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BLAME AND DANGER: AN ESSAY ON PREVENTIVE DETENTION

STEPHEN J. MORSE

In less cynical times, movies about prison life often included a stock scene: the young offender, about to be released, has an interview with the warden, who is, naturally, tough but kind. The warden tells the con that he has paid his debt to society, that his slate has been wiped clean, and that he can and should lead a good life when he is released. The message is meant to be simultaneously descriptive and inspirational. Let us suppose that the interview takes place today and the con is in for armed robbery. After listening to the warden’s speech, the con replies that immediately upon release he will go back to the old neighborhood, illegally obtain a handgun, and renew his career of armed robbery. Moreover, if there is any risk that a victim will identify him—precisely the reason he ended up in the joint on the present occasion—he will kill the victim. The warden (and we all) believe him. What happens next in our legal world? The big green door slides open and the con goes free, free to rob and kill. Why do we let this happen? Is there appropriate moral and legal reason to prevent what we fear, with altogether good reason, will shortly occur?

Now let me tell another story, which is true, but much less common and less often cinematically portrayed. A young man involuntarily committed
to a mental hospital has recovered and is about to be released. He receives from his doctor a prescription for psychotropic medication and aftercare plans, which should together diminish the risk of relapse. When he is unmedicated, the patient tends to believe that various people are threatening him and controlling his behavior. These delusional beliefs sometimes cause him to strike out at those he believes are threatening and controlling him. Indeed, it is precisely such a scenario that caused the young man to be involuntarily hospitalized on this and many previous occasions. Each time he is treated with medication and other therapies, the delusions of threat and loss of control abate, and he is released. But, alas, each time after leaving the hospital he stops taking his medication and the delusions return. The present doctor is quite sure the pattern will repeat itself and fears that the patient may seriously injure or even kill an innocent person. Nevertheless, the young man is too rational, too normal, to justify continued hospitalization and the hospital releases him. The doctor (and we all) believe that there is a serious risk that the ex-patient will do serious harm outside the hospital’s walls. Why do we let the patient go free? What should we do instead?

Although, compared to most cases of predicted harm, these cases involve an abnormally high degree of certainty about a high risk of future serious harmdoing, they are surely not fanciful hypotheticals. They realistically raise the question of when and under what restraints the state may justifiably intervene in the life of a citizen who, at the time of the intervention, has neither done nor attempted present harm, but who poses a substantial risk of doing so. The strong presumption against preventive detention and the relatively limited means to accomplish it ensure that, in absolute terms, the dangerous undetainables are vastly greater in number than the dangerous detainables, and thus represent a much greater risk to social safety. Such considerations are not lost on the public or politicians. Preventive detention has expanded in recent years and pressure for further expansion is predictable.

I will address the theoretical and empirical justifications for preventive

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3 Sometimes the issue is put in terms of a person’s “dangerousness.” There is no harm in such usage, as long as one remembers that dangerousness is simply an estimate of the likelihood that a given individual will engage in some type of undesirable behavior during some time period. Although there is an unfortunate tendency to conceive of dangerousness as a unitary characteristic of a person, the probability of future harmdoing is a function of both intrapersonal and situational variables. People with an enormous propensity for violence cannot hurt others when in solitary confinement, and even the most pacific citizens may be motivated to violence in certain situations. When used as a legal criterion to justify preventive detention, the vagueness of dangerousness can be remedied by legal specification of the probability and type of harm required to satisfy the criterion. Nevertheless, preventive detention criteria rarely specify the probability and type of harm required, thus allowing decisionmakers latitude for the considerable and, all too often arbitrary, exercise of discretion.
detention, with special attention to the different justifications for civil and criminal confinement and to proposals to expand the use of preventive detention. The general argument is that although some forms of preventive detention can be theoretically justified, the increased use of preventive detention would be unwise because the resulting increase in safety would not justify the corresponding massive liberty deprivation.

After prefatory remarks about the misleading nature of the assumption of perfect predictability in Part I, Part II turns to an exploration of the general justification for preventive detention and of whether the law should prefer a civil or criminal approach to preventive detention. Part III first examines two civil approaches: the involuntary civil commitment of nonresponsible, potentially dangerous people, and the postacquittal civil commitment of potentially dangerous criminal offenders who have been excused because they are nonresponsible. I conclude this Part with an extended case study of "sexual predator" laws, an increasingly popular type of civil preventive detention legislation. Part IV considers the criminal justice system's potential for enhancing incapacitative preventive detention by imposing longer sentences on dangerous, responsible offenders. Part V examines the final step: pure preventive detention, or the preventive detention of potentially dangerous but responsible and blameless agents. After rejecting the approaches to expanding preventive detention that Parts III-V address, I conclude in Part VI with a heuristic proposal to extend the crime of reckless endangerment to include the culpable omissions of some potential harmdoers who are aware that they pose a risk to others.

I. Fantasies, Fears, and Public Policy

Some theoreticians who discuss preventive detention assume that perfect prediction is possible and employ political and moral theory to analyze whether preventive detention is defensible. Although fanciful hypotheticals can be powerful tools to enhance rigorous thought, they can also mislead. Consider the assumption of perfect predictability about human conduct. In principle it may be possible, but imagine what currently unimaginable power the physical and social sciences would have to possess and how different social life would be if such an assumption were true. Under such circumstances, it is unlikely that our current views

\[4 \text{ See, e.g., Schoeman, supra note 1, at 27, 32-35 (focusing on moral issues regarding preventive detention, after assuming that the inadequacy of available predictive techniques is remediable).} \]

\[5 \text{ See Daniel C. Dennett, Elbow Room: The Varieties of Free Will Worth Wanting 5-18 (1984) (discussing the misleading nature of "bugbear" hypotheticals in discussions of determinism and freedom); see also D.H.M. Brooks, The Method of Thought Experiment, 25 Metaphilosophy 71, 82 (1994) (arguing that only "natural possibility" should constrain thought experiments that go beyond conceptual analysis).} \]
about human nature and personhood and our moral and political theory would remain static. For example, if we could predict with certainty which people would cause specified harms, our view of ourselves as autonomous agents would surely be altered, as would our sense of what duties we owe to others. Although perfect or almost perfect predictability is not logically inconsistent with autonomy, I suspect that as an empirical matter the assumption of autonomy would diminish and that the sphere of duties would enlarge. After all, burdening apparently less autonomous agents might not seem a dreadful liberty infringement. This is all hypothetical, of course, but that is the point. Good moral and political reasoning will depend upon the social context in which it occurs, including the dominant view of human nature.

Traditional and newer forms of preventive detention address an urgently felt need to avoid feared future harms. To determine what responses are justifiable, we must remember that perfect or near perfect predictability and a magic pill to reduce violent tendencies among either crazy or noncrazy people do not exist. We can never be completely safe without drastic intrusions on liberty that would affect far more people who would not cause serious harm than the substantially smaller number who would. Our moral, political, and legal theorizing must confront this reality.

II. THE GENERAL JUSTIFICATION FOR PREVENTIVE DETENTION AND THE CIVIL/CRIMINAL DISTINCTION

Any forward-looking form of legal regulation that aims to prevent future harm is generally justified by every person’s right not to suffer unjustifiable harm and the lack of a right to inflict such harm. Preventing harming by threat or actual restraint surely intrudes on the liberty of the potential harmdoer, but such an intrusion is justified in some circumstances by the potential infringement on the liberty of others.

Most forms of preventive legal regulation, ranging from tort damages to imprisonment, operate only by threats of future costs for harming and are primarily directed toward the specific, potentially harmful behavior being regulated. The possible damages resulting from the improper


7 I use the term “crazy” interchangeably with the term “mentally disordered,” with no disrespect towards people with behavioral problems. For legal purposes, I prefer the term “crazy” to “mental disorder” and other technical terms because it is more descriptive of the phenomena in question and has fewer connotations about disease processes that beg important questions about responsibility.
operation of an automobile may affect the potentially careless driver's driving, but they will not otherwise impinge on her freedom to live her life as she chooses. Similarly, the possible harsh punishment for a homicide conviction affects only a contract killer's potential killings; otherwise, she can do as she pleases.

Anticipatory confinement is a more certain means to prevent harms than the threat of potential, future costs. Why, therefore, does the law usually wait for the harm actually to occur to restrain some potential harmdoers physically? First, leaving people free to pursue their own projects, free to act in accord with their choices and to take the consequences, enhances liberty, dignity, and respect for the individual as a moral agent—albeit at the cost of increasing risk to others.8

Second, some forms of harmdoing are simply too trivial to justify detention, even if the harm actually occurs. Incarceration for double parking, for example, makes little sense according to any moral or political theory.

Third, the only completely effective present method to prevent future harmdoing in the community—some form of preventive detention—not only averts the feared harm, but also interferes broadly with unrelated liberties.9 Our liberal society prefers to avoid such blunderbuss interventions and to prevent harmdoing as unintrusively as possible, by deterrence aimed precisely at the specific dangerous behavior to be avoided, or by other less intrusive alternatives. Even potential homicide, for example, is prevented mostly by threats of punishment. For another example, if inoculation or quarantine could prevent the spread of a highly contagious, deadly disease, I assume that quarantine of a person willing to be inoculated would be unjustified and probably unconstitutional.

Although the broad, massive liberty intrusion of preventive detention is disfavored, there are two standard conditions that furnish justification: (1) the potentially harmful agent's lack of responsibility,10 and (2) the great danger that some responsible, potentially harmful agents unjustifiably pose to society. The classic example of the former is the involuntary civil commitment of people with mental disorder who are a danger to others.11 An example of the latter is the practice of holding some charged defendants without bail, because they may pose a grave threat to

8 See Schoeman, supra note 1, at 32 (setting forth the individual autonomy argument).
9 See, e.g., Corrado, supra note 1 (manuscript at 11) ("In [preventively detaining, the state] must take into account that detention not only prevents the future criminal activity, it prevents all sorts of unrelated lawful activity the criminal might have engaged in.").
10 Many statutes and some commentators would characterize the criterion as lack of "competence," but the terminology is not crucial. The important point is that the agent is not rational: both "nonresponsibility" and "incompetence" capture this idea.
11 See, e.g., CAL. WELF. & INST. CODE § 5250 (West Supp. 1995) (permitting invol-
society if they are released.  

In both cases, the potential benefits of preventive detention allegedly outweigh its undoubted costs. The loss of liberty in involuntary civil commitment is considered less onerous because the person is unable to respond rationally to the law's incentive structure and, arguably, mental disorder has already deprived the person of "effective liberty." Moreover, the confinement is not punishment, at least in theory. The extensive liberty intrusion of bail denial is justified by the grave danger the arrestee presents and by strict limitations on the term and conditions of preventive detention. For example, the detention cannot be punishment because the detainee has not yet been convicted, and it will terminate relatively quickly upon the resolution of the criminal charges. On balance, society is better off if courts deny bail in such cases, even if there will be some number of false positives among those defendants denied bail.  

12 See, e.g., 18 U.S.C.A. § 3142(e) (West Supp. 1995) (authorizing pretrial detention upon a finding that no condition or combination of conditions will reasonably assure the appearance of the person as required, the safety of any other person, and the safety of the community). The Supreme Court upheld the constitutionality of this statute in United States v. Salerno, 481 U.S. 739 (1987).


14 A false positive is an erroneous prediction that an event will occur. In the present context, it refers to cases in which a charged defendant is denied bail because we predict that he would offend if released, but in fact he would not. Behavioral prediction need not be cast in the binary fashion indicated, however. There are many nonbinary methods for characterizing risk that are far more precise and convey greater information. Indeed, there have been major advances in conceptualizing, investigating, and communicating predictions in the last decade. See, e.g., William Gardner et al., A Comparison of Actuarial Methods for Identifying Repetitively Violent Patients with Mental Illnesses, 20 LAW & HUM. BEHAV. 35 (1996); John Monahan & Henry J. Steadman, Violent Storms and Violent People: How Meteorology Can Inform Risk Communication in Mental Health Law, 51 AM. PSYCHOLOGIST (forthcoming 1996); Douglas Mossman, Assessing Predictions of Violence: Being Accurate About Accuracy, 62 J. CONSULTING & CLINICAL PSYCHOL. 783 (1994); Edward P. Mulvey & Charles W. Lidz, Conditional Prediction: A Model for Research on Dangerousness to Others in a New Era, 18 INT'L J.L. & PSYCHIATRY 129 (1995); Marnie E. Rice & Grant T. Harris, Violent Recidivism: Assessing Predictive Validity, 63 J. CONSULTING & CLINICAL PSYCHOL. 737 (1995).

Despite the undoubted advantages of the newer methods for investigating and expressing risk, there is nonetheless still virtue in reporting rates of false positives and
although detention of potentially dangerous but responsible people is a form of permissible regulation justified by the state’s interest in preventing danger to the community, courts apply it only in appropriate circumstances and subject to strict limitations.\(^\text{15}\)

The legal landscape is more complex, however, than these two neatly distinguished justifications. Hybrid forms of preventive detention, sometimes referred to as quasi-criminal commitments, straddle the two justifications. These commitments are civil in form and require a finding of mental abnormality, which is a proxy for diminished responsibility. Nevertheless, they are triggered by criminal justice system proceedings, they often involve fewer procedural protections than obtain in the criminal justice system, they often include looser criteria and more onerous conditions than obtain in traditional civil commitment of the mentally disordered, and they often appear punitive, despite the state’s protests to the

negatives. No matter how the risk data for an individual are obtained and expressed, a preventive detention decision and its accuracy \textit{ex post} are ultimately binary: The potential detainee either will or will not be preventively detained and, if undetained, will or will not do the feared harm. The decision to detain or not to detain may be justified \textit{ex ante} because, for example, the person’s score on an actuarial method, which precisely identifies the risk probability the person presents, exceeds or is lower than the level of risk that our society has determined justifies detention. It may seem strange to declare a case a “false positive” or a “false negative” when the risk assessment is expressed probabilistically and no specific prediction has been made. Nevertheless, the decision has binary consequences for potential detainees and society at large. A person who is detained and would not ultimately have behaved harmfully has unnecessarily been deprived of liberty. A person who is not detained and harms another has deprived the victim directly and society indirectly of liberty. Focusing on these outcomes in this way helps us keep in mind the human, moral costs of predictive enterprises.

\(^\text{15}\) See, e.g., Salerno, 481 U.S. at 747 (noting that the Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious crimes). Why a criminal charge should justify preventive detention generally is unclear. Preventive detention for potential danger related to the charged offense, such as to protect a threatened witness, is comprehensible. But if the charged defendant is simply dangerous generally, it is difficult to understand why preventive detention is more justifiable than for any other person posing an equal risk of similar harmdoing. The claim that the criminal charge is good evidence of dangerousness is an evidentiary argument rather than a principled reason to distinguish charged offenders. It is perfectly plausible, for example, that the con in the introductory example is more predictably dangerous than many people charged with serious offenses. Albert Alschuler argues that a probable cause determination of past misconduct does provide a predicate for prediction because it is some indication of culpability. As he recognizes, however, probable cause is not proof of guilt and it hardly seems sufficient to overcome the usual presumption against preventive detention. Albert W. Alschuler, Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process, 85 Mich. L. Rev. 510, 532-34 (1986).
contrary. 16

For example, traditional mentally disordered sex offender commitments are triggered by either a charge or a conviction of a sex offense 17 and depend on a finding that the offender is mentally abnormal. 18 These commitments, which have been held constitutional, may be more onerous than civil commitments and may be accomplished with fewer procedural protections than obtain in the criminal justice system. 19 The offender's diminished responsibility and the commitment's origin in a criminal charge or conviction justify the hybrid nature of the commitment. Commitment after acquittal by reason of insanity is another example of a similarly justified hybrid. A criminal defendant found legally insane is committed to a hospital for a potentially indefinite term after proceedings that may provide fewer protections than are available in the criminal justice system and more onerous conditions for release than obtain in ordinary civil commitment. 20

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16 See Allen v. Illinois, 478 U.S. 364, 377-79 (1986) (Stevens, J., dissenting) (describing the criminal character of Illinois's "sexually dangerous person" proceeding); cf. id. at 368-69 (majority opinion) (conceding that if the conditions of confinement were clearly punitive, the "civil veil" might be pierced and criminal procedural protections would be required).

17 The term "traditional" is meant to exclude newer "sexual predator" commitments, which occur at the completion of an offender's prison term for a sex crime. For a discussion of these newer commitments, see infra Part III.C.

18 Mentally disordered sex offenders are seldom sufficiently mentally abnormal to warrant either the insanity defense or traditional involuntary commitment. See discussion infra Part III.C.

19 See Allen, 478 U.S. at 375 (holding that proceedings under the Illinois Sexually Dangerous Persons Act are not proceedings in a "criminal case" within the meaning of the Fifth Amendment, and thus that Amendment's guarantee against compulsory self-incrimination does not apply).

20 See Jones v. United States, 463 U.S. 354, 367-69 (1983) (holding that: (1) a preponderance of the evidence standard for involuntary, indefinite commitment of insanity acquittees comports with due process, and (2) the length of an insanity acquittee's involuntary commitment depends upon his or her recovery, and thus the commitment may be of a much longer duration than an appropriate criminal sentence); see also Foucha v. Louisiana, 504 U.S. 71, 86 (1992) (holding that the continued involuntary detention of an insanity acquittee, no longer suffering from mental illness, on the basis that he cannot demonstrate that he is not dangerous to himself or to others, violates due process). This term of commitment must end when the patient either regains mental health or is no longer dangerous. See id. at 77 ("[T]he acquittee may be held as long as he is both mentally ill and dangerous, but no longer."). But see State v. Randall, 532 N.W.2d 94, 106-10 (Wis. 1995) (purporting to distinguish Foucha by holding that the continued commitment of an insanity acquittee who is no longer mentally ill does not violate due process if the acquittee is dangerous, there is a "medical justification" to continue the commitment, and the commitment does not exceed the maximum term of imprisonment that could have been imposed for the crime charged).
Under current legal arrangements, many people who appear to pose a great risk of serious harmdoing may not be preventively detained either because they are responsible and no pure preventive detention scheme has been devised to detain them, or they are arguably not responsible, but do not meet the usual criteria for involuntary civil commitment and no hybrid has been devised to detain them. Examples of the former are the con and patient described at the beginning of this Paper; an example of the latter would be a “mentally abnormal arsonic predator,” for whom no specific commitment exists.

Should the law prefer civil or criminal approaches to preventive detention? Paul Robinson responds with an admirably strict version of “the traditional account.” He asserts that the moral legitimacy of the criminal law requires that offenders receive punishments that are proportionate to their culpability. If punishments are too harsh or excuses too restrictive, harmdoers may be punished more than they deserve, thus undermining the criminal law’s legitimacy. The criminal sanction should apply only to those who are blameworthy, and then strictly in proportion to the offender’s desert. Preventive detention of nonresponsible, blameless agents should therefore be solely the province of the civil justice system. As noted, this is the standard account, and I subscribe to it fully, because it takes seriously and affirms the human potential for responsible, moral agency.

The standard account assumes that there is a difference between civil and criminal confinement marked by the differential purposes, attendant stigmas, procedures, and conditions of confinement. Punitive purpose is a necessary condition of criminal confinement, whereas civil confinement does not aim to punish. Criminal confinement brands the detainee as blameworthy; civil confinement stigmatizes the detainee as nonresponsible. Civil commitment does not require the same procedural protections as criminal incarceration because the detention is not punishment and does not carry the same stigma. The only limits to the conditions of

21 See Robinson, supra note 1, at 706-08 (setting forth the traditional account against a criminal approach to preventive detention).
22 But see Lord Windlesham, Punishment and Prevention: The Inappropriate Prisoners, 1988 Crim. L. Rev. 140, 146-47 (arguing that the conditions in which civil detainees are confined are indistinguishable in most respects from criminal restrictions on liberty).
23 A legal finding that an agent is nonresponsible and dangerous is of course also stigmatizing, but this is not the stigma of moral culpability that in part creates the need for the greater procedural protections of the criminal justice system. See In re Winship, 397 U.S. 358, 363 (1970) (citing the stigma of criminal conviction as one justification for the reasonable doubt standard in criminal cases). But see Michael Davis, Arresting the White Death: Preventive Detention, Confinement for Treatment, and Medical Ethics, APA NewsL., Spring 1995, at 92, 95 (arguing that the stigma in such cases is properly moral, because dangerousness is a type of reckless endangerment and is thus in itself wrongdoing).
criminal confinement are the wide borders of the Eighth Amendment prohibition of cruel and unusual punishments; civil confinement conditions should be the least intrusive necessary to meet the state's reason to detain. Of course, the legal and institutional world is rarely so neatly carved and skeptics may deny that practical differences exist. Nevertheless, the law's failure fully to honor important moral distinctions does not undermine their importance and the necessity of attempting to design and implement rules and institutions that express them.

If one subscribes to the standard account, there are three means to increase preventive detention: (1) expand civil preventive detention by substantially widening the criteria for both nonresponsibility and dangerousness; (2) expand criminal preventive detention by justifying the fairness of lengthier incarceration of defendants convicted of serious crimes; and (3) expand civil preventive detention to permit commitment of responsible and blameless but dangerous agents. The next three Parts of this Paper consider these alternatives.

III. Expanding Civil Commitment of Nonresponsible People

For the standard account of the distinction between criminal and civil confinement to obtain, the blameless must not be punished, and nonresponsible but potentially dangerous people must be preventively detained within the civil system. The first two subsections that follow consider mechanisms for civil commitment of nonresponsible people: preventive civil detention of nonresponsible, potentially dangerous people, and excusing and civilly committing blameless harmdoers. The last subsection addresses the new "sexual predator" commitment laws. Assuming that legislatures allocate the necessary resources, expanding civil commitment could substantially enhance public safety. But, expansion would also undermine the legitimacy of the criminal law by excusing properly blameworthy agents, by threatening basic liberties, and by permitting society to ignore the social causes of violence.

A. Preventive Civil Detention of Nonresponsible, Potentially Dangerous People

Would society be better off if involuntary civil commitment criteria were broadened to permit preventive detention of even more potential, rather than actual, harmdoers? Although one can mount a good theoreti-

24 See, e.g., Joseph Goldstein & Jay Katz, Abolish the "Insanity Defense"—Why Not?, 72 Yale L.J. 853, 865-68 (1963) (arguing that the insanity defense is not a defense, but rather a means to restrain some members of the group of defendants who would ordinarily be free of criminal liability).

25 In the remainder of this Paper, I shall refer to this possibility as "pure preventive detention," signalling that the commitment lacks a nonresponsibility or therapeutic rationale. Its purpose is solely to prevent predicted harm.
cal argument to support narrow involuntary commitment laws, the argument for broader commitment criteria is more problematic. In addition, any form of preventive detention in the absence of actual harmdoing raises grave practical questions.\(^{26}\)

For reasons much studied and theorized about, but in fact not very well understood, some unfortunate people are so irrational, so grossly out of touch with reality, that ascribing responsibility to them is a travesty according to any but the most extravagantly libertarian account of human agency. This is not to say that such people are totally incompetent. They are able successfully to perform many of the tasks of everyday life. Nevertheless, their practical reasoning is sometimes so irrational that responsibility for some conduct is out of the question. If their irrational practical reasoning increases the risk that they will cause harm to others—or perhaps to themselves—the usual liberty and autonomy justifications for allowing people to pursue their projects, to make wrong and foolish choices, are not present. These justifications are rooted in the capability for rational conduct. Consequently, the state is theoretically justified in intervening if the consequential benefits of the intervention outweigh the costs: permitting people incapable of rationality to cause harm irrationally does not enhance liberty and autonomy.

For example, the best recent evidence concerning the relation of mental disorder to violent conduct suggests that there is a weak but genuine positive association.\(^{27}\) In brief, some people with mental disorder tend to be violent as a result of mental disorder, especially if they have certain psychotic symptoms\(^{28}\) and if they are also substance users.\(^{29}\) The

\(^{26}\) I have argued primarily on consequential grounds against any form of involuntary commitment for people with mental disorder. Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 *Cal. L. Rev.* 54 (1982). I still believe that argument is correct, but for the purpose of this discussion I will acknowledge both the acceptability and the inevitability of involuntary commitments for dangerousness.

\(^{27}\) See Bruce G. Link & Ann Stueve, *Psychotic Symptoms and the Violent/Illegal Behavior of Mental Patients Compared to Community Controls*, in *Violence and Mental Disorder: Developments in Risk Assessment* 137, 154 (John Monahan & Henry J. Steadman eds., 1994) (noting that the preponderance of recent research suggests that the mentally ill are "somewhat more likely to be violent" than those who are not mentally ill); Jeffrey W. Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, in *Violence and Mental Disorder: Developments in Risk Assessment*, supra, at 101, 119 (finding a weak but robust association between mental disorder and violence, an association that strengthens as the definitions of mental disorder and violence widen).

\(^{28}\) See Link & Stueve, supra note 27, at 156 (concluding that certain psychotic symptoms that cause a person to feel threatened elevate rates of violent behavior in people with those symptoms).

\(^{29}\) See Swanson, supra note 27, at 119 (concluding that mentally disordered individuals who were also substance abusers are significantly more likely to be violent than
psychotic beliefs that external factors are controlling one's conduct and that others are threatening may predispose some people with mental disorder to behave violently. Assuming that such delusional beliefs are firmly held, an agent who strikes out at a perceived controlling threatener is not morally responsible for the attack and does not deserve legal blame and punishment. If a person expresses these delusional beliefs, and especially if she has acted violently in response to them in the recent past, she plausibly poses a substantial threat to others. Assuming that she has not competently chosen to forego treatment that would prevent the return of such beliefs, she is not responsible for her potential dangerous propensities and the state would not unjustifiably violate her liberty right by preventively detaining her. Of course, if reasonable, less intrusive forms of intervention, such as outpatient commitment or mandatory visits by a nurse to ensure medication adherence, were available, incarceration should not result.

The hypothetical case of a grossly irrational person falls within traditional, narrow justifications for involuntary civil commitment. Most of the people who create fear that they will be violent and who in fact actually harm others do not fit this description, however. The vast majority of people with mental disorder, including severe psychotic disorders, do not pose greater risk than noncrazy people, and the number of noncrazy but dangerous people is much larger than the number of dangerous crazy people. Thus, to promote public safety by preventive detention will require expanding the civil criteria of nonresponsibility to include many people hitherto considered perfectly responsible.

How could the law broaden the class of nonresponsible agents? First, it could assume that anyone who would unjustifiably hurt another person must be irrational and thus nonresponsible. Such an assumption collapses the categories of madness and badness, sickness and evil, and evidences a failure of nerve about the very possibility of objective criteria for rationality and moral judgment. Exploring the virtues and defects...
of such a project is beyond the scope of this Paper, but it suffices to note
that if such a worldview guided public policy, none of the usual moral and
political assumptions would apply. Moreover, such a worldview is unlikely
to gain general acceptance anytime soon, so I shall simply note it in
passing.

Another, related possibility is general expansion of the criteria of ab-
normality and nonresponsibility. The law might consider new syndrome
sufferers and people diagnosed as suffering from less severe mental disor-
ders as sufficiently abnormal and exempt from responsibility. For exam-
ple, “battered woman syndrome” sufferers and people with “antisocial
personality disorder”34 or some “substance-related disorders”35 might
qualify as sufficiently abnormal or nonresponsible. Nevertheless, ex-
panding the categories of abnormality and nonresponsibility again faces
conceptual and practical difficulties.

Although there are working definitions of mental abnormality, disor-
der, or disease that command wide allegiance,36 no consensually accepted
definition of these or like terms exists within the mental health profes-
sions, and none of the prevailing definitions was created to address moral,
political, social, and legal problems, such as who should be considered a
responsible agent.37 Therefore, simple inclusion of a syndrome or disor-

34 AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF
MENTAL DISORDERS 645-50 (4th ed. 1994) [hereinafter DSM-IV] (describing this dis-
order).
35 Id. at 175, 176-81 (substance dependence), 182-83 (substance abuse).
36 For example, the introduction to DSM-IV states:
[Each of the mental disorders is conceptualized as a clinically significant behav-
ioral or psychological syndrome or pattern that occurs in an individual and that is
associated with present distress . . . or disability . . . or with a significantly in-
creased risk of suffering death, pain, disability, or an important loss of freedom.
In addition, this syndrome or pattern must not be merely an expectable and cul-
turally sanctioned response to a particular event. . . . Whatever its original cause,
it must currently be considered a manifestation of a behavioral, psychological, or
biological dysfunction in the individual. Neither deviant behavior . . . nor con-

37 Id. at xxi-xxii. But see Jerome C. Wakefield, Disorder as Harmful Dysfunction: A
Conceptual Critique of DSM-III-R’s Definition of Mental Disorder, 99 PSYCHOL. REV.
232 (1992) (criticizing the definition of “disorder” in DSM-IV’s predecessor, DSM-
III-R, a definition that remains unchanged in DSM-IV).

Indeed, DSM-IV explicitly cautions against using its diagnostic criteria to re-

solving legal issues. See DSM-IV, supra note 34, at xxvii (“The clinical and scientific
considerations involved in categorization of these conditions as mental disorders may
not be wholly relevant to legal judgments . . . that take into account such issues as
individual responsibility, disability determination, and competency.”).
der in some reasonable diagnostic scheme cannot resolve whether a sufferer, even if “abnormal,” is sufficiently nonresponsible to warrant preventive detention. Making this decision requires a theory of responsibility and a moral and political theory about the limits of liberty.

Examination of current involuntary commitment criteria and practice discloses that, with few exceptions, only severely disturbed, highly irrational people are committed involuntarily. Although the civil commitment reforms of the 1960s and thereafter did not accomplish as much as advocates hoped, there is widespread agreement that, on both liberty and consequential grounds, involuntary commitment should be limited to the most disordered people. People with lesser disorders are too much like “us,” too rational, to qualify as nonresponsible. For example, it is almost unimaginable that a person whose sole diagnosis was “antisocial personality disorder” and who was potentially dangerous would be committed involuntarily. Although a large proportion of serious violent offenders in prison meet the criteria and could have been civilly committed if “antisocial personality disorder” satisfied the mental disorder criterion, the law treats people with this disorder as responsible moral agents because they are in touch with reality and not substantially irrational.

Furthermore, the ability of mental health professionals to predict future violence among mental patients may be better than chance, but it is still highly inaccurate, especially if these professionals are attempting to use clinical methods to predict serious violence. High proportions of

38 See Paul S. Appelbaum, Almost a Revolution: Mental Health Law and the Limits of Change 210 (1994) (concluding that the consequences of mental health law reforms were much more limited than anticipated).

39 See Charles W. Lidz et al., The Accuracy of Predictions of Violence to Others, 269 JAMA 1007, 1009 (1993) (reporting: (1) 60% sensitivity (true positive proportion) for clinicians’ predictions of violence, compared to an expected chance accuracy rate of 50%; and (2) no increase in accuracy with patients the clinicians judged to be especially dangerous). This study, which is one of the most methodologically sophisticated and persuasive to appear in the literature, demonstrates that clinicians are “relatively inaccurate predictors of violence.” Id. at 1010. Clinicians’ predictions of violence exceeded chance for male patients, but for female patients their predictions were not significantly better than chance. Id. Moreover, the sample in this study was particularly violent, suggesting that the sensitivity of violence predictions would decrease in a random sample of emergency room patients. Id. at 1009. Finally, although the sample was probably unusually violent, only 14.4% of the violent occurrences involved serious violence. Id. The study also concluded that it was unclear whether using clinical judgment to predict violence was more accurate than simply using a history of violence. Id. at 1010. For a second analysis of clinical predictive accuracy, see Mossman, supra note 14, at 788-90 (reanalyzing 58 data sets from 44 disparate published studies which demonstrate that: (1) clinicians’ predictions generally exceed chance, but that errors are inevitable; (2) past behavior is the best predictor of future violent conduct; and (3) nonclinicians furnished with data about past behavior may outperform clinicians who rely solely on data gained from a clinical interview); see also
false positives will ensue, especially if one is predicting low base-rate behavior, such as homicide or aggravated assault.

One can of course reasonably argue about what society and the law should consider sufficiently serious violence to justify preventive detention.\textsuperscript{40} For example, Charles Lidz, Edward Mulvey, and William Gardner found that within their particularly violent sample, thirty-two percent of the predicted violent patients and eighteen percent of the comparison group committed acts of hitting or striking, a category the investigators placed between "minor violence" and "serious violence."\textsuperscript{41} It is difficult to tell from the report, but apparently few of the hittings or strikings required the victim to receive medical attention. Should we be willing to

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David B. Villeneuve & Vernon L. Quinsey, Predictors of General and Violent Recidivism Among Mentally Disordered Inmates, 22 CRIM. JUST. & BEHAV. 397, 406-09 (1995) (investigating a sample of high-risk, recidivist, mentally disordered offenders for an average 92-month follow-up period after their release from a treatment facility, and finding: (1) 78.3\% of the sample were rearrested, of which 49.6\% were arrested for a violent offense; (2) an actuarial prediction instrument was a modest predictor of general recidivism, yielding a 31.7\% relative improvement over chance; (3) only 16.7\% of the initial rearrests were for a serious violent offense, a figure so low that accurate identification of this latter group using generally more accurate actuarial methods was precluded; and (4) the presence of psychosis decreased the rearrest risk for a violent offense). \textit{But see} Robert Menzies & Christopher D. Webster, Construction and Validation of Risk Assessments in a Six-Year Follow-Up of Forensic Patients: A Tridimensional Analysis, 63 J. CONSULTING & CLINICAL PSYCHOL. 766, 775-76 (1995) (reporting on the basis of a careful, sophisticated study of a high-risk sample that: (1) neither actuarial nor clinical prediction is highly accurate and that little progress on the risk assessment of people with mental disorder has been made; (2) with few exceptions, the direct predictions of dangerousness "were almost universally invalid[;]" (3) even those risk assessors who were best at the task provided predictions that were "neither powerful nor pragmatically of any value[;]" and, (4) a handful of sociodemographic variables were far better predictors than clinical assessments and actuarial instruments). This study "demonstrates once more that the 'holy grail' of violence prediction is still far off." \textit{Id.} at 775. In general, actuarial prediction is superior to clinical prediction. \textit{See generally} Robyn M. Dawes et al., Clinical Versus Actuarial Judgment, 243 SCIENCE 1668 (1989). But highly accurate prediction of future violent conduct by any method, even among high risk groups, eludes us.

Optimists about prediction sometimes overstate the accuracy rates found in more recent research, neglect the methodological flaws or cautions of newer work, lump all "violence" together, or fail to discuss adequately the trade-off between sensitivity and specificity. \textit{See, e.g.,} Alexander D. Brooks, The Constitutionality and Morality of Civilly Committing Violent Sexual Predators, 15 U. PUGET SOUND L. REV. 709, 735-54 (properly criticizing flaws in the older research, but making some optimist's errors).

\textsuperscript{40} Cf. C.M.V. Clarkson, Law Commission Report on Offenses Against the Person and General Principles: (1) Violence and the Law Commission, 1994 CRIM. L. REV. 324, 327-29, 331-32 (discussing the British Law Commission's assessment of the seriousness of various forms of assaultive behavior).

\textsuperscript{41} \textit{See} Lidz et al., \textit{supra} note 39, at 1009.
detain preventively those who might punch or kick other people, for example, when it is extremely unlikely that these assaults will be serious enough to occasion medical treatment? Preventive detention in such cases will surely require stronger justification than in the case of potential serious bodily injury, homicide, rape, arson, and the like. By reducing the degree of potential violence necessary to justify preventive detention, the law would prevent a small amount of serious harm and a somewhat larger amount of less serious harm, but only at the cost of increasing the number of false positive predictions of both, especially the former. Only the prevention of serious violence renders preventive detention cost-benefit justified, even among nonresponsible, potential harmdoers, especially because most disorders and associated problems can be treated more effectively and inexpensively in the community.42

Expanding the abnormalities sufficient to justify involuntary civil commitment would be demeaning and an affront to the civil liberties of large numbers of people. Many new and old syndrome sufferers experience distress or disability, might very well benefit from treatment, and sometimes threaten harm to others. But to brand people reasonably in touch with reality as nonresponsible is to demean them and to undermine responsibility ascriptions generally. Unlike the civil commitment of actual harmdoers that is triggered by a successful insanity defense in the criminal justice system, involuntary civil commitment of potential harmdoers requires no actual harm or attempt. Threats will suffice. In the absence of recent, harmful behavior, however, the generally weak ability to predict future serious violence becomes even worse.43 Consequently, the false positive rate will soar. Large numbers of people who in fact present no threat will languish in expensive hospitals that have few effective treatments to reduce their violence potential.44

42 CHARLES A. KIESLER & AMY E. SIBULKIN, MENTAL HOSPITALIZATION: MYTHS AND FACTS ABOUT A NATIONAL CRISIS 152-80 (1987) (concluding, based on empirical evidence, that “alternative care is more effective and less costly than mental hospitalization”). The claim is not that everyone can be treated more efficiently outside the hospital. Rather, it is that inpatient hospitalization is necessary for too few people with mental disorders to justify the expense and intrusiveness of maintaining an extensive system of inpatient treatment. See also Burton A. Weisbrod, A Guide to Benefit-Cost Analysis, as Seen Through a Controlled Experiment in Treating the Mentally Ill, 7 J. HEALTH POL‘Y & L. 808, 835-36 (1983) (analyzing data demonstrating that alternative community care is more effective at the same cost as traditional hospitalization, especially for people with schizophrenia and nonschizophrenic psychoses, but that community care may not be as cost-benefit justified in monetary terms for people with personality disorders).

43 See Mossman, supra note 14, at 789-90 (reporting that past behavior is the best predictor of future violence).

44 In the case of seriously crazy people, whose irrational practical reasoning leads to the intent to do harm, ameliorating the crazy thinking through proper medication should in fact reduce the risk of harmdoing. I know of no study that demonstrates
Preventive detention of an expanded class of allegedly nonresponsible, potentially violent people, should be rejected as a means to promote public safety. We cannot justly solve our social problems by “medicalizing” them and then granting the state otherwise unjustified powers to control the lives of citizens. It is no solution to the problems that impulsive, angry young men produce, for example, to redefine them as sufficiently “sick” to warrant preventive detention. Violence is sometimes the product of gross irrationality and all violence is ultimately perpetrated by individuals who form the intention to do so. But not all actual or future violence is the symptom of a disorder, and environmental conditions do make a difference in both the rate and type of violence that occurs. Medicalizing harmdoing locates the source of violence firmly in intrapersonal pathology, thus undermining responsibility and permitting society to avoid understanding and ameliorating social conditions that contribute to individual evil.

B. Excusing and Civilly Committing Blameless Harmdoers

If the justice system excuses a criminal offender for the same reason that renders the offender dangerous as well as blameless, then civil restraint is a possible response. Unlike most prison sentences, which are of limited duration, postacquittal civil restraint is in principle indefinite, terminating only if the conditions rendering the agent nonresponsible and potentially harmful abate. Consequently, an excused offender might be civilly detained for a period longer than the sentence that might have followed a criminal conviction. Current criminal law is not terribly forgiving, however, and, for example, few offenders are acquitted by reason of insanity. All citizens are expected to fly straight, even if it is difficult to do so for personal or social reasons. Furthermore, almost no excusing condition also renders the excused harmdoer potentially dangerous and thus a fit subject for postacquittal civil commitment. Indeed, legal insanity is the only doctrine that excuses from responsibility adults who are dangerous for precisely the reason—sufficient irrationality—that they are

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46 See Henry J. Steadman et al., Before and After Hinckley: Evaluating Insanity Defense Reform 27-28 (1993) (finding in a study of four states that the insanity plea was raised in just under 1% of all felony cases, the acquittal rates varied from 0.12 to 0.41 per 100 felony indictments, and the success of the plea as a percentage of pleas raised ranged from 7% to 46%, with an overall success rate of 23%).
excused. Yet legal insanity is a relatively narrow defense. Unless it were expanded to cover cases never before encompassed by the defense or unless new excuses were created, few offenders will be excused and preventively confined for potentially indefinite periods.

Substantial expansion of criminal excuses to permit the consequent expansion of civil commitment would be unsuccessful or unwise. The irrationality tests for insanity, such as the federal test or the first prong of the Model Penal Code, could be broadened simply by requiring less irrationality to excuse. Such a move has limits, however. A defendant reasonably in touch with reality, although also mentally abnormal, is arguably sufficiently rational to deserve punishment. Moreover, juries will not find a defendant legally insane unless the defendant is obviously and grossly out of touch with reality. Attitudes about culpability might soften, of course, but this does not seem likely in an era when society demands more, rather than less, criminal punishment.

Those dissatisfied with the alleged narrowness of irrationality tests have proposed and sometimes achieved the adoption of control tests. The apparently inexorable wave of adoptions halted abruptly in the wake

47 Compare a harmdoer excused because she was acting under duress. In virtually all cases, there is no reason to believe that the coercion applied in the current situation is a general feature of her life. Continued restraint of the harmdoer to prevent future occurrences of coercion is unnecessary.

Automatism might seem to be another doctrine that excuses defendants for the same reason that they are dangerous. Properly understood, however, many cases of automatism negate the act requirement of the prima facie case and thus are not excuses. In some jurisdictions, however, the defendant must plead legal insanity if automatism is produced by mental disease or defect. I believe that dissociative states, which often support automatism claims, should be treated as a potential excusing condition, rather than as denial of the act. Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. Rev. 1387, 1641-52 (1994) [hereinafter Morse, *Culpability and Control*]. Current law is often to the contrary. *See Model Penal Code § 2.01(2)(b)-(c) (1985)* (excluding a bodily movement during unconsciousness or sleep and conduct under hypnosis or posthypnotic suggestion from the definition of a voluntary act).

48 18 U.S.C.A. § 17(a) (West Supp. 1995) ("It is an affirmative defense . . . that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality of the wrongfulness of his acts.").

49 Model Penal Code § 4.01(1) (1985) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity . . . to appreciate the criminality [wrongfulness] of his conduct . . . .").

50 The most influential is, of course, the Model Penal Code's second prong. *Id.* ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity . . . to conform his conduct to the requirements of law.").
of Hinckley, however, and many jurisdictions deleted the control test. Some believe that this is unjust because it is unfair to blame and punish people who cannot control their conduct. I have argued elsewhere that most arguments about the meaning of loss of control or volitional dysfunction are confused and that most plausible control difficulties are better understood as rationality problems. Consequently, it is fair to omit a control test. Even if a control test were available and interpreted 


52 See, e.g., Robinson, supra note 1, at 703 n.35 (“[T]o exclude the possibility of exculpation on the ground of control dysfunction is to create the possibility for convicting blameless offenders.”). Professor Robinson also suggests that narrowing the insanity defense to exclude a control test may have exceeded the community’s expectations of justice. He bases this view on very interesting empirical research that he and psychologist John Darley performed. They presented subjects with vignettes about criminal conduct to test whether the criminal law was congruent with the community’s expectations of justice. The results from the part of the study that used a vignette of an allegedly mentally disordered agent indicated that the subjects thought a control test was appropriate. PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 128-39, 262-65 (1995).

I believe that the general “vignette” methodology has serious problems and fear that Robinson and Darley’s specific vignettes perhaps “stacked the deck” unfairly in favor of a control test. Even if their result is valid, however, its normative implication is unclear. The question for a desert theorist is whether some otherwise rational defendants are in fact unable to control their conduct. Many commentators deny this on conceptual and empirical grounds. If they are right—admittedly a big “if”—the following question arises: Should the public’s unjustified belief justify the adoption of an unjustifiable defense? Robinson and Darley are surely correct that the legitimacy of the criminal law is undermined if it is too inconsistent with the public’s sense of justice. Nevertheless, it is doubtful that the law should promulgate a rationally indefensible rule simply because the public demands it: The law must sometimes lead as well as follow. Finally, one wonders how much the public cares about a control test for legal insanity, compared to other possible inconsistencies. For example, suppose the law ignored the strong public sentiment that results matter and, following the lead of commentators such as Sanford Kadish, did not distinguish between attempted crimes and completed crimes on the theory that results do not affect the agent’s blameworthiness or dangerousness. See Sanford H. Kadish, Foreword to The Criminal Law and the Luck of the Draw, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994) (arguing that differential punishment for attempted crimes and completed crimes cannot be justified in terms of the crime preventive purposes of the criminal law or in terms of “any convincing principle of justice”). I conjecture that the public would care far more about this issue.

53 See Morse, Culpability and Control, supra note 47, at 1622-34 (setting forth in full the argument that most control difficulties are better understood as rationality problems); Stephen J. Morse, Excusing the Crazy: The Insanity Defense Reconsidered, 58 S. CAL. L. REV. 777, 813 (1985) [hereinafter Morse, Excusing the Crazy] (arguing that the law should treat as instances of irrationality many cases that are now con-
broadly, however, for the same reason given concerning the rationality test, it is unlikely that many harmdoers would or should be acquitted by reason of insanity and civilly committed. In sum, broadening the traditional insanity defense will not excuse large numbers of defendants and make civil commitment more generally available.\(^{54}\)

Proposals to apply legal insanity to hitherto excluded cases or to create new excuses for new syndromes often rest on a confusion and would be unwise. The confusion is the argument that simply because an abnormal condition was a cause in fact of harmful behavior, the harmdoer should be excused. This confuses causation with excuse. Causation is not itself an excuse: an abnormal condition warrants a genuine excuse only if it causes a genuine excusing condition, such as irrationality.\(^{55}\)

Most people suffering from the alleged new syndromes do not experience the gross loss of contact with reality that usually causes judges and juries to find offenders legally insane. Even if the new syndrome is a but-for cause of the harmdoing, the new syndrome-suffering harmdoer will seldom be sufficiently crazy to warrant an excuse. Punishment will be deserved and excusing will undermine the legitimacy of the criminal law. Furthermore, excusing deprives responsible agents of dignity and threatens other syndrome sufferers who have not committed harms with involuntary commitment.\(^{56}\)

Consider, for example, “battered woman syndrome.” Sufferers experience self-esteem difficulties, depression, feelings of helplessness, and oth-

\(^{54}\) Although I believe that the insanity defense should not be broadened, I also strongly oppose adoption of the “guilty but mentally ill” verdict. This verdict is unnecessary to provide treatment to prisoners fairly convicted. More important, it can operate as an unfair “compromise” in cases in which jurors actually believe the defendant is legally insane, but reject appropriate acquittal by reason of insanity because they fear that acquittal will lead to early release. See Morse, Excusing the Crazy, supra note 53, at 803-04 (setting forth in full the argument against the “guilty but mentally ill” verdict).

\(^{55}\) See Michael S. Moore, Causation and the Excuses, 73 CAL. L. REV. 1091, 1112-13 (1985) (demonstrating that if causation were itself an excuse, then under a determinist theory, all actions would be excused); Stephen J. Morse, Psychology, Determinism, and Legal Responsibility, in NEBRASKA SYMPOSIUM ON MOTIVATION: THE LAW AS A BEHAVIORAL INSTRUMENT 35, 48-50 (Gary B. Melton ed., 1986) (refuting the causal determinist theory that causation itself is an excuse).

er untoward mental and emotional states. Nonetheless, most are firmly in touch with reality. Although the great majority of battered women who raise a claim of self-defense attacked their batterers in a confrontational situation, among those syndrome sufferers who kill the batterer in a nonconfrontational situation that would not justify traditional self-defense, few will meet the criteria for legal insanity. Assume, however, that the insanity defense were widely expanded or a discrete “battered woman syndrome” excuse were created that would excuse any defendant who could demonstrate that all the syndrome criteria were met. Many such killers might then be excused, but would this result be desirable? Do we really want to claim that these people are not responsible agents? What coherent theory of excuse suggests that people firmly in touch with reality should be considered nonresponsible and what would become of our notions of responsibility if the law routinely excused in these and similar cases? Moreover, unlike duress defendants, the syndrome sufferer’s condition of excuse is precisely what makes her dangerous. Thus, postacquittal commitment of some type might be justifiable. For those who wish to expand preventive detention by broadening criminal law excuses, this would be a desirable result, but its price would be the denigration of a class of otherwise responsible agents.

Consider, next, “rotten social background” as an excuse. In addition to the conceptual and factual reasons to question whether those from a rotten social background generally are not responsible for their conduct,

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57 See Lenore E. Walker, The Battered Woman 31-35 (1979) (discussing common characteristics of battered women). For critiques of the battered woman syndrome defense, see Anne M. Coughlin, Excusing Women, 82 CAL. L. REV. 1 (1994) (arguing that by denying that women are capable of conforming to the law, the battered woman syndrome defense also denies that women have the same capacity for self-governance that is attributed to men); Robert F. Schopp et al., Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse, 1994 U. ILL. L. REV. 45, 58-59, 63-64 (doubting the validity of the syndrome and whether it is an accurate description of the victims of battering relationships and suggesting that learned helplessness is not consistent with the behavior of battered women who do kill); David L. Faigman, Note, The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent, 72 Va. L. REV. 619 (1986) (examining methodological flaws of battered woman syndrome research and analyzing weaknesses in Walker’s “cycle theory of violence”).


59 Some sufferers may be sufficiently irrational to warrant an excuse, but such cases are rare.

60 See Coughlin, supra note 57, at 70-87 (arguing that routine excusing of women who kill their batterers undesirably treats women as less than full moral agents).

61 See Morse, Culpability and Control, supra note 47, at 1652-54 (exploring the issue of a history of deprivation, emotional or otherwise, as an independent ground
the practical and civil liberties implications of concluding that they are not are vast. Because so many young male violent offenders come from a rotten social background, a large proportion of the type of people now in prison would have to be excused. They could not be released, however, because they pose an unacceptably high risk of future violence—especially to the already disadvantaged communities to which most would return—as a result of their rotten social background and because they have a history of recent harmdoing. Should we convert prisons to hospitals? What treatments would there be—how does one “treat” a rotten social background? When could we be reasonably certain that the “patients” no longer were dangerous? Simply to ask these questions suggests a dystopian regime that few would find inviting. If excused harmdoers were released from civil commitment earlier than they would be from prison, deterrence and preventive incapacitation would be weakened, and the public would lose confidence in the legitimacy of the criminal law. The proper response to the social injustice that produces “rotten social background” is to remedy the injustice, not to medicalize the problem and excuse responsible agents.

C. Sexual Predators: A Case Study

The history of mentally disordered sexual offender (“MDSO”) laws suggests that our society is particularly and deeply ambivalent about people who commit acts of sexual violence. On the one hand, we believe that they are wicked and deserve substantial penalties. On the other hand, many people cannot fathom “deviant” sexual behavior and so tend to think that something must be “wrong” with “sexual deviants.” People who commit acts of sexual violence apparently scare us more than people who commit other violent offenses, and attempts to restrain the former are routine. Legislatures have never adopted “mentally disordered arsonist” or “mentally abnormal armed robber” statutes to commit such offenders. But MDSO statutes have waxed and waned, depending on public fear and the currently fashionable location of violent sex offending on the bad/mad continuum.62

In recent years, MDSO legislation has been waxing once again, but with a twist. The newer commitment statutes, represented most famously for a control excuse). Among other reasons, most defendants with a “rotten social background” were rational when they offended and were not coerced to commit their crimes. And causation is not an excuse. See supra note 55.

by Washington’s Sexually Violent Predator statute, provide for commitment proceedings after a sexual offender has completed a prison term. The new commitments are thus not in lieu of criminal incarceration, but are allegedly genuine civil commitments. As such, they are applauded by those who wish to maintain the traditional dichotomy between civil and criminal confinement, especially if civil commitment is attended by substantial procedural protections. In contrast, I believe that the civil commitment of potential sexual predators or other allegedly abnormal potential offenders is unjustified and will do little to enhance public safety.

Nonresponsibility is usually a necessary condition of justifiable involuntary civil commitment under the standard account of civil and criminal confinement, but proponents of newer MDSO laws provide no coherent theory to suggest that sexual offenders as a class are not responsible. To begin, they were not incompetent to stand trial for the triggering offense, nor were they legally insane when they committed their most recent sexual offense. They were convicted and served their terms. Even bizarre, serial sexual murderers are seldom psychotic, and carefully plan and exe-

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64 Brooks, supra note 39, at 718-19 (discussing the civil/criminal dichotomy and noting that the Supreme Court has approved preventive detention under certain circumstances); Robinson, supra note 1, at 715 (supporting Washington’s Sexually Violent Predator statute, with its system of periodic review). But see 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 (1992) (criticizing Brooks’s general position, and specifically denying Brooks’s claim that it is better to preventively detain two individuals, one of whom we are confident will commit another crime of sexual violence in the future, rather than releasing them both).

Because the substantive criteria for most forms of commitment are so vague and broad, the procedural protections have less force than they otherwise might. See supra text accompanying notes 71-74.

65 It is possible, of course, that any abnormality arose after the conviction, but this is unlikely. I shall make the simplifying assumption that the offender’s mental state is the same at the time of the triggering conviction and of the commitment.

66 This is also true of traditional MDSO commitments that were triggered by a criminal conviction and imposed in lieu of sentence. Of course, a mere sex offense charge initiated some traditional MDSO commitments. There is no evidence, howev-
cute the crimes that satisfy their fantasies. 67 Nonpsychotic sex offenders are sufficiently responsible to deserve criminal punishment.

Perhaps, however, the degree of responsibility required to deserve criminal punishment for a sexual offense is consistent with the lack of responsibility that justifies civil commitment. Yet it seems perverse to claim that a person is responsible enough to deserve criminal punishment—the most serious, afflicting state intrusion on liberty—but is not responsible enough to avoid preventive confinement for potential harmdoing. 68 Indeed, it seems more logical to require less responsibility, and certainly no more, to justify preventive detention.

To avoid the difficulties the civil/criminal comparison produces, let us simply assume that civil preventive detention should require substantial nonresponsibility. Are Washington’s sexual predators responsible? In addition to the general arguments just addressed, consider the Washington statute’s definition of a sexually violent predator: a person qualifies if he “suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence.” 69 In turn, a “mental abnormality” is defined as follows:

“Mental abnormality” means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others. 70

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,71 but people with such disorders are seldom psychotic and rarely can avoid responsibility for their deeds. This is not a promising predicate for nonresponsibility.

“Mental abnormality” is not a recognized diagnostic term, a point recognized by friends and foes of the sexual predator law,72 but a statutory term does create a legal criterion and need not precisely track terms from other disciplines, such as psychiatry.73 The issue is whether the statutory definition makes sense on its own terms. The definition states that a person is abnormal if any biological or environmental variable affecting the person’s emotional or volitional capacities predisposes the person to engage in criminal sexual misconduct. But what else would predispose anyone to any conduct, sexual or otherwise, if not 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. For example, mental abnormality might be defined as “a congenital or acquired condition . . . which predisposes the person:” to write law review articles, to read law review articles, or to engage in any other activity. The content of abnormality in the definition is entirely parasitic on the requirement of “criminal sexual acts.” Nothing else in the definition differentiates the sexual predator from any other person. 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 automatically become “mentally normal”?74

Assuming, probably erroneously, that the law could cabin the vague term’s seemingly unconstrained reach, why any particular abnormality should excuse remains unexplained. As we have seen, simply because a mental abnormality may be causally related to other behavior does not mean that the behavior should be excused.75 Once again, this is to confuse causation and excuse. Causation, even by an “abnormal” variable, is not an excusing condition. Even if the potential predator suffers from

71 DSM-IV, supra note 34, at 629-73.
72 Brooks, supra note 39, at 730 (friend); La Fond, supra note 64, at 762-63 (foe).
73 Alexander Brooks cogently makes this point. Brooks, supra note 39, at 730.
74 In addition, the definition implies that some criminal sexual acts might not be a “menace,” but if not, why are they criminalized?
75 See supra note 55 and accompanying text.
some causal abnormality, it does not necessarily follow that the potential predator is not responsible.

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. Furthermore, the instrumental rationality of sexual predators is entirely intact. They may have strange or alarming desires, but they are perfectly capable of planning and executing 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, but what good reason is there to believe that sexually violent predators specially lack the ability to control their sexual conduct? What is there about sexual desires that makes them more "compelling" than other equally strong desires, such as the greed that may result in property crime? Why isn't the "Moneypile" as out of control as the person suffering from, say, "sexual sadism," a so-called paraphilia included in DSM-IV, which would surely satisfy Washington's abnormality requirement? Sexual urges, including "abnormal" sexual urges, are not irresistible forces that render human beings automatons. Most argument to the contrary is conceptually and empirically unsupported. People with sexual disorders or other abnormalities that predispose them to sexual violence may deserve our sympathy for the distress or disability their disorders may produce, but they equally deserve our condemnation if they act on their urges and hurt innocent victims to satisfy their desires.

In addition to being responsible agents, sexual predators do not pose a

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76 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 

77 See supra text accompanying notes 65-67; cf. 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).

78 See Morse's Mental Diagnostic Manual § 1.3 (on file in the author’s head).

79 See DSM-IV, supra note 34, at 530.

80 See, e.g., Brooks, supra note 39, at 730-32 (arguing that the Washington legislature chose to use the term "mental abnormality" in the Sexually Violent Predator statute to bring within the scope of that statute individuals with impaired volitional controls). Lack of control appears to be the dominant operative excusing condition that Brooks employs, but the empirical foundation is almost nonexistent and the theory is not conceptually supported.
sufficiently high risk of future harm, compared to other violent offenders, to warrant a distinctive form of preventive detention. It is difficult to obtain valid data about recidivism in general and about sexual offenses in particular, and little is known about sexual recidivism. The underreporting of sex offenses leads to practical difficulties in designing and conducting useful studies of sexual recidivism. Thus, all reported data must be considered with caution.

The most recent meta-analysis of sexual offender treatment studies discovered, on the basis of very few studies with disparate types of sex offenders, that the sexual recidivism rate measured by official reports was nineteen percent for treated offenders and twenty-seven percent for untreated offenders. Particular variables may increase the probability of sexual recidivism among certain types of offenders, but data suggesting different recidivism rates for different types of sexual offenders are limited and inconclusive. Moreover, most recidivism in general, even by violent offenders, is nonviolent. The inference from the best evidence is that sexual offenders are not more likely to recidivate than other violent offenders. Even long-term rates do not suggest that they are a class specially prone to violent recidivism. And finally, highly accurate prediction of future sexual recidivism, like the successful prediction of violence generally, is currently beyond our capability.

82 Gordon C.N. Hall, Sexual Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies, 63 J. CONSULTING & CLINICAL PSYCHOL. 802, 806 (1995). Nonsexual recidivism was not reported.
83 See Robert A. Prentky et al., Predictive Validity of Lifestyle Impulsivity for Rape, 22 CRIM. JUST. & BEHAV. 106 (1995) (reporting that high impulsivity had high predictive validity for sexual reoffending among previously convicted rapists, as well as for reoffending in general, as this group committed an even greater number of nonsexual offenses).
84 Furby et al., supra note 81, at 27 (reviewing the few studies that do organize their samples by category type and calling for more sophistication in identifying offender categories in recidivism research).
85 See Steven D. Gottfredson & Don M. Gottfredson, Behavioral Prediction and the Problem of Incapacitation, 32 CRIMINOLOGY 441, 468 (1994) (reporting that in their study of recidivism, subsequent arrest offenses were more likely to be trivial than serious by more than a three-to-one ratio).
86 See Scheingold et al., supra note 63, at 812 (reviewing recidivism statistics).
87 See Gordon C.N. Hall, Prediction of Sexual Aggression, 10 CLINICAL PSYCHOL. REV. 229, 239 (1990) (noting that some predictive techniques hold promise, but prediction of sexual aggression is still in an early stage of development, and concluding that (1) actuarial methods are superior to clinical prediction, and (2) past sexual aggression against adults is the best predictor of future sexual aggression against adults); Vernon L. Quinsey et al., Predicting Sexual Offenses, in ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS 114, 131-32 (Jacquelyn C. Campbell ed., 1995) (agreeing with the overall assessment of the Furby
It would be helpful to know if sexual offenders are less versatile than other offenders. Successful prediction that the next criminal act of most offenders would be of the same type as their previous offense is difficult, because most offenders, probably including sexual offenders, do not limit themselves to just one type of crime.\textsuperscript{88} If sexual predators are less versatile, however, it would help predict specifically sexual recidivism. After all, assuming that the general recidivism rate of sexual predators does not differ from that of other offenders, the law’s special concern about sexual predators must be sexual recidivism, rather than recidivism simpliciter. In the absence of more and better data about the versatility of sexual offenders, it is fair to assume that their crimes are not sufficiently limited to sexual offenses to increase predictive success substantially.

The Washington statute’s definition of “sexually violent offense” includes traditionally nonsexual offenses, such as kidnapping or burglary, if they are “sexually motivated.”\textsuperscript{89} Sexual motivation in turn is defined to mean that “one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.”\textsuperscript{90} Interpreted broadly enough to include, say, “unconscious” sexual gratification, this definition might permit commitment for any potential violent recidivism, whether or not it appeared directly linked to sexual violence. The statute is too vague and overbroad to permit accurate identification of those agents for whom it might be appropriate. Unnecessary, expensive, and potentially unconstitutional commitment is inevitable.

Finally, although sexual predators are responsible and not especially violent, one might try to justify preventive detention because they are specially treatable. Of course, there is no reason that treatment could not be provided in prison, as it can be for other physical and mental “abnormalities,” but there is anyway insufficient evidence to support this putative justification. Indeed, there is some reason to believe that there is a positive association between treatment for sexual offenders and the recidivism rate, although the association may be artificially produced.\textsuperscript{91} To the contrary, however, a more recent meta-analytic review of a small


\textsuperscript{90} Id. § 9.94A.030(32).

\textsuperscript{91} See Furby et al., supra note 81, at 24-25 (reporting in a review of sex offender recidivism research that eight of nine studies of untreated offenders show relatively low recidivism rates, while two-thirds of treated offender studies show relatively high recidivism rates, but noting that these results may in part derive from the likelihood that treated offenders were monitored more closely during these studies than untreated offenders, increasing the probability of being caught when reoffending).
number of studies found a positive, robust treatment effect for cognitive-behavioral and hormonal treatments, but the effect size was small and heterogeneous across the studies, and treatment was most effective with outpatient participants.\textsuperscript{92} Even this limited study provides little optimism about the positive cost-benefit outcome of inpatient treatment for the serious types of sexual predators that are allegedly appropriate candidates for potentially lifelong preventive detention.

There are surely some violent sexual offenders who recidivate with sexual violence reasonably narrowly defined. The evidence suggests, however, that sexual offenders are not a specially threatening or treatable class of violent offenders, and we cannot predict with reasonable accuracy which sexual offenders pose an unacceptably high risk for committing further serious sexual violence.

The civil commitment of sexual predators, who are responsible and are not especially likely to reoffend compared to other types of violent offenders, weakens rather than reinforces the traditional civil/criminal confinement distinction. The indefinite civil detention of responsible but dangerous sexual predators might provide some social safety at great expense,\textsuperscript{93} but only by undermining the liberty the law usually accords to responsible citizens. Medicalization of violent sexual predation is legal prestidigitation that wrongly justifies the unjustifiable.

If sexual predators and similar classes of potentially dangerous people are not civilly committable according to the traditional justifications and if it would be unjustifiable and undesirable to expand the criteria for civil commitment to include them, what should be done to protect society from the danger some of these offenders undeniably pose? It is to this question that this Paper now turns.

\textbf{IV. CRIMINAL PREVENTIVE DETENTION OF DANGEROUS BUT RESPONSIBLE AGENTS}

If expanding civil commitment by broadening the criteria of nonrespon-sibility is theoretically unjustifiable and if current predictive and treatment deficiencies render civil commitment inefficient, the problem dangerous people present persists. Does the criminal law offer acceptable alternatives that would enhance safety without blurring the civil/criminal distinction and without imposing disproportionate punishment?

Imposing long sentences for large numbers of offenders is a currently favored means to achieve both justice and indirect preventive detention

\textsuperscript{92} Hall, \textit{supra} note 82, at 805-08.

\textsuperscript{93} The sexual predator unit in Washington can preventively detain no more than 36 men. La Fond, \textit{supra} note 63, at 701. Given the recidivism rates of sex offenders, very little public safety is gained by this tiny program. To expand it considerably would be extremely expensive and would risk increasing the number of false positive commitments.
through incapacitation. Can the proportionality of such sentences be justified, however? The argument for longer terms is that too many serious offenders are receiving or actually serving disproportionately short terms, which are far milder than they deserve. For example, if sexual predators receive insufficient sentences, civil commitment appears needed to protect the public. If they served deserved long terms, however, the criminal justice system would not be punishing blameless offenders and civil commitment would not be necessary.

The first objection to imposing allegedly deserved longer sentences is that the “argument” about desert is simply a conclusion, because retributive theory furnishes no adequate guide to the proportionate length of a sentence. Of course, no pure consequential theory furnishes a remotely precise guide either. The problem is unavoidable in setting all criminal penalties because virtually everyone accepts that retribution is a necessary, although not sufficient, justification for punishment. Even if there is no consensually accepted cardinal scale, however, legislatures can sensi-

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94 The average prison time per violent crime tripled between 1975 and 1989. Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America 17 (1995). Indeed, lengthier incarceration of greater numbers of offenders has resulted in almost a tripling of the prison population in the last fifteen years. Id. at 40. For a history of the recent dominance of the now regnant incapacitative rationale for confinement, see Zimring & Hawkins, supra note 68, at 3-17 (arguing that incapacitative theory is not empirically supported and became popular through a passive process of elimination rather than after active academic and political debate).

95 There is no question about the current constitutionality of almost any term of years a legislature sees fit to impose for virtually any offense. Even the most draconian terms of years appear to be within the legislative prerogative. See Harmelin v. Michigan, 501 U.S. 957, 994-96 (1991) (holding that a mandatory life sentence without parole for the possession of 672 grams of cocaine may be cruel, but it is not unusual under the Eighth Amendment because legislatures have adopted such severe, mandatory penalties in various forms throughout our nation’s history).

96 What counts as a serious offense is debatable. Paul Robinson and I, among many others, believe that many offenses are punishable by terms of years that are disproportionate because the notion of desert that supports them is too harsh or because their length reflects a pure preventive detention component that is unrelated to desert for the current offense. See Robinson, supra note 1, at 714-16 (arguing that a purge of dangerousness considerations from criminal sentencing would significantly enhance the moral credibility of that system); see also Tonry, supra note 94, at 19-24, 196-201 (noting the disproportionality of sentencing in the United States, arguing that such harsh sentencing has had little effect on crime rates, and advocating a reversal in the trend of increases in penalties).

97 See, e.g., David Dolinko, Three Mistakes of Retributivism, 9 UCLA L. Rev. 1623, 1636-42 (1992) (arguing that retributivism cannot proscribe what punishment any particular crime deserves, what the penalty for the least serious offense in a ranked list of offenses should be, and by how much to increase the penalty for each successive crime on such a list).
bly rank offenses according to their perceived seriousness\textsuperscript{98} and can try with argument and empathy to apportion punishments accordingly.\textsuperscript{99} If legislatures engage in this process carefully and upon serious reflection, one cannot justify the resulting punishments as “really” proportionate because they are consistent with some metaphysical tablet in the sky, but they will satisfy reasonable expectations for justice in a liberal democracy. Legislatures often respond unjustifiably harshly to “the crime problem,” but this is not a necessary outcome of a retributive justification for punishment. No extant theory can conclusively demonstrate logically or empirically that any particular term of years is disproportionate for any crime. Nonetheless, justifiable proportionality can be achieved.

Another objection to imposing lengthy sentences on serious offenders is that many of the potentially dangerous convicts are young first offenders. Lengthy sentences for them are inappropriate, it is urged, because youth and lack of a serious prior record diminish their culpability. Consequently, younger criminals should be put on probation or given shorter sentences. But giving youthful offenders comparatively brief sentences ensures their release during the stage of their lives in which they are most vulnerable to reoffending in general and violent reoffending in particular.\textsuperscript{100} This is an undesirable outcome for those committed to using lengthier deserved sentences to accomplish preventive restraint.


\textsuperscript{100} See generally Daniel S. Nagin & David P. Farrington, The Onset and Persistence of Offending, 30 Criminology 501 (1992) (finding an inverse relationship between the age of onset of criminal behavior and persistence of offending attributable to time-stable individual differences); Daniel S. Nagin & David P. Farrington, The Stability of Criminal Potential from Childhood to Adulthood, 30 Criminology 235 (1992) (concluding, based on a long panel data set, that the positive association between past and future criminal behavior is attributable largely to stable, unmeasured individual differences); Daniel S. Nagin & Raymond Paternoster, On the Relationship of Past to Future Participation in Delinquency, 29 Criminology 163 (1991) (concluding based on a short panel data set that the principal explanation for the positive relationship between past and future delinquency is state dependence, the effect of past criminal experience reducing inhibitions against engaging in future delinquent acts); see also Christy A. Visher et al., Predicting the Recidivism of Serious Youthful Offenders Using Survival Models, 29 Criminology 329 (1991) (identifying variables associated with recidivism and assigning “statistically reasonable” risk functions to individuals).
The most general response is to rethink the influence of age on culpability. The Supreme Court has upheld the constitutionality of imposing the death penalty on convicts who committed their capital offenses when they were sixteen or seventeen years old.\footnote{See Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that the imposition of capital punishment in such a case is not violative of the Eighth Amendment).} Although I believe that this holding is vastly too harsh, it does suggest that waving larger numbers of older, serious juvenile offenders into the adult criminal justice system and then imposing on them substantial terms of years would be morally and legally acceptable to the public,\footnote{Indeed, this is already happening. Between 1988 and 1992, the number of juvenile cases of crimes against the person judicially waved to criminal court doubled.} and it surely would be constitutional.

There is no systematic empirical evidence comparing adult and adolescent decisionmaking concerning criminal conduct.\footnote{See Elizabeth S. Scott et al., Evaluating Adolescent Decision Making in Legal Contexts, 19 Law & Hum. Behav. 221, 238 (1995) (noting only a single comparative study of this type).} Some evidence about adolescent decisionmaking suggests, however, that adolescents may be more peer oriented, steeper time discounters, and more risk-preferring than adults,\footnote{Id. at 229-35 (reviewing research comparing conformity and compliance in relation to peers and parents, attitudes toward risk, and temporal perspectives of adolescents and adults).} but this does not logically imply that adolescents as a class are less responsible than adults. Even if such differences are robust, they may not diminish responsibility according to some normative models. For those who adopt such an unforgiving normative view of responsibility, lengthy terms, especially for older adolescents, would arguably be deserved and would keep youthful violent offenders incarcerated beyond the most vulnerable stage for reoffending. Some released later in life would nonetheless commit violent offenses, but violence is mostly a young person’s activity, and these cases would be comparatively rare.\footnote{For those who believe—as I do not—that an offender’s prior record should properly be a factor in the culpability assessment for the present offense, disclosure of the juvenile record would also result in lengthier sentences because many younger offenders have records of serious offenses committed while they were juveniles. Among those who believe that prior record is relevant, many would deny that a juvenile record qualifies, because they believe that juveniles are not fully responsible for their deeds.}

Although imposing longer terms on more offenders might not be unfair and would increase preventive restraint, it presents enormous problems. The ability to predict violent recidivism is limited, many of those incarcerated would not reoffend, and the vast majority of recidivism will not be serious, violent crime.\footnote{See Gottfredson & Gottfredson, supra note 85, at 468 (reporting that 22.4% of} Criminals released after long sentences will
have few skills and fewer prospects. Lives will be wasted. Maximum security institutions are ghastly places. The burden of such a scheme will fall largely on poor and minority criminals. Nonetheless, if one thinks that all offenders—even young offenders—deserve lengthy sentences, criminal punishment’s incapacitative effect would have the additional benefit of providing preventive detention.

Another influential proposal for taking desert into account and permitting preventive restraint within the criminal justice system is based on a mixed retributive and consequential theory of punishment.\textsuperscript{107} According to this view, because retributive theory furnishes no precise guide for proportionate sentences, it can only suggest a proportionate range for each crime, a range that in principle can be very broad. Any sentence within that range will be proportionate. The sentencing authority can then take dangerousness into account by setting the penalty within this range. More dangerous offenders will receive sentences tending towards the high end of the range, which can be very high, and vice versa. Many are satisfied that this proposal properly balances justice to the offender and social safety, but I am less convinced.\textsuperscript{108}

The proposal is too skeptical about the possibility of proportionate justice and suffers from the usual predictive difficulties. Although I agree that no theory furnishes a precise guide to highly specific sentences, permitting wide ranges for the same crime in effect abandons the quest for proportion and equality. Moreover, wide ranges will permit both unduly harsh punishment and substantially disparate sentences for the same crime based on predictions of future dangerousness that are likely to be quite inaccurate, even for seemingly high risk offenders. And when in doubt, the most conservative course will be to predict danger and incarcerate longer. After all, the offender allegedly cannot justifiably complain that a longer sentence within the “proportionate” range is disproportionate. In sum, many offenders will languish in prison for far longer than desert requires—the bottom of the proportionate range is not too retributively lenient by definition—and far longer than social safety requires as well. Of course, if the range is narrowed substantially, the pro-

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posal is much less objectionable, but then the sentencing scheme has less flexibility to provide preventive restraint.

The supposed need for preventive detention has also produced the classic criminal justice responses of habitual offender laws and selective incapacitation of alleged “career criminals.”¹⁰⁹ In both cases, convicted criminals with prior records are punished more harshly than the average offender convicted for the same offense. A debate rages about the fairness and efficiency of either scheme.¹¹⁰ Because my preferred theory of punishment suggests that we should punish for acts, not for character or disposition, and that offenders convicted of the same crime should be treated alike, I would not adopt either scheme as a method of criminal punishment.¹¹¹

Although this is not the appropriate forum for a defense of act retributivism, a brief explanation may be helpful.¹¹² When an offender has served the sentence for a crime, the “slate is wiped clean.”¹¹³ The next

¹⁰⁹ See, e.g., Rummel v. Estelle, 445 U.S. 263, 284-85 (1980) (holding that issues of the mechanics of recidivist statutes and the degree of punishment under them are within the discretion of the punishing jurisdiction); see also Harmelin v. Michigan, 501 U.S. 957, 994-96 (1991) (holding that a mandatory life sentence for the possession of 650 grams or more of certain controlled substances is not violative of the Eighth Amendment).

¹¹⁰ See, e.g., ZIMRING & HAWKINS, supra note 68, at 3-17 (exploring the rise in incapacitation as today’s principal justification for imprisonment in America). See generally Leonard J. Long, Rethinking Selective Incapacitation: More At Stake Than Controlling Violent Crime, 62 UMKC L. REV. 107 (1993) (arguing that general and selective incapacitation are not legitimate exercises of governmental authority in a reasonably affluent, democratic society); Edward P. Richards, The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals, 16 HASTINGS CONST. L.Q. 329 (1989) (arguing that courts and legislatures should engage in explicit risk analysis with respect to potentially dangerous people, balancing the risk of harm against the person’s liberty interest); David Wood, Dangerous Offenders, and the Morality of Protective Sentencing, 1988 CRIM. L. REV. 424 (arguing that criminal protective sentencing is unjustifiable, but that the civil detention of people identified as dangerous may be justified under certain conditions); Markus D. Dubber, Note, The Unprincipled Punishment of Repeat Offenders: A Critique of California’s Habitual Criminal Statute, 43 STAN. L. REV. 193 (1990) (arguing that California’s Habitual Criminal statute is inconsistent with the punishment theories of retribution, rehabilitation, deterrence, and incapacitation, and urging California courts to interpret the statute as narrowly as possible).

¹¹¹ See Morse, supra note 108, at 1494-1502, 1505-07.

¹¹² Those adamantly opposed to act retributivism as a necessary and sufficient or as a necessary and limiting justification for punishment will not be convinced, but perhaps pause may be given.

¹¹³ Charging practices, plea bargaining, and other vagaries of the criminal justice system undermine this claim, but they also undermine more consequential claims about appropriate incapacitation and deterrence. The argument proves too much. It is plausible but ultimately unproductive to reject all arguments derived from the vari-
offense of a previous offender is no worse per se, the victim is no more harmed, than if the offense were the offender's first. The multiple offender demonstrates greater antisocial tendencies, is at greater risk for reoffending, and cumulatively causes society more harm than an offender who offends only once or a few times, but having antisocial tendencies is not a punishable offense in the United States. The multiple offender will also spend a great deal more aggregate time incarcerated, even in the absence of habitual offender enhancement or selective incapacitation. These sentencing schemes impose additional incarceration because we believe that the defendant is dangerous and should be preventively detained, not because the defendant deserves more punishment for the instant offense. The argument that the multiple offender's latest crime is more blameworthy than the same crime committed by others or than his previous crimes is a salve to the residual retributivist conscience that seems to lurk in most people. It is simply unconvincing.

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.\textsuperscript{114} This claim initially appears attractive because it seems to justify preventive detention within the criminal justice system. Upon further reflection, however, the claim has a moral drawback, and it again blurs the civil/criminal distinction.

The moral drawback is that 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 box 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 in-

Carceration is for dangerousness, not for culpability, and thus the addition is not punishment. It is pure preventive detention imposed under the guise of criminal punishment.

Standard sentences for responsible multiple offenders, followed by civil commitment, would solve the problem only superficially. This scheme cleanly maintains the civil/criminal distinction, but as the discussions of sexual predator commitments and predictive inaccuracy disclosed, such commitments are unjustified. Again, one could try to claim that the multiple offender is on notice that civil commitment may follow imprisonment. By reoffending the offender therefore waives the usual right to be committed only if (1) the offender is dangerous and nonresponsible, and (2) the prediction technology is highly accurate. But most of these offenders are responsible and predictive accuracy is poor. If it is wrong for the state either to civilly commit responsible agents or to impose preventive detention in the absence of predictive accuracy, it should not do so, even if the agent in question has assumed the risk. Civil commitment of the multiple offender who “consents” to unjust preventive detention is itself unjust.

Finally, habitual offender laws, including “three strikes and you’re out,” are unlikely to have the desired effect. Given the relatively low probability of arrest and successful prosecution for the most serious crimes, save homicide, most offenders convicted of a third serious offense will be at or past the age at which the probability of committing further serious crimes decreases rapidly. Thus, we will spend huge sums of money keeping criminals in prison for draconian terms at just the time in their lives when the risk they pose finally diminishes. Moreover, these laws can have unintended, deleterious consequences, such as clogging the

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115 Paul Robinson, who prefers this solution, raises the compelling point that civil commitment has the attractive feature of periodic review, whereas lengthy sentences do not. Thus, civil commitment may protect the liberty of dangerous offenders more than criminal incarceration. Robinson, supra note 1, at 715. This is true under current legal arrangements, but if offenders deserve lengthy sentences, see supra text accompanying notes 94-96, the absence of periodic review does not endanger their liberty. Furthermore, there is nothing to prevent a state from allowing periodic review of enhanced sentences, although doing so blurs the civil/criminal distinction by reintroducing the risk of future violent conduct as a criterion for determining the proper length of a sentence.

116 See supra Part III.C.

117 See supra Part III.A.

118 James Q. Wilson, What to Do About Crime, COMMENTARY, Sept. 1994, at 25, 28 (noting that the peak ages of criminality are between 16 and 18).

119 See United States v. Jackson, 835 F.2d 1195, 1199 (7th Cir. 1987) (Posner, J., concurring) (arguing that life imprisonment for a 35 year old four-time armed robber is too harsh because the likelihood that he would commit armed robbery if released at age 55 after a proposed 20 year sentence is very low).
Perhaps habitual offender laws would be worth the cost if they had a sufficiently strong deterrent effect, but this is doubtful. Furthermore, better alternatives are available. Repeat offenders are just the type of impulsive, antisocial agents for whom deterrence has the least effect. If they were given and served reasonably lengthy, but not unduly harsh, sentences for their previous offenses and for their "third strike" offense, they would spend more of their vulnerable years behind bars and equivalent deterrence would be accomplished. They also would not have to be expensively and unnecessarily incarcerated for life.

Before concluding the discussion of enhanced criminal detention, assessment of the justice of this alternative requires brief mention of the immense number of social interventions that might reduce the dangerous propensities of the populace and, consequently, that might diminish the need for either criminal or civil incarceration. Gun control and reducing poverty and inequality are favorite candidates, as are programs that discourage early childbearing and encourage the formation and maintenance of two-parent families. Each of these solutions has defenders and detractors, but the purpose of noting them is not to advocate particular interventions. Rather, it is to highlight again that seeking social safety by preventive detention in either the criminal or civil system may cause society to ignore potentially less intrusive means of preventing harm. Ultimately, even if nothing is done, the responsible offender still deserves proportionate punishment, but many of us would feel far more comfortable imposing the deserved punishment if society had done more to prevent offenses from occurring at all.

V. Pure Preventive Detention of Responsible and Blameless, but Dangerous Agents

To safeguard the liberty of potential offenders, how much risk must we impose on potential, innocent victims? Should we confine potential offenders on the ground that their liberty to behave as they wish simply does not outweigh our liberty to be safe from the harm they will produce? Have we reached a stage of sufficient social peril and sufficient predictive accuracy to abandon the charade of nonresponsibility and to adopt civil preventive detention of responsible, currently blameless people purely on

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120 Fox Butterfield, ‘3 Strikes’ Law in California Is Clogging Courts and Jails, N.Y. Times, Mar. 23, 1995, at A1, B11 (reporting that whereas 94% of felony cases in California used to be handled by plea bargain, after passage of that state’s habitual offender statute, only 14% of second-strike cases and 6% of third-strike cases were disposed of by plea bargain).

121 See Bruce Porter, Terror on an Eight-Hour Shift, N.Y. Times, Nov. 26, 1995, § 6 (Magazine), at 42, 44 (describing the increasing levels of rage and violence in prisons and attributing the increase to the lengthier terms prisoners now must serve).
the ground that they are dangerous? For many people, this is the hardest question, the practice most difficult to justify.

Pure preventive detention does not satisfy the criteria for traditional civil or criminal confinement—the person posing sufficient risk for sufficient harmdoing is responsible and blameless—and thus it must be seen as an extended form of civil commitment. As such, pure preventive detention should be imposed only if there is no reasonable, less intrusive alternative to prevent harm and the conditions of confinement are nonpunitive. I recognize that these are contestable conditions that would require difficult line-drawing, but let us imagine an easy case: In the absence of detention, to prevent harmdoing would require a police officer always at the potential harmdoer's elbow. As this is impractical, imagine that the detainee is confined in a decent, cheap, hotel-like place, with reasonable food, exercise, medical care, conjugal visits, and the like. Assume that strict procedural requirements govern pure preventive detention proceedings and that detainees are granted the right to frequent periodic review to determine if they continue to pose a danger.

If all these constraints on pure preventive detention obtain, why shouldn't the law confine the potentially dangerous but responsible agent? It is hard to imagine a convincing liberty argument for allowing the potential harmdoer freedom to inflict great harm if the risk to others is sufficiently high and predictable. Under such conditions, the commitment would be cost-benefit justified and the potentially dangerous person's liberty right would be trumped. 122

Short of absolute certainty, there will always be false positives. Nevertheless, if the rate of such errors were low enough, one can imagine agreeing behind the veil of ignorance to a scheme that imposes a small risk of wrongful preventive detention, but thereby produces a great increase in safety for all. This is an unsettling conclusion—it would be comforting to believe that the right of responsible adults to pursue their projects would be absolute unless they violated the criminal law—but I

122 Alex Brooks, Michael Corrado, and Ferdinand Schoeman agree. See Brooks, supra note 39, at 752-54 (arguing that such commitment is not only cost-benefit justified, but also morally acceptable); Corrado, supra note 1 (manuscript at 11, 14) (balancing the lost freedom of future victims if the state does not detain a potentially dangerous person with that person's loss of liberty if detained); Schoeman, supra note 1, at 27, 32 (analogizing preventive detention to the cost-benefit decision of quarantine situations).

Corrado and Schoeman also suggest that in appropriate cases the state owes compensation to people purely preventively detained. See Corrado, supra note 1, at 10, 25-28 (describing compensation as a means to protect the detainee's right to his lost freedom and as a check upon state action); Schoeman, supra note 1, at 31 (identifying compensation as an issue to be considered in a civil preventive detention system). But see Davis, supra note 23, at 95-96 & n.27 (arguing that such incarceration is criminal, not civil, and that the state does not owe the detainee compensation). I test this suggestion in Part VI, infra.
believe that it is unavoidable. Although, once again, predictability is not inconsistent with responsibility, pure preventive detention threatens to dehumanize the detainee, treating him as if he were simply a dangerous animal, what Michael Corrado terms a “wild beast of prey,” rather than as an autonomous moral agent. Nevertheless, if a small risk of wrongful conviction is permissible in the criminal justice system, as it surely is, then a similar risk should be permissible in a pure preventive detention system that is appropriately limited in scope and administered with strict procedural protections.

Pure preventive civil detention is justifiable in principle, but should a state adopt it? Assuming that the risk criterion can be sufficiently defined to avoid vagueness concerns and that only the risk of serious violence warrants the practice, what level of certainty short of absolute certainty should be required to justify pure preventive detention, and do we possess the technology to make such predictions accurately?

The ultimate answers depend on moral and political theories that are always contestable and the available empirical evidence. Our society’s strong presumption in favor of liberty suggests, however, that pure preventive detention is not warranted, because even the lowest possible level of certainty about serious violence that might warrant pure preventive detention is beyond our ability. The false positive rate would be astronomical, leading to the costly detention of large numbers of people who would not cause harm and whose potential to pursue their own projects and to make a positive contribution to society would be aborted. Even if pure preventive detention were limited to the most serious offenses and to offenders from the highest risk groups who had actually committed sufficiently serious crimes and who were currently uttering threats, predictive accuracy about such low base-rate offenses would increase, but only slightly, as most such offenders do not recidivate or recidivate non-seriously. Some reoffend repeatedly and seriously, but we cannot accurately identify that group in advance. The false positive rate would still be far too high, leading to inevitable, unjust overcommitment. And, once again, pure preventive detention will be a safety valve that enables society to devote less attention and fewer resources to alternative means of reducing violence.

123 Corrado, supra note 1, at 1 n.1.
124 An equally clear and unsettling related conclusion is that potentially dangerous people need not cause or threaten harm to justify pure preventive detention. Detaining people who have not given any direct indication that they might behave dangerously would be justified if the predictive technology were accurate enough.
125 See Wilson, supra note 106, at 492 (noting that criminologists have identified characteristics of the group of youths who will commit serious crimes, but acknowledging that predictive technology is too imprecise to identify the particular members of this group).
VI. A MODEST PROPOSAL

Consider the following purely heuristic proposal to extend the crime of reckless endangerment. Here are the elements of the new crime: (1) prior conviction of at least one serious crime of violence, or at least one prior occurrence of involuntary civil commitment for actual serious violent conduct; (2) conscious awareness of an extremely high risk that the agent will in the immediate future cause substantial unjustified harm; and (3) failure to commit oneself voluntarily or to take other reasonably effective steps to avoid causing future harm. The crime is complete when the agent recklessly fails to take the steps reasonably necessary to avoid harmdoing. The term of imprisonment should be relatively short, but at the end of each term, a still-dangerous convict would be exposed to criminal liability again unless he or she took the appropriate steps.

The justification for criminalization is this: No one has a right to harm others unjustifiably and people who are consciously aware of an extremely high risk that they will do so have a moral duty to avoid unjustifiable harmdoing by taking preventive action. Like Odysseus, they must tie themselves to the mast. Omitting to take appropriate action under the circumstances is a culpable moral failure that imperils others and fairly justifies criminalization and punishment. The requirement of prior

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126 Cf. Model Penal Code § 211.2 (1985) (Recklessly Endangering Another Person). I characterize the proposal as "purely heuristic" because it would be wildly intrusive and a nightmare to administer, and I would therefore not adopt it. It raises theoretically interesting issues, however, and provides an interesting comparison to schemes of civil preventive detention that try to accomplish similar goals of protecting society from potential harmdoers.

127 I have used this hypothetical in class for years, but learned after writing this Part that Michael Davis recently and independently has made a very similar proposal. Professor Davis's paper has since been published and should be compared with the present Part. See Davis, supra note 23. In brief, rather than treating the proposal as a heuristic device, Davis argues that criminal punishment is genuinely warranted and, indeed, is a proper response to such cases. He argues that Schoeman's justification for pure civil detention fails, even if all the technological and procedural problems were solved. As the last Part makes clear, I tend to agree with Schoeman. As the present Part suggests, however, expanding reckless endangerment is not a theoretically unthinkable alternative to pure preventive detention, although enforcing it would be nightmarish.

128 Consider the following further hypothetical. Imagine that an agent is consciously aware of a substantial risk that he has a deadly, highly communicable disease that is transmitted by normal social interaction. Transmission can be prevented, however, by simple means that allow the agent safely to engage in normal social interaction. Suppose he fails to take those steps and communicates the disease with conscious awareness of a substantial risk that he would communicate it. The victim dies. Is a conviction for involuntary manslaughter or murder unjustifiable? If not, is it unthinkable to consider the omission to take the necessary steps to prevent communication sufficient to warrant conviction and punishment for reckless endangerment?
conviction or involuntary commitment for dangerous behavior protects a defendant with no prior record from possibly unfair convictions and helps the prosecution to demonstrate that the defendant was aware of the risk. The requirement of conscious awareness of an extremely high risk imposes liability only on subjectively culpable agents and only when the risk of harm is extraordinarily high.\textsuperscript{129} Without doubt, violations will often not come to the attention of the criminal justice system, and, also without doubt, proof beyond a reasonable doubt of the requisite mental state and omission might be difficult in many cases.\textsuperscript{130} Nonetheless, in clear cases criminal conviction and incarceration for a short period would be deserved.\textsuperscript{131}

Let us see whether the elements and the justification apply to the con and the patient, whose stories introduced this Paper. The con intends to commit more armed robbery and says that he will kill if necessary, although he may do neither. Until he acts, his purpose to rob and kill is to some degree conditional and may be renounced.\textsuperscript{132} At the least, however, he is consciously aware of a risk that he will. It then becomes his duty voluntarily to commit himself, presumably in a nonpunitive but secure institution, or to take other reasonable steps that would prevent him from robbing and killing, such as placing himself in a halfway house under intensive supervision. Why is it unfair under threat of punishment to require him to bind himself to the mast, to take steps to avoid harming? If he takes no steps, shouldn’t he be found culpable for his failure and incarcerated?

The patient, too, knows that he is at great risk for relapse if he decides to discontinue taking his medication and that violent conduct is highly likely to ensue. Thus, if the patient decides to stop taking his medication for rational reasons, such as the dislike of relatively minor but inconve-

\textsuperscript{129} Cf. Model Penal Code § 2.02(7) (1985) (the Code’s treatment of “willful blindness”). The section provides that knowledge of a particular fact is satisfied by knowledge of a high probability that the fact exists, unless the defendant actually believes that it does not exist.

\textsuperscript{130} In part this will be true because the state will have to prove that harm was substantially likely, a predictive enterprise subject to all the difficulties this Paper has already discussed. Still, the defendant’s awareness that he or she was likely to cause harm—which also must be proved—surely increases the predictability of the harm.

\textsuperscript{131} Perhaps, contrary to my expectation, such a scheme would be widely (over)used.

nient side effects, he is then consciously aware of an unjustifiable risk that he will cause harm while crazy. What right does the patient have to prefer avoiding minor side effects to avoiding harming others? Assuming that the reason for the omission was not crazy, the patient is culpable and would be imprisoned.

The extended crime of reckless endangerment looks like civil detention for dangerous propensities, but there is a distinction. Although the criminal law is far more forgiving of morally culpable omissions than culpable actions, in appropriate cases the criminal law does impose duties of affirmative action to prevent harm. The proposal suggests that the circumstances envisioned are appropriate cases for punishment because dangerous agents have no right to be at liberty to inflict harm without trying preventive measures if they are quite sure they will cause harm without such measures. If they fail to take steps to avert danger, they are culpable and deserve punishment. Nor does the crime punish simply for thoughts or propensities. Like other crimes of omission, it punishes for culpable failure to act. 133 As a proposal, it seems far more compelling than avoiding famine by selling the children of the poor as food to feed the rich. 134

**Conclusion**

The moral of the story can be briefly repeated. The legitimacy of both the criminal and civil confinement systems depends on maintaining the distinction between them. Criminal sanctions should be imposed only on culpable wrongdoers, and civil confinement should be reserved for nonresponsible agents who are dangerous and for whom confinement is cost-benefit justified. Various proposals to expand preventive detention threaten to excuse blameworthy defendants and preventively to detain large numbers of responsible people who will in fact pose no danger. Desirable conceptions of responsibility will be undermined. To avoid this result, indirect preventive detention accomplished by imposing arguably deserved, lengthy sentences on convicted criminals would work, and would help maintain a clear distinction between civil and criminal confinement, but would risk imposing punishments that might be too harsh. Moreover, readily available preventive detention may cause society to ignore other, potentially fairer and more effective interventions to prevent violence. Pure preventive detention would also be unfair because sub-

133 Kevin Reitz suggested in a personal communication that this proposal is more intrusive than the other preventive detention schemes that I reject because it requires the potentially dangerous person to turn himself in. The proposal is intrusive and I would not in fact adopt it. But the offender’s culpability justifies the intrusion and in most cases the potential harmer can probably avoid both prison and preventive detention by seeking less intrusive means to prevent harming.

stantial overcommitment would result. In sum, preventive detention will be unfair, expensive, and largely ineffective. Our society can devise better means to protect us.