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PUNISHMENT AND THE WILD BEAST OF PREY: THE PROBLEM OF PREVENTIVE DETENTION

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> Of course, the moral education theory says nothing about whether the execution of criminals might be justified not as punishment but as a method of "legitimate elimination" of criminals who are judged to have lost all of their essential humanity, making them wild beasts of prey on a community that must, to survive, destroy them. Whether such a justification of criminal execution can be morally tolerable is something I do not want to explore here.[1]

I. INTRODUCTION

Recent work on the philosophy of punishment is deeply unsatisfying. While the criminal law expands to include forfeitures where there has been no conviction and detention based on dangerousness, philosophers and legal commentators continue on as if the problem of punishment were some hothouse specimen, ignoring the jungle outside the window. In a world where the perception of dangerousness has led to dangerous remedies, philosophers either turn a blind eye, insisting that the state can't restrict freedom except for a crime committed—in spite of the fact that the state does, and in some cases must, restrict freedom where there has been no crime at all—or else they defer that problem to another time.

We cannot defer the issue any longer. Too much is happening. The Supreme Court has said that the limitations upon the state's authority to punish do not apply to detention for dangerousness because it is not punishment but regulation.[2] What does that do to our motto that no one should be punished except for a crime? It passes it by and leaves us wondering what the limitations on regulation are, and whether there is now any point in talking about the limitations on

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[1] Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 223 (1984).

[2] United States v. Salerno, 481 U.S. 739, 747 (1987). *See infra* notes 8-22 and accompanying text.

punishment. In a more recent case, however, the Court did seem to pull back,[3] holding that when someone was acquitted by reason of insanity, the state could not continue to detain him after he regained his sanity, even if he remained dangerous.[4] This seems to mean that detention on grounds of dangerousness was not permissible after all. But as Justice O'Connor made clear in her concurring opinion, the states may eliminate the insanity defense altogether,[5] which means that people innocent of crimes because of insanity would be convicted and imprisoned nevertheless—a good functional substitute for detention on grounds of dangerousness.[6]

These issues have come to the Court's attention because legislatures, under the press of popular outrage, have acted to put dangerous people away by restricting the insanity defense, by denying bail on grounds of dangerousness, and by passing sex offender and habitual criminal statutes that punish out of proportion to the crime. These are important things happening in the criminal law, but we do not have any clear sense of how to talk about them. Most of our thought has been given to punishment, but punishment and detention on grounds of dangerousness are two different things. Thus, the fact that no one may be punished unless they have committed a crime is no reason, by itself, to think that pure preventive detention is wrong. At the same time, there is something very disturbing about taking away the personal freedom of someone who has not yet violated the criminal law. Although this feeling is difficult to articulate, it seems to have something to do with the notion of freedom—the notion that someone who is still capable of choosing and acting freely has not yet forfeited his right to do so. It is hard to give any meaning to this intuition without falling into the worst sort of platitude. It is certainly not enough to argue, as some have, that the mere fact of human freedom is self-evidently an obstacle to preventive detention.[7] It is not; if it were self-evident, everyone who gave serious thought to the matter would be able to see it, and that just has not happened.

My aim in this Article is to begin to develop a theory that will make sense of these competing ideas—that pure preventive detention is appropriate in some situations as the only solution to a grave social problem, on the one hand, and that it is never appropriate because it

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[3] Foucha v. Louisiana, 504 U.S. 71, 82-83 (1992). *See supra* notes 23-28 and accompanying text.

[4] *Id.* at 83.

[5] *Foucha*, 504 U.S. at 88-89 (O'Connor, J., concurring).

[6] *See* Paul H. Robinson, *Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 702-03 (1993).

[7] *See infra* notes 80-83 and accompanying text.

is an attack on freedom, on the other. It is indeed the freedom of the actor that stands in the way of a simple right to detain. But the way in which it does that is rather complex, and the argument to that effect is not, I confess, a knock-down argument. However, it does salvage what there is of good sense in the notion that the problem is human freedom, and it does suggest a middle ground.

II. THE PROBLEM OF PREVENTIVE DETENTION

A. *SALERNO*

In 1987, the Supreme Court of the United States decided, in *United States* v. *Salerno*,[8] that detention of dangerous individuals was not punishment but regulation, and therefore, detention fell outside the limits the Constitution drew around the institution of punishment.[9] It was not punishment, the Court held, because it was not intended as punishment[10]—a point not easily dismissed. An essential element of our current understanding of punishment is the intent to punish. Mere infliction of pain or restriction of freedom is not punishment unless it is intentional, and is in response to some offense, real or perceived.

The issue in *Salerno* was the recent Bail Reform Act under which bail could be denied to those accused of crimes on the basis of dangerousness alone, even if no threat to the adjudicatory process (like flight or intimidation of witnesses) existed.[11] The defendants in the case had protested that such pretrial detention, based solely on the ground that they were dangerous, was punishment of the innocent. They charged that those who were merely accused and not yet convicted were innocent in the eyes of the law; while they could be detained to insure their appearance at trial, they could not be detained on the ground that they were dangerous to the community. The defense argued that to detain them on the latter grounds would be analogous to punishing them for future crimes and therefore, would be unconstitutional.[12]

These arguments had found favor in the Second Circuit Court of Appeals,[13] which explains the government's determination to have the case heard by the Supreme Court despite the fact that the case was

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8 481 U.S. 739 (1987).

9 *Id.* at 747, 752.

10 *Id.* at 747.

11 *Id.* at 742 (quoting 18 U.S.C. § 3142(e) (Supp. III 1985), *amended by* 18 U.S.C. § 3142(e) (1994)).

12 *Id.* at 744.

13 *United States v. Salerno*, 794 F.2d 64, 71 (2d Cir. 1986).

technically moot.[14] The government's determination was rewarded when the Court held that the pretrial detention provisions were not unconstitutional:

> The mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." Congress . . . perceived pretrial detention as a potential solution to a pressing societal problem. *There is no doubt that preventing danger to the community is a legitimate regulatory goal.*[15]

This maneuver may remind you of the "definitional stop" argument (as Hart called it) in defense of utilitarianism.[16] When the retributivist says that an exclusive interest in utility would justify punishing the innocent, the utilitarian replies: "But that wouldn't be punishment at all, since punishment is by definition something imposed on a person for a crime he has committed!" As Hart pointed out, it is not a very persuasive argument.[17] Our aim isn't to label imprisonment of the innocent as something other than punishment; we want to determine whether and why it is wrong. And so we might reply to the Court: you have sidestepped the issue by calling it "regulation"; you can't make imprisoning the innocent acceptable just by calling it regulation.

And yet, why not? We do allow the state to deprive people of freedom in cases in which it is not meant as punishment; and when it is not meant as punishment, we do not insist on the safeguards that punishment requires. Taxation restricts freedom; enforced military service restricts freedom; quarantine of those with contagious diseases restricts freedom. Whatever we think of those impositions, it would be foolish to insist that they could be imposed only on people who had committed crimes. The law restricts our freedom when it permits zoning ordinances. We think such restictions are justified when they are called for by the general welfare. We may believe that compensation

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14 *Salerno*, 481 U.S. at 756-58 (Marshall, J., dissenting).

15 *Id.* at 746-47 (emphasis added) (citations omitted).

16 *See* H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY 1, 5 (1968).

17 *Id.* at 5. The fallacy arises from a way of defining punishment that excludes "[p]unishment of persons . . . who neither are in fact or supposed to be offenders." *Id.* Hart himself proposes to add to the definition of the "standard case" of punishment four "secondary cases," one of which is punishment of persons "who neither are nor are supposed to be offenders." *Id.* at 4-5.

is required when property rights are limited, but it would seem odd to suppose that only the property of convicted criminals can be zoned.

So what should prevent the legislature from detaining those who are innocent, if they are found to be dangerous? The Court in *Salerno* was dealing with a statute that limited such treatment to those indicted for, though not yet convicted of, serious crimes.[18] The difficulty lies in finding a principle that would limit the justification of detention to just those cases. Certainly, the *Salerno* Court did not succeed in doing so. In general terms, the Court said, that "[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal."[19] Then, the Court stated that "[w]e have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."[20] The Court then pointed out that, "as our cases hold, this right [to liberty] may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the needs of society."[21]

Of course, with regard to punishment, the government is not entitled to balance the needs of society against the individual's liberty interest. Before he can be punished, an individual must be found, beyond a reasonable doubt, to have violated an existing criminal prohibition, within the confines of a proper criminal trial. But when it comes to "preventing danger to the community," it is apparently a matter of weighing and balancing, and nothing the Court said indicated how the right of the legislature to regulate such cases could be limited to pretrial detention. When the threat is serious enough, we may infer, that it is appropriate to detain dangerous persons who are innocent in the eyes of the law.[22]

B. *FOUCHA*

Foucha v. *Louisiana*[23] was a case involving a young man accused of aggravated burglary and the illegal discharge of a firearm.[24] On the evidence of two experts, Foucha was found not guilty by reason of insanity and, under Louisiana law, was committed to a mental hospital

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18 481 U.S. at 743.

19 *Id.* at 747.

20 *Id.* at 748.

21 *Id.* at 750-51.

22 The extent of this power depends on what the legislature may designate as dangerous. In this regard, the Supreme Court has not been very reassuring. In Jones v. United States, 463 U.S. 354, 365 (1983), the Court said that dangerousness need not involve violence.

23 504 U.S. 71 (1992).

24 *Id.* at 73.

"until such time as doctors recommend that he be released."[25] In 1988, the institution in which he was being held recommended that he be released because he was no longer insane.[26] A panel of two doctors appointed by the trial court also found that he was no longer insane.[27] The court refused to release him, however, because the panel was unwilling to certify that he was no longer dangerous.[28] The continued detention of Foucha was therefore the detention of a sane and innocent, but dangerous individual, a perfect case for testing the implications of *Salerno.*

If Foucha was no longer insane, and had never been found guilty of a crime, by what authority was he denied release? The hitch was in the Louisiana statute governing release of those committed after insanity acquittals. The statute required the detainee to prove before his release that he was no longer dangerous.[29] An older requirement that the detainee be released unless the state could demonstrate he was both insane and dangerous had led to a general reaction against releasing dangerous individuals into the community. A number of states adopted statutes like Louisiana's, shifting the burden of proof to the detainee and requiring proof both that he was sane and that he was no longer dangerous, not just one or the other.[30] This prevented dangerous persons from being released.

The Supreme Court declared the Louisiana statute, and all such statutes, invalid:

> A State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution. But there are constitutional limitations on the conduct that a State may criminalize. Here, the State has no such punitive interest. *As Foucha was not convicted, he may not be punished.* Here, Louisiana has by reason of his acquittal exempted Foucha from criminal responsibility.[31]

It is true that the State had no punitive intent, if "punitive intent" refers to deterrence or retribution. It was not the intention of the State to make an example of Foucha—at least it was not the explicit intention of the State to do that, and it is perfectly plausible that the State would have kept his continued detention quiet, if it could have. The State was not paying Foucha back for what he had done; he

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25 *Id.* at 74.

26 *Id.*

27 *Id.*

28 *Id.* at 74-75.

29 LA. CODE CRIM. PROC. ANN. art. 657 (West 1981), *amended by* LA. CODE CRIM. PROC. ANN. art. 657 (West Supp. 1996).

30 *E.g.*, N.C. GEN. STAT. § 122C-276.1 (1991), *amended by* N.C. GEN. STAT. § 122C-276.1 (1995).

31 504 U.S. at 80 (emphasis added) (citations omitted).

hadn't been convicted of any crime. This is not a case in which there was a doubt about the insanity claim; Foucha's mind had been so affected by drugs that he did not know what he was doing.[32] One basis for believing he continued to be dangerous was the possibility that he might use drugs again, and thus lose control again.[33]

But if the State had no punitive intent, then this was not punishment. Remember that according to the *Salerno* Court, "[t]o determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we look first to legislative intent. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it. . . .'"[34] Under the broad language of *Salerno*, the *Foucha* Court should have upheld the Louisiana statute. Instead, the Court treated his detention as punishment rather than regulation, and denied the right of the State to punish him.

Unfortunately, the Court did not draw upon any very clear principle in doing so, as Justice Thomas pointed out in his dissent.[35] The Court did not overrule *Salerno*, and, more importantly, Justice O'Connor in her concurrence urged that *Foucha* would stand as no bar to states that wanted to eliminate the insanity defense entirely, and hold dangerous persons by this means.[36] An insane person is morally innocent of crime, of course. But if a state crossed the insanity defense off its books entirely, the insane person could be convicted though morally innocent, and the injunction against punishing someone who had not been *convicted* would not apply.

Indeed, the Supreme Court has never held that due process requires an insanity defense, and several states do not have that defense.[37] The elimination of the insanity defense provides, within the limits of the criminal law, a means of detaining those who are sane and innocent but dangerous. Once the person who was insane when the crime was committed has recovered his sanity, he will continue to serve his sentence just like any other criminal. Someone in that condition is sane and innocent, but (perhaps) dangerous.[38] They are not

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[32] *Id.* at 74.

[33] *Id.* at 74 n.2.

[34] United States v. Salerno, 481 U.S. 739, 746-747 (1987) (citations omitted).

[35] *Foucha*, 504 U.S. at 102 (Thomas, J., dissenting) ("Invalidating this quite reasonable scheme is bad enough; even worse is the Court's failure to explain precisely what is wrong with it.").

[36] 504 U.S. at 88-89 (O'Connor, J., concurring).

[37] *Id.*

[38] No determination that he continues to be dangerous would be necessary, though their above average dangerousness is clearly the reason for keeping this class of persons

legally innocent, it is true. But they are morally innocent, and the fact that they are not also considered legally innocent is an indication of how far the law has strayed from its traditional moral bearings in jurisdictions that eliminate the defense. *Foucha* does not, therefore, draw a line that will protect the innocent but dangerous from punishment.

C. SEX OFFENDER STATUTES

Nor is it clear that *Foucha's* protection extends to those who have paid the price and served their time and are innocent in that sense, but remain dangerous. For example, may a sexual offender be detained after serving his sentence, on the ground that he is still dangerous? What of a convicted drug dealer who has served his sentence? What of any violent offender who has been convicted several times? Does dangerousness alone give the state the right to regulate the freedom of those individuals?

Take, for example, state laws governing the detention of sexual offenders. The older laws, sometimes called "sexual psychopath laws," provided for detention as an alternative to punishment for those who had committed sexual crimes and who were found to have a "propensity" to commit such crimes again.[39] The newer versions, known as "sexual predator laws," provide for detention of such persons *after* the completion of a prison sentence for a sexual crime.[40] These laws are the result of public outcry resulting from sensationalized cases of sexual assault.[41] The detention is said to be civil rather than criminal, but there need not be any finding that the criminal is psychologically or medically insane. Instead, such offenders are generally said to suffer from an antisocial disposition and to be psychopaths. Detention is indefinite until the detainee is shown no longer to be dangerous.

The validity of one state's sexual offender statute was challenged in *Allen v. Illinois*.[42] The petitioner had been charged but not yet convicted of a sexual offense.[43] Under the Illinois Sexually Dangerous Persons Act Act, the court ordered him examined by two psychiatrists, and on the basis of the testimony of those doctors and of the "victim of the sexual assault for which [he] had been indicted," he was de-

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incarcerated.

39 For a discussion of the history of these laws, *see* John LaFond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 659-663 (1992). This article appears in an issue of the *University of Puget Sound Law Review* devoted to Washington's new sexual predator law.

40 *Id.* at 670-84.

41 *Id.*

42 478 U.S. 364, 365 (1986).

43 *Id.* at 365-66.

clared to be a sexually dangerous person.[44] Persons so adjudged under the Act were committed to a maximum security institution for convicts needing psychiatric care, to be released when they had demonstrated that they were no longer dangerous.[45] So confinement under the sexual offender laws is not punishment.

Allen appealed, partly on the grounds that the psychiatrists had elicited information from him that violated his right against self-incrimination.[46] The Illinois Supreme Court rejected this appeal on the ground that proceedings under the act were civil and not criminal, whereas the right not to have to incriminate oneself applies only to criminal proceedings.[47] When the case reached the United States Supreme Court the question was whether detention under the Act was punitive in nature, thereby triggering the Fifth Amendment protections against compulsory self-incrimination.[48]

The Court affirmed the Illinois Supreme Court.[49] The Court's reasoning, apart from rebuttals to particular arguments advanced by the petitioner, follows:

> The State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement.[50] The Act thus does not appear to promote either of "the traditional aims of punishment—retribution and deterrence."[51]

And it concluded that the petitioner failed to show that his confinement was not aimed at treatment; the record contained little about the regimen at the psychiatric center. "We therefore cannot say that the conditions of petitioner's confinement themselves amount to

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44 *Id.* at 366.

45 *Id.* at 379 (Stevens, J., dissenting).

46 *See id.* at 367.

47 *Id.* at 368.

48 *See id.* at 365, 374.

49 *Id.* at 368.

50 That is, as soon as the detainee has proved himself no longer dangerous—which might be quite a long time indeed. The Court is simply referring to the fact that when the detainee does succeed in proving himself to be nondangerous, he will shortly be released. Indeed, the dissent noted that "the sexually-dangerous-person proceeding authorizes far longer imprisonment than a mere finding of guilt on an analogous criminal charge." *Id.* at 377. The dissent also referenced another case under the same Act:

> Stachulak was originally charged with Indecent Solicitation of a Child . . . . That offense carried a maximum penalty of a $500 fine and less than one year imprisonment in a penal institution other than a penitentiary. Instead of prosecuting him on that charge, the state brought a proceeding, which culminated in an indeterminate commitment, under the Sexually Dangerous Persons Act. For the last five years, Stachulak has been confined at the Psychiatric Division of the Illinois State Penitentiary at Menard, a maximum-security penal institution.

Id. at 377 n.5 (Stevens, J., dissenting) (quoting United States *ex rel.* Stachulak v. Coughlin, 520 F.2d 931, 936 n.4 (7th Cir. 1975), *cert. denied*, 424 U.S. 947 (1976)).

51 *Id.* at 370 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)).

'punishment' and thus render 'criminal' the proceedings which led to confinement."[52] Thus, confinement under the Illinois sexual offender law was not punishment.[53]

Confinement is not commitment of the insane either. What distinguishes those detained under these sexual offender acts is a propensity to commit sexual offenses. For the purposes of the law, these are not people who can be found insane; if they were, there would be no need for special sex offender laws. Those detained are sometimes said to be mentally ill. Indeed, the Illinois statute referred to a mental disorder.[54] Usually, however, the only evidence of such a disorder is a propensity to commit sexual crimes, and the only evidence of such a propensity is the fact that the offender has committed or has been charged with committing such crimes. For example, the Washington State sexual predator statute defines a sexually violent predator as:

> any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.[55]

And what is a mental abnormality in Washington?

> "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 per-

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[52] *Id.* at 374. Some think that what distinguishes punishment from civil commitment is the stigma that goes with punishment. But it would be foolish to think that there is no stigma attached to being detained as a sexually dangerous person. As Justice Stevens stated, "the stigma associated with an adjudication as a 'sexually dangerous person' is at least as great as that associated with most criminal convictions and 'is certainly more damning than a finding of juvenile delinquency.'" *Id.* at 377 (Stevens, J., dissenting) (quoting *Coughlin*, 520 F.2d at 936).

[53] *See id.* at 374. According to the dissent:

> A goal of treatment is not sufficient, in and of itself, to render inapplicable the Fifth Amendment, or to prevent a characterization of proceedings as "criminal." With respect to a conventional criminal statute, if a State declared that its goal was "treatment" and "rehabilitation," it is obvious that the Fifth Amendment would still apply. The sexually-dangerous-person proceeding similarly may not escape a characterization as "criminal" simply because a goal is treatment. *If this were not the case, moreover, nothing would prevent a State from creating an entire corpus of "dangerous person" statutes to shadow its criminal code.* Indeterminate commitment would derive from proven violations of criminal statutes, combined with findings of mental disorders and "criminal propensities," and constitutional protections for criminal defendants would be simply inapplicable.

Id. at 381 (Stevens, J., dissenting) (emphasis added). Justice Stevens' admonition about what could be the case if a goal of treatment could determine that something was not punishment must be taken seriously, since in the eyes of the majority it does just that. Fringes of the shadow code that Justice Stevens warns of may be seen in the new federal crime act.

[54] ILL. REV. STAT., ch. 38, ¶ 105-1.01 (1985).

[55] WASH. REV. CODE ANN. § 71.09.020(1) (West Supp. 1996).

son a menace to the health and safety of others.[56]

Personality disorders and mental abnormalities, as defined, include for example "paraphilias." The Supreme Court of Washington, upholding the statute in a recent case, appealed to the *Diagnostic and Statistical Manual of Mental Disorders*' definition of "paraphilia:" "the essential features of a paraphiliac mental illness are 'recurrent intense sexual urges and sexually arousing fantasies generally involving either (1) nonhuman objects, (2) the suffering or humiliation of oneself or one's partner (not merely simulated), or (3) children or other nonconsenting persons."[57] A person who suffers from such urges and fantasies may want to get rid of them, which perhaps justifies classifying the condition as a mental illness. But most normal people have had intense sexual urges and sexually arousing fantasies (directed perhaps at more socially acceptable objects), and we know that the force of such urges and fantasies does not deprive us of responsibility for our actions. For all the definition of paraphilia shows, a sexual predator may not be different from anyone else in his psychological makeup, except as to the object of his desires. What seems to qualify him as a "mentally ill" sexual predator is the fact that he has committed sexual crimes.

If it is recognized that sexual offender laws aim at incapacitating people who are sane in the legal sense and who have either served the allotted time for their crime or have not been convicted of any crime, then the question arises how these statutes are to be treated after *Foucha*. *Allen* used the same reasoning that *Salerno* used in distinguishing detention from punishment, and that reasoning was rejected in *Foucha* in connection with not-guilty-by-reason-of-insanity detainees who had regained their sanity. But *Foucha* did not overrule *Salerno*, which is still the law in connection with pretrial detention. The question, therefore, is what direction will the law take in the near future? Will sexual offender and similar laws be upheld as falling outside the limitations on punishment, or will the Court say of those detainees that because they have not been convicted, they cannot be punished?

D. THE MORAL JUSTIFICATION OF PREVENTIVE DETENTION

When we move from the constitutional issue raised by preventive detention to the moral issue of justification, we find that philosophers have not had very much to say about this problem. We might imagine a direct legislative utilitarian[58] arguing, as Justice Rehnquist did, that

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56 *Id.* § 71.09.020(2).

57 *In re* Young, 857 P.2d 989, 1002 (Wash. 1993) (en banc).

58 By "direct legislative utilitarian," I mean one who believes that the power of the legislature to act should be governed by some form of direct utilitarianism, whatever moral

it is merely a matter of weighing one alternative against another, and if detaining the dangerous increases the general welfare more than any alternative, then that is what the legislature should do.

The problem, of course, is that this line of reasoning would eat up the justification for punishment. At the very least, it would render the limitations upon the state's power to punish meaningless. The state would be justified in punishing when it was useful, but that power would be contained in the general power to detain, which would be justified when useful. Although the state may not punish except for past crimes—and only when the crime was committed by the person to be punished and under laws in effect when the crime was committed—the utilitarian power to detain would extend to detention whenever useful.

If we find a simple utilitarian approach to be distasteful, we might look to other traditional theories for an answer. We might interpret the retributivist dictum about punishing the innocent to extend to all forms of detention: no one may be *detained* by the state except for past crimes. In such an interpretation the dictum becomes more than an exposition of the meaning of "punishment"; it becomes a genuine limitation upon the power of the state to detain. Not only may no one be punished except for a past crime, but no one may be denied bail. And no one, certainly, may be detained simply on the grounds that he might commit a crime in the future. Thus, the preventive detention of sexual "predators," a matter of great recent interest, would simply be prohibited.

But why should the power to detain be limited in that way? The limitation on punishment has the support of the traditional definition, but what reason is there to say that the state may not detain in other cases? Unfortunately, traditional retributivism has not had much to say in answer to this question.[59] In fact, there are cases in which non-punishment detention is clearly justified, even if we do not have a theory to explain why. For example, there will be circumstances in which involuntary commitment and quarantine will be plainly justified.

Furthermore, we should distinguish two ways in which the state

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principles may govern personal decisions and the decisions of other organizations.

[59] *See* NIGEL WALKER, PUNISHMENT, DANGER AND STIGMA 95 (1980):

> The traditional retributivist, who asserts that the law enforcement system ought not to take account of the harm which people might do, must either explain why it should be subject to a restrictive principle which we do not apply outside the system, or else argue that we should apply the same principle outside it.

For Walker's views on more recent versions of retributivism, *see generally* Nigel Walker, *Modern Retributivism*, *in* JURISPRUDENCE: CAMBRIDGE ESSAYS 73 (Hyman Gross & Ross Harrison, eds., 1992).

may respond to intentional violations of the law. It may imprison as punishment for completed crimes, or it may restrain to prevent the violation from being consummated. This latter power—which we may call the power of "punitive restraint"—should be distinguished from preventive detention. Punitive restraint is justified by an ongoing attempt to harm, while preventive detention means detention on grounds of a generalized dangerousness to prevent crimes not presently intended or underway. Setting aside the question of preventive detention for the moment, punitive restraint in the case of ongoing efforts to break the law would seem to be as well justified as punishment for past crimes. But to the extent that the state is permitted to intervene to abort threatened crimes, the grounds for the restraint cannot be the past commission of a crime. If the state could never detain except for a crime committed, then the state could not intervene to prevent an ongoing attempt to harm. It seems clear that in some circumstances the state has the moral authority to do just that.[60]

Indeed, the power of the state to intervene to prevent crime is more easily justified than the power to punish. Imprisonment for the purpose of punishment lasts for more or less fixed periods of time. Very few people still believe that keeping someone detained for such a period can be justified on purely retributive grounds; at most retribution is a necessary but not sufficient condition for punishment. Suppose, then, that the detainee ceases to be dangerous during the period of his incarceration; how is his detention to be justified? All that is left is deterrence, which is to say that he is being punished for the effect his confinement will have on someone else. The fact of his

60 It is important to distinguish what I have called "punitive restraint" from pure preventive detention, though it is often thought of simply as a kind of preventive detention. I cannot imagine a more basic right of the community than to use the instrument of the law to restrain those who currently intend—in the strong sense of "intend" which imports the beginning of an effort to harm—to commit a crime. The great perplexity caused by preventive detention lies in the fact that such preventive measures can be aimed at those who do not currently intend harm but are nevertheless very dangerous because they are highly likely to intend harm in the future. It is for this last function that I would like to reserve the term "preventive detention." Punitive restraint is so-called because the present effort to harm gives rise to a certain blameworthiness even if no harm has yet been caused: blameworthiness, hence retribution, hence punitive. The criminal law, of course, has no special category for instances of punitive restraint. It finds its way into the law of punishment in the form of attempt provisions and stalker laws. But it also has its place in the recognition that the police may interfere to prevent an attempt to murder. They need not wait until the (unsuccessful) attempt is complete to apprehend and charge with murder; they may intervene to stop the attempt from being successful. It would be monstrous to suppose that that were not so, in spite of our claim that the system allows free persons to choose whether or not they will obey the law. Separating out punitive restraint from preventive detention, conceding that someone may be punitively restrained for as long as he actively intends to harm another, and recognizing a certain grayness in the notion of "actively intending" sucessfully would lower the heat in the debate over preventive detention.

crime, we say, gives us the right to use him as an example to prevent others from doing the same thing. That rationale raises all sorts of problems that we need not go into now—among other issues it raises the question why only the state may do this and not some private individual. But it should be clear that between holding someone to prevent him from committing a crime that he is trying to commit, and holding someone who has committed a crime in order to change the behavior of other people, the first is at least as well justified as the second—and probably better justified.

The point is: the state's power to detain cannot be limited to cases in which a crime has been committed. Even one who rejects the point about punitive restraint should admit that cases of commitment and quarantine may be justified.[61] On the other hand, even if you accept that the state's power to detain goes beyond punishment, it does not follow that you believe that preventive detention can be justified, for cases of apparently acceptable detention are all relevantly different from preventive detention. Involuntary commitment involves the insane, while preventive detention involves the sane. Quarantine involves physical illness, while preventive detention does not. Punitive restraint requires a present intention to harm, while preventive detention does not. It is to the moral justification of preventive detention, therefore, that we turn now.

The issue is whether a state should have the power to preventively detain, and if so, how should that power be limited. Preventive detention is detention not on the basis of past crimes but to prevent future crimes, crimes which the dangerous person does not presently intend to commit. It is detention of persons who are presumed sane but dangerous. Their future crimes, if they commit them, will be committed voluntarily and intentionally.

III. Arguments Against Preventive Detention

There are two arguments against preventive detention. The first is that preventive detention depends upon accurate predictions of dangerousness, and reliable predictions are, practically speaking, impossible—the notion of a predictable but voluntary action is incoherent. The second argument begins with the fact that preventive detention restricts freedom, and argues that respect for human freedom prohibits such restriction except where the detained person has committed a crime.

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61 If you do not admit that such cases may be justified, you should be prepared to give some explanation beyond the repetition of the dictum that no one may be detained except for a past crime.

A. PREDICTING DANGEROUSNESS

1. *The Reliability of Predictions*

Among those who believe that preventive detention cannot be justified, some, like Alan Dershowitz, hold that while it might be justifiable if predictions of dangerousness could be made with relative certainty, such predictions are by their very nature unreliable.[62] It is of course notoriously difficult to predict who will commit a violent crime. Using current methods, the best estimate is that there would be at least one "false positive" for every "true positive"; that is, we would preventively detain at least one person who would never commit a future crime for every person we detain correctly.[63] That rate of error would seem to many to be unacceptably high; it is much higher, for example, than the rate of error that we would find acceptable in convicting people of crimes.[64]

However, the advocate of preventive detention may argue that since such persons are to be detained because of the risk they create, it is wrong to speak of persons who are dangerous but would not in fact commit a crime as wrongly detained. To speak in that way imports notions of desert which are out of place in a discussion of preventive detention. Preventive detention incapacitates persons who create a threat of harm. For each of the persons detained, there is a one hundred percent chance that person presents a *risk* of harm.[65] We do not wonder whether we are justified in keeping cars without brakes off the road. We do not ask, for each such car, whether it would in fact have caused an injury. In at least some cases it would not. Keeping such cars off the road restricts human freedom, yet we do not protest that such restrictions cannot be justified because prediction is inaccurate. What is involved is not a prediction of future

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62 *See* Alan M. Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC. 24 (1970). For a more recent and rather pessimistic assessment of our ability to predict future violence, *see* Norval Morris, *Keynote Address: Predators and Politics*, 15 U. PUGET SOUND L. REV. 517 (1992).

63 CHIN L. TEN, CRIME, GUILT, AND PUNISHMENT 135-136 (1987); JEAN FLOUD & WARREN YOUNG, DANGEROUSNESS AND CRIMINAL JUSTICE 31, 180-202 (1981).

64 The comparison with the criminal justice system appears in many places, *see, e.g.*, Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54 (1982):

> Inaccurate predictions create a powerful objection to involuntary commitment because a society with a strong preference for liberty should seek to minimize incorrect involuntary commitments, even at the risk of increasing the number of "incorrect" rejections of commitment. The analogue to the criminal justice system, of course, is that our society does "not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty."

Id. at 75-76. (footnote omitted) (quoting *In re* Winship, 397 U.S. 358, 373 (1970) (Harlan, J., concurring)).

65 FLOUD & YOUNG, *supra* note 63, at 48-49.

harm but an assessment of present dangerousness, and that the state is justified in regulating dangerous behavior.

Even if we focus on the accuracy of predictions of future harm rather than of assessments of dangerousness, the reality is that legislatures and courts may be acting on the assumption that the accuracy of prediction is much better than fifty percent. For example, the Supreme Court of Washington in *In re Young*[66] quoted with approval an eighty percent accuracy figure for predictions of repeat sexual offenses,[67] and the Washington legislature incorporated a finding that such predictions were accurate in its sexual predator law.[68] The point is not that the court and the legislature are right; they may or may not be. The point is that an argument that addresses only the difficulties of prediction has nowhere to go in the face of these assertions. The opponent of preventive detention will surely want to know whether an objection can be made *even if* the predictions are accurate.

One argument that may be made in the face of such high estimates is that even an accuracy level of eighty percent is not enough. We require the same degree of accuracy to detain people for preventive reasons that we require to imprison them for crimes. It is sometimes said that it is better that ten guilty persons should go free than that one innocent one should be convicted, and if we took the analogy literally it would mean that no one should be detained unless there is better than a ninety percent chance that he has committed a crime in the past, or that he will commit a crime in the future.

It is true that we require a high degree of assurance when punishment is in the balance. But why should the same thing be true of preventive detention? When the question is conviction for a past crime, one harm already has been committed and cannot be changed whatever the outcome of the judicial process. The only dangers are those of convicting an innocent person, on the one side, of of letting a guilty person off without his proper punishment. Convicting an innocent person is clearly something to be avoided; the dangers of failing to punish a guilty person do not weigh heavily against it. Since we do not see the state as bearing any theological duty to maintain the eternal balance of right and wrong, the most notable danger is that effective deterrence will be lessened. But that is only a marginal consequence—we are not talking about letting everyone off, after all,

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66 857 P.2d 989 (Wash. 1993) (en banc).

67 *Id.* at 1003-04.

68 RCW 71.09.010:

> . . . The legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high.

but only about making a mistake in a single case.[69]

Consider that in the case of preventive detention there are other harms—harms to those who will be injured if persons who will commit crimes are released. If there is no deeper objection to preventive detention than the inaccuracy of punishment, then we should be aware that there is no reason to think of that inaccuracy as having the same consequences as inaccuracy in conviction. If a group of ten can be identified, six of whom will commit murder if allowed to go free—though we do not know which of the ten they are—then, if we detain them all, we perhaps wrongly detain four. But if we let them all go, six people will die. If the only concern is the risk of "false positives,"[70] then surely the likelihood that four will lose their freedom must be weighed against the likelihood that six will lose their lives.

There are three conclusions to be drawn: first, the empirical evidence concerning prediction is not conclusive. Those in favor of preventive detention will find either that present dangerousness is enough or that predictions of future harm can now be made with great accuracy. That is a practical consideration. Second, an analogy to conviction, which requires an extremely high level of accuracy, is not, and should not be, persuasive. This is a theoretical consideration. Third, because of these considerations, the opponent of preventive detention can no longer rest his case upon the unreliability of predictions.

2. *The Incoherence of Preventive Detention*

Setting aside the problem of reliability, preventive detention cannot be justified because the very notion is incoherent. Suppose that violent behavior is in some cases perfectly predictable, and that there are some persons who we can predict with absolute certainty will commit serious violent crimes in the future; if they are not detained, they will commit those crimes no matter what. Would not this be the best case for preventive detention? But, if we know with certainty that someone will commit a crime, then it would seem that the violent behavior itself is beyond the choice or control of the individual. We of

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69 The fact that the guilty person who is released by mistake may be dangerous and commit crimes in the future that he would not have committed had he been found guilty and kept incapacitated for his prison term only serves to underline my point, however. The concern in question is about the danger of allowing someone who will commit harm in the future to run free. It is not about punishment for what he has done. That is, it is a question about whether preventive detention is justified in the circumstances, and not about whether punishment is justified.

70 *If* that is our only concern. I am not arguing in favor of unrestricted preventive detention here; I am only arguing that the reliability of predictions is not an insurmountable problem for its advocates.

course do not blame someone whose harmful behavior is beyond his control. Because the notion of preventive detention is the notion of detention of sane human beings whose future harmful behavior will be voluntary, there cannot, for purely conceptual reasons, be any such thing as preventive detention. Instead, all forms of detention of predictably dangerous persons would be involuntary commitment of those whose dangerous behavior is beyond their control. Those whose actions remain within their control cannot be preventively detained; those whose future harmful behavior can be predicted are insane and may be involuntarily committed.

This argument, which has raised its head every time I have opened up a classroom discussion of preventive detention, involves some extraordinarily subtle philosophical points. It is implicit in certain arguments for abolishing the insanity defense. For example, Norval Morris argues that if the insane have an excuse, then so should those from rotten social backgrounds because there is a higher correlation between social adversity and crime than between insanity and crime. The implication is that where crime is predictable, it is to that extent unfree.[71] This problem also resembles the theological struggle with the concept of divine foreknowledge. In its simplest form, this concept entails the following syllogism:

1. For each action that we perform, God knew in advance that we would perform that action.

2. If God knows that something will occur, then that thing cannot fail to occur.

3. Therefore for each action that we perform, that action could not fail to occur.

Therefore we have no real choice in our actions; each action we perform must be performed. And the theological quandary leaves us with this dilemma: either God is not all-knowing, or we cannot be blamed for our actions.[72]

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[71] NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW, 63 (1982). Even if the implication is mistaken, there may be other reasons for taking into account the effect of social background on crime. *See* David L. Bazelon, *The Morality of Criminal Law*, 49 S. CAL. L. REV. 385 (1976); Richard Delgado, *Rotten Social Background*, 3 LAW & INEQUALITY 9 (1985). *But see* Stephen Morse, *The Twilight of Welfare Criminology*, 49 S. CAL. L. REV. 1247 (1976). All three are reprinted in MICHAEL CORRADO, JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW (1994).

[72] Saint Augustine finds this dilemma in the writings of Cicero:

> [T]o confess that God exists, and at the same time to deny that He has foreknowledge of future things, is the most manifest folly. This Cicero himself saw .... However, in his book on divination, he in his own person most openly opposes the doctrine of prescience of future things. But all this he seems to do in order that he may not grant the doctrine of fate, and by so doing destroy free will. For he thinks that, the knowledge of future things being once conceded, fate follows as so necessary a consequence

a. The Argument From Conceptual Modalities

In fact the problem does not depend upon God's existence or omniscience. The problem can be reconstructed without any mention of God's knowledge. If we look at the stripped-down version of the argument we will be in a better position to see what it involves:

1. For each action that we perform, it was true in advance that we would perform that action.

2. If it is true at time t1 that something will occur at time t2, then that thing cannot fail to occur at time t2.

3. Therefore for each action that we perform, that action could not fail to occur.

Thus, if I raise my arm now, it was true yesterday that I would raise my arm now. But if it was true yesterday that I would raise my arm now, it is impossible that I not raise my arm now, for it is inconceivable that it could have been true yesterday that I would raise my arm now unless I actually raise my arm now. Thus from the fact that it was true yesterday that I would raise my arm now it follows that it is impossible for me not to raise my arm now. Furthermore, if someone could have predicted with certainty yesterday that I would raise my arm now it must have been true yesterday that I would raise my arm now, and it would seem to follow from the predictability of my raising my arm that I cannot do otherwise. I have to raise my arm. If this argument is correct, then the predictably dangerous cannot help doing what they do; but, of course, neither can anyone else.

Some have rejected the first premise, arguing that it is not true that we will perform an action until the time at which we perform it; "John will call home" is not either true or false in advance of John's calling home. Since John is free to decide one way or the other, the prediction has no truth value in advance.[73] That response seems inad-

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that it cannot be denied.

ST. AUGUSTINE, CITY OF GOD 152-153 (Marcus Dods trans., 1950).

[73] *See, e.g.*, Aristotle, *De Interpretatione*, chapter 9:

> In the case of that which is or which has taken place, propositions, whether positive or negative, must be true or false .... [But] when ... it relates to the future, the case is altered. For if all propositions whether positive or negative are either true or false, then ... if one man affirms that an event of a given character will take place and another denies it, it is plain that the statement of one will correspond with reality and the other will not .... Now if this be so, nothing is or takes place fortuitously, either in the present or in the future, and there are no real alternatives; everything takes place of necessity and is fixed.

BASIC WORKS 45-46 (Richard McKeon trans., 1941). *See also* Elizabeth Anscombe, *Aristotle and the Sea Battle*, 65 MIND 1 (1956). Arthur Prior called the argument in question "the Master Argument of Diodorus." Arthur N. Prior, *Topology of Time, in* PAST, PRESENT, AND FUTURE 32 (1967). If I am not mistaken, something like this is one of the central doctrines of the philosophy of mathematics known as intuitionism. *See* WILLIAM & MARTHA KNEALE, THE DEVELOPMENT OF LOGIC 672-681 (1962); STEPHAN KOERNER, THE PHILOSOPHY OF MATH-

equate. I may not know in advance whether or not John will call home, but he will have to take one action or the other.[74] If he does call, then it is true now that he will, even though I do not now know it. If he does not call, then it is false now that he will. If I have a bet with someone—I say that John will and she says that John won't—then one of us is right and one of us is wrong, although we will not know who until the time comes.

It is easier to find a problem in the second premise. The premise is that if something is going to occur, then it cannot not occur—i.e., it must occur. This is ambiguous, but it is precisely the ambiguity that drives the argument. To see the two possible meanings, let us reconstruct it using an explicit modal operator "it cannot be the case that." We might understand the second premise to mean this:

A. If it is true at t1 that *X* will occur at t2, then it cannot be the case that *X* does not occur at t2.

Or we might understand it to mean this:

B. It cannot be the case both that it is true at t1 that *X* will occur at t2, and that X does not occur at t2.

The difference between them is a matter of scope. In A, the modal operator governs only the last clause; in B, it governs the entire sentence. The difference is significant, for one of these propositions is true, but makes the argument invalid. The other makes the argument valid, but is false.[75]

To see the difference it helps to think in terms of possible worlds. To say that a proposition cannot be the case is to say that it is not true in any possible world. What *A* says, then, is that if it happens to actually be the case, in the real world, that it is true at t1 that *X* will occur at t2, then it is not false in any world—more simply, it is true in every

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EMATICS 131-144 (1960).

74 This move, or rather its mathematical counterpart, is one of the moves rejected by the intuitionist: if I cannot prove *A* and I cannot prove *B*, then I cannot assert <*A* or *B*>. Indeed, if I cannot either prove or disprove *A*, then I cannot assert <*A* or not-*A*>.

75 Here is a classroom example that illustrates the sort of ambiguity involved: Get the class to concede that there is no logical contradiction in believing that there is an elephant in the classroom; if there were a logical contradiction, then it would be a logical truth that there is no elephant, and of course that is not so. Then get the class to concede that if someone believes that there is no elephant in a certain place, it is logically contradictory for him to believe that there *is* an elephant there. By a simple application of *modus tollens* (not-Q, if P then Q, therefore not-P), those premises would seem to entail that the class does not believe that there is no elephant in the classroom. Although no one is inclined to be deceived by the argument, it is often difficult for a listener to put her finger on the problem. The problem, of course, is the second premise: If what it says is that it is logically contradictory to believe that there is and is not an elephant in the room at one and the same time, then it is true, but the argument is invalid. If what it says is that if there in no elephant in the room then it is logically impossible for there to be one, the argument is valid. But the premise is false.

possible world—that *X* occurs at t2. And if that were the case, then the argument would be valid. From the fact that someone's behavior is predictable, it would follow that he could not do otherwise. This interpretation, however, is implausible. If it were a correct construction of the second premise, then every proposition that is true would, as a matter of logic, be necessarily true—that is, true in every logically possible world. Although that interpretation would make the argument valid, it surely is not a plausible reading of the second premise.

On the other hand, B is a plausible reading. Option B says that there is no possible world in which it is true on one hand that *X* will occur at a certain time, and on the other hand, *X* will not. It expresses the inconsistency of supposing the prediction to be true though the predicted event never comes to pass. But although that is a plausible reading of the second premise of the argument, it does not support the inference. The conclusion of the contested inference is that no action could fail to occur, and that every action that occurs occurs in every possible world. To reach this conclusion from the premise that it is true in advance that actions that do occur will occur, the reasoning has to include that the action occurs and that the action will occur in every possible world in which such is true in advance.

To make the problem a little more concrete, assume that these two things are true: that the North won the American Civil War and the South could have won it (the outcome of a war depending upon decisions made under conditions of uncertainty). It would seem to be true, in some sense or other, that if someone won the war then they could not (also) have failed to win it. Following this line of argument, that the North won the war leads to the argument that the North could not have failed to win. But we have assumed that the South could have won, so it must also be true that the North might not have won. An apparent paradox: the North could not have lost the war, and yet it could have.

The answer to the riddle is that one of the propositions is ambiguous—the one that says that if someone won the war then they could not (also) have failed to win it. If it means that whoever won the war won it in every possible world, then the paradoxical inference goes through. But that reading of the premise is implausible. What gives the proposition whatever plausibility it has is the fact that it is inconsistent to suppose both that someone won the war and that they did not win it. That fact does not make anyone the *necessary* victor.

What is at issue here is the following argument form: from the truth of some proposition *P*, and the truth of the proposition <if *P* then necessarily *Q*>, to infer the necessity of *Q*. What I have argued so far is that ordinarily the second premise will be true only if it expresses

the necessity of the connection between *P* and *Q*, and not a conditional resulting in the necessity of *Q* all by itself. But the necessary connection between *P* and *Q* does not warrant the inference from the truth of *P* to the necessity of *Q*. Thus, the necessary connection between the accuracy of a prediction that an action will occur and the occurrence of the action does not warrant the inference from the accuracy of the prediction that an action will occur to the unavoidability of the action. The conceptual argument, therefore, does not show that a predictable action cannot be voluntary.

b. The Argument From Temporal Modalities

There is, however, another move that could be made here. Return to the formal version of the argument just mentioned. I argued that from the simple truth of *P* the necessity of *Q* does not follow; in other words, from the predictability of an action the unavoidability of the action does not follow. The proponent of the argument might insist that more is at issue than the simple truth of *P*. He might argue that *P* itself is, in an important sense, a necessary truth. And if *P* is necessary, and <if *P* then *Q*> is necessary, then we are warranted in drawing the conclusion that *Q* is necessary. For if *P* is true in every possible world, and <if *P* then *Q*> is true in every possible world, then *Q* must also be true in every possible world.

In the case that concerns us, the first premise will involve propositions like this: it is true in advance that John will call home. We cannot claim that such propositions are true in every logically possible world, or even in every physically possible world. They are, however, propositions about a time that is past with respect to the time at which John will call home. At any given time it is necessarily true that it is out of our power to change the truth value of any proposition about the past. Thus, for every point in time in every possible world, this much is true: every world accessible through human action from that point in time in that world will contain all of the true propositions about past times that are contained in that world.

Making use of the different modal operator "it is out of John's power to bring it about that," we have the following *valid* (and apparently sound) version of the argument.[76] Suppose that in fact John does call home at time t2, then it was true the day before (time t1) that he would call home the next day. This is a fact that he cannot change at t2; he cannot go back in time and turn something that was true yesterday into something that was false yesterday. And so:

[76] Compare the discussion of the "power necessity" operator in JOHN MARTIN FISCHER, METAPHYSICS OF FREE WILL 8 (1994).

1. It is out of John's hands at t2 to make it false at t1 that he would call home the next day.
2. It is out of John's hands (being a logical truth) that if it was true at t1 that he would do X at t2, then he does X at t2.

Hence, it is out of John's hands to make it false at t2 that he calls home.

At a given time everything is out of John's hands except what he can affect at that time. What was true yesterday is out of his hands; hence, it is a part of every possible world accessible from him at this point. What is logically true is also true in every such world. But then the conclusion follows.

A lot of thought has been given to this puzzle and it is not one to be dismissed lightly. For our purposes, however, the solution is not complex: the first premise is false. It is not out of John's hands to make the earlier truth false. He can refuse to call home at t2; and if he refuses to call home at t2, it would have been false at t1 that he was going to call home at t2. It is simply misleading to suppose that all of the possible worlds accessible by a human being from a given point in time must include the truth of all of the true predictions about the future. For if they do, then of course there is only one world that is accessible from any point in time.[77] We must distinguish between predictive propositions and other sorts of propositions that might have been true in the past. Worlds accessible from a certain point in time must contain all truths about what has happened up to that point in time; but they must be allowed to differ as to their predictive propositions. If we look at things in that way, then it does not follow from the fact that I cannot change the past that predictability is inconsistent with voluntariness.

c. The Argument from Epistemic Warrant

The argument might be revived in another way, but I believe that can also be shown to be misleading. In that form, the argument

[77] Suppose that at a certain point in time I have two choices open to me, to do *A* or to do *B*. Then I have it in my power to make actual one of the set of worlds containing *A*, or the set of worlds containing *B*. Each of the worlds in those two sets will contain the history of the actual world up to the moment at which I make the decision. If the "history" of the world contains not only all the truths about what has occurred, but also all the truths about the future, then my choice is an illusory one. For if I end up choosing *A*, then it was true before I chose it that I would choose *A*, and that truth would be a part of every possible world I could reach from the point at which I made the choice—in other words, there is only one possible world I could reach. The solution I suggest in the text is that the "history" of the world must be understood, for purposes of possible-worlds talk, not to include propositions about the future. See the discussion of "hard" and "soft" facts of various sorts in Fischer. *Id.* at 111-130; Alvin Plantinga, *On Ockham's Way Out*, 3 FAITH AND PHILOSOPHY 235 (1986).

would begin with the premise that we could know in advance that someone was going to behave violently in the future. The argument would include the premise that knowledge is at least a warranted belief, and that to be warranted, a belief about future behavior would have to based upon sufficient causal conditions of the action predicted. If the premise were so, then since the only way we could know that someone would do something in the future is to know the causal conditions and their sufficiency for the future action, to avoid the action would be beyond the agent's control.[78] For if causally sufficient conditions for an event occur, then the event will occur; and if such conditions occur it will be beyond any agent's power to prevent the consequences of those conditions—including his own caused actions—from occurring. The argument concludes, therefore, that predictable actions are not voluntary.

The problem with the argument is that it assumes that sound predictions are possible only if the causal antecedents of behavior are known. If this were so, then it would be true that prediction is possible only if the agent is not responsible for what he does, and the notion of preventive detention does not make sense. But it does not appear to be so. We make predictions all of the time that are highly likely to be correct, yet which (unless we have settled the question in favor of determinism in some other way) must be assumed to be consistent with the predicted behavior being spontaneous. It is a good bet that if nothing arises to give me a reason not to go home at the end of the work day, I will go home. However, I could do otherwise. To borrow an example whose origin now eludes me, you may swear that you are not going to answer the phone for the next hour, but I predict that if your spouse rushes into the room saying that your child has been in an accident and that the hospital is going to call you to get you insurance number, you will answer when the phone rings. I am certain of it. But I am not aware of any causal antecedents of your behavior, and indeed I assume that you answer the phone freely. You could do otherwise. The fact that you are certain not to do otherwise does not mean that you have been caused to do as you do, and it does

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78 What is it, then, that Cicero feared in the prescience of future things? Doubtless it was this—that if all future things have been foreknown, they will happen in the order in which they have been foreknown; . . . and if a certain order of things, then a certain order of causes, for nothing can happen which is not preceded by some efficient cause . . . . But if this be so, then there is nothing in our own power, and there is no such thing as freedom of will; and if we grant that, says he, the whole economy of human life is subverted. In vain are laws enacted. In vain are reproaches, praises, chidings, exhortations had recourse to; and there is no justice whatever in the appointment of rewards for the good, and punishments for the wicked. And that consequences so disgraceful, and absurd, and pernicious to humanity may not follow, Cicero chooses to reject the foreknowledge of future things.

AUGUSTINE, *supra* note 72, at 153.

not mean that you could not do otherwise, unless we assume the very conclusion in question.[79]

My conclusion is that (allowing as always that determinism may be true, or that if it is not, it may still be true that all actions are caused) there is evidently nothing in the notion of prediction all by itself which makes it inconsistent to suppose that predictable actions can nevertheless be free.

B. RESPECT FOR RIGHTS

Given that predictability does not present a problem one way or the other, we must ask whether there are other reasons for rejecting preventive detention, reasons that come into play even if the prediction of dangerousness could be made more accurate. Is there some reason why we should not preventively detain even the one who *will* certainly commit a dangerous act in the future, let alone the one who will not?

1. The Right To Be Free

One who believes that preventive detention could not be justified even if predictions were perfectly accurate is Andrew von Hirsch.[80] Von Hirsch bases his rejection of preventive detention upon the high value we place upon human freedom: since preventive detention interferes with human freedom and with our ability to choose how we will live our lives, and since it deprives people of freedom for reasons they have no control over and cannot choose to change, he finds it morally unacceptable. "[S]uch a scheme would entail undue sacrifice

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[79] Of course if we accept compatibilism, the doctrine that freedom of action is compatible with the causation of action, actions will not turn out to be unfree just because they are caused, in any case. *See* Richard M. Hare, *Prediction and Moral Responsibility, in* ESSAYS ON BIOETHICS 195 (1993):

> [T]here are actions which we should all think we could predict and be right in thinking this, and about which, nevertheless, we also think it right to make moral judgments . . . . [M]ost of the philosophers of any penetration who have discussed this problem have been trying to find a way of saying that human actions are, in principle, both predictable and morally responsible.

See also Michael Corrado, *Is There an Act Requirement in the Criminal Law?* 142 U. PA L. REV. 1529, 1546-60 (1994) (discussing compatibilism) *and* Michael Corrado, *Automatism and the Theory of Action*, 39 EMORY L. J. 1191, 1201-09 (1990) (same).

[80] Andrew von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFF. L. REV. 717 (1972). *See also* B.H. Baumrin, *Preventive Detention*, 19 WAYNE L. REV. 1067, 1074 (1973):

> [T]he solution proposed by the District of Columbia [in adopting the new pretrial detention rule for dangerous offenders] is to detain them and thus prevent their crimes. To arrest a social epidemic three of the fundamental cornerstones of Anglo-American jurisprudence are to be sacrificed . . .[:] the criminal conduct requirement, the presumption of innocence, and the right to liberty.

of individual freedom and dignity."[81]

Do we in fact value individual choice so highly? The evidence that we do, according to von Hirsch, is that we do not incarcerate people until they have made a choice to break the law:

> [T]he choice—whether to engage in such conduct and chance the punishment—is left up to the individual; the state will not intervene unless he is found to have violated the law. By giving him that choice, society risks that the individual will make the wrong selection, to the community's detriment. .... Nevertheless, we choose to withhold the coercive power of the law until after the event. In so doing, we may incur the costs of certain anti-social conduct that might have been precluded by state preventive action. But that is felt to be well worth the assurance given to individual freedom.[82]

But we do not, in fact, withhold the coercive power of the law until after the choice has been made; more and more the community insists on putting dangerous people away to prevent crimes not yet committed. The argument must therefore be intended to show that we *should* withhold detention until the law has been broken. The argument comes to this: since we value individual choice highly, we should withhold detention until a crime has been committed; it is well worth the risk.

The problem is that the major premise in this argument might support an entirely different conclusion. If our respect for freedom entails the moral imperative to increase the amount of freedom in the world—a kind of consequentialism of freedom—then preventive detention might be morally acceptable. It might be that, by preventing crime, preventive detention would increase the future amount of freedom in the world (measured, perhaps, in terms of actual alternatives available to individuals[83]), and would increase it over every alternative available to the state.

If our respect for freedom means that the state may not interfere with existing freedoms, regardless of the consequences, then it may indeed conflict with preventive detention. But the extent to which we should protect existing freedom is clearly limited: we permit the state to tax, to jail convicted criminals, to educate children compulsorily, and to force people to serve in the military. For many of these things we think the good to be accomplished justifies the deprivation of freedom. What the argument lacks is some reason for thinking that preventive detention is different from these things. The burden, of course, ought to be on the other side; those who favor preventive de-

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81 Von Hirsch, *supra* note 80, at 747.

82 *Id.* at 746-747.

83 *See* Amartya Sen, *Justice: Means versus Freedoms*, 19 PHILOSOPHY AND PUBLIC AFFAIRS 1 *passim* (1990).

tention ought to have to show why it is acceptable. But it is clear that the argument from the value of human freedom gives no reason to think that such a demonstration would be impossible.

2. *The Right to Be Held Harmless*

Floud and Young have raised a different sort of argument.[84] To understand their position, it is necessary to know that in 1979 Ferdinand Schoeman argued that universal preventive detention—detention of any dangerous person regardless of whether they had committed a crime in the past or not—was not more objectionable in theory than the practice of quarantine.[85] Although Floud and Young accept the possibility of preventive detention for those who are dangerous and have been convicted of a crime, they argue that there is a "right to be presumed harmless" that protects those who have never committed a crime, no matter how likely they are to commit a crime in the future.

> The crucial objection is that such measures would entail abrogating the right to be presumed harmless which, like the right to be presumed innocent, is fundamental to a free society.[86]

This right to be presumed harmless does not extend to those who have been convicted of a crime because convicted offenders, through their culpability, have lost that right. They can be detained beyond a normal sentence in order to prevent future crimes, if along with their conviction for a past crime they can be proved to be dangerous.

The prior crime serves in part as evidence of dangerousness; but if it were only that, then any good evidence of future dangerousness should overcome the presumption, even without a prior crime. The additional factor introduced by the prior crime is culpability, which is a necessary condition of preventive detention and serves to distinguish dangerous offenders who may be preventively detained from dangerous non-offenders who may not. Unlike quarantine, preventive detention is an imputation of future intentional misbehavior; this, they argue, is a distinction that Schoeman missed. To accuse someone of future intentional misbehavior we need more than the likelihood of such misbehavior. Culpability for past crimes is the key:

> The notion of culpability seems to be indispensable [to explain why preventive detention of those convicted of past crimes is acceptable while universal preventive detention of the dangerous is not] . . . . [P]eople do not simply expect or hope to be treated as harmless; they have a right to be so treated, even if it is more probable than not that they do intend

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84 JEAN E. FLOUD & WARREN YOUNG, DANGEROUSNESS AND CRIMINAL JUSTICE 44 (1981).

85 Ferdinand Schoeman, *On Incapacitating the Dangerous*, 16 AM. PHIL. Q. 27 (1979).

86 FLOUD & YOUNG, *supra* note 84, at 44.

> harm; just as they have a right to be treated as innocent even if it is more probable than not that they are guilty . . . . . [I]n the end, only wrongful actions can lead to just forfeiture of these rights, as is well understood in respect of the presumption of innocence.[87]

Floud and Young do not have much to say about the presumption of harmlessness except that it blocks universal preventive detention and is lost when a violent crime is committed. Indeed, it seems to be no more than a statement of the conclusion: no one may be preventively detained unless they have already committed a crime. In particular, there is no good explanation of why the presumption of harmlessness may not be defeated by evidence of dangerousness without evidence of a prior crime. It is true that the presumption of *innocence* may only be defeated by evidence of culpability; but that is because the presumption of innocence is a presumption of non-culpability. There is no similar logical connection between a presumption of harmlessness and culpability, and no good reason why mere evidence of future dangerousness would not be enough to overcome such a presumption.

Of course, it could be that without a prior crime no other evidence of dangerousness is reliable enough; but that takes us back to the doubtful empirical argument based upon reliability. We are looking for firmer ground on which to stand, and neither respect for human freedom nor the "presumption of harmlessness" seems to provide that ground. Of course, if we were relatively sure of our conclusion—that universal preventive detention is never acceptable, but preventive detention of offenders sometimes is—then some such principle might be invoked to explain it. But that is not the position we are contemplating; we are simply trying to understand whether, and to what extent, preventive detention may be acceptable.

IV. Preventive Detention as Punishment

Though no persuasive argument against preventive detention has been proposed, there has not been one in favor of it either—a rather surprising fact, given the growing significance of the practice. Perhaps the only important argument in its favor is one advanced to show that preventive detention and quarantine can be reduced to punishment, and that a retributive justification of each can be given.[88] A close examination of this argument will aid us in understanding the true role of human freedom in limiting the state's right to detain.[89]

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87 *Id.* at 43-44.

88 *See* Michael Davis, *Arresting the White Death*, 94 APA Newsletters (Law and Medicine) 92 (Spring 1995); Stephen Morse, *Responsibility, Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. Rev. 113 (1996).

89 A longer and more detailed version of the argument that follows will be found in

A. PUNISHMENT

Let us begin with the assumption that Jones is a very dangerous man, and that we have been able to predict, with a great deal of confidence, that Jones will cause harm to another. Perhaps we can predict that, under ordinary stress, he is capable of maiming or killing the people around him, that he is very likely to come under stress, and, as a consequence, that he is likely to harm those around him. And let us assume that there is no way to prevent this harm except by detaining Jones right now. Because we respect his right to be free to make choices, we do not detain him. Instead, we approach him with this information: "You are a very dangerous person and if not restrained right now you are likely to cause serious harm. If you like we can show you the evidence we have for this; you will find it very persuasive. We offer you the opportunity to detain yourself now in a specially equipped detention facility. We must tell you, however, that if you refuse to detain yourself you will be breaking a law—the law against reckless endangerment—and we will have to imprison you. Make your choice."[90]

As I understand the argument, it supposes that we are morally justified in presenting the dangerous person with this choice and because of this justification, the dangerous person has no right to remain free; therefore, simple preventive detention does not conflict with any rights of the dangerous person. Either he has consented, or we are entitled to punish him for reckless endangerment; we may detain him either way. He has therefore no right to be free, and consequently it is morally acceptable for us to detain him without giving

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Michael Corrado, *Punishment, Quarantine, and Preventive Detention*, CRIMINAL JUSTICE ETHICS (forthcoming 1996).

[90] Here is how Davis sets up the argument:

> A dangerous person who, being informed of his condition, refused (civil) detention would, all else equal, fail to exercise the care a reasonable person would exercise in the circumstances. He would be deviating from the standard of reasonable care at least as grossly as would someone with contagious tuberculosis who refused (civil) confinement for treatment when nothing else would protect the public .... The alternative to detention is the moral equivalent of letting someone, without adequate justification, walk crowded streets with a large bomb that could go off at any moment. Imprisonment for reckless endangerment is a way of preventing the harmful conduct that mere gross recklessness risks. It is, in effect, (criminal) preventive detention. But it is more than that; it is just punishment.

DAVIS, *supra* note 88, at 95. Morse says this:

> Here are the elements of the new crime: 1) conviction of at least one serious crime of violence, or at least one occurrence of involuntary civil commitment for serious dangerous behavior; 2) conscious awareness of an extremely high risk that the defendant 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.

MORSE, *supra* note 88, at 152.

him the choice. The only question is whether it is less onerous for him to be placed in prison or in the special detention facilities; perhaps we must leave it to him to choose.[91] The punishment set for the crime of reckless endangerment would be of an appropriate and limited duration; we do not have to assume it would be for an indefinite period of time. But, of course, each time Jones is released he may be reexamined to see whether he remains dangerous. If he does, he may be presented with the same two choices.[92]

We should find the argument troubling. If it is sound, then we may imprison him for the crime of dangerousness, a conclusion that would appear to be inconsistent with strongly held beliefs about the nature of the criminal law. And yet if there is a flaw in the argument, it is not obvious. Certainly someone wielding a dangerous or defective instrument in public, endangering the lives of those around him in unjustifiable ways, can be made to stop under threat of punishment—a limitation upon his freedom. Why cannot a dangerous person who is himself a threat to others be made to give up all of his freedom under threat of punishment, assuming that the increase in the welfare of those around him outweighs the lessening of his own?

The plausibility of the argument thus depends, in part, on the reliability of the analogy to the person with a dangerous physical instrument. If there is no way to make an instrument safe to use, then the owner may be required to keep it out of commission; if he refuses, he may be jailed—repeatedly, if he continues to refuse. In the same way, the dangerous person may be required to keep himself out of commission. But the argument does not depend entirely upon the analogy with dangerous instruments. A person who is likely to cause trouble if he enters another person's house may be required to stay

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91 In speaking of quarantine, which he compares to preventive detention in this regard, Davis says:

> If . . . the police power provides no decisive reason for government to prefer civil confinement over criminal punishment, the choice between them should be left to the contagious person himself. He can, in other words, justifiably be confined for treatment only if he accepts such confinement. The contagious person can be confined for treatment only if he waives his right to be punished for reckless endangerment. The justification of civil confinement for treatment thus seems to leave the right to punishment intact, indeed, to be its conceptual twin.

DAVIS, *supra* note 88, at 95.

92 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.

MORSE, *supra* note 88, at 152.

> So, if you refuse civil confinement, we could justifiably jail you for a significant term for reckless endangerment. And if you have not successfully completed treatment by the end of your jail term, we could justifiably rearrest you as soon as you walked out, recharge you, and even deny you bail.

DAVIS, *supra* note 88, at 94.

out of that house under threat of imprisonment. The only difference between preventive detention and a restraining order is that preventive detention proposes not that the dangerous person stay out of a certain confined space, but that he stay within a certain confined space.

This difference is significant, however. In the case of the dangerous instrument and in the case of the restraining order, the issue is a limitation upon an actor's freedom. In neither case, however, is there a serious restriction upon the exercise of the actor's rights. Using a dangerous instrument unreasonably puts others in danger, for one thing, and no one can insist upon his right to do that in the absence of some independent justification. Exclusion from someone else's property is likewise not a denial of anything the actor has a right to—particularly if his only reason for being there would be to harm another. In neither of these cases is there any serious question about denying significant freedoms to which the actor is entitled.[93] On the other hand, if he is confined to an institution, he is deprived of the opportunity to do many things he normally would have the right to do—to walk down Main Street, to buy ice cream in his favorite store, to visit a friend, to live with his family. This is a very considerable loss to him, and it is not the same as depriving him of the right to be in someone else's house, or of the right to use a defective and dangerous vehicle. If the argument is sound, therefore, it will justify an extensive encroachment upon the freedom of the dangerous person.

A statute criminalizing reckless endangerment might read like the following:

> Any person who acts in conscious disregard of a substantial and unjustified risk that his action will cause physical harm to others is guilty of reckless endangerment.[94]

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[93] Recent innovations like the "stalking" statutes may raise questions like those raised by preventive detention if in fact they deprive the actor of the right to move about as he likes for legitimate reasons.

[94] The Model Penal Code has the following provisions:

Section 211.2. Recklessly Endangering Another Person.

A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.

Section 1.13. General Definitions.

. . .

(5) "Conduct" means an action or an omission and its accompanying state of mind

. . . .

Section 2.02. General Requirements of Liability.

. . .

(2)(c) *Recklessly.* A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the

Assuming, for the sake of argument, that such a provision could be morally justified, the question is whether it would authorize punishment of dangerous persons who refused to detain themselves.[95] It would, certainly, permit us to punish someone who, without justification, used a defective or dangerous instrument knowing that he created a serious risk to others in doing so. On these grounds, for example, the use of a dangerously defective vehicle could be prohibited.

It would also permit us to punish someone who knowingly engaged in conduct that endangered others. To drive recklessly is to endanger others, and it may be punished under the statute. To drive after having taken a sedative also endangers others. There is nothing

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material element exists or will result from his conduct.

Section 2.01. . . . ; Omission as Basis of Liability.

. . .

(3) Liability for the commission of an offense may not be based on an omission unaccompanied by an action unless:

(a) the omission is expressly made sufficient by the law defining the offense; or

(b) a duty to perform the omitted act is otherwise imposed by law.

Much of what follows in this paper will be a search for a duty that will make a failure to detain oneself a crime under the reckless endangerment statute. The MPC provides that a duty turning an omission into criminalizable conduct may be expressly created by the law, either in the statute involving the conduct in question, or elsewhere. We must keep in mind, however, that the problem for us is to find a legal duty that is morally justifiable. The law might, for example, create the duty for innocent and non-dangerous parties to detain themselves for the common good. A 1930s penal law in the Soviet Union punished family members of army deserters, whether or not they were aware of the desertion. Such a law would not generally be considered to be morally justifiable except under the most extreme conditions, if even then. By the same token a law creating a duty on the part of family members to detain themselves when a desertion occurred would not be justifiable either.

[95] There is a problem, of course, about how to understand the requirement that he must be aware of his dangerousness. If Jones does not *believe* that he is dangerous, in spite of what we tell him, then he cannot be said to be aware that he is dangerous. The whole scenario on which the argument is predicated seems to require that there be a test for dangerous that is reliable and known to be reliable. But beyond that it requires that Jones be persuaded by the results of the test. A test that is known to be reliable is something that a reasonable person ought to believe generally, but that is not enough to catch Jones under the statute if he does not actually believe it. Even if we were to change the statute, of course, to make negligence sufficient for liability—"where a reasonable person would have been aware"—there is no guarantee that the statute would catch Jones. For even in the presence of very persuasive external evidence Jones may be justified in not believing in his own dangerousness. If he has the evidence (however mistaken in the end) of his own determination not to harm anyone, then it may be reasonable for him not to believe the external evidence, however powerful it may seem to others. This is, I think, a serious problem for the argument, but it is one I prefer to disregard in this discussion. To reject the argument on this basis would be to allow the possibility that it would be proper to detain someone who did, as a matter of fact, accept his own dangerousness, and that is the more interesting issue. We may qualify the conclusion accordingly: If Jones can be persuaded of his dangerousness, then he may be involuntarily detained without violating any of his rights.

else the person who has taken a sedative must do to raise a threat other than beginning to drive. In each of these cases the actor will have done something that causes others to be in danger—whether using a dangerous instrument, or driving recklessly, or driving under the influence of a sedative—he is therefore blameworthy and may be punished for it.

The merely dangerous person, on the other hand, is not doing anything that causes others to be in danger, unless it is his failing to detain himself. But his failing to detain himself will be unjustified only if he has an obligation to detain himself, and unless we find such an obligation his behavior does not fall under the reckless endangerment statute. It is difficult to see how such an obligation could arise. It cannot be derived, for example, from the fact that if he does not detain himself he will be recklessly endangering others, for that is the very thing we are trying to prove. There must be some other reason for thinking that he has an obligation to detain himself or, to put it another way, for thinking that his failure to detain himself is unjustified.

If he is allowed to remain free and harms someone in the future, that harm will be unjustified, of course; otherwise he would not be dangerous. One who is likely to harm others, but only when it is justified, is not a threat to the community; he is doing what he ought to do. The danger of the dangerous person lies in the fact that he will cause unjustified harm. The question, therefore, is whether, from the fact that his future violence will be unjustified, we may conclude that his failure to detain himself is also unjustified.

If we could argue, from the prediction of unjustified harm, that he is obligated to do whatever is required to prevent that harm, and could also argue that there is no less onerous way of preventing it than to detain himself, then it might follow that his failure to detain himself was also unjustified. But neither of those conditions appears to be true. Consider first whether the likelihood of a future violation of an obligation should translate into a present obligation to do whatever is necessary to prevent that violation. It is perfectly clear that deontic logic alone will not support such an inference. Suppose that I have two debts of equal size, both due tomorrow and suppose that, although I had enough money to repay both, I have foolishly squandered some of it so that I have only enough money left to repay one. If the prospect of violating an obligation meant that I incur the derivative obligation to do whatever is necessary to prevent the violation, then I am not permitted to repay either loan. For if I repay either, I

will not be able to repay the other.[96]

The obligation of the dangerous person to do whatever is necessary to prevent his future harmful actions cannot be derived simply as a matter of logic from the possibility of future unjustified harm. That does not mean, of course, that there is no such obligation, only that it does not follow as a matter of logic from the future harm. If there is a way to demonstrate the existence of the obligation, however, the burden would seem to be upon those who would advance the argument to tell us what it is.

Even if such a derivation were possible—this seems to be the crux of the matter—it would not be the end of the matter. The obligation of the dangerous person to do whatever is necessary would not entail the obligation to detain himself; where preventive detention is in question, there is *always* a less onerous way to achieve the same result. The harm to be prevented is harm that the dangerous person will freely choose to bring about, and therefore he may prevent it simply by refraining from doing it. He need not detain himself now because the simpler and more direct alternative of refusing to cause harm remains open to him.

It would be different if causing harm were out of his control. If, having failed to restrain himself now, he had no choice as to his behavior in the future, then detaining himself would be the only means for preventing the harm, and in failing to detain himself he would be causing harm, or at least causing the risk of harm. He would be precisely like the driver who had taken a sedative before beginning to drive; he has already done the thing that puts others at risk. It would follow, under the circumstances, that he had the obligation to detain himself, and punishment for not doing so might be justified. But we have already seen that dangerousness is not the same as incompetence; preventive detention, unlike involuntary commitment of the incompetent, presupposes voluntary, responsible action.[97]

B. QUARANTINE

The fact that the dangerous person remains responsible for his

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96 The argument is this. Suppose that it is a general principle of inference that:

> From the obligation to do p at t–, and the fact that if p at t– then q at t, we may infer the obligation to do q at t. From this it follows that if I am obligated to pay loan L1 at t–, and if I can pay L1 at t– only if I withhold loan L2 at t, then I am obligated not to pay loan L2 at t. Since either of the two loans in the example may be L1 and either may be L2, it would follow from the assumption that I am obligated to pay either that I am obligated not to pay the other. Since there is no purely logical ground for preferring either, it would seem to follow that I am obligated to pay neither.

97 *See supra* part II.B.

behavior thus seems to raise serious difficulties for the thesis that preventive detention can be justified as punishment. Ferdinand Schoeman, in the article already cited, has argued that if the voluntariness or responsibility of future actions interferes with the justification of preventive detention, then so does it interfere with the justification of quarantine.[98] Though Schoeman does not draw this conclusion, the implication is strong; since most of us would agree that quarantine may be justified, and since preventive detention and quarantine are in the same boat, any argument against preventive detention must be flawed.

The similarity between preventive detention and quarantine is that in both cases we confine people on the basis of dangerousness in the absence of fault. Since those who are contagiously ill can, if they choose, avoid spreading their disease by avoiding contact with others, the argument I have made against preventive detention should also, therefore, be an argument against quarantine. There is, however, a significant difference between preventive detention and quarantine. While preventive detention is aimed at preventing violence that the actor will intentionally choose to bring about, the person with a highly contagious disease need not intend to communicate the disease or even act in conscious disregard of the risk of spreading it. If we can predict that she will act in that way, she will be a candidate for preventive detention and not quarantine. She may communicate the disease through negligence; indeed she may communicate it without fault, taking all the care that she knows how to take. It may be so contagious that there is simply no way to prevent its spread if she is in the company of others; or if there is such a way, it may be that no one knows what it is. She may be unable to control all of the factors that influence its spread in spite of the greatest care.

If she remains in the society of others, therefore, it may be beyond her power to prevent the spread of the disease. Her very presence will be a threat to the safety of others. She is more like the person who is driving while intoxicated than like the person who will intentionally cause harm. Driving while intoxicated is itself an act that threatens others; there is no further competent act that need intervene between the driving and the resulting harm. Nothing prevents us from deriving an obligation not to drive while intoxicated from the obligation not to harm others. Once the intoxicated person has begun to drive it is out of her control to avoid causing harm. Similarly, there may be an obligation to seclude oneself when dangerously ill if the disease is contagious enough, and the effects are serious enough.

98 Schoeman, *supra* note 85.

Just being in the presence of others may place preventing harm out of the control of the carrier of the disease.

There are, naturally, all sorts of contagious diseases; some are easily transmitted and others are transmitted only through identifiable, voluntary acts. HIV may be of the latter sort; if it is, then quarantine for HIV is subject to the same difficulties as preventive detention. By failing to detain himself the HIV carrier is not doing something that will cause harm to others without further voluntary intervention on his part. Absent some better argument for punishing dangerous persons, we cannot justify punishing him for his failure to detain himself. Other diseases, and tuberculosis may be an example, are not within the actor's control in the same way, and in those cases quarantine is a different matter. It is more like involuntary commitment of the incompetent than like preventive detention. If such a person refuses to detain himself, punishment may be perfectly appropriate.

C. COMPENSATION

This brings us to the odd conclusion that those who are likely innocently to infect others may be detained as punishment if preventing the spread of the disease is beyond their control, while those who would deliberately spread a less contagious disease may not. True, this will not be a problem in practice, since the intention to spread the disease will not normally be discovered until after an attempt has been made to do it, at which time it can be punished as an ordinary crime. Nevertheless, we have been supposing that dangerousness can be predicted even when there is no present intention to harm, and it seems counterintuitive to suppose that we may punish those whose dangerousness lies in perfectly innocent behavior, while those we may predict will try deliberately to spread their disease may not be punished so long as they have not yet made the attempt.

Though I am not now prepared to develop it further, the solution, I think, is this: to state that preventive detention is not justifiable (or has not been shown to be justifiable) as punishment is not to say that it is never justified at all. Detention is a taking of freedom, and there are other grounds on which such takings can be justified. The community is sometimes entitled to requisition resources even if the owner of the resources has not abandoned his right to them, if (1) they are required for the prevention of serious harm to the community, and (2) the owner is fully compensated. The difference between a taking away of freedom in the name of punishment and a taking away of freedom for the common good is a little like the difference between self-defense and necessity, and it is significant in this respect:

although a taking away of freedom as punishment does not require compensation, taking for the common good is commonly believed to require compensation.

If I take something from another in self-defense—if I destroy his gun, for example, to keep him from shooting me—I do not owe him compensation. The injury he has suffered is one he has brought on himself, and significantly it is one that he could have avoided by refraining from doing what he had no right to do, namely trying to injure me. What he has lost can therefore be chalked up to his own responsibility. If, however, I take something from someone out of necessity—I destroy his gun using it as a hammer to hammer in the nail that will save my dam and keep my land from flooding—I do owe compensation. Though neither of us is presently responsible for the harm that is about to befall me, there is no reason why he should be made to pay for the cost of preventing my catastrophe. It is fair and efficient to make me pay for what I use to save myself.

V. Conclusion

The criminal, like the aggressor, has it in his power to prevent the injury of punishment. What he is being asked to give up for the common good is something that he has no right to anyway: his freedom to harm others. If, to prevent him from doing harm, he must be threatened with prison, then nothing has been taken from him that he is entitled to. On the other hand, the innocent but dangerous person is being asked, on behalf of the common good, to give up all sorts of freedoms unconnected to the harming of others. He is asked to give up his freedom to walk freely in the streets, to live where he chooses, to visit his family, to shop, to take in a movie. It is wrong to suppose that there are no conditions under which the state may ask him to do that; but if it does, it is asking him to give up things to which he is entitled for the common good. It would thus seem both fair and efficient to compensate him for the loss of these things—fair because he is paying out of his own resources to prevent harm to others and efficient because if he is compensated the community will not be likely to squander his freedom without justification.