of *any* behavior. The content of abnormality in the definition is entirely dependent on the requirement of “sexually violent offenses.” Nothing else in the definition differentiates the sexual predator from *any* other person. *All* behavior, normal and abnormal alike, is the product of congenital or acquired conditions affecting emotional or volitional predispositions. But if anyone who has a tendency to engage in sexual violence is abnormal, then the term “mental abnormality” is circularly defined and does no independent conceptual or causal work. Moreover, such a definition collapses all badness into madness. Finally, it is strange, if not incoherent, to define an abnormality by reference to the penal code. If the penal code becomes more forgiving, do the people who now satisfy the definition become automatically “mentally normal?”<sup>18</sup>

*Assuming*, probably erroneously, that the law could cabin the seemingly unconstrained reach of the vague term “mental abnormality,” why any particular abnormality should excuse remains unexplained. Simply because a mental abnormality may be causally related to other behavior does not mean that the behavior should be excused.<sup>19</sup> This is to confuse causation and excuse. Causation, even by an “abnormal” variable, is not an excusing condition. To believe otherwise is to commit what I have termed “the fundamental psycholegal error.”<sup>20</sup> Even if the potential predator suffers from some causal abnormality, it does not necessarily follow that the potential predator is not responsible. The causal abnormality must produce a genuine, independent excusing condition, such as irrationality, for a moral or legal excuse to obtain.

What actual theory to hold potential predators nonresponsible might be implicit, however? Irrationality is not a good candidate, because sexual predators are firmly in touch with reality. One might try to claim that their sexual desires are irrational, but no adequate theory exists to distinguish irrational from rational desires.<sup>21</sup> Furthermore, the instrumental rationality of sexual predators is entirely intact.<sup>22</sup> They may have strange or alarming desires, but they are perfectly capable of planning and exe-

18. In addition, the definition implies that some criminal sexual acts might *not* be a “menace,” but if not, why are they criminalized?

19. Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1112–14 (1985) (demonstrating that if causation were itself an excuse, then under a determinist theory, all actions would be excused); Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1592–94 (1994) (refuting the “causal” theory of excuse and terming it the “fundamental psycholegal error”) (1994); see also Stephen J. Morse, *Brain and Blame*, 84 GEO. L. J. 527, 534–37 (1996) (explaining why abnormalities of the brain or nervous system that may play a causal role in criminal conduct do not furnish independent ground for an excuse).

20. Morse, *Culpability and Control*, *id.* at 1592.

21. See Robert Nozick, *The Nature of Rationality* 139–40 (1993) (“At present, we have no adequate theory of the substantive rationality of goals or desires. . .”).

22. Even bizarre, serial sexual murderers—people far more dangerous than Leroy Hendricks—are seldom psychotic, and carefully plan and execute the crimes that satisfy their

cuting the means to fulfill them. It is possible that the strength of their desires makes it difficult for sexual offenders to assess the probability that they will be caught, but this would not distinguish these offenders from other impulsive offenders, and impulsivity does not warrant an irrationality excuse.

We are thus left with some type of control theory of excuse. Indeed, this was precisely the theory of nonresponsibility that the Supreme Court accepted as sufficient to justify the *civil* commitment of sexually violent predators generally. Commenting on criteria for civil commitment that depend on a control theory, the Court wrote:

These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of future dangerousness, and then links that finding to the existence of a “mental abnormality” or “personality disorder” that makes it difficult, if not impossible, for the person to control his dangerous behavior. . . . The precommitment requirement of a “mental abnormality” or “personality disorder” is consistent with the requirement of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their conduct.<sup>23</sup>

At least eight justices subscribed to this part of the Court’s opinion, which implicitly assumes that Kansas (and other states) understand and can reliably and validly assess when an agent is “unable to control” *intentional action*.

But what good reason is there to believe that volitional problems are well understood and that sexually violent predators specially lack the ability to control their sexual conduct? So-called volitional or control problems are generally and notoriously difficult conceptually to define and practically to apply. Just such difficulties led both the American Bar Association and the American Psychiatric Association to recommend the abolition of a control test for legal insanity during the wave of insanity defense “reform” ferment that followed John W. Hinckley, Jr.’s successful insanity defense.<sup>24</sup> Moreover, what is there about sexual desires that make them more “compelling” than other equally strong desires, such as the greed that may result in property

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fantasies. Janet Warren et al., *The Sexually Sadistic Serial Killer* 14, 19 (1995) (unpublished manuscript on file with the author) (reviewing the literature and analyzing 20 cases of sexually sadistic serial killers selected from files obtained by the National Center of the Analysis of Violent Crime of the FBI); see Ronet Bachman et al., *The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault*, 26 LAW & SOC’Y REV. 343 (1992) (finding in a study of conditions that would affect the likelihood of committing sexual assault that both perceived risk of formal sanction and moral evaluation of the act had a significant restraining effect).

23. Hendricks, *supra* note 10, at 2080 [emphasis added].

24. American Bar Association, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 330, 339–42 (1984); American Psychiatric Association, STATEMENT ON THE INSANITY DEFENSE 11 (1982).

crime?<sup>25</sup> Why isn't the "Moneyphile"<sup>26</sup> as out of control as the person suffering from, say, "sexual sadism," a so-called paraphilia included in the *DSM-IV*?<sup>27</sup> which would surely satisfy Kansas's abnormality requirement? Hendricks reported that when he was stressed he could not control his urges. Similarly, people who are dependent on substances and use them to control "stress" report that they *feel* strong cravings. I believe that all these people are honestly reporting how they *feel* subjectively, but these feelings are no substitute for a conceptual or empirical demonstration that they are in fact out of control or that we can reliably and validly measure control problems.

In sum, neither Kansas nor the Supreme Court provided either empirical or conceptual reason to believe that "mentally abnormal sexually violent predators" could not control themselves. There was only assertion on this point and little empirical or conceptual reason to accept it. Indeed, the Court was countenancing civil commitment based on a finding of nonresponsibility for people who had been found fully criminally responsible and justly punished for precisely the same behavior that now allegedly warranted commitment. In my view *Hendricks* is a transparent attempt to fill the gap with a make-weight justification that seeks to bring the Kansas scheme within the confines of traditional civil commitment.

Most important because most threatening to civil liberty, the Kansas scheme could be expanded without difficulty to authorize the preventive detention of classes of potentially dangerous people vastly broader than the sexually violent individuals the *Hendricks* statute covered. All people convicted of crime are potentially civilly committable according to *Hendricks'* logic. In Samuel Butler's nineteenth-century novel *Erewhon*, criminals were treated as sick and hospitalized. This "medicalized" conception of criminal behavior has also had a great purchase on the imagination of many allegedly scientific thinkers of the post-World War II era, who sought to elide the distinction between mad and bad. At various times, criminal behavior has been seen as the "symptom" of pathological psychodynamics or sociodynamics; current scholars and others inclined to the elision are more likely to view it as a symptom of a faulty brain or faulty nervous system. For these people, punishment is a crime, because it is unjustified by the desert of the criminal, who is, after all, just "sick." What is worse, punishment is useless because it does not cure the patient and return him or her to a productive role in society. Criminals need to be treated according to this conception, and potential criminals need to be detained preventively for their own good and for ours. This is the vision, I fear, that *Hendricks* permits.

25. An interesting question about sexual disorders or other "disorders of desire" is whether the "condition" is a mental disorder independent of the "symptomatic" "abnormal" desire or whether the abnormal desires are themselves the abnormal condition, but let us hold this question open.

26. My term.

27. See *supra* note 15, at 530.

*Hendricks'* holding means that a state legislature is free within the widest limits to define mental abnormality as it wishes and to find that mentally abnormal people so defined are unable to control specific conduct. The problem the case presents is that the definition of "mental abnormality" the Supreme Court found acceptable cannot be logically limited to sexually violent predators. As I demonstrated above, the definition is so broad that it in fact can be applied to *any* behavior. *All* behavior is produced by congenital and acquired emotional and volitional predispositions, and the abnormality could be *any* antisocial or deviant conduct "in a degree constituting a menace to the health or safety of others." Interpreted narrowly, any crime against the person would constitute a menace to health or safety; interpreted broadly, any crime at all could constitute such a menace. In *Jones*,<sup>28</sup> for example, the Supreme Court was untroubled by the spectre that relatively minor property crime was used as the predicate for the dangerousness component of commitment after an insanity acquittal.

Nothing, therefore, would seem constitutionally to bar a state from defining a class of "mentally abnormal violent predators," or more broadly, "mentally abnormal dangerous predators," and from providing for involuntary commitment of the class at the end of a prison term or if the alleged predator was incompetent to stand trial. The expanded definition of "mental abnormality" would be this:

a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit violent [dangerous] offenses in a degree constituting such person a menace to the health or safety of others.

As long as this "condition" "makes the person likely to engage in violent [dangerous] acts," the new criterion is a perfect analogue to the Kansas sexually violent predator provisions. And if the legislative history or act's preamble contained language indicating that the state found that such mentally abnormal violent [dangerous] people could not control themselves and presented a special threat to public safety, the analogous constitutional justification would be complete. Moreover, if the state found that these "violent predators" were, alas, untreatable, the failure of the state to provide anything more than pure incapacitation would not compromise the allegedly nonpunitive character of the commitment.

Finally, as *Youngberg v. Romeo* makes clear, even if one purpose of the commitment is treatment and "violent predatory predisposition" is treatable, the state need not provide more than "professional judgment" deems minimally necessary.<sup>29</sup> In sum, the pure behavioral quarantine of poten-

28. *Jones v. United States*, 463 U.S. 354, n.14 at 365 (1983).

29. *Youngberg v. Romeo*, 457 U.S. 307, 322–23 (1982). *Youngberg* further held that if budgetary constraints prevented professionals from providing what they deemed minimally necessary, the professionals would have a good-faith immunity bar to liability. *Id.* at 323.

tially violent predators, as if they were wild beasts, would be justified, and little effective treatment would be provided, even if it were available.

In *Hendricks*, the Supreme Court has provided constitutional warrant for extensive commitment of apparently responsible agents. Its attempt to justify mentally abnormal sexual predator laws by a nonresponsibility assumption failed, and wide-ranging pure preventive detention can now be instituted with only the clumsiest legislative sleight-of-hand.

### B. Post-Insanity Acquittal Commitment

In all states, a defendant found not guilty by reason of insanity may be committed to a state hospital because there is a presumption that the acquittee remains mentally disordered, and as a result, not responsible and dangerous. In *Foucha v. Louisiana*<sup>30</sup> the Supreme Court considered whether a state could continue to confine an insanity acquittee in a hospital if the inmate continued to present a risk of violent conduct, but was no longer suffering from a serious mental disorder. Further confinement based on desert was impermissible because *Foucha* had been found nonculpable for the previous conduct that occasioned the present commitment. In a five-to-four decision, the Supreme Court held the commitment unconstitutional on the ground that mental disorder was a necessary criterion for the continued commitment in hospital of a currently responsible person who had not been convicted of crime. In short, civil commitment of a person who had committed dangerous acts in the past and was likely to do so in the future was nonetheless unconstitutional if the person was both innocent and responsible. The Court thus upheld the traditional civil–criminal distinction, but the justices were closely divided—indeed, four were untroubled by the pure preventive detention of continued confinement.

Furthermore, in an extraordinarily cryptic portion of her concurrence, Justice O' Connor suggested that the state might continue to confine a person like *Foucha* if the commitment scheme were more narrowly drawn.<sup>31</sup> Justice O' Connor seemed willing to uphold the civil commitment of at least some dangerous people who had been acquitted by reason of insanity for committing dangerous acts in the past and were still dangerous, even if these people were now also fully responsible. It is not clear from the O' Connor concurrence if she would require some finding of mental abnormality, as did the statute upheld in *Hendricks*, to make the commitment analogous to traditional civil commitment. If not, however, then five justices of the Supreme Court would be willing to countenance pure preventive detention, at least of a person who had committed a crime without being responsible and who continued to be dangerous.

30. 504 U.S. 71, 86 (1992).

31. *Id.* at 87–88.



Legislatures and lower courts have accepted Justice O'Connor's implicit invitation to adopt a "narrow" *Foucha* exception. For example, in *State v. Randall*,<sup>32</sup> the Wisconsin Supreme Court upheld the continuing confinement of an insanity acquittee who was no longer suffering from a mental disorder. The Wisconsin Supreme Court held that due process was satisfied if the acquittee was dangerous, if there was a "medical justification" to continue the confinement, and if the commitment did not exceed the maximum term of imprisonment permitted for the crime charged.<sup>33</sup> Neither physical nor serious mental disorder was present, so the only "medical justification" must be that there was a "treatment" available to "cure" the "patient" of the "medical abnormality" of being dangerous. But unless mental disorder caused the agent to be dangerous because it gave the agent crazy reasons to harm others, the agent is entirely responsible for being dangerous and is indistinguishable from any other person with a history of violence and a continuing propensity to commit crimes. There may in fact be interventions applied to individual agents that can reduce violent propensities, but they ordinarily cannot be involuntarily applied in locked institutions to legally innocent and responsible people. Moreover, there is no evidence whatsoever to suggest that the potential for violence of people who had previously been crazily dangerous is more treatable than the potential for violence of people generally.

The "medical justification" criterion is a transparent and fraudulent attempt to bring this type of commitment within the disease justification for preemptive confinement. The limitation on the term of the commitment to the maximum term for the crime charged is simply a salve to the legislative conscience and a signal that the continued commitment is punitive. Using the prison sentence possible for the crime charged as a limit on the commitment term makes little sense. As the United States Supreme Court recognized in *Jones v. United States*,<sup>34</sup> the rational limit to a medically justified commitment should be set by treatment and danger considerations, not by considerations of proportionate desert. The defendant was not responsible, so desert is entirely inapt. And if amenability to treatment and potential danger are the justifications for the commitment, then the agent should be released only whenever treatment succeeds or danger is reduced for any reason.

The progeny of *Foucha*, such as *Randall*, suggest that pure preventive detention of insanity acquittees is potentially constitutional, requiring again only the incantation of a "medical" formula to ensure its constitutional credentials. What is more, the logic of *Randall*, like the logic of *Hendricks*, would permit much broader intervention than for the limited class of insanity acquittees. If continued confinement of now-responsible insanity acquittees—a massive deprivation of liberty—is justifiable, then perhaps the

32. 532 N.W.2d 94 (Wis. 1995).

33. *Id.* at 106–10.

34. 463 U.S. 354 (1983).

involuntary but “medically justified” “treatment” of all dangerous, incarcerated criminals—an arguably lesser deprivation—would also be justified.

Finally, if “medically justified” confinement, severed from desert, is acceptable for responsible, dangerous agents, why should it matter that the agent was acquitted by reason of insanity? Why would not dangerousness and “medical justification” warrant commitment generally? Indeed, this is precisely the potential scenario that *Hendricks* implies. *Randall* and like cases simply confirm the possibility.

### C. Pre-Trial Detention of Dangerous Defendants

The most obvious and straightforward criminal law example of preventive detention of dangerous and responsible agents is the pre-trial detention without bail of potentially dangerous charged defendants. In *United States v. Salerno*<sup>35</sup> the U.S. Supreme Court upheld the constitutionality of this practice because such detention is limited in substantial ways. Most important, there is probable cause to believe the defendant committed the crime charged, and the length of the commitment is limited by the constitutional requirement that criminal defendants must receive speedy trials. Still, the guarantee of a speedy trial does not prohibit intervals of months, and occasionally longer, between arrest and trial, so denial of bail can cause substantial, if not unlimited, incarceration.

Although *Salerno* in fact accepts pure preventive detention—the defendant may have been properly charged, but until he or she is convicted the person is presumed innocent—it is arguably only a minimal and impeccably rational gap-filler. The legal presumption of innocence in criminal law is a normative doctrine that allocates the risk of error almost totally to the state when liberty and criminal stigma are at stake,<sup>36</sup> but this admirable legal presumption is quite distinct from the relatively uncontroversial assumption that the vast majority of charged defendants are factually guilty. Thus, when such people threaten grave danger if left at liberty until trial and if the term of preventive confinement seems minimal, denial of bail on grounds of potential danger seems defensible. Once again, limited pure prevention is permissible.

### D. Legislative “Redefinition” of the Elements of Crime

The U.S. Supreme Court has explicitly and implicitly granted states the authority to redefine the mental-state elements of crimes to ensure that

35. 481 U.S. 739 (1987).

36. In *re Winship*, 397 U.S. 358, 363–64 (1970) (holding that the Due Process Clause requires the state to prove every element of the crime charged “beyond a reasonable doubt” to “provide concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law’”).

some dangerous defendants receive longer prison sentences than they in fact deserve. For example, in *Montana v. Egelhoff*,<sup>37</sup> the Supreme Court considered the constitutionality of a Montana statute that prohibited a criminal defendant from using evidence of voluntary intoxication to negate the *subjective* mental states that the definitions of most crimes include.<sup>38</sup> James Allen Egelhoff shot two victims in the back of the head after spending all day drinking with them. He was charged with deliberate homicide, which Montana defined as *subjectively* “purposely or knowingly” causing the death of another human being.<sup>39</sup> Egelhoff claimed that he lacked these mental states because he had been in a state of alcohol-induced black-out.<sup>40</sup> Pursuant to the Montana intoxication statute, however, the trial court instructed the jury that it could *not* consider Egelhoff’s intoxication in determining whether he purposely or knowingly killed the victims. Egelhoff appealed on the ground that the statute violated due process because it prevented the jury from considering relevant evidence and thus relieved the state from proving all the elements of the crime beyond a reasonable doubt.

Although the Montana Supreme Court accepted Egelhoff’s claim, the U.S. Supreme Court approved the Montana statute on historical and consequential grounds. The Court claimed that such rules were traditional; moreover, the statute served the purpose of protecting the public from the criminogenic properties of drink. The Court noted briefly in passing the argument that a voluntary drinker *is* responsible for all the consequences of the impaired faculties that ensue.

But if Egelhoff was unconscious, is he as guilty as if he had killed purposely or knowingly? If he killed when he was genuinely in a state of alcohol-induced “unconsciousness,” he did not actually kill purposely or knowingly, as Montana law defines these *mens reas*. Perhaps he killed recklessly if he was consciously aware before or during his drinking binge that there was a substantial and unjustifiable risk that he would become homicidal if he drank to the stage of unconsciousness. Or perhaps he was not aware that his drinking created this risk, but he should have known that this risk existed. If so, he is guilty of killing negligently. But if Egelhoff did not kill purposely or knowingly—a factual issue usually left fully to the jury—then according to standard principles of culpability and desert, he does not deserve to be punished for killing with one of these two particularly heinous mental states. If Egelhoff’s claim about unconsciousness was true, however, he has demonstrated that he is capable of multiple homicide when drunk and that he is undoubtedly a dangerous agent. Nevertheless, he is not guilty of purposely or knowingly killing his victims, and the greater

37. 116 S. Ct. 2013 (1996).

38. Mont. Code Ann. Sec. 45-2-203 (1995).

39. Mont. Code Ann. Sec. 45-5-102 (1995).

40. Indeed, a few hours after the shooting and more than an hour after being taken custody, Egelhoff’s blood alcohol content was 0.36.

punishment for these crimes that the Montana intoxication statute permits is a form of preventive detention justified solely by dangerousness.

The counterargument, briefly noted by the U.S. Supreme Court, is that Egelhoff was responsible for becoming drunk and therefore he should be held fully responsible for the consequences of his drunken conduct. Montana's statute, which prohibits defendants from using evidence of voluntary intoxication to rebut an allegation that a crime was committed with a required, subjective *mens rea*, expresses moral condemnation of behaving badly when drunk. Aristotle, for example, thought that a person who did harm when drunk was undoubtedly culpable.<sup>41</sup> But getting drunk is one wrong, and whatever else an agent does while drunk is another. With few and highly controversial exceptions,<sup>42</sup> the common law does not allow the *mens rea* for one crime to substitute for the *mens rea* required for a second crime.

Consider further the Model Penal Code's rule on this issue, which tries to have it both ways about intoxication.<sup>43</sup> While rejecting strict liability generally, the Code provides that a voluntarily intoxicated defendant may use evidence of such intoxication to negate purpose and knowledge, but not to negate recklessness. The Code thus equates the culpability for becoming drunk with the conscious awareness of *anything* criminal that the agent might do while drunk. This "equation" permits the state to meet its burden of persuasion concerning recklessness without actually proving that the defendant was *ever* actually aware that getting drunk created a grave risk that the defendant would then commit the specific harm the statute prohibited.

As an empirical matter, however, this equation is often preposterous. An agent will not be consciously aware while becoming drunk that there is a substantial and unjustifiable risk that he or she will commit a particular crime when drunk, unless the person has a prior history of committing this specific crime while unconscious from drink. If such a prior history or other circumstance indicating prior conscious awareness exists, then the prosecution is capable of proving and should be required to prove the existence of prior awareness. The prosecution should not be able to rely on what is in effect the conclusive presumption that becoming drunk demonstrates the same culpability as the actual conscious awareness of a substantial and unjustifiable risk that the defendant would commit the specific harm.

The Montana statute goes even further toward strict liability than does the Model Penal Code, of course, by providing that a defendant cannot use evidence of voluntary intoxication to negate purpose or knowledge. One interpretation of the statute—rejected by Montana's own Supreme Court, but adopted by Justice Ginsburg—is that the intoxication provision simply

41. Aristotle, *Nicomachean Ethics*, bk. III, ch. 5, 27–29.

42. Felony-murder and certain extensive doctrines of accomplice liability are the prime examples.

43. Model Penal Code, Sec. 2.08(2) (Official Draft 1962).

works to redefine the mental-state element for murder to include an objective *mens rea*—negligence. Ever since the Supreme Court’s opinion in *Patterson v. New York*,<sup>44</sup> it has been clear that the states have the federal constitutional authority to effect such a redefinition, but this was not Montana’s interpretation of its own law.<sup>45</sup> More important for my analysis, this redefinition undermines the standard view that culpability is hierarchically arrayed depending on the blameworthiness of the various mental states.<sup>46</sup> We simply do not believe, and with good reason, that negligent harming is as blameworthy as committing the same harm purposely or with conscious awareness. The latter mental states indicate that the agent is consciously lacking in concern for the interests and well-being of an identifiable victim or class of victims, an attitude toward moral obligations that is more blameworthy than lack of awareness. Few except Justice Holmes believe that objective and subjective blameworthiness ought to be equated.<sup>47</sup> Characterizing a negligent killer as a murderer does violence to our ordinary notions of culpability and desert.<sup>48</sup>

Egelhoff was a dangerous agent, and it is undeniable that the state might have had great difficulty proving beyond a reasonable doubt that he was legally conscious and thus guilty of purposely or knowingly killing. Without the crutch of strict liability, the state might have been able to convict him only for negligent homicide, typically graded as involuntary manslaughter, which carries a substantially shorter term of years than does murder. To avoid this result, to ensure that people like Egelhoff are preventively de-

44. 432 U.S. 197 (1977) (permitting New York to place on the defendant the burden of persuasion on the issue of “extreme emotional disturbance,” New York’s analogue to the provocation/passion doctrine, which traditionally reduces murder to manslaughter, and permitting the state largely to define as it wishes the elements of crime that the state must prove beyond a reasonable doubt).

45. Montana could, if it wished, have defined the *mens rea* for murder as negligence without constitutional hindrance. But such a definition would have been a similar abandonment of culpability and objectionable for precisely the same reasons I criticize the *Egelhoff* opinion.

46. See Douglas Husak, *The Sequential Principle of Relative Culpability*, 1 LEGAL THEORY 493 (1995) (defending a qualified version of the claim that culpability is hierarchically arrayed depending on the relative blameworthiness of particular mental states).

47. Oliver Wendell Holmes, Jr., *THE COMMON LAW* 49–51 (1881; Dover ed., 1991).

48. With these observations in mind, consider Egelhoff’s culpability again. First, let us assume that as the result of voluntary intoxication, James Allen Egelhoff was actually in a mental state that would meet the law’s requirement of “unconsciousness” when he killed. It is not unthinkable morally to condemn drinking oneself purposely or recklessly into a state of unconsciousness, but this behavior is not a crime *per se*. Criminal law theorists dispute the basis for the exculpatory effect of unconsciousness, but all agree that it does exculpate. So, if we believe Egelhoff’s claim that he was legally unconscious, or to put it more accurately, if the prosecution were unable to prove beyond a reasonable doubt that he was legally conscious, then Egelhoff is not guilty of purposely or knowingly killing. Moreover, there is no evidence that Egelhoff was consciously aware when he was drinking that he would become homicidal when drunk. Thus, he did not kill recklessly, even if we look back to his earlier mental states to find culpability. Once again, Egelhoff might be fully responsible for becoming unconscious, but it is a form of strict liability to hold him fully accountable for anything he did while unconscious without proof of the mental states usually required. He culpably caused the condition that would negate the *prima facie* case, but not with purpose, knowledge or recklessness that he would be exculpated.

tained for longer than their culpability warrants, the Montana statute, with constitutional blessing, permits undeserved criminal incarceration.

States are thus quite free to redefine the elements of crimes in nontraditional ways to permit conviction of more serious crimes and hence longer incarceration than is justified by the defendant's desert. The implications of this for preventive detention generally are enormous. Consider the following hypothetical scheme for homicide liability. Suppose a state defined "criminal homicide" as "intentionally engaging in conduct that causes the death of another human being." Then, the state might permit affirmative defenses that would permit conviction of lesser degrees of homicide liability if the *defendant* could prove the "mitigating" circumstances that she did not kill purposely, or recklessly, or negligently. After all, *Patterson* teaches that states can shift the burden of persuasion on mitigating affirmative defenses to the defendant. In such a case, the defendant would be fully exonerated only if she were able to prove that she killed with no culpable mental state whatsoever. In such a regime, there would be great risk of defendants being convicted of crimes that could not be proven if the state bore the burden of persuasion beyond a reasonable doubt on all fundamental *mens rea* elements. If such a statute would be constitutional—and I fear that it might be—a powerful engine for generating preventive detention would be created. Many dangerous defendants would do more time than they deserve.

#### E. "Preventive Detection"

"Preventive detection"<sup>49</sup> in criminal law includes various types of "sting" and other undercover operations. In these instances, law enforcement believes that the targets are engaged in unlawful activity or are predisposed to do so and are simply looking for the opportunity, but no arrest is yet justified because the police do not have probable cause to believe that the target has committed a crime. Law enforcement simply believes, often on good evidence that is nonetheless insufficient for probable cause, that the targets are "criminal elements." By various stratagems, law enforcement's goal is to entice the target unwittingly to provide evidence that confirms the police belief. In the case of many so-called consensual or victimless crimes, such as bribery, receiving stolen goods, drug selling, and prostitution, the completed crime will produce no complaining victim, so law enforcement allegedly must resort to undercover tactics to enforce these laws. The ethics of various aspects of such operations have been hotly debated,<sup>50</sup> but the need for these operations is widely assumed, and the legality of the practice in general is clear. Even if a target has no prior record of any type, a sting

49. I owe this creative phrase to Professor Robert Blecker.

50. See especially, Gary T. Marx, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 89–107 (1988).

that produces criminal wrongdoing will support a conviction unless the defense of entrapment obtains and the governing law of entrapment supports the conclusion that sting behavior is lawful preemption.

The majority entrapment rule is the so-called subjective test, which provides a defense only if the defendant was not predisposed to commit the crime. The focus of this test is on the defendant's culpability. If the defendant was ready, willing, and able to commit the crime—that is, unless law enforcement was completely responsible for creating the criminal predisposition—the defendant will be found culpable, even if the police conduct was morally offensive. In one sense, this rule makes a great deal of sense. After all, causation is not itself an excuse.<sup>51</sup> If the defendant commits the prohibited act with the requisite *mens rea* and without any other excuse, why should the nature of any “but for” cause for the criminal behavior affect the defendant's culpability, whether the cause is police conduct or anything else? For example, why should it matter if the “buyer” who buys illegal drugs from a ready, willing, and able seller is an actual buyer or an undercover cop? The defendant's culpability is the same in both cases.

Notice in such cases, however, that the target may have a criminal disposition, but having such a disposition is not a crime in itself. Although the defendant may have been predisposed and ultimately culpable for the crime, the expression of the predisposition by that criminal behavior was the product of police conduct. The target was innocent of wrongdoing until the police intervened. Law enforcement is essentially preempting criminal behavior with innocent victims or under “uncontrolled” conditions by causing it to occur with police officers, under “controlled,” generally less dangerous conditions.

The minority, “objective” entrapment test produces rather more mixed but still powerful evidence that sting operations are preemptive. This test focuses on the nature of the police activity, rather than on the defendant's culpability. The goal is to deter outrageous police misconduct. If the police activity was so enticing that it would have created criminal predisposition in an average and otherwise innocent person, then the defense of entrapment will obtain, whether or not a particular defendant was predisposed. In either case the defendant is once again legally innocent until the law enforcement intervened; indeed, the citizen without predisposition lacks any culpability whatsoever toward this criminal conduct. But even in cases in which the defendant was predisposed, the minority rule would not allow as much preemption because the conduct still must be sufficient to entice an unpredisposed, innocent agent.

The minority rule's focus on outrageously preemptive law enforcement seems to suggest substantive limits to preemption, but the rule is somewhat perplexing. After all, even outrageously enticing police conduct constitutes an offer, rather than a threat. Offers increase freedom and are not coercive, so it is difficult to understand why the “outrageously enticed” defendant

51. Stephen J. Morse, *Brain and Blame*, *supra* note 19, at 531–34 (1996).

should have a defense. Genuinely blameless individuals do not engage in criminal conduct, even when the positive incentives are profound. Indeed, it is no defense if a private citizen uses precisely the same tactics that would support an entrapment defense under the minority rule if they had been employed by law enforcement. Moreover, the minority rule offers no entrapment defense to the most serious forms of criminal conduct that most typically motivate the desire for preemptive action. When less serious crime is at stake and the police activity is sufficiently unseemly, the minority rule does set a limit on preemptive police conduct, but the limitation is itself limited. The minority entrapment rule permits substantial preemption.

#### F. Inchoate Crime

Inchoate crime laws—solicitation, conspiracy, and many cases of attempt—purport to respond to culpable criminal behavior, but I suggest that they incorporate a significant amount of pure preemption. I recognize that this suggestion is controversial, but in many cases of inchoate criminality, I believe, a clear showing of sufficient desert is absent, but we are willing implicitly to punish because the inchoate criminal is dangerous. Inchoate crimes are designed substantially to fill gaps, rather than to respond to fault.

According to the usual story, we do not lock people up for bad thoughts and intentions; we lock them up only for bad deeds done intentionally. With the exception of attempts in which the agent has done the “last act,” all cases of inchoate crime involve situations in which the agent’s behavior is preliminary, often very much so, and often not objectively or manifestly dangerous.<sup>52</sup> We are willing to punish such agents because we believe that their preliminary conduct is sufficient evidence that they really do intend to commit or to aid the commission of the object crime.<sup>53</sup> If we really believed that inchoate criminals would go no further than “mere” preparatory conduct or further than simply agreeing to commit crimes, for example, we would surely not criminalize many attempts or conspiracy. Indeed, punishment of both attempt and the completed crime and solicitation and the object crime is prohibited. The U.S. Constitution permits the punishment of both conspiracy and the object crime,<sup>54</sup> but this practice is questionable and justified solely by the “group danger” rationale, rather than by the truly independent criminality of agreement.<sup>55</sup>

52. See George Fletcher, *RETHINKING CRIMINAL LAW* 141 (1978).

53. I recognize that conspiracy requires neither perpetration nor necessary accomplice liability in non-*Pinkerton* jurisdictions, but I believe that the characterization in the text still holds. If they do commit the object crime, most conspirators will in fact be either perpetrators or accomplices. And conspirators whose behavior would not meet the criteria for perpetration or accomplice liability will typically be considered conspirators in the first place solely because American conspiracy law foolishly permits extravagant boundaries for the scope of conspiracies.

54. See *Callanan v. United States*, 364 U.S. 640 (1961).

55. See Model Penal Code and Commentaries, Comment to Sec. 5.03, at 390 (1985).



Until a defendant commits the last act, we can never be certain that the potential miscreant will express bad thoughts and intentions by bad action. The state can prove beyond a reasonable doubt that an inchoate criminal agreed to commit the object crime, asked another to commit it, or came close to committing it with the purpose that it be committed. In such cases it may be vastly likely that the inchoate criminal is really “on the job.” Indeed, the closer the potential criminal comes to committing a nefarious deed, the more confident we can be about the prediction that he or she will commit the crime. But whether one will really do it is in doubt until the last act is accomplished. There is an argument that pre-last act attempts deserve punishment because they produce social anxiety, but most attempts probably do no such thing, and the harm of “social anxiety” is not a sufficiently independent ground for punishing attempts. In sum, except for the criminalization of “last-act” cases, inchoate criminality is largely preemptive, rather than a response to behavior that itself risks harming others.

The affirmative defense of abandonment or renunciation, which is applicable only to inchoate crime, is further evidence that criminalizing such conduct is a preemptive response to potential danger rather than a retributive response to past wrongdoing. Although the defendant may have satisfied all the elements of conspiracy, solicitation, or attempt and would be entirely guilty if seized at the moment the elements were first satisfied, in brief, the defense obtains if the defendant completely abandons or renounces the intention to achieve the criminal objective and acts to prevent the criminal objective from occurring.<sup>56</sup> The abandonment or renunciation must not be motivated by fear of detection, by circumstances that increase the difficulty of achieving the objective, or by the desire simply to postpone the crime until a later time. Another, significant exception is that the defense does not apply if an attempt defendant has completed the last act, even if there is genuine remorse and a total change of heart at that moment.

Abandonment is an anomalous defense because the criminal who is *prima facie* guilty of inchoate crime has satisfied the elements of the crime and acted without justification or excuse. Abandonment itself neither justifies nor excuses inchoate criminal behavior because the defendant’s act and mental state satisfy the elements of the crime and the defendant has acted unjustifiably. The inchoate crime is “complete.” Nonetheless, we let the criminal “take it back,” which is not permitted with any other crime or class of crimes, even if the completed, prohibited harm can be entirely remedied.

For example, if an agent takes and carries away the property of another with the intent permanently to deprive the owner of the property, but then the agent renounces her criminal intention and returns the property before

56. See, e.g., Model Penal Code Sec. 5.01(4).

the owner discovers the loss, the agent is guilty of larceny and has no defense. Only prosecutorial discretion not to prosecute or jury nullification could prevent conviction. If an agent intentionally destroys the fungible property of another, but then renounces her criminal intention and replaces the destroyed property with identical property, she will be guilty of the malicious destruction of property, even if the owner never knew the original was destroyed. In these cases, like cases of abandoned inchoate crime, no substantial, objective harm may be done and we may sometimes be quite sure that the agent will never offend again, but the defense obtains only in cases of inchoate crime.

Various justifications can explain the affirmative defense of abandonment. Inchoate crimes do not produce a prohibited harm and results matter, it might be claimed, but the examples in the last paragraph above and the exception for failed “last-act” attempts indicate that the absence of harm does not itself justify the defense. The defense gives the genuine renouncer an incentive to renounce, but the person who genuinely renounces presumably least needs the incentive. Moreover, if we want to provide incentives to avoid producing harms, why shouldn’t we permit a defense if genuine remorse alone causes any criminal intentionally to “cure” any crime? I am not denying that results or incentives play a role in the justification of abandonment, but it seems clear that we permit the defense in large measure because we believe that abandonment demonstrates that the criminal wasn’t yet “really” a criminal, wasn’t really “on the job.” When the agent previously formed the intention to commit the object crime and acted on that intention sufficiently to satisfy the act element of inchoate criminality, somehow the criminal really didn’t fully mean it. We permit active abandonment because until the last act, there is always a genuine chance that the inchoate criminal does not “really” mean it.

Failed last-act cases and completed crime cases with “cure,” even if there is genuine remorse in both cases, demonstrate that the agent has intentionally done all the conduct necessary to produce the objective, prohibited harm. In contrast, all other inchoate crimes may always be cases simply of bad intentions. Now, bad intentions with substantial preliminary conduct may be good indicators that criminal deeds will follow, but there is no guarantee. We allow the potential criminal to prove our fears wrong by active renunciation or abandonment because we criminalize inchoate crime for preemptive purposes and not because we believe inchoate crime, in itself, deserves criminal blame and punishment.

### G. Recidivist Sentencing Laws

Imposing enhanced sentences on recidivists permits punishment greater than that authorized for the present crime. No one denies that such sen-

tences have a preemptive incapacitative purpose, but the standard argument used to bring these sentences within the usual limits on state intervention is that the recidivist or habitual offender *deserves* the enhancement. An enhanced sentence might thus be analogized to a higher sentence within the proportionate range deserved for a specific crime.<sup>57</sup>

Many argue that although desert is a necessary justification for punishment, it is not sufficient and also too imprecise to support a proportionality principle that would warrant narrowly specific punishments for each type of criminal conduct. Consequently, desert can do more than set a relatively wide range of punishment for each crime. Criminals would deserve and should serve at least the minimum for their crime, but would not deserve and should not serve more than the maximum.

Within the deserved range, however, the sentencing authority would have the discretion to use consequential concerns, such as potential dangerousness or amenability to rehabilitation, to set the specific sentence. I oppose such proposals,<sup>58</sup> but they are considered fair and sensible because no criminal receives more punishment than he or she deserves, and the law is able to respond practically to considerations other than desert. In such a scheme, two offenders who committed the identical crime under identical circumstances concerning the crime could receive very different sentences. Thus, those criminals who receive longer sentences because they are dangerous are being preventively detained acceptably because they also deserve what they are getting. If enhanced sentences have a similar desert rationale, a preemptive component becomes less problematic. The desert claim is therefore popular among proponents of enhanced sentencing because enhancement thus appears justified by the dominant, mixed retributive and consequential theory of punishment. This claim is controversial, however, and I believe, implausible.

When an offender has served the deserved sentence authorized for a particular offense, the legal and moral slate is clean. Further offenses of a previous offender are no worse *per se*, and the further victims are no more harmed than if the offense were the offender's first. The recidivist demonstrates greater antisocial tendencies, a worse character, and is surely more likely to commit further crimes than the single offender, but being antisocial, having a bad character, and being at greater risk for criminal conduct are not punishable crimes in the United States. Our enhanced fear of multiple offenders is justified, but the enhancement of their sentences reflects primarily that fear and not the multiple offender's desert.

57. See Norval Morris, *MADNESS AND THE CRIMINAL LAW* 148–50 (1982). Indeed, the mixed retributive-consequential justification for punishment that uses a proportionate range is probably the dominant view in the United States today.

58. See Stephen J. Morse, *Justice, Mercy and Crazyness*, 36 *STAN. L. REV.* 1485, 1491–1503 (1984).

Even if one agrees with the foregoing brief argument—and many, of course, do not—it is plausible to claim that multiple offenders are on notice that they may be preventively detained. Consequently, by reoffending they waive the moral right to proportionate criminal punishment.<sup>59</sup> This claim initially appears attractive, because it seems to justify preventive detention within the theoretical limits of the traditional criminal justice system. Upon further reflection, however, the claim has a moral drawback: The state should not act immorally by punishing too harshly, even if the criminal “consents.” Disproportionate punishment is simply wrong. People can of course consent to the risk of harms being imposed on them. The law allows boxers to fight and patients to undergo life-endangering medical treatments. In such cases, however, the activity is itself morally and legally acceptable. When the activity is not acceptable—homicide or aggravated assault, for example—the law does not allow the victim’s consent to justify the conduct. It is still wrong and the harmdoer will be punished.

Similarly, disproportionate punishment is wrong, even if the criminal “consents” by committing the crime. Furthermore, if enhanced punishment is not deserved, the additional incarceration is for dangerousness, not for culpability, and thus the addition is not deserved punishment. I believe that enhanced sentencing is pure preventive detention imposed under the guise of criminal punishment. At most, the retributive argument for it, which would bring enhanced sentences within the usual limiting justification for detention, is controversial and flimsy.

#### H. Capital Punishment for “Dangerousness”

The most extreme form of preventive action within the criminal justice system is, of course, capital punishment based on the aggravating factor of “dangerousness.” In such cases, desert is a necessary but not sufficient justification for the imposition of the death penalty. If the convicted criminal poses a substantial danger, death is justified unless there are sufficient mitigating factors to warrant a lesser sentence. The potential for future criminal behavior is not itself wrongdoing, however, even if the defendant is at fault for being the type of person who presents such danger. Death for dangerousness is preventive, the ultimate enhancement beyond the punishment deserved for the convict’s past crime.

59. See C.S. Nino, *A Consensual Theory of Punishment*, 12 PHIL. & PUB. AFF. 289, 293–300 (1983) (presenting a justification for punishment based on the theory that offenders consent to forgo their immunity from punishment by committing criminal acts). Larry Alexander suggests that consent has draconian implications, in that it can justify any punishment, no matter how disproportionate. Larry Alexander, *Consent, Punishment, and Proportionality*, 15 PHIL. & PUB. AFF. 178, 179–82 (1986). But see C.S. Nino, *Does Consent Override Proportionality?*, 15 PHIL. & PUB. AFF. 183 (1986) (responding to Alexander’s critique by setting forth and discussing some of the presuppositions of his own thesis).

## I. Self-Defense

My final example of preemption in the criminal law is the justified use of force prior to the formal commencement of criminal proceedings. To simplify, I shall discuss only deadly force in self-defense by private citizens. Recall the criteria for justified deadly force: The person must honestly and reasonably believe that an unlawful aggressor is threatening death, grievous bodily harm or certain, especially heinous, felonies such as rape or kidnapping, and the person must honestly and reasonably believe that the threatened harm is imminent. Justifiable defensive force must be necessary and proportionate. Unless the harm is imminent, defensive force is unnecessary to avoid harm because other, less fatal, means, such as seeking the help of law enforcement, would be possible. Moreover, deadly self-defense is proportionate only if the harms threatened are extremely serious.

Finally, the honesty and reasonableness of the defender's belief about the imminent threat indicate that the defender is properly morally and legally motivated. The presumed aggressor need not actually be threatening unlawful, imminent, and deadly harm. It is sufficient if the defender reasonably believes that this is the case. If these conditions are met, the person may justifiably kill the presumed aggressor. The law thus grants private citizens the right *ex ante* to take the law into their own hands, to kill preemptively, under the limited set of conditions the criteria for self-defense impose.<sup>60</sup>

The justification for self-defense appears unproblematically straightforward, but in fact it is controversial.<sup>61</sup> Nonetheless, I believe that it is fair to claim that the dominant view, which covers most cases, is this: A tragic but apparently inevitable confrontation will result in the death or other appalling infringement on the right of a blameless person, unless she regrettably takes the life of a person who entirely reasonably appears to be an unlawful aggressor. In other words, the defender behaves as an ethical citizen when she concludes that she is imminently about to be killed or to become the victim of another grievous infringement of her rights. There is no alternative. Both participants in the confrontation are people, deserving of all the respect and dignity we morally and legally accord to people, but if one must die to prevent dreadful harm to the other, it is better that the apparently blameworthy agent should be killed. In essence, I do not believe that the most general justification is that the aggressor forfeits his or her rights or that self-defense protects personal

60. The dominant view is that the reasonable but mistaken defender is justified in using deadly force. In other words, killing in such circumstances is not wrongful, is permissible, and perhaps is even the right thing to do under the circumstances.

61. For expositions of the various arguments, see George P. Fletcher, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 27–36 (1988); Suzanne Uniacke, *PERMISSIBLE KILLING* (1994).

sovereignty, although elements of both may obtain. Rather, I believe that self-defense is justified by the more general principle that properly motivated agents should commit the lesser evil. In emergency circumstances, it is better that a blameless, well-motivated person should be safe and the general right to live of an apparently blameworthy agent should yield.

This account is perfectly plausible, but note that it justifies private deadly force in a vast number of cases in which death is not ordinarily warranted. For example, the account *justifies* homicide in cases of reasonable mistake in which the tragic choice does not actually exist.<sup>62</sup> Moreover, even if the choice is real, justifiable killing does not provide the aggressor with the protections of due process, and it applies in cases in which the death penalty would not be justified. Indeed, in large numbers of cases in which self-defensive deadly force is justified, capital punishment would be unconstitutional. The justified self-defender is justified to kill without legal probable cause or proof beyond a reasonable doubt that the apparent aggressor was an unlawful, “capitally criminal” aggressor. Self-defense therefore obtains in cases in which there is no deadly danger or in which there is such danger but it would not justify death after lawful due process proceedings. Most victims of deadly self-defense do not deserve death.

Finally, even some of the most hoary limitations on self-defense, such as the imminence or immediacy criterion that is a proxy for the emergency need for private action, are under attack because they do not permit potential victims sufficient grounds to protect themselves.<sup>63</sup> In sum, provided that they act reasonably—and the criteria for reasonableness are weighty when deadly force is used—private citizens have extensive warrant for preemptive action to prevent feared harms.

62. Many wish to treat reasonable mistake as an excusing condition because objectively there was no need to use deadly force. If the self-defensive killing was not actually necessary, the reasonably mistaken defender has acted wrongfully, but should be excused. See Paul H. Robinson, STRUCTURE AND FUNCTION IN CRIMINAL LAW 100–24 (1997). If the latter view is correct, then reasonable but mistaken self-defense does not qualify as an example of legally authorized, private preemption.

I find the minority, “objective” view implausible. The borderline between justification and excuse can be notoriously hazy. See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984). In general, however, justifications are *ex ante* action-guiding rules addressed to all citizens that tell them when it is right, or at least permissible, to cause otherwise prohibited harms. In contrast, excuses are *ex post*, individualized exonerating factors that indicate that the wrongdoer was not responsible. A careful, reasonable citizen who acts properly under the circumstances is entirely responsible for her conduct, and what more can we ask of any citizen than that she do the right thing under the circumstances. It is profoundly regrettable if the right thing to do causes unnecessary harm, but in a world of inevitably imperfect information and action-guiding rules that tell us how to behave in such a world, the reasonably mistaken agent has surely acted rightly.

63. See, Stephen J. Morse, *The “New Syndrome Excuse Syndrome,”* 14 CRIM. JUST. ETHICS 3, 12 (Winter/Spring 1995); Robert F. Schopp, JUSTIFICATION DEFENSES AND JUST CONVICTIONS 99–102 (1998).

## J. Implications of Positive Law

The implicit argument of Part II has been that the laws and practices canvassed—civil commitment of sexually violent predators, present and potential *Foucha* exceptions, pretrial bail denial based on dangerousness, some “redefinitions” of the *mens rea* elements of crimes, “preventive detection,” inchoate crime, enhanced sentencing of recidivists, capital punishment, and justifiable private use of force—all demonstrate that our legal system already employs or permits substantial preemptive, liberty-infringing action to promote safety when the usual justifications for substantial liberty infringement—crime and disease—are absent or are dwarfed by considerations of danger. The transparent, unsuccessful attempts to justify many of these laws and practices with the usual disease and culpability justifications simply confirm that courts and legislatures recognize that they are transgressing the usual boundaries in the interest of public safety. Examination of positive law suggests that the demand for safety justifies the acceptance of some degree of preemption for responsible agents.

None of these laws or practices clearly involves “pure” preemption, however. That is, none permits intervention without a prior history of dangerous conduct and at least some plausible nonresponsibility or culpability claim. Thus, the primary public safety justification, although often denied, may have substantial theoretical and practical purchase. It is clear that we do accept some justifiable preemption in such cases. Part III considers whether the demand for safety will also justify pure preemption.

### III. RIGHTS, SAFETY, AND EPISTEMOLOGY: LIBERTY HANGS BY A TECHNOLOGICAL THREAD

It is a commonplace that the rights to be left alone and to be safe are both precious and sometimes conflict with each other. Everyone has a right to pursue harmless projects and to be left alone. The state must leave people alone, even if people think very bad thoughts and are potentially very bad, unless they are nonresponsibly dangerous or unless they harm others. Everyone also has a right to be free from unjustifiable, intentional harm from others. The state may infringe liberty to protect individuals from such harms and individuals may sometimes privately infringe the liberty of others to protect themselves.

In most present cases of preemption justified by desert or disease, there is a past history of dangerous conduct or a reasonably clear threat of future violence. To use Randy Barnett’s term, the agent is “communicating” a threat, a condition that should be sufficient to trigger preventive detention to protect the interests of potential victims.<sup>64</sup> If the threat is sufficiently

64. See Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U.L. REV. 157, 160–64 (1996). Professor Barnett does not extend the concept of communication to threats presented by nonresponsible agents. *Id.* at 165. There is no

credible, even in the absence of an identifiable victim or sufficient conduct to satisfy the definition of a criminal attempt, the justification for intervention is powerful. The rights of innocent potential victims surely would trump the rights of future harmdoers.

At present, however, we are loathe to intervene in the lives of responsible agents. We fear that our predictions of future violence are likely to be inaccurate because predictive technology is insufficient and bias will intrude. Moreover, fear of unacceptable rates of false positives in the absence of previous dangerous conduct and distaste for doctors becoming “jailers” are primary criticisms of dangerousness criteria for involuntary civil commitment and an impetus to more paternalistic criteria, such as need for treatment or grave disability,<sup>65</sup>

Suppose, however, that predictive technology existed that would allow society to predict with great accuracy that a fully responsible agent who had neither thought bad thoughts nor done bad deeds would in the future intentionally cause unjustified serious harm, but that the technology would not allow society to predict when or to whom the harm would occur. Others have the right not to be intentionally harmed by the agent. Would that person nonetheless have the ordinary right to pursue harmless projects free of state intervention until the intentional harm occurred or was reasonably believed to be imminent? If not, what form of intervention would be justified? Could the state monitor the person’s activities with otherwise unacceptably intrusive intensity? Could the state compel the person to receive “treatment” or other less benign interventions to reduce the dangerous propensity? Could the state confine the person?

What, if anything, would justify purely preemptive action to prevent danger? The traditional answer is, of course, “nothing.” Our society does not accept pure prevention of responsible agents. But if it did, the probable justification would be a limited form of self-defense: The usual right to be left alone yields when the anticipated harm is very serious and we can be quite sure that the harm will occur unless preventive action is taken.<sup>66</sup>

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reason, however, not to consider the threats of such agents communications, even in the absence of a past history of violent conduct.

65. See John Monahan, Mary Ruggiero, & Herbert D. Friedlander, *Stone-Roth Model of Civil Commitment and the California Dangerousness Standard: Operational Comparison*, 39 ARCH. GEN. PSYCHIATRY 1267 (1982) (describing the opposition to the dangerousness standard and reporting based on an empirical study that 86% of the patients in the study sample who were committed on grounds of dangerousness would have also met more paternalistic criteria); Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54 (1982) (discussing the problem of false positives); see also Steven P. Segal, Margaret A. Watson, Stephen M. Goldfinger, & David S. Averbuck, *Civil Commitment in the Psychiatric Emergency Room: II. Mental Disorder Indicators and Three Dangerousness Criteria*, 45 ARCH. GEN. PSYCHIATRY 753 (1988) (clinicians can employ a dangerousness scale of unknown validity reliably, and perceived dangerousness to others was associated with major mental disorder and severity of symptoms).

66. See Barnett, *supra* note 64, at 160–64; and Phillip Montague, PUNISHMENT AS SOCIETAL-DEFENSE 42–48, 61 (1995) (providing a preemptive justification for self-defense by individuals and by states against other, potentially hostile states and recognizing the epistemic problems often attending preemptive action).



Under such conditions, perhaps it is unreasonable to wait until harm is imminent. A society should be permitted to strike preemptively to defend itself, and so should private individuals if recourse to the state is unreasonable. The potential for danger is simply too great to risk waiting for harm to become imminent in the hope that one could in the future successfully perceive imminent harm and successfully intervene then to prevent it. As a matter of justice, the balance of evils would be positive. Behind the veil of ignorance, would not we all agree to limited, humane preemptive strikes for the safety of all?

Consider the following example from international relations, in which the preemptive striker was not justified by international law.<sup>67</sup> You may recall that in 1981 the Israeli military bombed a nuclear reactor that Iraq was building. Iraq claimed that the reactor was being built for purely peaceful purposes and an Iraqi nuclear attack on Israel was not plausibly imminent according to any traditional definition of imminence. The Israelis nonetheless had good reason to fear Iraq's intentions, for the potential destruction of the State of Israel was at stake. Despite much hand-wringing and good arguments that the Israelis had violated international law, most people who love peace surely breathed a sigh of relief and thought, at least privately, that the Israelis had done the right thing. If Iraq had nuclear weapons, for example, its later invasion of Kuwait would have been vastly more dangerous to regional and world peace than it was. Recall that Iraq attacked Israel during the Gulf War with Scud missiles although Israel was not a belligerent. Suppose the warheads were nuclear? Should Israel have waited until Iraq had nuclear weapons pointed at Israel? If so, what should it have done then?

Prediction technology is now insufficiently developed practically to permit preemptive strikes.<sup>68</sup> Any predictive technology is sure to produce large numbers of false-positive predictions, especially when predicting low base-rate behavior, such as homicide or other types of especially serious violent conduct. In addition to its alleged desert rationale, imminence therefore has an important prediction rationale as a criterion for social or private self-defense, as reflected in attempt and self-defense doctrines, for example. There is a positive relation between the likelihood of actual aggression and its imminence.

But what if predictive accuracy was sufficient to satisfy an accuracy criterion for preemption? Elsewhere I have argued that if the technology existed

67. See Brun-Otto Bryde, *Self-Defense*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 213 (1982). I have often independently used the example in conversation, but George Fletcher used it in print and therefore deserves credit. Fletcher, *A Crime of Self-Defense*, *supra* note 61, at 20.

68. See Morse, *Blame and Danger*, *supra* note 7, at 126–29; Vernon L. Quinsey, Grant T. Harris, Marnie E. Rice, & Catherine A. Cormier, *Violent Offenders: Appraising and Managing Risk* (1998) (reporting newer research results indicating better but not extremely high accuracy). See generally Nicholas Rescher, *Predicting the Future: An Introduction to the Theory of Forecasting* 133–56, 191–246 (1998) (evaluating the pitfalls to predictive accuracy in general and to successful prediction of human behavior in particular).

for correctly predicting all or most future behavior, our view of ourselves and many of our moral and legal arrangements would be quite different from those at present.<sup>69</sup> A less extreme case is possible, however, that makes pure preemption imaginable and potentially practicable at present without threatening our self-conception and all that flows therefrom. This scenario obtains if predictive accuracy is high only in limited circumstances, with limited groups, especially if the people accurately predicted were somehow “different” according to some morally acceptable criterion.

For example, some commentators believe that we are starting to approach such predictive success for people with “abnormal” sexual desires and histories of past violent conduct.<sup>70</sup> Few would find this category morally unacceptable as a basis for differential treatment on the ground that the perception of difference was based on irrational animus. Assuming that we could predict the behavior of potential sexually violent offenders accurately, would these people have a right to be left alone until harm was imminent?

I suggest that as a theoretical matter, if the following criteria were met, pure preventive action should be justifiable: (1) if the potential harm were sufficiently grave; (2) if the prediction technology were sufficiently accurate; (3) if the preventive response were maximally humane and minimally intrusive under the circumstances; and (4) if the preventive action was preceded by adequate due process. The potential grave harm would give the state a compelling reason to intervene.

How grave is grave enough might be a matter of dispute, but I am assuming that the infringement of pure preventive action should be justified only by very serious harms, indeed. Others might be less restrictive, however. For example, the U.S. Supreme Court upheld the potentially indefinite confinement of a person found not guilty by reason of insanity for *shoplifting* on the ground that minor property crime was a sufficient predicate for the dangerousness component of the commitment.<sup>71</sup> The Court was untroubled by the relatively harmless nature of the acquittee’s crime and ruled that dangerousness should not be confused with violence. The majority argued that theft was a danger to society and often led to violent crime, so potential theft was a sufficient basis for a finding of dangerousness. *Jones* involved traditional preventive detention, however. Michael Jones was not a morally and legally responsible agent, but he had committed wrongful behavior. In the case of pure preemption, let us make the soothing assumption that the potential for more grave harm would be required to satisfy the need for a compelling state interest.

Sufficient predictive accuracy would solve the related problems of unacceptably high false-positive rates and of unnecessary overcommitment. Again, how much accuracy would be required would be a normative ques-

69. Morse, *Blame and Danger*, *supra* note 7, at 115–16.

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

71. *Jones v. United States*, 463 U.S. 354, n.14 at 365 (1983).

tion. Whatever level were required, a past history of violence in theory could be no more than an epistemic or evidentiary consideration. After all, if we could predict future violence sufficiently and equally well without a history of violence, then in theory there is no need substantively to require a past history of violence. Nor would the principle of legality be violated by a pure predictive scheme independent of past history. Pure prevention is not justified by desert, nor is punishment appropriate. Therefore, no question of a substantive need for action, fair notice of conduct and the like arises. The legal decision maker will, of course, need reliable and valid criteria to make the requisite prediction, but this concern is distinguishable from criminal justice concerns for legality.<sup>72</sup>

To consider further the degree of accuracy that fair pure prevention might require, compare the state's burden of persuasion in criminal trials and in traditional civil commitment: "beyond a reasonable doubt," and "clear and convincing evidence," respectively. The burden of persuasion for proving a probability standard is, of course, independent of the standard itself. There can be "maybe definites" (low burden of persuasion needed to prove a high-probability standard) and "definite maybes" (high burden of persuasion needed to prove a low-probability standard).<sup>73</sup> But burdens of persuasion do teach us about the law's tolerance for error, which should provide insight concerning the substantive accuracy rate that would justify preemptive action.

In *In re Winship*<sup>74</sup> the U.S. Supreme Court finally "constitutionalized" the reasonable-doubt standard, holding that the state had to prove every element of the crime charged beyond a reasonable doubt. The state had to bear such a high risk of nonpersuasion because, if convicted, the defendant faced the immense intrusions of losing liberty and stigma. To use the chestnut, the Court was strongly favoring acquittal of the guilty to the conviction of the innocent. In *Addington v. Texas*,<sup>75</sup> the Court held that the Constitution required the "intermediate," clear-and-convincing evidence standard in civil commitment cases. Although an innocent person's liberty was at stake, the Court rejected the reasonable-doubt standard because commitment is not punitive and the factually improper release of one who genuinely needs help is worse than acquitting the guilty. Finally, the Court recognized the state's interest in appropriate commitment and argued that, given the nature of the evidence in commitment cases, the higher standard might make it virtually impossible for the state to meet its persuasion burden. In sum, the Court accepted in both cases that mistakes that would wrongly lead to the loss of liberty were inevitable, but the Court was willing to accept higher false-positive rates in commitment cases than in criminal

72. Cf. Barnett, *supra* note 64, at 167.

73. I owe this useful turn of phrase to John Monahan & David Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 L. & HUMAN BEHAVIOR 37 (1978).

74. 397 U.S. 358 (1970).

75. 441 U.S. 418 (1979).

trials. Even in the former, however, the potential patient's liberty interest warranted a standard higher than the preponderance of the evidence standard generally applicable in civil cases. The loss of liberty makes and should make the law intolerant of error.

Pure preemption is different from either criminal conviction or traditional civil commitment. The potential harmdoer is innocent of any wrongdoing, is not suffering from mental disorder, and does not need treatment for a disorder in the traditional medical and psychological sense. But the harmdoer may face an intrusion on liberty that rivals and even exceeds criminal punishment or civil commitment. Further, identified potential harmdoers would be stigmatized. All these considerations suggest that a very high state burden of persuasion ought to obtain: That is, only very low false-positive rates should be acceptable. In contrast, if the danger to potential innocent victims is grave and if it would be difficult to prove and thus to prevent potential harm with a higher standard, *Addington* suggests that a lower burden of persuasion and consequently higher false-positive rates might be acceptable. In any case, the arguments for a higher burden of persuasion suggest that the independent substantive standard for accuracy ought also to be high.

Let us assume that the deprivation of liberty that pure preemption produces is so immense that predictive success would have to be correspondingly high in general, and that, possibly, the accuracy required might vary with the intrusiveness of the preventive action. The potential harmdoers might still complain that they were being unfairly treated because others, for whom the prediction of harm was not yet as successful, might be as potentially dangerous. If the choices of data to collect were based on rational policy goals and the predictive technology did not focus on particular groups for discriminatory or other unacceptable reasons, this objection would not be powerful, however. For example, if it is rational and nondiscriminatory to collect data about and to try to predict the conduct of violent sexual offenders, such offenders cannot complain if there are no data yet concerning arsonists, who might also be dangerous. The Equal Protection Clause of the U.S. Constitution does not guarantee this type of "perfect" equality.

Assuming normative consensus on the amount of potential harm and predictive accuracy required and that some people meet this standard, and assuming that the preemptive actions taken are the least intrusive necessary to prevent the harm, what objections to pure preemptive action would remain? One might be based on social constructivist complaints that society's definition of dangerous classes of people is an expression of power, oppression or whatever, and not a reflection of real dangers, like the bad bacteria that can kill us. Criminalization of the behavior of such people is bad enough; intrusive preemption would be outrageous. This type of argument gains purchase from our society's history of past, and alas present, intolerance for many forms of harmless or trivially harmful behavior be-

cause these behaviors allegedly are dangerous enough to warrant blame and criminal punishment.<sup>76</sup> But the argument could be obviated by precise specification of serious criterial harms—such as homicide, forcible rape, or maiming—that only shameless ideologues could deny were dangerous.

A second objection might be the familiar *reductio* of the “parade of horrors.” Suppose, for example, we could predict future grave harmdoing accurately when a child was newborn or even in utero. Imagine the intrusions that could follow, not only to the potential harmdoer, but also to third parties, such as pregnant women. This objection is hackneyed, but it carries more than a grain of truth. Once we are in the “good bacteria, bad bacteria” narrative, then being humane becomes only a “side constraint” to our consequential balancing. At the extremes, the psychological costs of an intrusion might outweigh the benefit, but depending on the harm to be prevented, society might well accept imposing immense psychological and physical costs on those unfortunate enough to be potentially violent.

A less familiar objection concerns the causation of violent predisposition. Although human beings are mostly genetically alike from place to place, the rates of the most serious, violent crimes vary enormously across and within countries and across time periods in the same place. This commonplace observation suggests that environmental variables account for much of the variance in the rates of grave harmdoing. Future dangerous conduct is not simply a function of intrapersonal variables.

Some have used this observation to suggest that deprivation and other types of alleged environmental causes of crime necessitate an excuse for criminals exposed to these causes.<sup>77</sup> The analogous argument would be that society should remove or reduce criminogenic social conditions before preemptively restraining the innocent agents caused to be dangerous by those conditions. But social causation of criminal behavior is not per se an excuse, even if one believes that the causal conditions are unjust, because virtually all criminals retain the general capacity for rationality.<sup>78</sup> If seemingly unjust social conditions per se are thus irrelevant to criminal responsibility, perhaps they should also be irrelevant in a pure preventive regime. Nevertheless, justice might demand an asymmetrical response to retrospective moral evaluation and prospective preemption.

A rational criminal is at fault and deserves punishment, whatever may have been the causal variables that produced the intentional prohibited conduct. Sympathetic observers might feel regret or special sympathy for a criminal whose conduct is in part the product of unjust social conditions,

76. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a state statute prohibiting adult, consenting, private homosexual conduct).

77. The most well-known exemplar was Judge David Bazelon. See David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976). For a more recent example, see Richard Delgado, “*Rotten Social Background*”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?* 3 L. & INEQ. 9 (1985).

78. See Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985); Morse, DEPRIVATION AND DESERT (2000, forthcoming).

but no excuse is warranted.<sup>79</sup> At least in the case of violent crimes, the criminal knows that the conduct violates the law and exposes him or her to punishment. The law can effectively operate as part of the agent's practical reason.

In the case of pure preventive action, however, the agent is entirely blameless at the moment of preemption. He or she has done nothing wrong yet and the preemption scheme cannot effectively operate as part of the agent's practical reason. After all, the agent may be entirely unaware that he or she is at risk for preemptive action. Unlike the criminal who can avoid acting violently and receiving punishment, the potentially dangerous but currently innocent agent cannot use practical reason and act intentionally to avoid the intrusion, which, depending on the circumstances, might be severe. To impose preemptive action, justice would therefore seem to demand not only that *ex post* preemptive liberty infringements should be the least intrusive necessary, but also that *ex ante* society should take all reasonable steps to prevent unjust social conditions that produce predictable danger.

Two objections to this suggestion arise immediately. First, if the predictive criteria were known, many people might be able to use practical reason to avoid preemption. Aristotelians famously believe that people are capable of training themselves to become more virtuous agents. Now, some predictive variables, such as sex, might be static and unalterable by the exercise of practical reason. But others, like employment status, and even character traits, might very well be dynamic and subject to influence by reason. Indeed, many, and perhaps most, of the variables affected by injustice are likely to be dynamic and plastic. If this were true, the social-injustice argument is weakened because practical reason could be used to change the equation to diminish the probability of future harmdoing.

Still, this objection is not decisive. Preventive action may be most efficient when the potentially dangerous agent is young, before the agent becomes responsible. Moreover, many plastic variables may play a role, but it is possible that unmodifiable variables that injustice produces may account for much of the variance in large numbers of cases.

For example, suppose that poverty systematically produced predisposing biological variables as a result of, say, poor prenatal care and poor nutrition. Suppose further that the effects of these predisposing variables could not be easily altered by any means, even if society and the agent both tried. The strength of this first objection will depend in large part on how the "world works." It is in any case an unforgiving objection.

The second objection raises a familiar paradox. Avoiding the injustice that produces predictable danger might itself require vast intrusions on liberty. Little imagination is necessary to envision dreadfully invasive social engineering to "make people free." Nonetheless, one can imagine less

79. Cf. Martha Klein, DETERMINISM, BLAMEWORTHINESS AND DEPRIVATION 89–91, 171–174 (1990) (arguing that justice demands reduced sentences in such cases because the criminal has been punished in advance, has paid in advance, by being a victim of unjust conditions).

intrusive social programs that might substantially reduce injustice and consequent danger, thus meeting the second objection to the social-injustice argument. This article is not the appropriate place to devise such programs, but the general claim is surely plausible. Through reasonable social action, the state can reduce the risk that victims of injustice will also be subject to preemptive action. Behind the veil of ignorance, I think that we would agree that this should be done to mitigate the intrusion of a regime of preemptive strikes.

A final objection to preemptive action to prevent danger is that such intrusions are a form of undeserved punishment. After all, preventive detention might in many cases be the least intrusive alternative to prevent the danger. For example, sexually violent predators may not be treatable, and monitoring predators in the community is probably too cumbersome and expensive to be feasible. Even if the conditions of commitment were quite comfortable—indeed, even if the material conditions of the detainee were more comfortable than the material conditions of liberty—detention is a massive deprivation that will appear and feel punitive to the detainee. Compelled “treatments” and other measures might likewise seem punitive.

Nonetheless, pure preemption is not punishment. Although preemptive action will in many cases intentionally impose conditions that are painful, the pain is neither desired nor necessary. Dangerous propensities might be reduced through quite nonintrusive means, such as benign and comfortably administered medication, and many painful things we require of citizens, such as sending soldiers into battle, are not punitive. Further, pure preemption is not an expression of blame and it is not imposed to deter. I believe that the claim that preemptive strikes are punitive is dependent on the prior conclusion that preemption is unjustified, rather than being the premise for that conclusion.

A general regime of preemption would not be acceptable at present according to the criteria I have addressed. Large numbers of people present a risk of sufficiently grave harm to justify preemption, but we cannot identify them with sufficient accuracy; we lack reasonably affordable means to prevent the danger from occurring, and society has not done all that it reasonably could to reduce injustice and consequent risk. Even if the regime were limited to particularly high-risk groups and there were few false negatives—that is, among the high-risk groups, most dangerous people would be accurately identified and preempted—there would inevitably be high rates of false positives and detention would almost always be the preferred mode of intrusion. Substantial harm might be avoided, but the unnecessary loss of liberty and the financial costs would both be huge. Finally, in my view, the injustice would also be great. In sum, pure preemption just is not worth the cost at present.

The discussion thus far suggests that liberty hangs by a technological thread. That is, we cannot justify pure preemption because we lack the technology to impose such a regime at acceptable cost. If the technology

improved sufficiently, however, I have suggested that pure preemption would be justified under very limited conditions. I believe that to be true, and I offer a complementary prediction: When the technology reaches that stage, the legislatures and the Supreme Court will agree. *Hendricks* is just the beginning. The real danger is that driven by fear—the oncoming onslaught of the “superpredators”<sup>80</sup> and all that—we will institute pure preemption under less limited conditions. This will be unjust because no respectable social-defensive theory can warrant a regime that will tolerate so much loss of liberty for so little benefit.

#### IV. JUDY AND J.T. NORMAN: A CASE STUDY IN CURRENT PREEMPTIVE FUTILITY

On the night of June 12, 1985, after her husband, John Thomas (J.T.) Norman, fell asleep, Judy Norman took her grandchild to Judy’s mother’s house, extracted a pistol from her mother’s purse, returned to her home, pointed the weapon at the back of her sleeping husband’s head, and pulled the trigger, but the gun jammed. She unjammed it and fired one shot in the back of J.T.’s head. Judy felt his chest and discovered that her husband was still breathing and making sounds. She then shot J.T. twice more in the back of the head. That same night, Judy Norman admitted to the deputy sheriff who arrested her that she killed J.T. because “she took all she was going to take from him so she shot him.”<sup>81</sup>

The story she told is both horrifying and not uncommon. Judy was 39 years old. She and J.T. had been married almost 25 years and got along well when he was sober. But J.T. suffered from chronic alcoholism and when drunk he had continuously subjected her to brutal physical and emotional abuse, beginning about the fifth year of their marriage. He beat, tortured and degraded Judy, including forcing her to make money by prostitution. On numerous occasions he threatened to kill and to maim her. On those occasions when she left home to escape the abuse, J.T. always found her, brought her home, and beat her.

The day before the homicide, J.T. drove while intoxicated to a highway rest area where Judy was engaging in prostitution. He assaulted her and then drove home, but during the drive he was stopped by a patrol officer and jailed for driving while impaired. After Judy’s mother arranged J.T.’s release from jail that same day, he continued drinking and abusing Judy. Indeed, he seemed particularly angry after his release, and his abuse escalated. Sheriff’s deputies were called to the Norman house that evening. Judy complained that J.T. had been beating her all day and that she could not

80. William J. Bennett et al., *BODY COUNT* 26–29 (1996).

81. *State v. Norman*, 378 S.E. 2d 8, 9 (N.C. 1989). All facts in the text are taken from the North Carolina Supreme Court’s opinion. There was no substantial dispute about the events preceding the homicide.



take it any more. The deputies advised her to file a complaint, but Judy told them that she was afraid that J.T. would kill her if she had him arrested. The deputies told her that they could do nothing without a formal complaint and they left. An hour later the deputies returned because Judy had taken a bottle of pills in an apparent suicide attempt. J.T. called her names, cursed her, and told the attending paramedics to let her die. A deputy finally chased J.T. back into the house as the ambulance rushed Judy to the hospital. Her stomach was pumped and she was sent home with her mother.

During her brief stay in the hospital, Judy discussed with a therapist either filing charges against J.T. or having him committed. Judy agreed to go to a mental health center the following day to discuss these possibilities. She also expressed anger toward J.T. and threatened to kill him.

The next day, on which the homicide occurred, Judy did go to the mental health center to discuss filing charges or trying to commit J.T. and then she confronted J.T. with the possibility of commitment. Her husband responded that he would “see them coming” and would cut her throat before they reached him. Also that day, Judy went to the social services office to seek welfare benefits, but J.T. followed her there, interrupted the interview, and forced her to go home with him. He then continued to abuse Judy by threatening to kill and maim her, slapping and kicking her, throwing objects at her, and burning her by putting out one of her cigarettes on her upper torso. He did not let her eat or bring food into the house for the children. Later that evening, when they went together to their bedroom to lie down, J.T. called Judy a “dog” and made her lie on the floor. Their daughter brought their baby grandchild into the bedroom and the Normans agreed to baby-sit. After J.T. fell asleep, the baby started crying. Judy took the child to Judy’s mother’s house so that it would not awaken J.T.

At her mother’s residence, Judy took a pistol from her mother’s purse and then returned to the house with the gun and killed J.T. Charged and tried for first-degree murder, the jury found Judy guilty of the lesser-included offense of manslaughter. Judy’s attorney appealed on the ground that the jury was not, but should have been, instructed to consider self-defense. The Supreme Court of North Carolina affirmed the conviction because J.T.’s potential threat of death or grievous bodily harm, which might otherwise have justified the use of deadly force in self-defense, was not imminent when Judy shot him. While J.T. was asleep, Judy had alternatives to deadly force, the court opined, and thus deadly force was not justified.

It is impossible to read this terrible story without horror and pity. It is also impossible not to feel anger and regret that the abuse and the death were not prevented.<sup>82</sup> There were so many times at which some intervention

82. Some might not be angry about the killing of J.T. because they might believe that he got what he deserved. But as I argue below, the death penalty would not have been justified even if J.T. had been arrested, tried, and convicted for all the crimes he committed against Judy. He deserved hard time, but his death, too, was a tragedy.

might have made a life-affirming and life-saving difference. In this case study, however, I wish to focus on the gravest harm the case presented, the denouement: Judy's killing of J.T. Let us suppose that the therapist, who visited Judy in the hospital and who observed Judy's anger and depression and heard her numerous threats to kill J.T., believed that Judy would try to kill J.T. Let us assume further, as is almost certainly the case if we take the criteria for civil commitment seriously, that Judy was *not* then sufficiently disordered to warrant civil commitment.<sup>83</sup> It is also clear that even if Judy truly did form the firm intent to kill J.T. while she was in the hospital, Judy had not then gone far enough toward killing J.T. to satisfy the act requirement for attempt liability. Thus, when third parties first learned of Judy's possible homicidal intent, they had little legal purchase to intervene involuntarily. Indeed, even under the most expansive definitions of attempt, Judy did not meet the criteria until, at the least, she took the pistol from her mother, and in many jurisdictions, that would not have been enough. The civil and criminal law, properly applied, were essentially powerless to stop Judy Norman from killing her husband even if the relevant authorities were justifiably convinced that the probability of homicide was high.

Now let us shift focus. Judy Norman married at 14, lived in a rural part of western North Carolina,<sup>84</sup> was forced by J.T. to make her living by prostitution, had children at home to look after, and, although I do not know this, it is fair to infer that she had little education, few occupational skills, and no resources. It is also fair to infer that her community was not well-served by shelters or other institutions devoted to protecting victims of domestic violence. Indeed, there was no public response when J.T. forced her to leave the social service office and Judy rightly assumed that law enforcement could not really protect her. Almost certainly, even if Judy had filed a complaint and cooperated in a prosecution of J.T., it is highly unlikely that he would have served serious time or that jail would have reformed his drinking and violent tendencies, and it is correspondingly

83. Judy had just made a suicide attempt, but the hospital was willing to release her immediately, so I assume that she did not make a very serious attempt and that she was not suffering from a major mental disorder that would justify ordinary civil commitment. Of course, people who do not meet the criteria for commitment are routinely committed, and certainly the hospital could have detained her. Any judge would approve commitment of a person who had just attempted suicide, even if the attempt was not seriously lethal. But let us assume, as is almost certainly correct, that the civil commitment system followed its own criteria and that Judy was not formally committable. And even if she had been committed, the term would have been brief at most—a matter of days—and her cycle with J.T. would have continued.

In many jurisdictions, the prediction of danger to J.T. would be sufficient to impose a duty on the therapist to warn J.T. of the danger. In this case, however, a reasonable therapist might have concluded that warning J.T. might be more dangerous to Judy than Judy's risk to J.T.

84. The events took place and Judy Norman was tried in Rutherford County. According to the 1990 Census, the county population was almost 57,000. Approximately 42,000 people lived in mostly nonfarm rural areas and about 15,000 lived in an "urban" area the Census describes as "outside urbanized area." No one lived "inside urbanized area."

likely that he would have emerged from incarceration more disposed than ever to hurt Judy.

Moreover, even if her husband were imprisoned for a time, we may safely assume that Judy lacked the resources and skills to move to another location, where she could live an economically and socially viable life with her children and where J.T. could not find her. Finally, Judy could have armed herself and waited for the next assault, but this would have been a dreadfully risky strategy that was likely to result in her death if she failed to kill J.T.

In sum, while her husband was asleep in the bed, it was entirely reasonable for Judy Norman to conclude that it was completely predictable that he would abuse her brutally in the near future, and despite the contrary but facile conclusions of the North Carolina Supreme Court, it was entirely reasonable for Judy Norman to believe that no one was really able to protect her and that there was nowhere to hide. Nonetheless, J.T.'s threat was not imminent according to traditional self-defense doctrine. What should Judy Norman have done to protect herself from her husband's future, certain, vicious, and possibly lethal violence? Judy was essentially powerless to protect herself by lawful means.

I have asserted that society lacked the legal means to prevent Judy from killing J.T. and that Judy lacked effective legal and practical means to prevent J.T. from abusing her. This appears to be a lamentable state of legal affairs. After all, her husband was a serious felon who deserved serious time for brutally abusing Judy, but he never intentionally tried to kill her and he did not deserve to die. If convicted for his undeniably terrible crimes, and even if no mitigation were allowed for his alcoholism or for other problems he surely had, capital punishment would have been both unconstitutional and morally unthinkable.

Similarly, Judy was not responsible for and did not deserve her husband's abuse. And recall, if one is even tempted to argue that she was at least in part complicit in her own misery because she stayed with him, Judy had tried to leave, but J.T. prevented her.

What could have been done? How could the killing and the abuse have been prevented? One possible means of preventing the homicide would have been to detain Judy preventively (or to impose some other type of liberty-infringing regime), but this would have required pure preventive detention, based solely on a risk estimate. When her threat first became evident and highly credible, Judy was not suffering from a mental disorder or other condition warranting traditional civil commitment. I am assuming that some type of "battered victim syndrome," which Judy may have been suffering from according to some defense experts, would not be a justifiable basis for traditional civil commitment on the ground that her syndrome-produced failure to leave her husband rendered her dangerous to herself. In a word, the law might authorize a broader, public preemptive response

to danger, justified by the danger *simpliciter* and by the lack of reasonable alternatives.

To protect Judy, another possibility is that the law could extend the justification of deadly self-defense in circumstances such as those Judy faced. That is, the law might permit a broader, private preemptive response to danger, justified by the danger and by the lack of reasonable alternatives.

I believe that the parallel problems of preemptive, preventive action that *Norman* presents are instructive. My claim is that at present nothing could be done to prevent Judy Norman from killing her spouse, even if pure preemption were available, but that the killing should have been justified as lawful self-defense. The criteria for private preemption should be loosened in appropriate, limited cases. To simplify the analysis again, I will focus only on the final days of J.T.'s life, but much could be said about the 20 years of the abusive relationship that preceded and produced the homicide.

Judy Norman told a therapist the night before she killed her husband that she intended to do it. Was it a "firm" intention?: Probably not, but it was credible under the circumstances. Judy presented a potential but real threat. Was there any legal step that could have been taken to prevent her from killing J.T.? I have already mentioned that neither traditional civil commitment nor attempt liability was available. Simply uttering verbal threats is not necessarily evidence that the speaker is crazy, especially in this case, and it is surely insufficient action to support a finding of probable cause for attempted homicide. Neither desert nor disease was present, and Judy Norman does not qualify for any other traditional gap-filling form of preemption.

Would pure preemption have helped? The harm threatened—homicide—was sufficiently grave. But how accurately can we predict homicide, very low base-rate behavior, under the circumstances of this case? Let us consider some of the standard, mostly demographic variables that social science indicates would be predictively valid: age, gender, socioeconomic status (SES), prior history, drug use. Judy is a 39-year-old woman of low SES status with no previous history of violence. To the best of our knowledge, she does not abuse drugs. Among these variables, only low SES is a heightened risk factor, and it is much less important than virtually all the others, which suggest lesser risk. Women of Judy's age with no history of violence and drug use do not commit much homicide.

Individuating a bit more, we note that Judy was a victim of abuse and made an apparently serious verbal threat. I know of no data that would allow us to use these additional variables validly to calculate the odds ratio beyond the base-rate of homicide for people demographically like Judy. The base-rate is tiny, however, and even if Judy was much more likely to kill than her demographic peers, the actual probability would be very, very low indeed. Even the most precise prediction table or equation would vastly and unacceptably overpredict in this case. Moreover, what would be the appro-

priate preemptive intervention? Detention? If so, for what purpose beyond separating Judy from her husband for a period, under what conditions, and perhaps most important, for how long? Therapy? Again, what type and for what precise purpose? A specific, sensible, affordable, and effective intervention is difficult to devise.

Finally, would not any intervention aimed at Judy be an unjust form of victim blaming? Who is the problem: Judy or her spouse? She tried to leave but J.T. prevented her. Neither law enforcement nor social services offered realistic help. Before we coercively intervene in Judy's life and deprive her of substantial liberty, does not justice demand that we try to help her first, either by helping her leave her husband or by restraining him?

In sum, pure preemption of Judy Norman would not have been justified at present. But if we could predict Judy's homicide accurately, if a tailored intervention were sensible, and if other social interventions had been tried first but were unsuccessful, then with regret society might properly preempt Judy. For now, however, she must be left at liberty.

Judy should not have been convicted of manslaughter, however, because her killing was no more preemptive than the present theory of self-defense, properly understood, already permits. Judy reasonably believed that J.T. presented a threat of death or grievous bodily harm, in response to which deadly force would be proportionate. The only genuine issue is whether the threat was imminent. Recall that the justifiable use of private defensive force requires that the threat must be imminent, because if there is a reasonable alternative to the private use of force, it must be employed. Judy killed her spouse when he was defenseless himself, drunkenly asleep in bed, and therefore presented no imminent threat by traditional standards. But suppose the imminence criterion is simply a proxy for its underlying rationale, namely that defensive force is justified only if there is no reasonable alternative.

Judged by the rationale of a rational imminence standard, the harm was imminent. Judy had nowhere to hide and no other reasonable, lawful alternative, including waiting for the next deadly attack. It was simply too risky. I am not suggesting that the state of nature obtained in Rutherford County, North Carolina, in 1985. A sufficiently intact criminal justice system existed to charge, try, convict, and imprison Judy Norman for killing her husband. Still, no adequate means other than killing J.T. existed for her to protect herself from his virtually certain future, death-endangering violence. Judy Norman had no reasonable alternative and justifiably killed J.T. At the least, Judy Norman should have been given self-defense instructions and the jury should have been permitted to consider whether the use of deadly force was justified.

Loosening the imminence criterion would not justify widespread private vengeance or "open season" on abusive people, nor would it invite an expanded "battered victim syndrome" defense. My claim fits within the rationale for traditional self-defense doctrine. The defender would have to

demonstrate that she reasonably believed that there was no reasonable alternative possible. Only then would the use of private force be necessary because the harm was legally imminent. In most locations and under most circumstances, such a showing may be difficult or impossible if the threat is not temporally immediate. But to assert that there is always a reasonable alternative that any reasonable person would recognize is to blink reality.

## **V. CONCLUSION: WHAT TO DO UNTIL THE DOCTOR COMES**

Until the good doctor comes and shows us all how to produce only good bacteria, the short answer to what to do is, “not much.” We cannot prophylactically use powerful, wide-spectrum antibiotics. Such medications will kill too many good bacteria in addition to the bad. At most we should take them prophylactically only if we are faced with conditions in which it is virtually certain that otherwise the bad bacteria will overwhelm the body’s natural defenses and will then be too strong to suffer defeat at the hands of therapeutic medicine.

