1989

The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals

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by EDWARD P. RICHARDS*

Introduction

As America moves into the twenty-first century, we must determine to what extent individual liberties must be sacrificed for the common good. Ideals of liberty and privacy are stretched to the limit as modern fears of street crime merge with ancient fears of plague.[1] As the Supreme Court confronts new laws molded by these fears, it retraces old patterns of jurisprudence and establishes a new public health jurisprudence of prevention.[2]

Nation states fear pestilential diseases because they can destroy the social order.[3] Historically, civilizations have been terrorized by communicable diseases:

> In earlier ages, pestilences were mysterious visitations, expressions of the wrath of higher powers which came out of a dark nowhere pitiless, dreadful, and inescapable. In their terror and ignorance,

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1. For a more specific discussion of a traditional appproach to HIV/AIDS, see Richards, *Communicable Disease Control in Colorado: A Rational Approach to AIDS*, 65 DEN. U.L. REV. 127, 127-129 1988 [hereinafter Richards]; Richards & Bross, *Legal Aspects of Sexually Transmitted Disease Control: Private Rights and Public Duties*, in SEXUALLY TRANSMITTED DISEASE (2d ed., forthcoming).

2. This Article does not review mental health jurisprudence, except as related to the determination of dangerousness. The state has traditionally had the right to confine the mentally ill, conditioned on a proper determination of mental illness. *See* O'Conner v. Donaldson, 422 U.S. 563 (1975); Parham v. Georgia, 442 U.S. 584 (1979). Mental health cases are not a satisfactory basis for restricting future conduct of physically ill persons because they have a much larger component of *parens patriae* power than do the public health cases. Neither does this Article pose a general theory of imprisonment. For an excellent review of the jurisprudence of imprisonment, see Zimring & Hawkins, *Dangerousness and Criminal Justice*, 85 MICH. L. REV. 481, 482-94 (1986).

3. W. H. MCNEILL, PLAGUES AND PEOPLES 160-65 (1976).

> we did the very things which increased death rates and aggravated calamity. . . . Panic bred social and moral disorganization; farms were abandoned, and there was shortage of food, famine led to civil war, and, in some instances, to fanatical religious movements which contributed to profound spiritual and political transformations.[4]

Epidemics have ravaged the United States at several points in its history. In response, legislatures granted public health authorities substantial power,[5] and the courts supported this delegation of power based on society's right of self-defense.[6] In hindsight, some of these disease control measures were ineffective, some even detrimental. Yet, these measures did serve the broader purpose of preserving order by assuaging fear through action and authority.[7]

A series of recent United States Supreme Court decisions has produced a neo-public health jurisprudence. The new public health cases all involve quasi-criminal proceedings in which defendants stood accused of threatening the public welfare through violent action. In stepwise fashion, the Court has approved ever greater restrictions on the liberty of individuals who have not been convicted of a crime. Although these decisions may seem unrelated to disease control, they apply traditional public health rationales and procedures to individuals who pose a threat to society.

This jurisprudence of prevention builds on the foundation of traditional public health jurisprudence—society's right to restrict individuals for the common good. The link between the old disease control cases and the Supreme Court's recent decisions is that both attempt to preserve social order through prevention rather than punishment. Although pragmatically a detainee may care little whether he is locked up for punishment or to prevent future harm, jurisprudentially the difference is profound. The courts have required few procedural safeguards in public health cases because persons are deprived of liberty to protect the public

4. H. ZINSSER, RATS, LICE AND HISTORY 129 (1963).

5. As discussed later in this Article, courts have sanctioned involuntary vaccinations, detention, and treatment of suspected venereal disease carriers, the isolation of tuberculosis carriers, and the general authority to do whatever is necessary to control the spread of communicable diseases.

6. It has therefore been adjudged that the States may legislate to prevent the spread of crime, and may exclude from their limits paupers, convicts, persons likely to become a public charge, and persons afflicted with contagious or infectious diseases. These and other like things having immediate connection with the health, morals, and safety of the people, may be done by the States in the exercise of the right of self-defence.

Plumley v. Massachusetts, 155 U.S. 461, 478 (1894).

7. J. H. POWELL, BRING OUT YOUR DEAD (1949) [hereinafter POWELL].

welfare, not as a punishment.[8]

In the prevention cases, the Supreme Court has allowed the disassociation of punishment and prevention in criminal law: states may now restrict the liberty of individuals to protect the public welfare, irrespective of the nature of the threat. In adopting the kernel of traditional public health jurisprudence, the right of societal self-defense, the prevention cases also approve the three hallmarks of public health jurisprudence: 1) deference to non-judicial expert decision makers; 2) post-restriction judicial review through *habeas corpus*, rather than full pre-restriction judicial review; and 3) proof of future dangerousness based on scientific rather than criminal law standards of proof.

The prevention decisions signal an increasing willingness of the Supreme Court to subrogate individual liberty to the common good.[9] This shift from individualistic to communal values will profoundly affect many areas of jurisprudence, and the most direct effect will be the revival of traditional public health jurisprudence. At present there is profound confusion among public health officers. The nation's public health system is in disarray; major public health responsibilities—from fighting critical epidemics such as AIDS, to keeping drinking water safe—"have become so fragmented that deliberate action . . . is often difficult, if not impossible. . . ."[10] A driving force behind this fragmentation of public health efforts is the perception on the part of health officers that they no longer have the authority to restrict an individual's liberty to protect the public safety. They assume that the strides made by the Supreme Court and the Congress in the protection of individual liberty have been at the expense of public health authority.[11] Through its new public health decisions, however, the Court has reaffirmed the substantive and procedural foundations of the traditional disease control cases. Having applied these principles in new contexts, the Court should not now abandon them when it reviews traditional disease control cases.[12]

8. While there is certainly a component of prevention in all criminal law cases, it has historically been subrogated to the issue of punishment.

9. But note that the jurisprudence of prevention is not a sound basis for abandoning criminal due process protections when the state intends to punish, rather than to prevent future harm. Once an act is committed, the rationale for expedited procedures and abbreviated due process disappears. On the other hand, it must be acknowledged that the commission of dangerous acts in the past may indicate that the individual will commit dangerous acts in the future.

10. Cimons, *Panel Stresses Public Health Risks; Study Finds System Now Lacks Ability to Offer Safeguards,* L.A. Times, Sept. 8, 1988, Part 1 at 18, col. 1.

11. *Id.*

12. Recent commentary asserting the unconstitutionality of traditional disease control measures, including deprivations of liberty, has been written with a view to homosexual HIV carriers. It would be incongruous for the Court to strike a disease control measure limiting

This Article first traces the evolution of the theme of punishment versus prevention through the traditional public health cases. The second section of the Article elucidates these threads in the new prevention cases. The discussion of the prevention cases begins with an analysis of *In re Gault*[13] and *In re Winship*.[14] These cases represent the Supreme Court's traditional position that all crime-related detentions are punishments requiring full due process protections. It is the explicit rejection of the due process absolutism expressed in *Gault* and *Winship* that marks the beginning of a modern jurisprudence of prevention.

The discussion of the prevention cases focuses on their adoption of traditional public health themes. In these opinions, the Supreme Court has limited the presumption of innocence to criminal trials, endorsed the preventive detention of adults and juveniles to prevent future criminal acts, upheld legislative measures providing for confinement of individuals through civil actions without criminal due process protections, and allowed detention of individuals under the authority of expert decisionmakers.

The final section of this Article discusses the ramifications of preventive jurisprudence. Through the use of civil standards of proof, these decisions legitimize prospective efforts to control certain types of criminal behavior, broaden the state's authority to confine the dangerous mentally ill, and permit confinements to be carried out expeditiously. These decisions also pose the threat of totalitarianism. The Article concludes with an analytic framework for balancing public protection against individual liberty.

I. Public Health Jurisprudence

A. The Historical Perspective

Sanitation laws are the oldest public health measures.[15] The Romans developed the discipline of sanitary engineering, building water works and sewers.[16] The next advance in public health was the quarantine of disease-carrying ships and their passengers instituted in response

homosexual practices when the Court has already found that majoritarian moral beliefs are sufficient to support the criminalization of homosexual sexual activity. *See* Bowers v. Hardwick, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring)

13. 387 U.S. 1 (1967).

14. 397 U.S. 358 (1970).

15. *See Leviticus* 11-16.

16. C. BOLDUAN & N. BOLDUAN, PUBLIC HEALTH AND HYGIENE 4 (1941) [hereinafter BOLDUAN].

to the diseases brought back by the Crusaders.[17] The English statutory and common law recognized the right of the state to quarantine and limit the movement of plague carriers. Blackstone observed that disobeying quarantine orders merited severe punishments,[18] including death.[19]

17. The word "quarantine" derives from *quadraginta*, meaning forty. It was first used between 1377 and 1403 when Venice and the other chief maritime cities of the Mediterranean adopted and enforced a forty-day detention for all vessels entering their ports. BOLDUAN, *supra* note 16, at 7.

18. The fourth species of offenses, more especially affecting the commonwealth, are such as are against the public *health* of the nation; a concern of the highest importance, and for the preservation of which there are in many countries special magistrates or curators appointed. . . . The first of these offenses is a felony, but by the blessing of Providence for more than a century past, incapable of being committed in this nation. For by statute I Jac. I c. 31 . . .it is enacted, that if any person infected with the plague, or dwelling in any infected house, be commanded by the mayor or constable or other head officer of his town or vill to keep his house, and shall venture to disobey it he may be enforced . . . to obey such necessary command and, if any hurt ensue by such enforcement, the watchmen are thereby indemnified. And further, if such person so commanded to confine himself goes abroad, and converses in company, if he has no plague sore upon him, he shall be punished as a vagabond by whipping, and be bound to his good behavior; but if he has any infectious sore upon him uncured, he then shall be guilty of felony. By the statute 26 George. II, c. 6 . . . the method of performing quarantine, or forty days probation, by ships coming from infected countries, is put in a much more regular and effectual order than formerly, and masters of ships, coming from infected places and disobeying the directions there given, or having the plague on board and concealing it, are guilty of felony without benefit of clergy. The same penalty also attends persons escaping from the *lazarets*, or places wherein quarantine is to be performed, and officers and watchmen neglecting their duty, and persons conveying goods or letters from ships performing quarantine.

4 W. BLACKSTONE, COMMENTARIES *161.

The most severe of these penalties were reserved for the masters of ships who disobeyed quarantine orders or concealed the presence of plague on their ships. The authority to quarantine ships is preserved in the earliest United States laws and court decisions. E.g., Gibbons v. Ogden, 9 Wheat. 1, 114, (1824):

> New Hampshire passed her quarantine laws first, February 3d, 1789 . . . Connecticut passed hers in May, 1795. The laws of Maryland show the temporary continuation of those laws in that State, from 1784 to 1785, from 1785 to 1792, from 1792 to 1799, and so down to 1810 . . . The State of Virginia passed, 26th of December, 1792, 'an act reducing into one the several acts to oblige vessels coming from foreign parts, to perform quarantine;' . . . Georgia passed her quarantine law December 17th, 1793. Undoubtedly those laws derive their efficacy from the sovereign authority of the States; and they expressly restrain, and indeed prohibit, the entry of vessels into part of the waters and ports of the States. They are all so similar, that one or two may suffice as examples. The quarantine law of Georgia, s. 1. prohibits the landing of persons or goods coming in any vessel from an infected place, without permission from the proper authority; and enacts, that the said vessels or boats, and the persons and goods coming and imported in, or going on board during the time of quarantine; and all ships, vessels, boats, and persons, receiving any persons or goods under quarantine, shall be subject to such orders, rules and directions, touching quarantine, as shall be made by the authority directing the same. . . .

19. In retrospect, it is difficult to determine whether death was meant as a punishment or was imposed to prevent future dangerous conduct.

The American colonies adopted the English laws on the control of diseases. When the Constitution was written, public health power was left to the states,[20] because it was considered fundamental to the state's police power.[21] Soon after the Constitution was ratified, the states were forced to exercise their police power to combat an epidemic of yellow fever that raged in New York and Philadelphia. The flavor of that period was later captured in an argument before the Supreme Court:

> For ten years prior, the yellow-fever had raged almost annually in the city, and annual laws were passed to resist it. The wit of man was exhausted, but in vain. Never did the pestilence rage more violently than in the summer of 1798. The State was in despair. The rising hopes of the metropolis began to fade. The opinion was gaining ground, that the cause of this annual disease was indigenous, and that all precautions against its importation were useless. But the leading spirits of that day were unwilling to give up the city without a final desperate effort. The havoc in the summer of 1798 is represented as terrific. The whole country was roused. A *cordon sanitaire* was thrown around the city. Governor Mifflin of Pennsylvania proclaimed a non-intercourse between New York and Philadelphia.[22]

The extreme nature of the actions, including isolating the federal government (which was sitting in Philadelphia at the time), were considered an appropriate response to the threat of yellow fever.[23] The terrifying nature of these early epidemics[24] predisposed the courts to grant

20. T. COOLEY, CONSTITUTIONAL LIMITATIONS 572 [hereinafter COOLEY].

21. Police is in general a system of precaution, either for the prevention of crimes or of calamities. Its business may be distributed into eight distinct branches: 1. Police for the prevention of offenses; 2. Police for the prevention of calamities; 3. Police for the prevention of endemic diseases; 4. Police of charity; 5. Police of interior communications; 6. Police of public amusements; 7. Police for recent intelligence; 8. Police for registration.

J. BENTHAM, GENERAL VIEW OF PUBLIC OFFENSES, (quoted in COOLEY, *supra* note 20 at 572).

> It is a well-recognized principle that it is one of the first duties of a state to take all necessary steps for the promotion and protection of the health and comfort of its inhabitants. The preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and whatever reasonably tends to preserve the public health is a subject upon which the legislature, within its police power, may take action.

In re Halko, 246 Cal. 2d 553, 556, 54 Cal. Rptr. 661, 663 (1966).

22. Smith v. Turner, 48 U.S. (7 How.) 283, 340-41 (1849).

23. They may be thought to conflict strangely with the doctrine, that the Federal government alone has jurisdiction of commerce between the States, but it may serve as an illustration that the police laws of the States are paramount; that when men are trembling for their lives, no commercial regulations can oppose a moment's obstacle.

Id. at 341.

24. Ten percent of the population of Philadelphia died of yellow fever between September and November, 1793. POWELL, *supra* note 7 at xiv.

public health authorities a free hand in their attempts to prevent the spread of disease:

> Every state has acknowledged power to pass, and enforce quarantine, health, and inspection laws, to prevent the introduction of disease, pestilence, or unwholesome provisions; such laws interfere with no powers of Congress or treaty stipulations; they relate to internal police, and are subjects of domestic regulation within each state, over which no authority can be exercised by any power under the Constitution, save by requiring the consent of Congress to the imposition of duties on exports and imports, and their payment into the treasury of the United States.[25]

The last great short-term epidemic in the United States was the Spanish Influenza in 1918-1919,[26] and the influenza epidemic of 1958-1959 killed 50,000 Americans in one winter.[27] Venereal diseases have always been a scourge,[28] rendering women sterile,[29] crippling babies,[30] and, in the case of syphilis, causing long-term illness and death. Tuberculosis was the leading cause of death for young adults as late as 1940, killing 60,000 people a year,[31] with perhaps twenty times that many infected at any one time.[32]

Acknowledging the public's justified fear of infectious disease, courts have granted broad powers to public health officers.[33] Only in the

25. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 616 (1840).

26. This epidemic killed 200,000 people in the U.S. and 20,000,000 worldwide. A.W. CROSBY, EPIDEMIC AND PEACE 1918 (1976).

27. The fear of influenza is still sufficiently strong to have fueled the great swine flu campaign, despite evidence that human beings are not endangered by swine flu. This failure of public health policy clearly contributed to the paralysis of public health officials confronted by AIDS. For a discussion of influenza in the U.S. and the swine flu non-epidemic, see R. NEUSTADT & H. FINEBERG, THE EPIDEMIC THAT NEVER WAS (1983). For a discussion of the successful investigation of Legionnaires' Disease, see G. THOMAS & M. MORGAN-WITTS, ANATOMY OF AN EPIDEMIC (1982).

28. Cutler & Arnold, *Venereal Disease Control by Health Departments in the Past: Lessons for the Present*, 78 AM. J. PUB. HEALTH 372 (1988).

29. M. PERNOLL & R. BENSON, CURRENT OBSTETRIC AND GYNECOLOGIC DIAGNOSIS & TREATMENT 718 (6th ed. 1987).

30. Rathbun, Review, 10 SEXUALLY TRANSMITTED DISEASES 93 (1983); Rathbun, *Congenital Syphilis: A Proposal for Improved Surveillance, Diagnosis, and Treatment*, 10 SEXUALLY TRANSMITTED DISEASES 102 (1983).

31. BOLDUAN, *supra* note 16, at 80. In 1915 there were more than 100,000 tuberculosis deaths per year, earning tuberculosis the moniker "white plague." *Id.*

32. The Center for Disease Control (CDC) predicts that by 1991 about 100,000 persons a year will die of diseases secondary to HIV infections. Proportionate to the population, this is about the same death rate as for tuberculosis in 1940. *See generally* R. DUBOS, THE WHITE PLAGUE (1952).

33. Compagnie Francaise de Navigation à Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380 (1902); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Board of Health v. Ct. of Common Pleas, 83 N.J.L. 392, 85 A. 217 (1912); *Ex Parte* Company, 106 Ohio 50, 139 N.E.

last thirty years has a substantial segment of the population begun to question the value of public health restrictions. This diminishing support for public health restrictions is less rooted in an increased sensitivity to individual liberties than it is a product of the loss of fear of communicable diseases. With the advent of sanitary measures such as pasteurization of milk and the development of antibiotics, society's fear of communicable diseases has declined.

Few cases have challenged the constitutionality of state actions taken to protect citizens from a communicable disease.[34] The only successful attacks on such exercises of state police power have been based on federal preemption of state laws that restricted interstate commerce.[35] Yet, even interference with interstate commerce[36] is not always fatal to health regulations.[37] If a state regulation is substantially related to

204 (1922); *Ex Parte* Caselli, 62 Mont. 201, 204 P. 364 (1922); *In re* Halko, 246 Cal. 2d 553, 54 Cal Rptr. 661 (1966); Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973).

34. Deference to disease control laws was philosophically inconsistent with Supreme Court decisions handed down during the same period in which substantive due process arguments were used to strike down laws intended to protect workers' health. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

35. *See* Hoke v. United States, 227 U.S. 308 (1913); Bowman v. Chicago & Northwestern R. Co., 125 U.S. 465, 489 (1888); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 525 (1935); Sligh v. Kirkwood, 237 U.S. 52, 59-60 (1915); Asbell v. Kansas, 209 U.S. 251 (1908); Railroad Co. v. Husen, 95 U.S. 465, 472 (1878).

36. Counsel's arguments in *Smith v. Turner* supporting the authority of the state to prevent the entry of disease carriers were as follows:

> It would be a truer illustration to suppose a citizen or an alien,—no matter whom, the President of the United States or the humblest individual that ever entered the harbour,—any person capable of being the vehicle of infectious disease,—to approach our city, bringing infection, bearing death to thousands,—an approach more dreadful than that of an invading army. He is repelled,—justly repelled,—by the express authority of the law of nations. (Vattel, Book 2, ch. 9, 123.)
>
> By whom is he repelled? By the Federal government? Under what clause of the Constitution? Under which of its powers? Under its commercial power?—A traffic in contagion! a tariff upon disease! Under its war power?—A war with the king of terrors! No. The State, and the State alone, has the power, and alone is charged with the duty, of repelling disease, and of guarding its confines from the entrance of whatever might injure its citizens.

48 U.S. (7 How.) 283, 338 (1849).

37. For the period of nearly a century since the government was organized Congress has passed no quarantine law, nor any other law to protect the inhabitants of the United States against the invasion of contagious and infectious diseases from abroad; and yet during the early part of the present century, for many years the cities of the Atlantic coast, from Boston and New York to Charleston, were devastated by the yellow fever. In later times the cholera has made similar invasions; and the yellow fever has been unchecked in its fearful course in the Southern cities, New Orleans especially, for several generations. During all this time the Congress of the United States never attempted to exercise this or any other power to protect the people from the ravages of these dreadful diseases. No doubt they believed that the power to do this belonged to the States. Or, if it ever occurred to any of its members that Congress might do something in that way, they probably believed that what

health and safety, then the Supreme Court will uphold it.[38] This is true even if the regulation interferes with interstate commerce, such as would result from a *cordon sanitaire* in which all travel is forbidden.[39]

From vaccinations to quarantines, laws enacted to protect society have been upheld even when they force individuals to sacrifice their liberty and privacy.[40] Because modern American society has mostly lost its fear of infectious disease, it is easy to criticize public health restrictions as unnecessarily limiting individual liberty. But to understand United States public health jurisprudence, one must realize that it is based on a deeply rooted fear of pestilential diseases.

> ought to be done could be better and more wisely done by the authorities of the States who were familiar with the matter.

Morgan's Steamship Co. v. Louisiana Bd. of Health, 118 U.S. 455, 466 (1886).

38. It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo, and cast it overboard. The soldier and the sailor, though in the service of the government, are arrested, imprisoned, and punished for their offenses against society. Paupers and convicts are refused admission into the country. All these things are done, not from any power which the States assume to regulate commerce or to interfere with the regulations of Congress, but because police laws . . . must of necessity have full and free operation, according to the exigency which requires their interference.

Thurlow v. Massachusetts (The License Cases), 46 U.S. (5 How.) 504, 632 (1847).

39. That from an early day the power of the States to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, is beyond question. That until Congress has exercised its power on the subject, such state quarantine laws and state laws for the purpose of preventing, eradicating or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution.

Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380, 387 (1902); *see also* Asbell v. Kansas, 209 U.S. 251 (1908).

40. Thomas v. Morris, 286 N.Y. 266, 269, 36 N.E.2d 141, 142 (1941) provides a good example of typical disease-control measures for typhoid carriers. The case concerned whether the identity of typhoid carriers should be kept confidential. Interestingly, the court found the notion of hiding the identity of typhoid carriers absurd.

> The Sanitary Code which has the force of law . . . requires local health officers to keep the State Department of Health informed of the names, ages and addresses of known or suspected typhoid carriers, to furnish to the State Health Department necessary specimens for laboratory examination in such cases, to inform the carrier and members of his household of the situation and to exercise certain controls over the activities of the carriers, including a prohibition against any handling by the carrier of food which is to be consumed by persons other than members of his own household . . . . Why should the record of compliance by the County Health Officer with these salutary requirements be kept confidential? Hidden in the files of the health offices, it serves no public purpose except a bare statistical one. Made available to those with a legitimate ground for inquiry, it is effective to check the spread of the dread disease. It would be worse than useless to keep secret an order by a public officer that a certain typhoid carrier must not handle foods which are to be served to the public.

B. Hallmarks of Traditional and Modern Public Health Cases

As courts have reviewed the constitutionality of laws that ostensibly protect the public health and safety, they have developed consistent standards for what is an acceptable exercise of public health authority. The courts have allowed substantial restrictions on individual liberty pursuant to public health laws that seek to prevent future harm rather than to punish past actions. If a court finds that a law is directed at prevention rather that punishment, it will allow the state to:

1) rely on expert decisionmakers;[41]
2) provide for judicial review through *habeas corpus* proceedings rather than through prerestriction hearings;[42] or
3) use a scientific, rather than a criminal law, standard of proof.[43]

Prevention cases share some or all of these three characteristics. Traditional public health cases and prevention cases, however, are distinguished by their facts: prevention decisions[44] are concerned with dangerous behavior rather than with communicable disease.

1. Distinguishing Public Health Restrictions from Punishment

Although a state's power to protect the public health is broad, it is restricted to preventing future harm. The state may not punish a person under its public health police powers.[45] In public health law, administrative deprivations of liberty are tolerated because their purpose is not to punish.[46] The Supreme Court's acceptance of the idea that confinement to prevent criminal activity is not necessarily punishment marked the beginning of the modern jurisprudence of prevention. Central to all the prevention decisions is the unbundling of punishment and deprivation of liberty in ostensibly criminal law cases.

41. *See In re* Halko, 246 Cal.2d 553, 557-58, 54 Cal. Rptr. 661, 664 (1966); *see also infra* notes 57-70 and accompanying text. This broad authority frees public health officials from the detailed "least restrictive alternative" analysis required in other situations where the public good is less certain. *See* San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 51 (1973).

42. *See infra* notes 71-74 and accompanying text.

43. *See infra* notes 83-84 and accompanying text. Nothing prevents a state from providing the same due process protections in its public health laws as it does for criminal cases. To do so, however, makes the public health laws unworkable. Criminal due process would force the health officer to wait until it could be proven that a person was intentionally spreading a communicable disease, but by that time, more people would be infected by the carrier's actions.

44. Jurisprudentially, prevention cases are "lost cases." Since they involve criminal conduct, they have been pigeonholed as criminal law cases. Conversely, public health cases are seen as civil rights cases and are considered in isolation from criminal law cases.

45. *See infra* notes 49-52.

46. *See infra* notes 49-52.

The distinction between allowable restrictions and forbidden punishment is sometimes finely drawn. For example, being put in the community pesthouse was seldom a pleasant prospect,[47] and with the closing of pesthouses, public health restrictions have frequently been carried out in prisons.[48] The courts have steadfastly allowed persons to be held in a penal institution if the purpose is regulatory rather than penal.[49] In the classic case, a prostitute may be confined in jail as quarantine measure[50] without the due process protections that would be necessary to put her in the same jail cell[51] as a punishment for prostitution.[52]

In the old public health cases, courts recognized that involuntary detention in a jail is little different from being incarcerated in the same jail.[53] In its recent decisions, the Supreme Court has been less scrupulous in recognizing the trauma of detention. The Court has explicitly rejected the argument that a deprivation of liberty should be determined by the physical characteristics of the place where one is detained.[54] The poetic notion that being in prison does not make one a prisoner[55] is sadly

47. Paul Revere's child was infected during the smallpox epidemic of 1764. Out of concern for her well-being, he refused to allow her to be taken to the pesthouse. As was the custom, he and his family were confined in their house for the duration of the infection. During this period (over a month), a quarantine flag was hung in front of the house and a guard was posted to keep the Reveres in and others away from the house. FORBES, PAUL REVERE AND THE WORLD HE LIVED IN 76-77 (1942). *See also* Kirk v. Wyman, 83 S.C. 372, 65 S.E. 387, 388 (1909) (pesthouse described as "coarse and comfortless . . . adjoin[ing] the city dumping grounds")e

48. *See Ex parte* McGee, 105 Kan. 574, 581, 185 P. 14, 16 (1919), discussing the confinement of men infected with venereal disease in a prison. The court rejected the petitioner's claim that he was being punished without due process, concluding that, "While it is true that physical facilities constituting part of the penitentiary equipment are utilized, interned persons are in no sense confined in the penitentiary, and are not subject to the peculiar obloquy which attends such confinement."

49. *See Ex parte* Fowler, 85 Okla. Crim. App. 64, 184 P.2d 814, 820 (1947).

50. For a review of authority, see *Ex Parte* Company, 106 Ohio 50, 139 N.E. 204 (1922).

51. *See In re* Dayton, 52 Cal. App. 635, 199 P. 548 (1921); *In re* Arata, 52 Cal. App. 380, 383, 198 P. 814, 816 (1921).

52. *See, e.g., Ex parte* Caselli, 62 Mont. 201, 203 P. 364, 365 (1922) (discussing the rights of a quarantined person to due process protections):

> In my opinion, the Fourteenth Amendment to the Constitution of the United States and sections 6 and 7 of article 3 of the Constitution of the state of Montana, relied on by complainant's counsel, have no application to this class of cases. I cannot conclude that the makers of the two Constitutions ever contemplated a situation where a state would be rendered powerless to protect itself by prompt and speedy action from the spread of a contagion which by neglect might reach to and affect any considerae ble number of people in a community.

53. *Ex parte* Martin, 83 Cal. App. 2d 164, 170, 188 P.2d 287, 291 (1948).

54. Bell v. Wolfish, 441 U.S. 520 (1979).

55. "Stone walls do not a prison make,
Nor iron bars a cage;
Mindes innocent and quiet take

at odds with the reality of prison life.[56] The personal consequences of detention cannot be ignored. They must not, however, overshadow society's interest in self-defense.

2. *Expert Decisionmakers*

Public health jurisprudence is based on a deference to scientific decision making. This deference may be expressed by incorporating scientific standards into legislation, or by delegating the right to make public health decisions to boards of health[57] or individual health officers[58] who are skilled in the science of public health. This deference is illustrated in the best-known of the traditional public health cases, *Jacobson v. Massachusetts*,[59] in which the scientific basis of a Massachusetts law requiring vaccination for smallpox was challenged.

Mr. Jacobson believed that the scientific basis for vaccination was unsound and that he would suffer if he was vaccinated. The Massachusetts Supreme Court found the statute consistent with the Massachusetts state constitution,[60] and Jacobson appealed to the United States Supreme Court. The Supreme Court examined the issue of whether involuntary vaccination violated Jacobson's "inherent right of every freeman to care for his own body and health in such way as seems to him best . . ."[61] The Court bifurcated this question, first considering the right

That for an Hermitage;
If I have freedome in my Love,
And in my soule am free
Angels alone that sore above,
Injoy such Liberty."

RICHARD LOVELACE, LUCASTA. "To Althea From Prison," st. 4.

56. "The vilest deeds like poison weeds,
Bloom well in prison air;
It is only what is good in Man
That wastes and withers there:
Pale Anguish keeps the heavy gate,
And the Warder is Despair.

OSCAR WILDE, THE BALLAD OF READING GAOL, part V, st. 5.

57. Board of Health v. Union Common Pleas, 83 N.J.L. 392, 395, 85 A. 217, 218 (1912) discussed whether the legislature had intended there to be a right of appeal to decisions by the Board of Health:

> To assume that the legislature intended to confer a review of a discretionary power of this character, vested in a statutory board, charged with its exercise in critical situae tions, involving detriment to the life and health of a community, is tantamount to a declaration that the police power of the state is moribund and useless.

58. *In re* Irby, 113 Kan. 565, 215 P. 449 (1923).

59. 197 U.S. 11 (1905).

60. Commonwealth v. Pear, 183 Mass. 242, 66 N.E. 719 (1903).

61. 197 U.S. at 26.

of the state to invade Jacobson's person by forcing him to submit to vaccination:

> This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned."[62]

With this language, the Court stated the basic bargain of civilization: an individual must give up some personal freedom in exchange for the benefits of being in a civilized society. Jacobson sought to enjoy the benefit of his neighbors being vaccinated for smallpox[63] without personally accepting the risks inherent in vaccination.[64] The Court rejected Jacobson's claim which it viewed as an attempt to be a free-rider on society.[65]

The Court next considered Jacobson's right to contest the scientific basis of the Massachusetts vaccination requirement. Accepting that some reasonable people still questioned the efficacy of vaccination,[66] the Court nonetheless found that it was within the legislature's prerogative to adopt one from many conflicting views on a scientific issue.[67]

62. *Id.* (quoting Railroad Co. v. Husen, 95 U.S. 465, 471 (1877)).

63. The control of smallpox depends on the isolation of individual cases and the maintenance of a certain level of immunity in the population at risk. If everyone other than Jacobson was immunized, Jacobson would have a much lower probability of infection than if all of his neighbors had declined to be vaccinated. This shared benefit is called herd immunity. *See* J. LAST, PUBLIC HEALTH AND PREVENTIVE MEDICINE, 132 (1986). For a fascinating discussion of the medical knowledge of smallpox contemporaneous with Jacobson, see W. OSLER, THE PRINCIPLES AND PRACTICE OF MEDICINE 128 (1905).

64. Vaccination for smallpox has always carried some risk of serious and sometimes fatal complications. *See* P. BEESON AND W. MCDERMOTT, TEXTBOOK OF MEDICINE 211 (1975).

65. We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the State.

197 U.S. at 37. An individual's attempt to enjoy the benefits of society while escaping the concomitant restrictions on personal liberty is a recurring theme in public health cases. Whether the risks and benefits are linked, as in *Jacobson*, or indirectly related, such as cases quarantining disease carriers, the courts have upheld intrusive measures that benefit society. While the prevention cases also adopt this principle of subrogation of individual liberty to societal good, they are less concerned with the corresponding benefits to the restricted individual.

66. "It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox." *Id.* at 34 (citing Matter of Viemeister, 179 N.Y. 235, 239 (1903)).

67. "It is no part of the function of a court or a jury to determine which of two modes was likely to be most effective for the protection of the public against disease. That was for the

In later cases the courts have shown deference when reviewing discretionary orders by public health officers:[68] only the most general statutory language is needed to support discretionary orders,[69] in contrast to the specificity that is necessary for a penal deprivation of liberty. The prevention cases share this acceptance of discretionary decision making, and in some ways they extend the scope of discretion by permitting judges to make decisions that in a traditional public health case would normally be made by an expert.[70]

3. *Review of Public Health Orders*

Traditional public health laws do not provide for pre-restriction hearings to review a health officer's orders.[71] Instead, review is through post-restriction *habeas corpus* proceedings.[72] Although courts have recognized that detention involves grave intrusion into an individual's ex-

legislative department to determine in the light of all the information it had or could obtain." *Jacobson* at 30.

68. "It is not for the courts to determine which scientific view is correct in ruling upon whether the police power has been properly exercised. The judicial function is exhausted with the discovery that the relation between means and ends is not wholly vain and fanciful, an illusory pretense . . . ." City of New York v. New Saint Mark's Baths, 497 N.Y.S.2d 979, 983 (1986) (quoting Williams v. Mayor of Baltimore, 289 U.S. 36, 42 (1933)).

69. In *Ex parte* Kilbane, 32 Ohio St. 530, 530-531, 67 N.E.2d 22, 22-23 (1945) the court upheld public health regulations with the following provisions:

> These regulations authorize the health commissioner of a city to make or cause to be made an examination of a person if *reasonably* suspected of having a venereal disease, and it found to be so infected, and whenever in his opinion the public health requires it, to order such person placed in quarantine.

(emphasis in original).

70. Schall v. Martin, 467 U.S. 253, 279-80 (1984). *See infra* notes 282-84 and accompanying text.

71. *See Ex parte* Roman, 199 P. 580, (1921). This case was a test of the legality of the statute allowing the detention of prisoners suspected of being infected with a communicable disease. After upholding the state's power to authorize the holding of a potentially infected prisoner beyond his sentence, the court discussed the review of such detentions:

> However, if, after such arrest or detention, such person challenges the right of the authorities to continue the detention, the fundamental law affords such person the right to have the legality of his or her detention inquired into by a court of competent jurisdiction in a habeas corpus proceeding. The law denies to no one restrained of his liberty without a hearing the right to prove in some tribunal that the facts justifying his restraint do not exist.

72. *See In re* Halko, 246 Cal.2d 553, 554, 54 Cal. Rptr. 661, 662 (1966):

> Petitioner contends the right of the health officer to issue consecutive certificates of quarantine and isolation for periods of six months each, "without means of questioning and judicially determining" the conclusion of the health officer, results in "continually depriving one of his liberty." Therefore, section 3285 "is unconstitutional in that it deprives this petitioner of his liberty without due process of law."
>
> We disagree with the petitioner's interpretation of the law and his assertion that section 3285 is unconstitutional.

pectation of liberty,[73] the control of communicable disease has been found to outweigh the individual privacy interest.[74]

The authority to detain without judicial process was reviewed most recently in *Reynolds v. McNichols*.[75] Ms. Reynolds, a prostitute, challenged a Denver public health officer's authority to require her to be examined and treated for venereal disease without a judicial hearing.[76] The court rejected petitioner's equal protection claim,[77] declining to apply strict scrutiny to the ordinance in question.[78] The court found that both the detention and the walk-in orders[79] were constitutional.[80]

73. The individual may also be subjected to an examination for venereal disease during his or her detention. *See* People v. Strautz, 386 Ill. 360, 54 N.E.2d 441 (1944).

74. *Id.*; Welch v. Shepherd, 165 Kan. 394, 196 P.2d 235 (1948).

75. 488 F.2d 1378 (10th Cir. 1973).

76. The statute defined a person under suspicion as any person arrested and charged with "vagrancy, prostitution, rape, a violation of this article, or another offense related to sex." *Id.* at 1384. The ordinance provides that persons who have been arrested may be detained in jail without bail, pending examination and treatment.

> [T]he detention of any person in jail under the provisions hereof shall continue only for such time as is reasonably necessary to examine such person and render treatment if such person is found to have a venereal disease in a communicable form. The provisions hereof shall not be utilized as, nor construed to be, a penalty or punishment. No person detained for health under the provisions hereof shall be released from such detention even if he or she is otherwise eligible for release on bond or by reason of payment of fine, or termination of sentence imposed.

Id. While vagrancy was not at issue in this case, it would be expected that vagrancy would only be an acceptable ground for testing and treatment if it was correlated with communicable disease transmission.

77. Similarly, the claim that the ordinance was enforced only against females, and not males, is, under the circumstances of this case, insufficient to invoke the equal protection provision of the Fourteenth Amendment. The trial court indicated that it was of the view that the equal protection argument was not properly within the issues raised by the pleadings in the case and accordingly did not consider it. In any event, in our view plaintiff's suggestion that she was unconstitutionally dealt with by the city authorities is under the circumstances unavailing.

> In regard to her equal protection argument, the fact that on the two occasions when plaintiff was arrested in a hotel room the plaintiff's customer was not himself arrested and detained for examination is not significant. From the record before us, there is nothing to indicate that plaintiff did in fact have sex relations with either of her male companions, though evidence of solicitation was obvious. Such being the case, there was no reason to examine plaintiff's male companions.

Id. at 1383.

78. The court asserted only that there was no equal protection claim available and, thus, refused to discuss the level of scrutiny which would be applicable to the case. *Id.*

79. Detention could have been avoided if the prisoner had agreed to accept treatment without further testing. Moreover, the ordinance empowered the Director of Denver Health and Hospitals to order persons suspected of carrying a venereal disease, who were not in jail, to present themselves for examination and treatment. *See id.* at 1385. The ordinance also authorized the Denver police to order persons to present themselves at Denver Health and Hospitals for examination and treatment. *Id.* at 1386.

80. Involuntary detention for a limited period of time for the purpose of permitting examination and treatment of a person reasonably suspected of having a venereal disease has been upheld by numerous state courts, against a wide variety of constitutional challenges as a valid

Perhaps the clearest difference between public health detentions and criminal arrests is that public health detentions are not bailable.[81] The rationale underlying this rule is that if the person could be relied on not to spread the disease while out on bail, there would be no need for detention in the first place.[82]

4. *Standard of Proof*

The deference of courts to public health authority finds further expression in their rulings on the appropriate standard of proof for restricting an individual's liberty.[83] When persons detained under the public health authority petition for *habeas corpus* relief, the courts use a "reasonable belief" standard for determining the validity of the detention or testing orders.[84]

Reasonable belief may be based on individual specific information, such as a diagnosis of tuberculosis,[85] which may be obtained through voluntary testing of individuals at risk.[86] In modern public health prac-

exercise of the police power designed to protect the public health. *Id.* at 1382. The *Reynolds* court held: "The provisions of the ordinance permitting limited detention for involuntary examination and treatment of a venereal disease being in themselves constitutional, the fact that the city provides a less onerous alternative, which the plaintiff in this case elected to follow, does not violate any constitutional right of the plaintiff." *Id.* at 1383.

81. "To grant release on bail to persons isolated and detained on a quarantine order because they have a contagious disease which makes them dangerous to others, or to the public in general, would render quarantine laws and regulations nugatory and of no avail." Varholy v. Sweat, 153 Fla. 571, 575, 15 So. 2d 267, 270 (1943).

82. In this matter, public health cases resemble another police power action where bail is not mandatory, the regulation of immigration. *See* Carlson v. Landon, 342 U.S. 524 (1952). Congress adopted this same rationale in the Bail Reform Act of 1984. In upholding this law, the Supreme Court adopted a public health rationale for not requiring that the state prove its case "beyond a reasonable doubt." U.S. v. Salerno, 631 F.Supp. 1364 (S.D.N.Y. 1988).

83. *In re* Martin, 83 Cal. App. 2d 164, 167, 188 P.2d 287, 289 (1948), deals with the appropriate standard of proof for instituting quarantine. Petitioners were arrested for vagrancy, then detained on a venereal disease health-hold when they posted bail.

> It would seem unnecessary to state that the delegation of such complete authority over one of the most fundamental of our constitutional rights —the right of personal liberty—must of necessity carry with it the obligation to exercise such unusual powers only when, under the facts as brought within the knowledge of the health authorities, "reasonable ground exists to support the belief" that the person so held is infected. (citation omitted).

84. *Id.* at 168-69: "The necessity of proof in cases such as this is analogous to that required on a preliminary examination before a magistrate prior to commitment on a criminal charge, the extent of the inquiry being merely as to the existence of reasonable cause pending opportunity for further investigation or examination."

85. *See In re* Halko, 246 Cal.2d 553, 54 Cal. Rptr. 661 (1966); Moore v. Draper, 57 So. 2d 648 (Fla. 1952); Moore v. Armstrong, 149 So. 2d 36 (Fla. 1963).

86. *Ex parte* Johnston, 40 Cal. App. 242, 180 P. 644 (1919) (petitioner voluntarily submitted to test for venereal disease, and tested positive; health officer then ordered that petitioner be detained).

tice, statutorily required disease reports are the basis of most disease control activities.[87] These statutes require physicians and laboratories to report on persons found to be infected with the disease in question.[88] The disease report then becomes the basis for the reasonable belief that an individual is infected and should be restricted to protect the public health.

The courts will also accept a reasonable belief based on epidemiologic information.[89] Courts have been willing to accept the epidemiologic link between an individual's status, such as being a prostitute,[90] and the probability that the individual will be infected with a communicable disease.[91] The Supreme Court used a similar reasonable-belief analysis in a prevention case[92] involving the release of a successful habeas corpus petitioner: the Court found that the fact that the petitioner had been convicted of a crime (even though the conviction was overturned) weakened petitioner's claim that he had been unjustly detained.[93] The Court's reliance on a conviction as evidence of an increased probability of guilt is an epidemiologic-based finding analogous to a finding that being a prosti-

87. *See* Simonsen v. Swenson, 104 Neb. 224, 228, 177 N.W. 831, 832 (1920):

> No patient can expect that if his malady is found to be of a dangerously contagious nature he can still require it to be kept secret from those to whom, if there was no disclosure, such disease would be transmitted. The information given to a physician by his patient, though confidential, must, it seems to us, be given and received subject to the qualification that if the patient's disease is found to be of a dangerous and so highly contagious or infectious a nature that it will necessarily be transmitted to others unless the danger of contagion is disclosed to them, then the physician should, in that event, if no other means of protection is possible, be privileged to make so much of a disclosure to such persons as is necessary to prevent the spread of the disease.

88. *See* Jones v. Stanko, 118 Ohio St. 147, 160 N.E. 456 (1928); *see also* Whalen v. Roe, 429 U.S. 589 (1977), (discussion of the general power to require the reporting of public health and safety related information).

89. *See In re* Arata, 52 Cal. App. 380, 198 P. 814 (1921); *In re* Clemente, 61 Cal. App. 666, 215 P. 698 (1923); *Ex parte* Company, 106 Ohio St. 50, 139 N.E. 204 (1922); *In re* Dayton, 52 Cal. App. 635, 199 P. 548 (1921); *Ex parte* Kilbane, 32 Ohio St. 530, 530, 67 N.E.2d 22 (1945); *Ex parte* King, 128 Cal. App. 27, 16 P.2d 694 (1932).

90. "The demographic factors that correlate best with gonorrhea incidence are age, race, marital status, socioeconomic status and urban residence. Individuals who are single, have a lower socioeconomic status and reside in a large city are more likely to be infected by gonorrhea." H. W. HETHCOTE AND J.A. YORKE, LECTURE NOTES IN MATHEMATICS: GONORRHEA TRANSMISSION DYNAMICS AND CONTROL (1984) [hereinafter HETHCOTE].

91. *But see* Caves v. Hilbert, 92 Okla. Crim. 175, 222 P.2d 169 (Crim. App. 1950) (no cause to arrest a woman and have her tested for venereal disease just because she was in a hotel room with a man, who was not her husband); *Ex parte* Dillon, 186 P. 170, 49 Cal. App. 239 (1919) (having sex in rooming houses held not to constitute probable cause for venereal disease quarantine).

92. Hilton v. Braunskill, 107 S.Ct. 2113 (1987). *See infra*, Part II, Section B, subsection 6.

93. *See infra* text accompanying notes 336-37.

tute increases a person's probability of being infected with a venereal disease.

II. The Jurisprudence of Prevention

A. The Background of the Prevention Decisions

The primal fear of communicable diseases no longer exists in late twentieth century America. While there have been isolated incidences of hysteria over AIDS, this does not compare with the fear and Draconian actions that accompanied epidemics of polio and other easily communicated diseases. Contemporary fears focus on crack dealers,[94] juvenile gangs,[95] rapists,[96] serial murderers, and other post-industral urban nightmares.[97] These fears imprison the elderly in their homes,[98] fuel the "war on drugs," and exert pressure on legislatures to pass ever more stringent criminal laws.[99] Yet, stricter criminal laws have little effect on crime

94. Enoch Thomas was nine when he started running errands for crack dealers. His budding career ended at age 11, with a bullet fired point-blank through his head.

> Known as "Shrimpy," he was a small kid with a sweet smile. The deal he died for was tiny by the multi-billion dollar standards of the drug business but big enough for his employers to kill him and dump his body, encased in a see-through plastic bag, two blocks from his home.

Debusmann, *In America's Underbelly, a Deadly Mix of Poverty and Drugs*, The Reuter Library Report, Sept. 18, 1988.

95. On Jan. 30, Karen Toshima was one of thousands of people who went to Westwood Village to have an enjoyable evening. Instead, she found death from a bullet fired by a member of a street gang. In her death, she joined the 60 percent of victims of gang murders who, like her, were innocent bystanders. Every person who was in Westwood Village on Jan. 30 can truthfully say, "But for the grace of God, it could have been me," because Karen was not killed by a personal enemy. She was killed by our common enemy, a wantonly violent member of a street gang.

Gang Shooting in Westwood, L.A. Times, Feb. 18, 1988, Part 2, at 6, col. 3 (home ed.).

96. A man known as the "Elevator Rapist" was sentenced to 175 years in prison by a judge who wanted him "kept from the community for the rest of his natural life."

> The man, Ronnie Matthews, 29 years old, was sentenced Monday in State Supreme Court in Manhattan to consecutive terms on 15 counts of robbery, rape, sodomy and sexual abuse.

Man given 175 Years for Rapes in Harlem, N.Y. Times, Aug. 31, 1988, at B3, col. 1 (city ed.).

97. "A Saturday afternoon three days before Christmas. A dingy, noisy subway train rolls under Greenwich Village and approaches the World Trade Center. Five shots ring out in eight seconds. Four black youths lie wounded. Bernhard Goetz becomes a legend." *Up in Arms over Crime; As the Goetz case showed, Americans are fearful and angry,* TIME, April 8, 1985, at 28.

98. French police on Friday charged two men with the murders of a number of old women who were strangled in their Paris homes over the past three years.

> Police named the accused as Thierry Paulin, 24, from the French Caribbean island of Martinique, and his friend Jean-Thierry Mathurin, from French Guyana. They were both arrested on Wednesday.

Two Men Charged with Murders of Elderly Paris Women, The Reuter Library Report, Dec. 4, 1987.

99. But then what can you expect from people who often seem to concern themselves with the rights of criminals and forget about the rights of the people the criminals prey on. (Applause.) We believe justice demands that a crack dealer with a machine

rates.[100] The failure of traditional criminal laws has led legislatures to pass laws to restrain persons suspected of posing a threat to society. The prevention cases arise from constitutional challenges to these laws.

The prevention cases have announced a stark rejection of the traditional rule that individuals may not be detained without full criminal due process protections. This rule, established in the cases of *In re Gault*[101] and *In re Winship*[102], was based on the premise that confinement constitutes punishment irrespective of the intent of the law authorizing the confinement, and that full due process protections are therefore required for all detentions.[103] The rejection of *Gault* and *Winship* is the cornerstone of prevention jurisprudence.

1. In re Gault[104]

In re *Gault* arose when fifteen-year-old Gerald Gault was arrested for making an obscene phone call. After a series of summary proceedings, the Juvenile Court judge committed Gerald to the State Industrial School until he was 21 or otherwise discharged by process of law.[105] The Arizona Supreme Court rejected Gerald's writ of review, upholding the juvenile court's ruling.[106] The United States Supreme Court accepted the case for the purpose of reviewing the adequacy of the due process afforded by the Arizona delinquency proceedings.[107]

The *Gault* Court first reviewed the history of the juvenile court movement.[108] The Court recognized the salutary motives behind the movement to create a separate juvenile justice system,[109] but found that

> gun who murders a police officer in the line of duty should give up his life as his punishment. (Applause.) We must protect our protectors, and that means the death penalty for these vicious killers. (Applause.) If you ask me, there are no Americans braver and no citizens more precious than the men and women who guard us—our state and local police. (Applause.)

Federal News Service, Sept. 22, 1988 (remarks of President Reagan to Texas GOP fundraising dinner, George Brown Convention Center, Houston, Texas).

100. C.E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 189 (1978).

101. 387 U.S. 1 (1967).

102. 397 U.S. 358 (1970).

103. *Id.* at 365.

104. 387 U.S. 1 (1967).

105. *Id.* at 7-8.

106. *See* Application of Gault, 99 Ariz. 181, 407 P.2d 760 (1965).

107. We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution.

Gault, 387 U.S. at 13.

108. *Id.* at 14-19.

109. "The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals.

the urge to do good had led to a system of juvenile justice that departed from traditional notions of due process:

> Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. And in practice . . . the results have not been entirely satisfactory.[110]

Weighing the benefits and detriments of juvenile justice systems,[111] the Court concluded that the benefits of allowing juvenile court judges wide discretion did not outweigh the detriments. The Court narrowed its inquiry to consideration of the physical confinement involved when a juvenile is detained. Through its eloquent description of confinement,[112] and its reference to existing juvenile court proceedings as a "kangaroo court",[113] the Court expressed its view that juvenile detention is not constitutionally different from adult imprisonment.[114] The *Gault* Court stated that juveniles are entitled to the full panoply of criminal due process protections: notice of charges,[115] the right to counsel,[116] the right to confront witnesses,[117] and the privilege against self-incrimination.[118]

2. *In re* Winship[119]

Samuel Winship was a twelve-year-old boy who had stolen $112 from a woman's pocketbook.[120] The state petitioned the family court to have Samuel declared a juvenile delinquent[121] and sent to training

They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone." *Id.* at 15.

110. *Id.* at 17-18.

111. *Id.* at 17-27.

112. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours . . . ."

Id. at 27 (footnote omitted).

113. *Id.* at 28.

114. "In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.'" *Id.*

115. *Id.* at 31.

116. *Id.* at 41.

117. *Id.* at 56.

118. *Id.* at 55.

119. 397 U.S. 358 (1970).

120. W. v. Family Court, 24 N.Y.2d 196, 247 N.E. 2d 253, 257 (1969).

121. A minor could be found to be a juvenile delinquent if he or she committed an act which, if done by an adult, would constitute a crime. 247 N.E.2d at 255.

school. The family court adjudged the minor a delinquent, and was affirmed in a memorandum decision.[122] The New York Appeals Court reviewed the decision in light of the requirements of In re *Gault*. The court held that while a juvenile proceeding need not afford the procedural protections of a criminal trial, the juvenile must be afforded the essentials of due process and fair treatment.[123]

The New York Appeals Court sought to uphold the New York law by distinguishing *Gault* on substantive and procedural grounds. The procedural argument was twofold: first, delinquency proceedings in the Family Court are not criminal proceedings;[124] second, in contrast to *Gault*, which involved a proceeding with no procedural safeguards,[125] New York did afford minors reasonable procedural protections.[126] The substantive argument was based on a *parens patriae* approach to juvenile proceedings:

> The Judge, acting as a mature and well-balanced parent, tries to find the answer to the child's trouble; and only if all else fails and there is no other recourse, does he commit the child to any institution, and even then he tries to find the one best suited to the child's needs and having the fewest punitive policies.[127]

The New York Appeals Court concluded that the paternalistic New York Family Court Act was distinguishable from the punitive and procedurally flawed Arizona law at issue in *Gault*,[128] and upheld the determination that Samuel Winship was a delinquent.[129]

The United States Supreme Court took the appeal to review the narrow question of whether the due process requirements announced in *Gault* mandated that the facts in a juvenile delinquency proceeding be proven beyond a reasonable doubt.[130] The Court's decision was predetermined by the question it sought to answer: Does *Gault* hold that it is

122. In the Matter of Samuel W., 291 N.Y.S. 2d 1005 (1968) (*mem.*).

123. W. v. Family Court, 247 N.E.2d at 255-56.

124. Careful and fully explicit safeguards, however, are provided in the statute to insure that an adjudication of this kind is not a "conviction" (§ 781); that it affects no right or privilege, including the right to hold public office or to obtain a license (§ 782); and a cloak of protective confidentiality is thrown around all the proceedings. (§ § 783-84).

W. v. Family Court, 247 N.E.2d at 256.

125. *Gault*, 387 U.S. at 5.

126. *W.*, 247 N.E.2d at 257.

127. *Id.* at 254.

128. "The decision in *Gault*, in which there was almost a total absence of due process, is not necessarily to be read as an interdiction of this standard of proof required by the New York statute." *Id.* at 257.

129. *Id.* at 258.

130. "This case presents the single, narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudica-

the fact of locking a person up, rather than the label on the detention, that is determinative of the necessary standard of proof?'[131]

The *Winship* Court began its opinion with a lengthy discussion of the historical basis for the "beyond a reasonable doubt" standard of proof in criminal prosecutions.[132] Besides the weight of history, the Court identified two other reasons for requiring the "beyond a reasonable doubt" standard in criminal prosecutions. First, the Court noted the almost uniform acceptance of the standard in common law jurisdictions.[133] Although the Court stopped short of adopting jurisprudence by survey, it said that "such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.' "[134] The Court's second basis for accepting the "beyond a reasonable doubt" standard was a risk calculus previously articulated in *Speiser v. Randall*:[135]

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.[136]

The core of the decision in *Winship* is the Court's acceptance of the *Gault* standard that regulatory confinements are constitutionally indistinguishable from punitive incarcerations. Referring to *Gault*, the *Winship* Court said:

> We made clear in that decision that civil labels and good intentions do not in themselves obviate the need for criminal due process safeguards in juvenile courts, for "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.[137]

Having established the critical role of the "beyond a reasonable

tory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." *Winship*, 397 U.S. at 359.

131. "In effect the Court of Appeals distinguished the proceedings in question here from a criminal prosecution by use of what *Gault* called the 'civil label-of-convenience which has been attached to juvenile proceedings.'" *Id.* at 365 (citations omitted).

132. *Id.* at 361-64.

133. *Id.* at 362.

134. *Id.* at 361-62 (citation omitted).

135. 357 U.S. 513 (1958).

136. *Id.* at 525-26.

137. *Winship*, 397 U.S. at 365.

doubt" standard in criminal prosecutions,[138] the *Winship* Court's equation of juvenile proceedings with felony prosecutions mandates the application of the "beyond a reasonable doubt" standard in juvenile proceedings.[139]

Ultimately, the bases for the majority's decision later provided the foundation for other courts to undermine *Winship*'s holding. In particular, the *Winship* majority's reliance on jurisprudential majoritarianism[140] put the holding in a tenuous position. Although it is true that most, if not all, jurisdictions require the "beyond a reasonable doubt" standard in criminal prosecutions, it is also true that most jurisdictions do not regard civil detentions as equivalent to criminal prosecutions.

In addition, the Court's assumption that liberty is a transcendent value, i.e., one that cannot be set off by the state's interest in a conviction, irreversibly shifts the balance of risk in favor of the defendant. Yet balancing risks is fundamental to the right of societal self-defense that underlies both traditional public health jurisprudence and the jurisprudence of prevention. Because balancing risks is so fundamental, the Court in subsequent prevention cases adopted the *Winship* formulation. Unlike the *Winship* Court, these courts did not find the defendant's liberty transcendent. By increasing the weight allocated to society's interest in preventing harm, these courts used a balancing of risks to justify not providing full criminal due process protections in the same circumstances where the *Gault* and *Winship* Courts would have mandated them. Thus, the decline of precedent established by the *Gault* and *Winship* decisions paved the way for the Court's jurisprudence of prevention.

138. "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction, except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." *Id.* at 364.

139. "In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*." *Winship*, 397 U.S. at 368.

140. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986):

> Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. . . . The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching. This is essentially not a question of personal "preferences" but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.

Id. at 196-97 (Burger, C.J., concurring).

B. The Prevention Cases

The October 1978 term of the United States Supreme Court was a watershed for prevention jurisprudence. In the companion cases of *Addington v. Texas*[141] and *Bell v. Wolfish*,[142] the Court rejected the rule of *Winship* and *Gault* that civil involuntary confinements require the same due process as criminal prosecutions. Both *Addington* and *Bell* recognize that the state may detain persons without punishing them.

1. Addington v. Texas

Addington was a sympathetic case in which to reject the *Gault/Winship* protections. The defendant, who was clearly mentally ill, might have been denied treatment if the state was forced to provide full due process protections. By abandoning the absolutist position of *Winship* and *Gault*, *Addington* allowed the Court to recast the distinction between regulatory and punitive restrictions.

Mr. Addington had a long history of mental illness, having been temporarily committed to state mental hospitals seven times in the six years prior to the incident that led to this case.[143] The case began when Mr. Addington was arrested for a misdemeanor assault against his mother. Pursuant to Texas law,[144] his mother petitioned the state to commit him to the state hospital for an indefinite period.[145] Mr. Addington retained counsel and contested the commitment. At his trial, the state offered uncontroverted evidence that "appellant suffered from serious delusions, that he often had threatened to injure both of his parents and others, that he had been involved in several assaultive episodes while hospitalized and that he had caused substantial property damage both at his own apartment and at his parents' home."[146] The trial court instructed the jury that it must find that the state established its case by

141. 441 U.S. 418 (1979).

142. 441 U.S. 520 (1979).

143. 441 U.S. at 420.

144. TEX. REV. CIV. STAT. ANN. art. 5547-31 to 5547-57 (Vernon 1958 and Supp. 1978-1979).

145. State v. Turner, 556 S.W.2d 563 (Tex. 1977), *cert. denied*, Turner v. Texas, 435 U.S. 929 (1978), provides information about the Texas commitment process under the Texas Mental Health Code that the courts relied on in reviewing *Addington*. The state could not move for an indefinite involuntary commitment unless the person failed to respond to treatment during temporary hospitalization. This temporary confinement had to be for at least 60 days, and had to be close in time to the petition for indefinite confinement. The state then had to prove by competent expert testimony that the proposed patient was mentally ill, posed a threat to self or others, and was mentally incompetent. These requirements assured that indefinite commitments would only be used for persons who had established mental illness. 556 S.W.2d at 564.

146. *Addington*, 441 U.S. at 420-21.

"clear, unequivocal and convincing" evidence.[147] The jury found that Frank Addington "was mentally ill and required hospitalization for his own welfare and protection, as well as the protection of others."[148]

The Texas Court of Civil Appeals focused on the parallels between indefinite civil confinement and criminal incarceration. Based on this analysis, the court of civil appeals reversed the trial court, holding that the danger to self and others must be proved "beyond a reasonable doubt."[149] The state appealed the reversal, maintaining that *State v. Turner*[150] established that the legal elements necessary to support a mental health commitment need be proven only by a preponderance of the evidence.

The Texas Supreme Court found *Turner* controlling.[151] The central issue in *Turner* (and the one that was ultimately determinative in the United States Supreme Court decision in *Addington*) was whether a civil commitment proceeding is punitive and thus controlled by *Winship* and *Gault*.[152] In a brief opinion based on the holding in *Turner*, the Texas Supreme Court reversed the civil appeals court and reinstated the trial court's finding that Frank Addington should be confined indefinitely in the Austin State Hospital.[153] The Texas Supreme Court held that civil commitments are not punitive, but are undertaken to benefit the patient as well as to protect society.[154] Since the court found civil commitments to be civil proceedings, it found that the elements of the state's case need only be proved by a preponderance of the evidence.[155]

147. *Id.* at 421.

148. State v. Addington, 557 S.W.2d 511 (Tex. 1977).

149. Addington v. State, 546 S.W.2d 105 (Tex. Civ. App. Beaumont 1977).

150. 556 S.W.2d 563 (Tex. 1977).

151. State v. Addington, 557 S.W.2d 511 (Tex. 1977).

152. The respondent points out the similarities between juvenile delinquency proceedings and civil commitment proceedings; the stigma which attaches to an adjudication of delinquency compares with the stigma concomitant with the finding that one is mentally ill; indefinite confinement of a juvenile delinquent for rehabilitation compares with indefinite commitment for treatment. These similarities have prompted several courts to conclude that due process requires proof beyond a reasonable doubt in civil commitment cases.

Turner, 556 S.W.2d at 564-65.

153. 557 S.W.2d at 512.

154. *Id.* at 511.

155. The judge in the *Addington* trial court instructed the jury that they must make their findings based on clear and convincing evidence. The Texas Supreme Court in *Turner* found that Texas did not recognize clear and convincing as distinct from the usual civil standard of a preponderance of the evidence:

> Some courts in other jurisdictions make a distinction between the standard of clear and convincing evidence and the usual civil standard of the preponderance of the evidence; however, Texas Courts review evidence by but two standards: factual sufficiency and legal sufficiency. The requirement of clear and convincing evidence is

The Texas Supreme Court decision was appealed directly to the United States Supreme Court on the issue of the proper standard of proof for involuntary commitment in a mental institution.[156] Frank Addington requested the Supreme Court to apply the *Winship* requirement of proof beyond a reasonable doubt to mental health commitments.[157]

Echoing the majority's risk analysis in *Winship*,[158] the United States Supreme Court structured its opinion in *Addington*[159] around selecting a standard of proof based on the risks of an improper judicial determination. The *Addington* Court described society's interest in the outcome of judicial determinations as a continuum, with civil lawsuits between private parties[160] at one end and criminal cases at the other end. Somewhere in between lie the cases that are civil in nature, but whose outcome involves either a litigant's liberty or an allegation that he committed a crime such as fraud.[161]

Although the *Addington* Court accepted the *Winship* Court's proposition that the "beyond a reasonable doubt" standard is deeply rooted in common law tradition, it declined to follow the holding in *Winship* that the reasonable doubt standard is constitutionally mandated in this non-criminal context:

> In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit

merely another method of requiring that a cause of action be supported by factually sufficient evidence. 556 S.W.2d at 565.

156. Addington v. Texas, 441 U.S. 418, 419-20 (1979).

157. *Id.* at 427.

158. 397 U.S. at 363-64. This risk analysis was that pronounced by the Court in Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

159. Chief Justice Burger delivered the opinion, in which all other members joined, except Justice Powell, who took no part in the consideration or decision in the case.

160. "Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion." *Addington*, 441 U.S. at 423.

161. In civil cases affecting a liberty interest, the state is usually a party. The *Addington* Court gave as an example immigration and naturalization cases in which the Court has required "clear, unequivocal and convincing" evidence before deportation or denaturalization. 441 U.S. at 424 (citing Woodby v. INS, 385 U.S. 276, 285 (1966); Chaunt v. United States, 364 U.S. 350, 353 (1960); Schneiderman v. United States, 320 U.S. 118, 125, 159 (1943)). Immigration and naturalization cases are perhaps misleading in that the underlying factual issues are usually vague. They may provide more procedural due process than the usual civil case, but they provide little substantive due process. The Court proposed that cases involving allegations of fraud or some other quasi-criminal activity by the defendant typify situations where a more rigorous standard of proof applies. While a state is certainly not prevented from requiring more than a preponderance of the evidence in fraud based civil actions, the higher standard is not constitutionally required. Most of the civil litigation under the Racketeer Influenced Corrupt Organizations Act (RICO) has been possible because the Supreme Court has held that RICO violations need not be established by proof of criminal liability (proof beyond a reasonable doubt.) Sedima S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 491 (1985).

> constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgement. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself.[162]

Having established that the standard of proof is an important symbol of the value society places on individual liberty,[163] the Court then shifted its analysis to the value of liberty itself. The Court found that the value of liberty for a non-mentally ill person, who is facing potential mistaken confinement, is higher than the potential harm to society of not confining the individual.[164] Because of the possibility of mistakenly confining a non-mentally ill person, the state must use a higher standard of proof than preponderance of the evidence.[165]

The value of individual liberty shifts, however, for a person such as Frank Addington,[166] who is mentally ill and who is at risk of being committed on a mistaken determination of dangerousness. In contrast to the non-mentally ill person, for whom commitment is a pure detriment, the improperly detained but nonetheless mentally ill individual might benefit from commitment.[167] "One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma. . . . It cannot be said, therefore, that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed."[168]

162. *Addington*, 441 U.S. at 424 (citations omitted). This is reiterated at 428:

> In addition, the "beyond a reasonable doubt" standard historically has been reserved for criminal cases. This unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the "moral force of the criminal law," and we should hesitate to apply it too broadly or casually in noncriminal cases (citations omitted).

163. *Id.* at 425-26. The Court was frank in assessing the importance of the debate over standards of proof:

> Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests or the nuances of a judge's instructions on the law may well be largely an academic exercise; there are no directly relevant empirical studies. Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be unknowable, given that factfinding is a process shared by countless thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence.

Id. at 424-25.

164. *Id.* at 427.

165. *Id.*

166. *Id.* at 421.

167. The Court also assumed that an erroneous commitment will probably be recognized and corrected. *Id.* at 428-29.

168. *Id.* at 429.

This analysis, predicated on both *parens patriae* and public health rationales, underlies many prevention cases and traditional public health cases: restriction not only protects society, it is sometimes even beneficial to the restricted individual.[169] By recognizing that a civil confinement has potential benefits to the defendant,[170] the *Addington* Court destroyed the absolutist position of the *Winship* Court that there is no basis for distinguishing a civil commitment from a criminal prosecution. The Court buttressed this analysis by noting that many states that have specific standards for indefinite commitment do not use a "beyond a reasonable doubt" standard.[171]

The *Addington* Court recognized that the most powerful argument against adopting a "beyond a reasonable doubt" standard for involuntary commitment is that psychiatric diagnosis is an inexact science. The Court pointed out that in criminal law cases the "reasonable doubt" standard is applied to "specific, knowable facts",[172] while psychiatric diagnosis is based on subjective medical impressions.[173] The Court reasoned that if a psychiatrist could only testify to "reasonable medical probability", then holding jurors and judges to the "beyond a reasonable doubt" standard would result in the rejection of commitment "for many patients desperately in need of institutionalized psychiatric care."[174]

2. Bell v. Wolfish[175]

A companion case to *Addington*, *Bell v. Wolfish* also allowed the Court to distinguish regulation and punishment on sympathetic facts. Confinement itself was not in issue in *Bell*, only the conditions of the

169. For example, The New York Family Law challenged in Schall v. Martin, 467 U.S. 253 (1984), was purportedly intended to protect minors from the criminal consequences of their own acts. The sexually dangerous person in Allen v. Illinois, 478 U.S. 364 (1986), would ostensibly obtain treatment during confinement, *see infra* notes 292-309 and accompanying text; prostitutes picked up under health-hold orders receive treatment for venereal disease; children who are involuntarily vaccinated benefit from a reduced risk of contracting a communicable disease; and epileptics who are denied licenses to drive unless they are certified to be free of seizures benefit from not being involved in automobile accidents. Conversely, pretrial detainees and successful *habeas corpus* petitioners do not derive any benefit from detention. *See* United States v. Salerno, 794 F.2d 64 (2d Cir. 1986); Braunskill v. Hilton, 629 F.Supp. 511 (D.N.J. 1986).

170. "The State of Texas confines only for the purpose of providing care designed to treat the individual." *Addington*, 441 U.S. at 428, n.4.

171. *Id.* at 430-31.

172. *Id.* at 430.

173. *Id.* But while mental illness and future dangerousness are certainly subjective determinations, it is not so clear that questions such as the defendant's intent are specific, knowable facts.

174. *Id.* at 430.

175. 441 U.S. 520 (1979).

confinement. *Bell* arose as a challenge to the conditions in which pretrial detainees were confined.[176] Petitioners, who in the absence of a criminal adjudication were subjected to the same conditions as convicted criminals, claimed their confinement was unconstitutional punishment.[177] The federal district court agreed that the detainees were entitled to different treatment than convicted felons, holding they could only be deprived of liberty as a matter of compelling necessity.[178] The district court then reviewed each of the petitioner's claims in light of the "compelling necessity" standard.[179]

The court of appeals was sensitive to the conflict between the rights of pretrial detainees and the needs of prison administrators. Nonetheless, the court found that pretrial detainees must be given the rights afforded unincarcerated individuals[180] and stressed that pretrial detainees, as legally innocent persons, are entitled to a greater protection than afforded by the Eight Amendment:

> [I]t is not enough that the conditions of incarceration for individuals awaiting trial merely comport with contemporary standards of decency prescribed by the cruel and unusual punishment clause of the eighth amendment. Time and again, we have stated without equivocation the indisputable rudiments of due process: pretrial detainees may be subjected to only those "restrictions and privations" which "inhere in their confinement itself or which are justified by compelling necessities of jail administration."[181]

The court of appeals then reviewed each of the factual situations considered by the district court.[182] Although they reached different conclusions on the constitutionality of certain situations,[183] the district court and the court of appeals agreed that it is constitutionally impermissible to subject pretrial detainees to the same conditions as convicted prisoners. The lower courts' reasoning that the presumed innocence of pretrial

176. *Id.* at 523. *See* United States *ex rel.* Wolfish v. Levi, 439 F.Supp. 114 (S.D.N.Y. 1977).

177. *Bell* at 527.

178. The district court found that because they were "presumed to be innocent and held only to ensure their presence at trial, 'any deprivation or restriction of . . . rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity.'" U.S. *ex rel.* Wolfish v. Levi at 124 (quoting Detainees of Brooklyn House of Detention v. Malcolm, 520 F.2d 392, 397 (2d Cir. 1975)).

179. U.S. *ex rel.* Wolfish v. Levi at 124-65.

180. Wolfish v. Levi, 573 F.2d 118, 124 (2d. Cir. 1978).

181. *Id.* (citing Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974)).

182. "In actuality, we have here decided not one, but twenty cases relating to specific conditions at the MCC." Wolfish v. Levi, 573 F.2d at 133.

183. *See, e.g., id.* at 126 (double celling); 130 (telephone privileges); 132 (right to possess a typewriter).

detainees requires a finding of necessity before they can be confined[184] is compatible with the concerns expressed in *Gault* and *Winship* that persons not be deprived of liberty without due process of law.

Yet Justice Rehnquist's opinion for the Supreme Court[185] rejected this reasoning, stating that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[186] More broadly, the Supreme Court held that the presumption of innocence has little significance outside of a criminal trial.[187]

The Supreme Court's determination that innocence does not entitle a detainee to better treatment stems from its analysis of detention versus punishment.[188] Rejecting the *Winship* standard that all detentions are punishments,[189] the Supreme Court found:

> Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. . . . And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible . . . during confinement does not convert the conditions or restrictions of detention into "punishment."[190]

Public health jurisprudence has always accepted that detention *to protect the general welfare* is not constitutionally impermissible punishment.[191] If detention is not punishment, then an individual may be detained without full due process protections.[192] By basing its holding on a finding that detention *related to criminal law violations* is not necessarily punishment, the *Bell* Court prepared the way for later determinations that individuals may be detained to protect the public from criminal activity.[193]

184. "Neither respondents nor the courts below question that the Government may permissibly detain a person suspected of committing a crime prior to a formal adjudication of guilt." *Bell*, 441 U.S. at 534.

185. 441 U.S. 520. Rehnquist's majority opinion, was joined by four justices, with Justice Powell concurring in part and dissenting in part.

186. *Id.* at 533.

187. *Id.*

188. *Id.* at 535.

189. *Winship*, 397 U.S. at 365.

190. *Bell*, 441 U.S. at 537.

191. *See In re* Martin, 83 Cal. App. 2d 164, 188 P.2d 287 (1948).

192. *Bell*, 441 U.S. at 536.

193. *See infra* note 416-20 and accompanying text.

In *Bell*, the Supreme Court reinforced the parallel of criminal detention and traditional public health jurisprudence by stressing that courts should accord great deference to "expert" prison administrators.[194] The *Bell* court recognized that prison officials, like health officers, sometimes are experts only by statutory title,[195] but argued that actual expertise is not the only basis for judicial deference. There is also a structural requirement for such deference, in that "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."[196] This echoes the courts' assertions that public health decisions are to be made by legislatures and not by courts.

The *Bell* Court adopted a simple test for the bounds of administrative discretion: "It is enough to say that they have not been conclusively shown to be wrong . . ."[197] This deference to expert decision making was carried to its logical extreme in *Barefoot v. Estelle*,[198] where the Court allowed experts to decide whether a prisoner should live or die. Yet, while *Barefoot* is extreme as to the reach of expert discretion, the expert decisionmaker did not become involved until after a conviction with full due process protections. It was left to later cases to allow an expert to confine a defendant without a criminal conviction.

3. Barefoot v. Estelle[199]

Barefoot v. Estelle, a death penalty appeal arising from a case decided by the Texas Court of Criminal Appeals,[200] represents an extreme case of restricting an individual's liberty for the safety of society.[201] *Barefoot* is a prevention case because the underlying substantive issue was whether Texas had proved that Thomas Barefoot was so dangerous to society as to merit the death penalty.[202] The trial court used the "beyond a reasonable doubt" standard, which is constitutionally required in

194. "Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547.

195. "We further observe that, on occasion, prison administrators may be 'experts' only by Act of Congress or of a state legislature." *Id.* at 548.

196. *Id.*

197. *Id.* at 555 (citing Jones v North Carolina Prisoners' Labor Union, 433 U.S. 119, 132 (1976)).

198. *See infra* subsection 3.

199. 463 U.S. 880, *reh'g denied*, 464 U.S. 874 (1983).

200. Barefoot v. State, 596 S.W.2d 875 (Tex. Crim. 1980), *reh'g denied*. At the time this case was heard, the Court of Criminal Appeals was the court of last resort for criminal cases in Texas.

201. This discussion is not meant to endorse the Supreme Court's decision in *Barefoot*.

202. Barefoot v. State, 463 U.S. at 888.

criminal adjudications.[203] However, this provided scant protection for Barefoot because the state was only required to prove that there was some "probability" that Barefoot posed a risk of future dangerousness.[204] In effect, the state's burden of proof was so slight that Barefoot could have been put to death as a regulatory restriction.[205]

Barefoot had burned down a bar and then shot and killed a police officer investigating the arson. The jury convicted him of capital murder of a police officer. After the conviction phase of the trial, the same jury heard evidence on the question of whether Barefoot should be put to death.[206] To sentence a person to death in Texas, the state must show: 1) that the killing was intentional;[207] 2) that it was without reasonable provocation;[208] and 3) that the defendant poses a threat of future dangerousness.[209] The state must prove each of these elements beyond a reasonable doubt to satisfy traditional procedural due process concerns.[210]

The state relied on psychiatric testimony to establish future dangerousness, calling two psychiatrists, Drs. John Holbrook and James Grigson, to testify at the punishment stage of the trial. Each doctor was posed a hypothetical fact situation based on the evidence in the case and asked if the individual described in that question would probably commit future acts of violence that would constitute a continuing threat to society. Each doctor testified that, in his opinion, the hypothetical criminal would continue to be dangerous.[211] In addition to this expert testimony, numerous lay witnesses testified that "appellant's reputation in their

203. TEXAS CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981), requires that the jury find: "(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted."

204. "Appellant contends that the trial court erred by refusing to define 'probability' in its charge to the jury at the punishment stage of the trial. This Court has previously held that such a definition is not required." Barefoot v. State, 596 S.W.2d at 887.

205. This case only applies to persons convicted of capital murder. Conversely, under Texas law a capital murderer may not be put to death unless the state can establish future dangerousness. By allowing Texas to use a regulatory standard of proof for this determination, the Supreme Court is endorsing regulatory executions.

206. Barefoot v. Estelle, 463 U.S. at 883-84 & n.4.

207. TEXAS CODE CRIM. PROC. ANN., art. 37.071 (Vernon 1981), requires that the jury find: "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result."

208. TEXAS CODE CRIM. PROC. ANN., art. 37.071 (Vernon 1981), requires that the jury find: "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

209. TEXAS CODE CRIM. PROC. ANN., art. 37.071 (Vernon 1981), requires that the jury find: "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society".

210. *See supra* note 138 and accompanying text.

211. Barefoot v. State, 596 S.W.2d at 887.

communities for being a peaceful and law-abiding citizen was bad."[212] The judge then sentenced Barefoot to death.

In his appeal to the Court of Criminal Appeals, the defendant raised several questions about the conduct of his trial.[213] The issue that is central to the jurisprudence of prevention is the effect of the term "probability" in the test for future dangerousness. Defendant argued that this term should have been defined in the jury instructions.[214] In addition, defendant asserted that, since they had not examined him, the psychiatrists should have been precluded from testifying in response to a general hypothetical.[215] He also questioned the qualifications of psychiatrists as a group to predict dangerousness.[216] The Court of Criminal Appeals rejected all of appellant's points of error.[217]

The United States Supreme Court also rejected the defendant's challenge that psychiatrists as a group are incompetent to determine dangerousness to a sufficient degree of certainty.[218] The Court reasoned that psychiatrists are no less reliable than laypersons, and that lay testimony is sufficient to establish future dangerousness.[219] The Court addressed the issue of the degree of accuracy necessary for determining dangerousness:

> Dr. John Monahan, upon whom one of the State's experts relied as "the leading thinker on this issue" concluded that "the 'best' clinical research currently in existence indicates that psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in

212. *Id.* at 888.

213. The Texas Court of Criminal Appeal noted:

> Appellant contends that the trial court erred by failing to instruct the jury at the guilt-innocence stage of the trial on the law of circumstantial evidence, denying his motion for change of venue, overruling his challenges for cause of three prospective jurors, refusing his request for additional peremptory challenges, admitting evidence of extraneous offenses, failing to define "probability" in the charge at the punishment stage, and overruling his objections to the testimony of two witnesses as to the probability he would commit acts of violence in the future. Appellant also contends that art. 37.071, V.A.C.C.P., is unconstitutionally vague.

Id. at 878.

214. The Court of Criminal Appeals, relying on King v. State, 553 S.W.2d 105 (Tex. Crim. App. 1977), affirmed the trial court's refusal to give an instruction defining probability. 596 S.W.2d at 878.

215. *Id.* at 887. In his appeal to the U.S. Supreme Court, the defendant also attacked the authority of psychiatrists to determine future dangerousness. *See Barefoot*, 463 U.S. at 896-97.

216. *Id.*

217. *Id.* at 889: "The evidence that we have already summarized in this opinion is amply sufficient to support the jury's verdict and the court did not err in overruling appellant's motion for an instructed verdict."

218. *Id.* at 896-97.

219. *Id.* (citing with approval Jurek v. Texas, 428 U.S. 262, 274-76 (1976)).

the past . . . and who were diagnosed as mentally ill."[220]

The Court pointed out that Dr. Monahan did believe there were circumstances in which prediction is "empirically possible and ethically appropriate,"[221] but it is difficult to accept that the determination in *Barefoot* would fit these circumstances.[222] The experts did not even examine defendant, but instead rendered their opinions based on hypothetical questions.[223] The Court held that the use of hypothetical questions to establish future dangerousness is proper[224] because the admissibility of such testimony is supported by the Federal Rules of Evidence.[225] The Court refused to find that death penalty cases pose special evidentiary problems.[226] The Court's approach imposed upon the defendant the harsh burden of convincing a lay jury[227] to disregard the expert testimony of the state's psychiatrists.[228]

220. *Barefoot*, 463 U.S. at 899-900 n.7 (citing "Tr. of Hearing" at 195 (quoting J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 47-49 (1984)) (emphasis in original). The United States Supreme Court found the issue of the proper standard of proof for future dangerousness to be of secondary importance. In the Court's view, the primary issue was whether the handling of the *habeas corpus* petition in this death penalty case had been proper. Most of the Supreme Court's opinion is concerned with "the question presented by the application, namely, the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals by a death-sentenced federal *habeas corpus* petitioner . . .." *Id.* at 887 (quoting *Barefoot*, 459 U.S. 1169 (1983)).

221. *Barefoot*, 463 U.S. at 889-901 n.7.

222. "Doctor Grigson . . . has been used by the state of Texas for dozens of sentencing hearings in death penalty cases and virtually each time had testified that the defendant was incorrigibly dangerous, thus permitting them to be sentenced to death. Texas newspapers have labeled him 'Doctor Death.'" Reuters News Service, May 18, 1981.

223. *Barefoot*, 463 U.S. at 885.

224. *Id.* at 903 (citing Spring Co. v. Edgar, 99 U.S. 645, 657 (1879) (use of hypothetical questions in place of testimony based on expert's personal evaluation of evidence is proper)).

225. 463 U.S. at 904.

226. "Although cases such as this involve the death penalty, we perceive no constitutional barrier to applying the ordinary rules of evidence governing the use of expert testimony." *Id.*

227. Texas provides indigents $500 for the costs of investigation and engaging expert witnesses. *Id.* at 899 n.5. At the time the *Barefoot* case was originally tried, the "going rate" in Texas for preparation and trial testimony exceeded $1500 for a physician expert.

228. See Justice Blackmun's dissent for a detailed analysis of the problems in refuting pseudo-scientific testimony. *Id.* at 916-38. The United States Supreme Court acknowledged the danger of expert testimony in Satterwhite v. Texas, 108 S. Ct. 1792, 1796 (1988):

> The controversy in *Estelle v. Smith* [451 U.S. 454 (1981)] also centered on the expert testimony of Dr. James P. Grigson. In that case, as in this, Dr. Grigson appeared as a witness for the State in a capital sentencing proceeding and testified that the defendant was a severe sociopath who would continue to commit violent crimes in the future. He based his testimony upon a psychiatric examination of the defendant that he had conducted pursuant to court order. The problem in the case was that defense counsel were not given advance notice that Dr. Grigson's psychiatric examination, encompassing the issue of their client's future dangerousness, would take place. We recognized that, for a defendant charged with a capital crime, the decision whether to submit to a psychiatric examination designed to determine his future dangerousness

Barefoot is an extreme example of judicial deference to expert decisionmaking. The Texas legislature avoided due process challenges to its death penalty guidelines by preserving the facade that a jury may only recommend death after determining beyond a reasonable doubt that the defendant posed a future danger,[229] while, in reality, an expert determines "whether there is a probability" that the defendant will be dangerous in the future.[230] Since, on the face of the statute, any probability would do, it is the expert who effectively decides whether the defendant is dangerous enough to die. The jury only decides whether it believes the expert. Thus, "beyond a reasonable doubt" is transformed into an "any evidence at all" standard.[231]

Putting aside the policy that death penalty cases deserve special standards,[232] *Barefoot* allows a person to be put to death on little more[233] than a chance that he or she poses a threat to society.[234] While this is an extreme result, it may nonetheless be rational. The issue of future dangerousness is not reached until the defendant is convicted with full due process protections of capital murder. Constitutionally, Texas could sentence the defendant to death without further findings. Instead, it requires the defendant's life to be balanced against the potential threat that he or she poses to society. Balancing individual liberty against potential

> is "literally a life or death matter" which the defendant should not be required to face without "the guiding hand of counsel."

Id. (quoting Estelle v. Smith, 451 U.S. at 471 (quoting Smith v. Estelle, 602 F.2d 694, 708 (5th Cir. 1979) and Powell v. Alabama, 287 U.S. 45, 69 (1932))).

229. TEXAS CODE CRIM. PROC. ANN., art. 37.071 (Vernon 1981), *quoted in Barefoot*, 463 U.S. at 883-84 n.1.

230. *Barefoot*, 416 U.S. at 916-19.

231. Barefoot had not been convicted of any crimes of violence in the past. There was testimony that he had broken out of jail in New Mexico where he was being held on charges of sexual assault. The state also presented witnesses to his bad character, but they testified as to general character, rather than specific events that would allow the jury to independently evaluate Barefoot's proclivities. *Barefoot*, 463 U.S. at 917 (Blackmun, J., dissenting.)

232. Justice Blackmun's dissent refers to Woodson v. North Carolina, 428 U.S. 280, 305 (1976) as a statement of the traditional policy for death penalty determinations:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 924 (Blackmun, J., dissenting (quoting *Woodson*, 428 U.S. at 305)).

233. While the jury must answer yes to three special issues to trigger the imposition of the death penalty, two of these issues are also elements of capital murder. These elements would already have been established in the determination of guilt phase of the trial. *See Barefoot*, 463 U.S. at 916-17 n.1 (Blackmum, J., dissenting).

234. "In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself." *Id.* at 916.

harm to society is the fundamental expert determination in public health jurisprudence.

Harsh as the result in *Barefoot is*, the expert decision making occurred only after a full criminal trial. In the subsequent prevention cases, beginning with *Schall v. Martin*, the Supreme Court extended the role of the expert to the determination of whether a person should be confined at all. These cases have erased the bright line between dangerousness based on criminal activity and dangerousness based on health and safety concerns. The Supreme Court based its abandonment of this traditional distinction on the application a societal self-defense analysis.

4. *Schall v. Martin*[235]

Schall established the acceptability of detentions based on the discretion of an expert decision maker.[236] By limiting its holdings to juveniles, who have historically not been granted full constitutional protection, the Court was able to assert the right to detain individuals to prevent future crimes without great controversy.

In *United States ex rel. Martin v. Strasburg*,[237] the district court confronted both the constitutional basis for a determination of dangerousness and the theory of regulatory versus punitive detention. The case arose from a class action *habeas corpus* petition brought "on behalf of a class of all juveniles who are being held or who will be held before these proceedings are concluded in pretrial detention under New York Family Court Act § 739(a)(ii)."[238]

Three named petitioners participated in the trial on the merits, and the records of thirty-three other detainees were introduced into evidence.[239] Many of the petitioners were detained on suspicion of serious crimes.[240] The *habeas corpus* petition challenged the constitutionality of

235. 467 U.S. 253 (1984).

236. Although Schall established the state's right to detain juveniles prior to an adjudication of guilt or delinquency, it did not directly overrule *Winship* or *Gault*. The *Schall* Court moved away from the emphasis on due process protections to a regulatory model for detention. *See infra* notes 277-81 and accompanying text.

237. 513 F. Supp. 691 (S.D.N.Y. 1981).

238. *Id.* at 693. While the detentions were of a short duration, jurisdiction was granted based on a recurring violation theory.

239. *Id.* at 694.

240. *Edwin Rodriguez* was arrested . . . and charged with arson and reckless endangerment . . . .

Juan Santiago, 12 years old . . . was arrested . . . and charged with first degree assault on a 71 year old woman. . . .

Jerome Basnight, 14 years old, was arrested . . . and charged with first degree robbery and criminal possession of a weapon. . . .

Johnny McArthur, age 15 was arrested . . . for pointing a loaded, cocked automatic at a 13 year old. . . .

the New York law allowing the preventive detention of minors.[241] The New York statute provided that the state could detain a minor, if, in the judge's discretion, it appeared that there was a substantial probability that the minor would not return on the court date, or that the minor would commit an act that would be a crime if committed by an adult.[242] The judge's determination was based on the intake probation officer's report[243] and the judge's own evaluation and experience.[244]

The petitioners alleged that the statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment,[245] contending that the judge's discretion under section 739 was so broad as to be arbitrary.[246] They also contended that the statute treated juveniles differently from adults, thus violating their right to equal protection.[247] The district court addressed three issues: 1) whether the detention of juveniles is punishment or a regulatory action;[248] 2) whether detention without a full adversary proceeding violates due process considerations;[249] and 3)

> *Christopher Cox*, 13, *Glen Maloney*, 13, and *Wade Forde*, 13, were arrested. . .along with *Clarence Smith*, 13, and *Alex Michael*, 15, and charged with grabbing and threatening people with a weapon in an attempt to take their bus passes.

Id. at 695-97. The remainder of the petitioners were arrested under similar circumstances. *See id.* at 695-700.

241. N.Y. Family Court Act § 739; *see Martin*, 513 F. Supp. at 694, n.2.

242. The statute in question, N.Y. Family Court Act § 739, provided:

> (a) After the filing of a petition under section seven hundred thirty-one or seven hundred thirty-two, the court in its discretion may release the respondent or direct his detention. In exercising its discretion under this section, the court shall not direct detention unless it finds that unless the respondent is detained:
>
> (i) there is a substantial probability that he will not appear in court on the return date; or
>
> (ii) there is serious risk that he may before the return date do an act which if committed by an adult would constitute a crime.

Id.

243. The intake probation officer must have a master's degree in social work, sociology or related fields, or a bachelor's degree, plus two years of paid-for experience in social work and related fields. The probation officer interviews the juvenile for ten to forty minutes and investigates the arrest record. The officer may either 'adjust' the case (defer a decision) or refer it to the court with recommendations. *See* 513 F. Supp. at 701.

244. In deciding whether juveniles should be detained, each judge must rely on his or her own subjective judgment, based on the limited information available at court intake and whatever personal standards the judge has developed in exercising discretionary authority under the statute. *Id.* at 702.

245. *Id.* at 704.

246. *Id.* Petitioners argued that the subjective prediction of future misconduct, which § 739(a)(ii) authorized as the basis for the pretrial detention of juveniles was a vague, arbitrary, and capricious standard and that no rational prediction was possible under the statutory scheme. *Id.*

247. *Id.* at 704.

248. *Id.* at 705.

249. *Id.* at 707.

whether it is proper for a judge to make a determination of future dangerousness without either detailed standards or expert testimony.[250]

The district court focused its inquiry on the character of the detention involved—physical confinement—rather than on the legislative intent behind the statute. The court reasoned that a state cannot preemptorily label a statute as regulatory regardless of its actual effect on the detained individual.[251] In this case the court was persuaded that the stigmatization associated with incarceration amounted to punishment.[252] This broad view of punishment is rooted in Supreme Court precedent:

> It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."[253]

Once the district court determined that the statute imposed a criminal sanction through a civil proceeding, it was inexorably driven to conclude that "pretrial detention without a prior adjudication of probable cause is, itself, a per se violation of due process."[254]

The court was most concerned with the latitude that the statute gave a judge in determining whether to detain an individual.[255] The court heard extensive testimony on the hazards of predicting future dangerousness[256] and concluded that dangerousness cannot be predicted with any "acceptable degree of accuracy."[257] Adopting public health

250. *Id.*

251. "The state cannot escape the obviously punitive nature of detention under § 739 by labelling the statute 'preventive' and 'regulatory,' since 'even a clear legislative classification of a statute as "non-penal" would not alter the fundamental nature of a plainly penal statute.' " *Id.* at 716 (citations omitted).

252. "However, 'punishment' is not limited to deprivations based on having committed a specific, identifiable crime. It is sufficient if the person is stigmatized as disreputable in a manner closely analogous to the process that occurs upon a formal finding of criminal guilt." *Id.*

253. United States v. Brown, 381 U.S. 437, 458 (1965).

254. 513 F.Supp. at 707.

255. The first defect [the vagueness of the statute] is perhaps the most pernicious. The judge is empowered to make a prediction about the probability of an individual committing a crime if released. No guidelines for making that determination are set out in the statute, and none has been adopted by the court. The judge's determination is moored to no concrete or reasonably determinable yardsticks. . . . The whole process is riddled with subjectivity and caprice and confers upon the judge 'a license for arbitrary procedure.'

Id. (citation omitted).

256. *Id.* at 709-11 nn.31-32.

257. *Id.* at 709.

metaphors,[258] the court expressed concern that predictions of future dangerousness tend to overinclusiveness, so that there are too many "false positives."[259] After examining the evidence presented by clinical[260] and statistical[261] methods of predicting future dangerousness, the court found it unreasonable to accept that a family court judge, whose only information is derived from the accused's brief appearance before the court, can determine future behavior.[262]

The more difficult issue was whether the district court would accept a properly qualified professional decision made in the peremptory manner that is mandated by the circumstances of a juvenile detention hearing.[263] Not only would it be expensive to make detailed investigations of each detainee, it would also take considerable time to make a particularized determination in each case involving testing and interviewing the detainee, collecting background information, and conferring with social workers.[264] If, during this time, the state were to keep the juvenile in custody, it would be with even less procedural protection than the statute at issue provided. If the juvenile were not detained, he or she might commit more crimes or fail to appear before the court.[265] The court did not address these state concerns, but instead attacked the very notion of

258. While the Court used public health terms to describe the problems of an imperfect screening system, it ignored the risk to society of crimes committed by persons awaiting adjudication. Despite the "false positives," a public health analysis, as conducted later by the Supreme Court, would find this an acceptable risk-benefit ratio. *See Schall*, 467 U.S. at 278-79 & n.30.

259. 513 F. Supp. at 709.

260. "Clinical methods rely on the use of trained psychiatric or social science staff, attempting a 'wide band procedure in which a broad range of information about the individual is gathered from sources such as interviews, social history, and projective testing.'" *Id.* at 711.

261. "In statistical prediction, the individual is, in effect, classified in terms of the presence or absence of the predictor variables. Given the classification, the frequencies of behaviors can be concluded for persons belonging to the same class." *Id.* at 712 (citation omitted).

262. *Id.*

263. If the juvenile is in custody, he must be brought before a judge within 24 hours. The judge may postpone the § 739 hearing for an additional 24 hours. If the juvenile is detained, a fact-finding hearing (equivalent to a trial on the merits) must be heard within 14 days, and usually three to six days. The judge makes a determination at the hearing based on the testimony presented. In many cases there is no one present with personal knowledge of the alleged crime. *Id.* at 702.

264. *See id.* at 711-12.

265. *Id.* at 713. Paroling the juvenile during a determination of future dangerousness was particularly nettlesome to the district court:

> What seems to be the most patently arbitrary action, however, occurs in those cases in which the juvenile is paroled to the custody of his parents or guardians after the incident, has been home on parole ranging in the case histories in this record from roughly 5 days to over a month prior to the § 739 hearing, and even though there is no showing of any other infraction while on parole, the judge nonetheless orders remand purportedly because there is a risk that the juvenile will commit a new crime before he is tried on the instant offense. Whatever meager rationale may exist

detention, assailing the premise that future dangerousness can be predicted.[266] This line of argument implies that the detention of minors is constitutionally permissible, even if based on particularized determinations of future dangerousness.[267]

In affirming the district court's decision, the Court of Appeals for the Second Circuit predicated its analysis on the assumption that "[t]he presumption of innocence and the requirement that guilt be proven beyond a reason doubt are important elements of Due Process itself . . . ."[268] Although a focus on the presumption of innocence usually leads to an absolute prohibition on pretrial detention, the court of appeals in this case examined the evidence on the relationship between detention and eventual adjudication. The court accepted defendant's assertions that at least two-thirds of all persons detained pursuant to section 739 were eventually released without being sentenced to additional detention as a punishment and therefore should not have been detained at all.[269] The appeals court held that this limited congruence between final adjudication and preventive detention failed to prove a compelling government interest in pretrial detention, and that the statute was unconstitutional:

> Our decision is strictly limited to the precise issue before us. We hold only that pre-trial detention may not be imposed for anti-crime purposes pursuant to substantively and procedurally unlimited statutory authority when, in all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt.[270]

The appeals court found that the detention served as a "punishment imposed without proof of guilt established according to the requisite constitutional standard."[271]

> in other situations . . . remand is wholly unjustified and unsupportable in these circumstances . . . ."

Id.

266. The literature generally agrees that no reliable method of predicting dangerousness, whether clinical or actuarial in nature, exists at this time. . . .
> Thus, it is clear that juveniles who are subjected to § 739 detention have their freedom curtailed by judgments that are untrustworthy and uninformed and without the requisite rationality which due process mandates.

Id. at 712.

267. The District Court handed down its decision before *Barefoot*, which endorsed determinations of future dangerousness. *See supra* subsection 3.

268. Martin v. Strasburg, 689 F.2d 365 (citing *In re* Winship, 397 U.S. 358 (1970)).

269. The Court of Appeals accepted defendant's assertions that there were three classes of detainees for whom detention was not warranted: 1) persons eventually released without adjudication; 2) persons detained on mistaken information; and 3) persons later adjudicated guilty but released for time served. Martin v. Strasburg at 373.

270. *Id.* at 374.

271. *Id.* In contrast to the absolutist position of the district court, the appeals court did not strike the statute for vagueness.

The Supreme Court reviewed the court of appeals decision in *Schall v. Martin*,[272] and considered the question of "fundamental fairness" under the Due Process Clause in this context, focusing on two questions: "First, does preventive detention under the New York statute serve a legitimate state objective?"[273] "And, second, are the procedural safeguards contained in the FCA [Family Court Act] adequate to authorize the pretrial detention of at least some juveniles charged with a crime?" The first question effectively transformed the lower courts' terminology of "pre-trial detention" and "compelling governmental interest"[274] into "preventive detention"[275] and "legitimate state objective."[276] As a result, the Court shifted the analysis away from the criminal context and toward public health concepts and tests.

The Supreme Court quickly defused the issue of punishment without adjudication by stressing that minors may benefit when the state provides detention and thus 'protect[s] the juvenile from his own folly.'[277] The Court indirectly addressed the legitimacy of the state's interest in pretrial detention by referring to "[t]he 'legitimate and compelling state interest' in protecting the community from crime . . . ."[278] This interest is not diminished by the age of the offender, but may in fact be enhanced by the high rate of recidivism among juveniles.[279] The Supreme Court bolstered its reasoning by reference to the large number of states that have adopted preventive detention for minors.[280] With this commentary the Supreme Court completely transformed the District Court's absolute rejection of the statute as punishment without due process into a question of balancing the right of society to protect itself against the right of a minor to engage in youthful folly. As a balancing question, the Supreme Court held that the statute provided for an allowable regulatory

272. 467 U.S. 253 (1984).

273. *Id.* at 263-264.

274. *Strasburg*, 689 F.2d at 373.

275. *Schall* at 263.

276. *Id.* at 264.

277. *Id.* at 265 (citation omitted).

278. *Id.* at 264. The Court also referred to the "weighty social objective" of crime control. *Id.*

279. *Id.* at 264-65.

280. *Id.* at 266-67 n.16. The Court did not find that wide usage in itself is determinative of whether a practice satisfies due process requirements. Wide usage does, however, rebut the argument that the practice in question does not offend " 'some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Id.* at 268 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

detention.[281]

The critical feature in *Schall* that characterizes it as a prevention case is the statute's broad grant of authority to expert decision makers, who determine whether an individual should be detained. The District Court, accepting extensive expert testimony on the appropriateness and accuracy of predictions of future dangerousness, concluded that these determinations are inherently arbitrary, and held therefore that the statute was an unconstitutional delegation of authority.[282] The Supreme Court rejected these evidentiary attacks on the propriety of determinations of future criminal conduct:

> Our cases indicate . . . that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, and we have specifically rejected the contention, based on the same sort of sociological data relied upon by appellees and the District Court, "that it is impossible to predict future behavior and that the question is so vague as to be meaningless."[283]

The Supreme Court found that it is precisely this difficulty in determining future criminal conduct that justifies granting the judge broad authority.[284] The Court's balancing of uncertainty turns the trial court's analysis on its head: controversy over the methodology for determining future criminal conduct was found to validate a vague law rather than undermine it. Rejecting sociological evidence that the judges' decisions could not be made correctly, the Supreme Court deferred to the judge as expert decision maker. Although this reasoning is consistent with public health jurisprudence, in which a health officer's decision or act in the face of uncertainty is acceptable, an analogous delegation of decision making power is anathema in the criminal law context.

The Supreme Court's finding that the state may regulate individual behavior in the face of controversy over the scientific basis for that regulation underscores an important distinction between the jurisprudence of prevention and the jurisprudence of individual liberties developed in criminal law. Criminal law demands proof beyond reasonable doubt, but science seldom provides answers to sociologic problems that can withstand a "beyond a reasonable doubt" analysis. Even issues as clear as the value of childhood immunizations are endlessly debated—yet few would

281. *Schall*, 467 U.S. at 274. Preventive detention serves the legitimate state objective, held in common with every state in the country, of protecting both the juvenile and society from the hazards of pretrial crime.

282. 513 F.Supp. at 707.

283. *Schall*, 467 U.S. at 278-79 (footnotes and citations omitted); *see also supra* notes 185-87 and accompanying text.

284. 467 U.S. at 279-80.

argue that this debate should be allowed to interfere with the involuntary immunization of children.[285]

The Supreme Court's satisfaction with the statute's procedural protections is another parallel to public health jurisprudence. The Court found that the statute in *Schall* provided for notice, a hearing, and a statement of facts prior to detention.[286] Although these procedural protections are rudimentary in nature,[287] the majority found them satisfactory, dismissing the Court of Appeals' conclusion that the proceedings were too brief to allow appeal through *habeas corpus*.[288] The Supreme Court determined that the record provided at the hearing, combined with the right of appeal to the New York Supreme Court, made it reasonable to consider *habeas corpus* a part of the protections in a section 320 detention.[289] This reliance on *habeas corpus* for "correcting on a case-by-case basis any erroneous detentions . . . "[290] reflects the public health emphasis on procedural flexibility,[291] rather than the criminal law emphasis on certainty and procedural regularity.

Detailed procedural safeguards cost time and money. When the concern is prevention of future harm, these costs limit the state's ability to act. A prevention analysis starts with the premise that there are some circumstances in which procedural protections are incompatible with societal self-defense. The simplest example would be a police action to in-

285. *See supra* notes 59-67 and accompanying text. In Jacobson v. Massachusetts, 197 U.S. 11, 28-29 (1905), the Supreme Court noted:

> If the mode adopted by the Commonwealth of Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient or objectionable to some—if nothing more could be reasonably affirmed of the statute in question—the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few.

286. *Schall*, 467 U.S. at 275.

287. *Id.* at 283-86 (Marshall, J., dissenting).

288. *Id.* at 281; *see* Martin v. Strasburg, 689 F.2d at 374.

289. *Schall*, 467 U.S. at 281.

290. *Id.*

291. *See In re* Halko, 246 Cal. App. 2d 553, 558, 54 Cal. Rptr. 661, 664 (1966) ("[A] person quarantined without reasonable grounds is entitled to relief by habeas corpus.") However, in *In re* Arata, 52 Cal. App. 380, 383, 198 P. 814 (1921), the court was careful to point out that the issue is a factual one:

> That the health authorities possess the power to place under quarantine restrictions persons whom they have reasonable cause to believe are afflicted with infectious or contagious diseases coming within the definition set forth in Political Code, section 2979a, as a general right, may not be questioned. It is equally true that in the exercise of this unusual power, which infringes upon the right of liberty of the individual, personal restraint can only be imposed where, under the facts as brought within the knowledge of the health authorities, *reasonable ground exists to support the belief* that the person is afflicted as claimed; and as to whether such order is justified will depend upon the facts of each individual case.

terrupt a violent crime in progress: the police are not required to have a probable cause hearing before breaking up a bank robbery that is in progress. They do not need to obtain a warrant before shooting a person who is shooting at them. There is universal agreement that imposing procedural requirements in these circumstances would make it impossible to prevent the threatened harm. Conversely, a criminal law analysis starts with cold facts: the crime has been committed. There is no urgency for action. Unlike the crime in progress, there is uncertainty about the guilt of the accused. While the expense of procedural protections may still be troublesome, the delay is not crippling.

The prevention cases assume that the violent crime in progress is one extreme in a continuum of situations in which the probability of harm is great enough to outweigh the benefits of full due process protections.

5. Allen v. Illinois[292]

The Supreme Court in *Allen v. Illinois* further refined the regulatory detention punitive incarceration dichotomy. *Allen* was a criminal action, but the statute at issue also provided for indefinite civil detention in a maximum security prison.[293] The defendant protested that his detention was a punishment imposed without proper due process, and in particular that the statute did not protect the accused's privilege against self-incrimination.[294] The Supreme Court found that the detention was regulatory, not punitive.[295] Because the need for accurate factfinding is critical to regulatory detentions, the Court rejected defendant's complaint that he was forced to incriminate himself.[296]

Terry Allen was accused of hiding in a woman's car, forcing her to drive him to a "romantic place," and then forcing her to have sexual relations with him. The victim was able to escape without further injury.[297] The State of Illinois charged Allen with the crimes of unlawful restraint and deviate sexual assault.[298] While the charges were pending, the state moved to declare Allen a sexually dangerous person under the Illinois law that provided for the indefinite civil commitment of such

292. 478 U.S. 364 (1986).
293. *Id.* at 369; *and see infra* note 299.
294. Allen v. Illinois at 370.
295. *Id.* at 374.
296. *Id.* at 375.
297. People v. Allen, 107 Ill.2d 91, 481 N.E.2d 690, 693-94 (1985).
298. 481 N.E.2d at 692.

persons.[299]

After a bench trial, an Illinois judge determined that Allen was a sexually dangerous person[300] and remanded him to the Menard Psychiatric Center, a maximum security facility.[301] Reviewing Allen's appeal, the Illinois Supreme Court identified three questions for decision: 1) Are *Miranda* warnings required before a defendant is examined by a psychiatrist pursuant to a court order in a sexually dangerous person proceeding? 2) Did the defendant waive any applicable privilege against self-incrimination? 3) Did the state prove beyond a reasonable doubt that the defendant was a sexually dangerous person as defined by the statute?[302]

The Illinois Supreme Court, relying on *People v. Pembrock*[303] and *People v. English*,[304] found that a proceeding to have a person committed under the sexually dangerous person statute was civil in nature,[305] and that in a civil proceeding there is no constitutional requirement that the defendant be given *Miranda* warnings.[306] The court found that there was no privilege against self-incrimination in a sexually dangerous person proceeding, but held that statements made during these proceedings could not be used against a defendant in subsequent criminal proceedings.[307] The court also found there was sufficient evidence to find beyond a reasonable doubt that Allen had a propensity to commit sexual assault.[308] Allen appealed to the United States Supreme Court, arguing that the commitment hearing was a criminal proceeding and, therefore, that he was entitled to full criminal procedural protections.[309]

299. Ill. Rev. Stat. ch. 38, para. 105-1.01 (1985) (*quoted in* Allen v. Illinois, 478 U.S. at 366 n.1) defines sexually dangerous persons as follows:

> "All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons."

300. People v. Allen, 481 N.E.2d at 692-93.

301. Allen v. Illinois, 478 U.S. at 372.

302. People v. Allen, 481 N.E.2d at 692.

303. 62 Ill.2d 317, 342 N.E.2d 28 (1976).

304. 31 Ill.2d 301, 201 N.E. 455 (1964).

305. People v. Allen, 481 N.E.2d at 695.

306. *Id.* at 696.

307. *Id.*

308. *Id.* at 697.

309. Defendant's basic theory was, "If it walks like a duck . . . ." The state provided some, but not all, criminal procedures; the result of the proceeding was that defendant was sent to a maximum security prison. Allen v. Illinois, 478 U.S. at 370; *see also id.* at 377-79 (Stevens, J., dissenting).

As a prevention case, the critical issue in *Allen* is the extent to which the State has authority to restrict individual liberty without triggering criminal law protections. The *Allen* Court recited the rule that legislative labeling of a statute as civil is not dispositive.[310] However, the rationale of *Allen* expanded the state's discretion to fashion civil remedies for what traditionally have been considered criminal wrongs; the increased discretion follows from the Court's rejection of defendant's contention that *In re Gault* prevented him being deprived of liberty without being afforded the privilege against self-incrimination.[311] This ruling allowed Illinois to incarcerate a technically innocent, mentally competent individual without full criminal law protections. The Court made clear in its rejection of *Gault* that Illinois' characterization of the statute as potentially benefitting the defendant was crucial. The Illinois law escaped criminal law scrutiny simply because the legislature denied that it intended to punish confinees.

Allen explicitly overruled *Gault* to the extent that *Gault* had purported to govern every deprivation of liberty:

> First, *Gault's* sweeping statement that "our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty," is plainly not good law. Although the fact that incarceration may result is relevant to the question whether the privilege against self-incrimination applies, *Addington* demonstrates that involuntary commitment does not itself trigger the entire range of criminal procedural protections.[312]

The Court also found that the Illinois statute served a *parens patriae* role in providing treatment to mentally ill individuals.[313] This treatment component defeated defendant's objection that the statute was wholely punitive. Although the treatment was carried out in a maximum-security facility, the Court found that the confinement was not inconsistent with the statute's purpose, and noted further that states have the right to protect the community from persons who are dangerous due to mental

310. The Illinois legislature expressly designated proceedings under the Act as civil in nature. Discussing the effect of this designation, the Supreme Court stated:

> As a petitioner correctly points out, however, the civil label is not always dispositive. Where a defendant has provided "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" that the proceeding be civil, it must be considered criminal and the privilege against self-incrimination must be applied.

Allen v. Illinois, 478 U.S. at 369 (citation omitted).

311. *Id.* at 372.

312. *Id.* at 372-73 (citation omitted).

313. *Id.* at 373.

illness.[314]

The *Allen* Court emphasized that excessive reliance on criminal law protections, especially the privilege against self-incrimination, can reduce the accuracy of determinations of dangerousness.[315] This focus reflects a shift from the criminal law perspective that the defendant is best off with a determination of innocence to the public health perspective that the defendant is better off being treated.[316] Ultimately, the Court identified support for the statute's relaxed procedural requirements in the special role of the states in our federal system, concluding that the "essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. . . ."[317]

The Court expands this notion of flexibility in the subsequent cases of *Hilton v. Braunstill*[318] and *United States v. Salerno*.[319] While *Allen* allowed Illinois to confine an individual without full due process protections, it was predicated on a determination beyond a reasonable doubt that the defendant had committed a crime. In *Hilton* and *Salerno*, the Court found that adults could be confined to prevent future harm *without* proof beyond a reasonable doubt that they had committed crimes in the past.

6. Hilton v. Braunskill

In the 1987 Term, the Supreme Court solidified its jurisprudence of prevention in the companion cases of *United States v. Salerno*[320] and *Hilton v. Braunskill*,[321] two cases that knit together a body of decisions heretofore regarded as unrelated exceptions to due process requirements.[322] In these cases, the Court extended the concept of regulatory

314. *Id.* (citing *Addington*, 441 U.S. at 426).

315. The Court's analysis of the value of the privilege against self-incrimination was in the context of distinguishing Mathews v. Eldridge, 424 U.S. 319 (1976), which dealt with the application of the privilege in a property deprivation case:

> As the Supreme Court of Illinois and the State have both pointed out, it is difficult, if not impossible, to see how requiring the privilege against self-incrimination in these proceedings would in any way advance reliability. Indeed, the State takes the quite plausible view that denying the evaluating psychiatrist the opportunity to question persons alleged to be sexually dangerous would decrease the reliability of a finding of sexual dangerousness. As in *Addington*, "to adopt the criminal law standard gives no assurance" that States will reach a "better" result.

Id. at 374-75.

316. Allen v. Illinois, 478 U.S. at 375.

317. *Id.* at 375 (citing *Addington*, 441 U.S. at 431).

318. 107 S. Ct. 2113 (1987). *See infra* subsection 6.

319. 107 S. Ct. 2095 (1987). *See infra* subsection 7.

320. 107 S. Ct. 2095 (1987).

321. 107 S. Ct. 2113 (1987).

322. *Salerno*, 107 S. Ct. at 2102.

detention well into traditional criminal law jurisprudence. The Court based this extension on the right of societal self-defense that underlies the jurisprudence of prevention.

Braunskill, the more narrowly decided of these two cases, involved a *habeas corpus* petition by a state prisoner.[323] Dana Braunskill was convicted of first-degree sexual assault and fourth-degree unlawful possession of a knife.[324] At trial, the judge refused to allow an alibi witness' testimony, which Braunskill alleged would have refuted testimony placing him at the scene of the crime. The New Jersey Court of Appeals found that the alibi witness had been improperly excluded,[325] but that the testimony was of 'dubious value'; the appeals court was satisfied "beyond a reasonable doubt that any such error did not affect the verdict."[326] Braunskill filed his petition for *habeas corpus* pro se[327] from within the New Jersey State Prison. Upon granting the petition for *habeas corpus*, the federal district court did not order the petitioner's release, but stayed the issuance of the writ for 30 days to allow the state time to retry the petitioner. [328] The state asked the district court to suspend its order pending appeal of the case, alleging that Braunskill was a potential threat to the community.[329] The court denied the motion, finding that the only acceptable ground for detaining Braunskill would be the risk that he would not appear for subsequent proceedings.[330] The state then sought a stay of the court's order from the United States court of appeals. The appeals court "summarily denied the stay application."[331]

Reversing the court of appeals, the United States Supreme Court determined that the proper standard for reviewing a motion to stay a writ of *habeas corpus* are the same as those for reviewing a civil judgment, because *habeas corpus* proceedings are civil, not criminal, in nature.[332] More specifically, a court must consider "where the public interest lies."[333] The Court found that considering whether releasing a *habeas corpus* petitioner might endanger the community was in the public inter-

323. 629 F.Supp. 511 (D.N.J. 1986).
324. *Id.* at 513.
325. *Id.* at 515.
326. *Id.* at 516 (citation omitted).
327. Pursuant to 28 U.S.C. § 2254.
328. *Braunskill*, 629 F.Supp. at 526.
329. *Hilton*, 107 S. Ct. at 2117.
330. *Id.*
331. *Id.*, citing Carter v. Rafferty, 781 F.2d. 993, 997 (3d Cir. 1986).
332. *Id.* at 2118. Therefore the general standards governing stays of civil judgments should also guide courts when they decide whether to release a *habeas corpus* petitioner pending the state's appeal. *Id.* at 2119.
333. *Id.* at 2119.

est.[334] The Court rejected the argument that substantive due process "prohibits the total deprivation of liberty simply as a means of preventing future crimes."[335]

Detaining an individual in order to prevent future criminal behavior harkens back to the idea that moral contagion is a public health issue.[336] By implicitly applying the public health metaphor to crime, the Court avoided applying the cumbersome constitutional protections that pertain in a criminal context. *Hilton* weakened the presumption of innocence through the facile observation that persons who have been convicted of a crime are less likely to be innocent than persons not convicted of a crime.[337]

Although the *Hilton* court acknowledged that the foundation of a successful *habeas corpus* petition is a finding that the underlying conviction was constitutionally infirm,[338] the Court stressed that a prisoner is entitled to less protection than an arrestee or a randomly chosen citizen because the prisoner has already been found guilty beyond a reasonable doubt by a jury.[339]

However, this holding is not in keeping with the notion that innocence is an absolute quality: either one is innocent or one is not innocent.[340] By quantifying innocence so that it may be set off against dangerousness, the Court transformed the absolutist issue of constitu-

334. "[I]f the state establishes that there is a risk that the prisoner will pose a danger to the public if released, the court may take that factor into consideration in determining whether to enlarge him." *Id.*

335. *Id.* at 2120.

336. The Supreme Court, in Holmes v. Jennison, 39 U.S. 540 (1840), stated:

> No political community, no municipal corporation, can be under any obligation to suffer a moral pestilence to pollute its air, or contagion, of the most corrupting and demoralizing influence, to spread among its citizens, by the conduct and example of men, who, having forfeited the protection of their own government by their crimes, claim to be rescued from the consequences, by an appeal to the same Constitution and laws, under which our own citizens are not, and cannot be screened from punishment, when it is merited by their conduct."

Id. at 615-16.

337. When combined with the holding in *Bell*, which limits the presumption of innocence to criminal trials, this ruling severely constrains the presumption of innocence as a viable legal theory.

338. *Hilton*, 107 S. Ct. at 2120.

339. But we also think that a successful habeas petitioner is in a considerably less favorable position than a pre-trial arrestee . . . to challenge his continued detention pending appeal. Unlike a pre-trial arrestee, a state habeas petitioner has been adjudged guilty beyond a reasonable doubt by a judge or jury, and this adjudication of guilt has been upheld by the appellate courts of the state.

Id.

340. The Supreme Court foreshadowed this relativistic view of innocence with its decision in *Bell* that innocent pretrial detainees are not entitled to special status. *See supra* note 188-92 and accompanying text.

tionally impermissible punishment of an innocent person into the probabilistic issue of dangerousness. Once we contemplate judicial balancing of the pain of detention against the safety of society, then detention of innocent persons is no longer unthinkable. Ultimately the due process issues become subsumed within a determination of dangerousness.

In a federal *habeas corpus* action, the judge makes the determination of dangerousness. Because federal rules governing *habeas corpus* derive from the court's equity powers,[341] the federal judge has broad discretion to make the determination. Despite serious risk of unconstitutional vagueness,[342] the Supreme Court accepts this procedure recognizing that the public interest requires that the determination be flexible. However, this procedure is arguably inconsistent with the criminal law doctrine that bars punishment under ambiguous statutes.[343]

7. United States v. Salerno[344]

U.S. v. Salerno represents the most recent refinement of the regulatory/punitive dichotomy: the civil detention of adults to prevent future criminal conduct. Commentators have assailed this decision as an erosion of criminal defendants' rights.[345] More importantly, the Supreme Court's decision in *Salerno* may signal an effort to revive a set of previously unrelated civil restriction cases as precedent for the jurisprudence of prevention.

The district court in *U.S. v. Salerno* reviewed the indictment of Anthony "Fat Tony" Salerno.[346] Salerno was indicted under the Racketeer Influenced and Corrupt Organizations Act (RICO)[347] for conspiring to engage in a pattern of racketeering.[348] Pursuant to the Bail Reform Act of 1984,[349] which allows bail to be denied to persons who pose a threat of future criminal activity, the government moved to have Salerno detained prior to trial. Conceding that he posed no risk of flight, the government nevertheless maintained that he posed a threat to the community and "that no condition or combination of conditions will as-

341. *See* Fed. Rule Civ. Proc 62(c) and Fed. Rule App. Proc. 8(a), *cited in Hilton* at 2119.

342. "Since the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a rigid set of rules." *Id.* at 2119.

343. *See, e.g.*, Scull v. Virginia, 359 U.S. 344, 353 (1959) (sending convicted person to jail for crime "he could not with reasonable certainty know he was committing" violates fundamental fairness").

344. 107 S. Ct. 2095 (1987).

345. *See infra* note 405.

346. United States v. Salerno, 631 F. Supp. 1364 (S.D.N.Y. 1986).

347. 18 U.S.C. § 1962.

348. *Salerno*, 631 F. Supp. at 1366-67.

349. 18 U.S.C. § 3142(f)(1)(A) (1984).

sure the safety of the community or of any person . . . ."[350] The district court conducted a hearing at which Salerno, represented by counsel, was allowed to offer testimony rebutting the government's allegations. Salerno was not, however, allowed to cross-examine or confront the government's witnesses.[351]

In deviating from the usual form of an adversarial hearing,[352] the court stated that a pretrial detention hearing is civil, rather than criminal in nature.[353] It characterized the proceeding as one involving involuntary civil commitment, subject to the reduced standard of proof established in *Addington v. Texas*.[354] By this characterization, the District Court was able to avoid the issue of Salerno's presumed innocence and indulge in a risk calculus based on the government's evidence that Salerno ran a criminal enterprise.

The government presented extensive evidence that Salerno posed a danger to the community.[355] This evidence consisted of allegations of past criminal activities and the assertion that Salerno had the power to direct murder with no more than a word.[356] Within the constraints of the limited adversary hearing given Salerno, the court found that "the government has established by clear and convincing evidence that the defendant . . [e]pose[s] a present danger to the community and that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community."[357] Concluding that

350. *Salerno*, 631 F. Supp. at 1366.

351. The government was concerned that Salerno would kill or intimidate the witnesses if he was allowed to confront them:

> The government has a substantial interest at this early stage of the case in preventing premature discovery, in protecting the emotional and physical well-being of its witnesses and in preventing impairment of on-going investigations. On the record of this case, the court finds that these interests outweigh any prejudice claimed by Salerno in not being able to directly impeach Fratianno and Lonardo.

Id. at 1373. Central to the court's accepting the government's request to shelter its witnesses was the testimony on Salerno's involvement with various conspiracies to commit murder. *See id.* at 1367-68.

352. *Id.* at 1373.

353. Moreover, the court pointed out, "At a pretrial detention hearing, many of the rights a defendant enjoys at a criminal trial are absent. The detention hearing is not punitive in nature; rather, it is an involuntary civil commitment proceeding at which proof by a standard less than 'beyond a reasonable doubt' is applicable." *Id.* at 1373.

354. *Id.* (citing Addington, 441 U.S. 418 (1979)).

355. "The court has received a great deal of information about Salerno's danger to the community; it is overwhelming. By 'clear and convincing' proof, the government has established that Salerno is the head, or 'Boss', of an organization engaged in extortion, loansharking, illegal gambling, and murder." *Id.* at 1371.

356. "The government has proffered information showing that Salerno could order a murder merely by voicing his assent with the single word 'hit.'" *Id.* at 1371.

357. *Id.* at 1366.

the government had satisfied the statutory test to justify detention pursuant to the Bail Reform Act of 1984,[358] the district court ordered Salerno's detention.[359]

Salerno appealed his pretrial detention to the Second Circuit Court of Appeals,[360] challenging both the sufficiency of the evidence of future dangerousness and the constitutionality of the Bail Reform Act.[361] The appeals court did not find that the district court's limitations on the adversary hearing prejudiced Salerno's rights, nor did it contest the use of a "clear and convincing" standard (rather than "beyond a reasonable doubt") to justify detention.[362] The court also held that the conditions of the proposed detention itself were proper.[363]

After rejecting Solerno's procedural objections, the appeals court addressed the constitutional issue of detention based on future dangerousness. The court declined to characterize detention as regulatory rather than punitive in nature:

> The sole bases for the detention order in this case are the findings that the defendants would, if released, carry on "business as usual" notwithstanding any release conditions, and that business as usual involves threats and crimes of violence. We regard section 3142(e)'s authorization of pretrial detention on this ground as repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes.[364]

358. 18 U.S.C. §§ 3141-56 (Supp. II 1984).

359. IT IS HEREBY ORDERED THAT defendants Salerno and Cafaro be committed to the custody of the Attorney General for confinement in a corrections facility . . . and that, on an order of a court of the United States or on the request of an attorney for the government, the person in charge of the corrections facility in which they are confined deliver them to a United States marshal for the purpose of an appearance in connection with a court proceeding.

U.S. v. Salerno, 631 F. Supp. at 1375.

360. *United States v. Salerno*, 794 F.2d 64 (2d Cir. 1986) [hereinafter *Salerno* (2d Cir.)].

361. *Id.* at 68.

362. *Id.* at 70.

363. *Id.* at 71.

364. The court in *Salerno* at 71-72 (quoting from United States v. Melendez-Carrion, 790 F.2d 984 (2d Cir. 1986)), pointed out:

> The Government contends that section 3142(e) [the Bail Reform Act] is to be upheld simply because preventive detention is a rational means of advancing the compelling state interest in public safety. That cannot be the test for determining the constitutionality of preventive detention. The fallacy of using such a test can be readily seen from consideration of preventive detention as applied to persons not arrested for any offense. *It cannot seriously be maintained that under our Constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future.* Yet such a police state approach would undoubtedly be a rational means of advancing the compelling state interest in public safety. In a constitutional system where liberty is protected both substantively and procedurally by the limitations of the Due Process Clause, a total deprivation of liberty cannot validly be accomplished [on the sole ground that] doing so is a rational

Pretrial detention is inconsistent with the traditional view that liberty is an absolute constitutional value, yet, the appeals court did not take a pure absolutist position in reviewing the use of pretrial detention[365] For example, the court proposed the use of surveillance as an alternative to incarceration to prevent a monstrous crime, such as the threatened destruction of an airliner.[366] In suggesting this unpalatable alternative to pretrial detention, the appeals court implicitly recognized that the doctrine of absolute liberty until a final criminal conviction has unacceptable societal implications.

The appeals court carefully distinguished *Gerstein v. Pugh*[367] as limited to administrative steps incident to arrest.[368] The court refused to make *Gerstein*, which it characterized as a decision rendered to protect suspects, "the basis for extending that detention for weeks and months after the probable cause determination ha[d] been made."[369] The court was also careful to limit the ruling in *Schall v. Martin*[370] to juveniles. Conceding that adults may pose as great a threat to society as juveniles, the *Salerno* court interpreted *Schall* as "at pains to point out" that juveniles are always in some form of custody.[371] Both of these finely drawn distinctions were swept away in the Supreme Court's reversal of *Salerno*.

Justice Rehnquist set the stage for the Supreme Court opinion in *Salerno* by reviewing the legislative history of the Bail Reform Act. The Court found that the Act was passed in response to "the alarming problem of crimes committed by persons on release," and that it gave courts "adequate authority to make release decisions that give appropriate rec-

> means of regulating to promote even a substantial governmental interest. (emphasis added in *Salerno* (2d Cir.).

365. The appeals court also suggested that if a crime is sufficiently heinous, then the Government need merely assert that it fears the suspected criminal will flee. *Id.* at 74. This leaves the question whether it is constitutionally preferable to detain on the acceptable but sham ground of fear of flight.

366. "Even the risk of some serious crime . . . must, under our Constitution, be guarded against by surveillance of the suspect and prompt trial on any pending charges, and not by incarceration . . . ." *Id.* at 74.

367. 420 U.S. 103 (1975).

368. "We do not believe that *Gerstein v. Pugh* upholds pretrial detention to guard against the commission of future crimes. The detention there allowed, upon a policeman's assessment of probable cause, was for the purpose of taking 'the administrative steps incident to arrest.' " *Salerno* (2d Cir.) at 74 (citations omitted).

369. *Id.*

370. 467 U.S. 253 (1984).

371. *Salerno* (2d Cir.) at 74. The appeals court also stressed that *Schall* represents the state exercising *parens patriae* power to protect the juvenile, rather than focusing on *Schall* as exercising the authority to protect the public.

ognition to the danger a person may pose to others if released."[372] In recognizing that the threat of public danger requires courts to exercise increased discretionary authority, the Supreme Court invoked public health jurisprudence to shift the constitutional question from criminal to civil law antecedents.

The key to this transformation is a recharacterization of "impermissible punishment" as "permissible regulation," based on *Bell v. Wolfish*[373] and *Schall*.[374] Both *Bell* and *Schall* involved situations in which the effect of a statute was to confine "innocent" persons to unpleasant places. In *Schall*, the Supreme Court accepted that detention of juveniles did not constitute punishment.[375] *Bell* involved adult pretrial detainees who were confined in a crowded federal detention center; the *Bell* Court found that this admittedly unpleasant confinement was not punishment because it was reasonably related to a legitimate government objective.[376] Following these holdings, the *Salerno* court found:

> As an initial matter, 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 the 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].' "[377]

Examining the legislative history of the Bail Reform Act, the Supreme Court determined that Congress intended pretrial detention to protect the public and not to punish.[378] The Court concluded that pretrial detention pursuant to the Bail Reform Act is "regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause."[379]

372. U.S. v. Salerno, 107 S. Ct. 2095, 2098 (1987) (citing S. REP. NO. 98-225, p. 3, U.S. CODE CONG. & ADMIN. NEWS 1984, p. 3185).

373. 441 U.S. 520 (1979).

374. 467 U.S. 253. By contrast, in *Mendoza-Martinez*, 372 U.S. 144 (1963), an immigration law punished persons who left the United States to evade the draft. In that case, the apparent purpose of the statute (punishment) was also the intended purpose. *Id.* at 169.

375. *Schall*, 467 U.S. at 269.

376. *Bell*, 441 U.S. at 539.

377. *Salerno*, 107 S. Ct. at 2101 (citations omitted).

378. "Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. Congress instead 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." *Id.* (citations omitted).

379. *Id.* at 2101.

More generally, the Supreme Court rejected the notion that the Due Process Clause is an "impenetrable wall".[380] The Court recited a litany of cases in which states subrogated the liberty of individuals to the protection of society.[381] The Court stressed that, although those instances may all be considered "exceptions" to the "general rule" that the government may not detain a person prior to a judgment of guilt in criminal trial, the rule is by now so riddled with exceptions as to be ineffective in limiting the government's authority to restrain individuals.[382] Characterizing these cases as supportive of the government's right to infringe liberty for the public good, the Supreme Court implicitly reaffirmed the right of the government to detain: 1) "in times of war or insurrection . . . individuals whom the government believes to be dangerous";[383] 2) "potentially dangerous" resident aliens pending deportation hearing;[384] 3) "mentally unstable individuals who present a danger to the public";[385] 4) "dangerous defendants who become incompetent to stand trial";[386] 5) "juveniles when they present a continuing danger to the community";[387] and 6) persons arrested on suspicion of committing a crime.[388]

In reviewing the facial challenge to the Bail Reform Act the Court stressed that it was construing a statute that contained a detailed procedure for assuring the protection of the defendant's rights.[389] The Court emphasized that the Bail Reform Act provides more due process protection than many other cases; in particular, the Supreme Court contrasted the provisions of the Bail Reform Act with the statute that was upheld in

380. *Id.*

381. *Id.*

382. *Id.* at 2102.

383. *Id.* It is interesting that the Court cited Ludecke v. Watkins, 335 U.S. 160 (1948), a case allowing the detention of an enemy alien, and Moyer v. Peabody, 212 U.S. 78 (1909), rather than the more notorious *Korematsu*, 323 U.S. 214 (1944).

384. *Salerno* at 2102 (citing Carlson v. Landon, 342 U.S. 524 (1952) and Wing Wong v. United States, 163 U.S. 228 (1896)).

385. *Salerno* at 2102 (citing Addington, 441 U.S. 520 (1979)).

386. *Salerno* at 2102 (citing Jackson v. Indiana, 406 U.S. 715 (1972) and Greenwood v. United States, 350 U.S. 366 (1956)).

387. *Salerno* at 2102 (citing Schall v. Martin, 467 U.S. at 269).

388. *Salerno* at 2102 (citing Gerstein v. Pugh, 420 U.S. 103 (1975)).

389. The government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure that safety of the community or any person.

Id. at 2103.

Schall v. Martin.[390] In rejecting the appeals court's limitation of *Schall* to the pretrial detention of juveniles, the Supreme Court may have foreseen a broader role for *Schall* as a standard for due process in adult detentions.

Disposing of Salerno's challenge based on the Excessive Bail Clause of the Eighth Amendment, the Court dismissed the argument that the Constitution's prohibition against excessive bail amounts to a requirement that bail always be provided. If there are considerations other than flight, the Court said, then the Excessive Bail Clause does not require release on bail.[391]

Disposing of Salerno's plea for freedom, the Court carefully characterized its holding as an exception to the societal expectation of liberty. Although the Court reiterated that the Bail Reform Act included safeguards that enabled it to pass constitutional scrutiny, the Court emphasized that liberty is not absolute, but must be balanced against the "primary concern of every government—a concern for the safety and indeed the lives of its citizens . . . ."[392]

III. Reconciling Traditional Public Health Jurisprudence and the Jurisprudence of Prevention

For the past generation, civil rights activists have pushed the courts to apply ever more rigorous standards to criminal prosecutions. At the same time, conservatives have pushed the courts to give the states more authority to contain crime, drugs, and degeneracy. The collision of these political agendas has resulted in the jurisprudence of prevention: courts have preserved the protections of criminal law, but have also given states the authority to avoid some of these protections through civil detentions.

In the prevention cases, the Supreme Court has transformed the traditional police power to restrict disease carriers into a general power to restrict individuals whose criminal activity poses a threat to society.[393] In its infancy, prevention jurisprudence was merely an ad hoc approach

390. "The protections are more exacting than those we found sufficient in the juvenile context, see *Schall*, and they far exceed what we found necessary . . . in *Gerstein v. Pugh*." *Id.* at 2104 (citations omitted).

391. "We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail." *Id.* at 2105.

392. *Id.* at 2105.

393. This transformation mirrors the introduction of the doctrine of *ferae naturae*, that a wild animal belongs to the person who catches it, into modern oil and gas law. Oil and gas were once thought to run free underground. By analogy with the law applying to the capture of wild animals, it was decided that oil and gas belonged to whomever captured it.

that appeared in disparate cases. With *Allen*,[394] *Hilton*,[395] and *Salerno*,[396] it has moved into adolescence. Prevention jurisprudence is characterized by highly technical distinctions between punishment and regulation,[397] meticulous attention to requiring only the bare minimum of procedural due process,[398] and the granting of broad authority to decision makers.[399] These characteristics mirror traditional public health authority.

In the public health model, the decisionmaker is the public health official; the standard for the decision is reasonable medical probability; the individual is treated, and released after the danger of communicability has passed; and the health department is concerned only with future acts.[400] This model works very well for gonorrhea.[401] It is potentially most restrictive in the case of pan-drug-resistant tuberculosis.[402] Most public outcry over the traditional public health model has surrounded HIV/AIDS because the untreatability and inevitable fatality of the disease could be called on to justify the use of such Draconian measures such as indefinite confinement.[403] The jurisprudence of prevention represents legislative and judicial reaction to the real and perceived dangers in

394. *See supra* Part II, Section B, subsection 5.

395. *See supra* Part II, Section B, subsection 6.

396. *See supra* Part II, Section B, subsection 7.

397. *Bell*, 441 U.S. at 560-62; *Salerno*, 107 S. Ct. at 2101; *Allen*, 478 U.S. at 370. *See supra* note 190 and accompanying text.

398. *See supra* note 231 and accompanying text.

399. *Schall* 467 U.S. at 278-281. *See supra* note 283 and accompanying text.

400. This model does not involve judicial hearings except as necessary to obtain police cooperation in apprehending a recalcitrant disease carrier. If a person is unjustly confined, the only recourse is a *habeas corpus* petition.

401. In this context, "working well" reflects that disease carriers are rapidly treated and returned to the community. The ease and speed of treatment reduces the necessary restriction of individual liberty to a minimum. "Working well" is harder to evaluate in the face of 3 million cases of gonorrhea a year. *See* HETHCOTE, *supra* note 90 at 1.

402. Once a person becomes symptomatic with tuberculosis he may die unless he is provided prolonged treatment with antituberculosis drugs. It is a difficult disease to treat and requires treatment with somewhat toxic drugs for several months. In some cases, the bacillus becomes resistant to the drugs and thus becomes untreatable. Patients with infectious, drug resistent tuberculosis pose a particular problem because some of the persons that they infect will also develop drug resistent tuberculosis. Pan-drug resistent tuberculosis is frequently fatal in adults and children, despite all available treatments.

Richards, *supra* note 1, at 149; *see also* B. KETCHER, L. YOUNG, & M. KODA-KIMBEL, APPLIED THERAPEUTICS: THE CLINICAL USE OF DRUGS 682 (1983).

403. [T]he point of mandatory AIDS antibody testing is the degradation of gays and the reconsecration of heterosexual supremacy as a sacred value, even though mandatory testing, to date, has not been directly aimed at gays nor, indeed, has made any mention of them. AIDS-testing legislation is not to be understood as business-as-usual public policy-making aimed at maximizing overall social utility or realizing public goods—it can adequately be understood only in terms of the nature and function of social rituals, in particular, purification rituals.

American society. The fear is that courts will use the jurisprudence of prevention to impose punishment without affording the procedural protections that the Constitution requires in a criminal context.

The fear that traditional public health authority will be used for sinister ends is exacerbated by the prevention cases. All such rulings have been controversial, drawing fire from dissenting justices[404] and from scholarly commentators.[405] Rather than recognizing the pattern that is emerging from these isolated cases, however, the critics have focused on the arbitrariness of the Supreme Court's actions.

A. The Punishment-Oriented Prevention Model

From an individual rights perspective, the most troubling scenario is the evolution of a model that uses public health and safety rhetoric to justify procedures that are, in essence, punishment and detention.[406] In this model, judges would have regulatory decisionmaking authority limited only by legislative exhortations to protect society. The potential consequence for a potentially dangerous individual would be indeterminate detention, indistinguishable from punitive imprisonment.[407] Proceedings would be carried out expeditiously affording defendants only limited procedural protections. The detained individual could appeal the adjudication only through *habeas corpus* proceedings. Under this scenario, a prosecutor could obtain detention through careful adherence to the ritualistic formulation of appropriate standards of proof, yet with proof devoid of substance.[408]

Mohr, *Policy, Ritual, Purity: Gays and Mandatory AIDS Testing*, 15 L., MED. & HEALTH CARE 178 (1987).

404. *See Allen*, 478 U.S. at 375 (Stevens, J., dissenting).

405. *See Constitutional Law—Criminal Law and Procedure: Pretrial Detention—Bail Reform Act of 1984*, 101 HARV. L. REV. 169, 179 (1987). This article is illustrative because it recognizes the difficult problem posed by defendants such as Salerno who are willing to kill to avoid prosecution. It does not, however, accept that this real danger justifies beggaring the presumption of innocence. While this is an admirable position from an individual rights perspective, it oversimplifies the role of the Court in preserving societal harmony. For a nonjudgmental discussion of the impact of the decision and its potential mitigation through pretrial services, see Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 YALE L.J. 320 (1987).

406. *See* Garbus, *Detention U.S.A.*, THE NATION, Jan. 30, 1988 at 113.

> Recently, Judge Vladimir Terebilov, the Soviet Union's highest ranking judge, called for limiting pretrial detention to a maximum of six months. This reform, if enacted, would place the Soviet Union far ahead of the United States and in line with the more enlightened criminal jurisdictions of the world. The United States is one of the few large countries (the others are Chile and South Africa) that permit indeterminate detention of people not convicted of a crime, thanks to the Bail Reform Act of 1984.

407. Since this is not a criminal model, individuals will not be criminally accused, but only identified as having an arbitrary probability of causing trouble in society.

408. *See supra* text accompanying note 234.

Although this model seems an unthinkable Orwellian scenario, it holds certain attractions. Our society is being torn apart by fears of urban violence, hysteria surrounding the use of drugs, and fears generated by the criminal justice system's failure to adequately respond to these problems. If future Supreme Court decisions do not vere from its jurisprudence of prevention, traditional criminal jurisprudence will gradually be supplanted in many areas. To preserve individual rights, courts should adopt a risk-analysis approach to the jurisprudence of prevention, rather than a punishment model.

B. A Risk Analysis Basis for the Jurisprudence of Prevention

A risk-analysis jurisprudence concedes that there are special cases in which the need to protect society outweighs an individual's right to traditional constitutional protections.[409] Although courts have always recognized that there are exceptions to constitutional protections,[410] there has not been a rigorous effort to define the conditions that trigger an exception. This tension is very apparent in *Schall* and *Barefoot*, in which it was argued that the methodologies used to predict future dangerousness were so flawed as to be meaningless.[411] The Supreme Court only increased this tension by rejecting substantive due process arguments out of hand, relying on the adversarial process to "sort the wheat from the chaff".[412]

If the prevention cases share a common jurisprudential basis with traditional public health cases, they also share an analogous risk calculus. The parameters used to determine the risk of a communicable disease may be transformed into a formulation for ascertaining a detainee's risk of future dangerousness. If we call the risk factor for a communicable disease (R), then (R) is determined by the severity (S) of the disease, its transmissibility (T), and the number of persons at risk (P): (R) = (S)(T)(P). Severity is a complex term that integrates the duration

409. The notion of "traditional" constitutional protection is, of course, a fairly slippery concept. Most criminal law constitutional protections are of recent origin, as are civil rights protections. It might be argued that the line between traditional protections and the historical lack of constitutional protections from state imposed restrictions lies somewhere between 1945 and 1960.

410. *See, e.g.*, *Ex parte* McCardle, 74 U.S. 506 (1868) (war and insurrection); Carlson v. Landson, 342 U.S. 524 (1952) (immigration and naturalization); Korematsu v. United States, 323 U.S. 214 (1944) (detention of American citizens of Japanese ancestry during wartime upheld).

411. *See also Schall*, 513 F. Supp. at 707; *Barefoot*, 463 U.S. at 896-97. Subsequent research on the 31 named defendants in *Schall* determined that the 24 who could be located had continued to engage in criminal activities. *See* KRAMER, AT A TENDER AGE 242 (1988).

412. *Barefoot*, 463 U.S. at 901 n.7.

of the disease with the mortality and morbidity.[413] Transmissibility is a measure of the ease with which the disease may spread from individual to individual. Transmissibility varies greatly for different diseases.[414] The population at risk is determined by individual susceptibility, patterns of high risk behavior, and demographic[415] and geographic constraints on transmission.

The higher (R), the greater the threat to citizens and to the stability of the community. In a constitutional context, the balance between individual liberty interests and societal protection will shift away from individual rights with increasing (R). When (R) is very low, such as for the common cold, there is no rational relationship between detention or other intrusive measures and disease control. When (R) is very high, as for pan-drug-resistant tuberculosis, then the rationale for intrusive state action,[416] including permanent isolation, is compelling.[417]

413. For example, the common cold is a disease with a very low severity because it has a short duration, causes only moderate discomfort and has a very low mortality. HIV infection is a very severe disease because it is untreatable, its duration is not self-limited and it causes significant morbidity and ultimately death in all infected persons. The severity of tuberculosis varies depending on the susceptibility of the organism to the available treatments and the resistance of the patient to the disease. Most cases of tuberculosis are treatable and cause only limited symptoms. There are strains of tuberculosis that are resistant to all available antitubercular drugs. These strains cause a disease that is disabling and frequently fatal.

414. For example, the common cold is highly infectious and is spread through respiratory secretions. This results in a highly transmissible disease. Gonorrhea is highly infectious, but is only spread through sexual contact. Thus, gonorrhea is less transmissible than a cold but is still sufficiently transmissible to have an incidence of 3 million cases a year. Tuberculosis is spread through respiratory secretions but, unlike cold and gonorrhea, is not highly contagious. Leprosy is extremely difficult to transmit, requiring both close personal contact with an infected person and a defective immune system.

415. Gonorrhea is a demographically determined disease because it is confined to persons who are sexually active.

416. This is implicitly limited to the universe of actions that have medical rationales. It would not include punitive measures such as forced labor or torture.

417. As diseases such as HIV bring public health issues before the courts again, it should be possible systematically to evaluate proposed restrictions by following this risk calculus. Following this form, a public health risk brief should include:

> 1) an analysis of the severity of the disease, including its treatability, mortality, morbidity, and special factors (e.g., whether the disease causes a congenital syndrome in the children of infected pregnant women) that would influence a risk assessment;
> 2) an analysis of the transmissibility of the disease, including the component of voluntary action involved in transmission and the probability of an effective contact (i.e., a contact that transmits the disease) during various activities;
> 3) a description of the population at risk, including both its demographics (i.e., the number of persons at risk and their identifying characteristics, such as age, sex, ethnicity, etc.) and special characteristics of subpopulations at risk.

This format would aid public health officials in evaluating the constitutionality of proposed disease control measures. It would also allow courts to better separate factual medical issues from political and policy issues. For example, Utah and California might agree on the

A parallel risk analysis in prevention cases might allow a rigorous evaluation of individual detentions, focusing on factors similar to those relevant to traditional public health risk analysis:

1) the threat to society posed by the behavior in question;[418]
2) the probability that the defendant would engage in the dangerous behavior;[419]
3) the number of persons at risk of engaging in the dangerous behavior.[420]

The resulting risk calculus might have factors of (R) for the risk to society, (T) for the threat posed by the activity under consideration, (D) for the probability of dangerousness, and (N) for the number of possible offenders: (R) = (T)(D)(N).

The greater (R), the greater the state's right to protect itself from the activity in question. Protective measures would range from minimal regulation,[421] to systematic regulation,[422] to prohibition,[423] to prospective actions to prevent possible future activity.[424] More significantly, as (R) decreases, the importance of substantive due process increases.[425]

For example, in *Salerno* the Appeals Court postulated the threatened destruction of an airliner by terrorists.[426] Intuitively, (R) would be very high for this scenario. The high risk involved would provide the state with a sufficient basis to detain the suspected terrorist with only summary proceedings. Given these factual assumptions, the risk of

medical risk of gonorrhea, but disagree on the extent of individual restriction that the risk would justify.

418. For example, a violent sexual offender would pose a greater risk than a chronic writer of hot checks.

419. While this is certainly a difficult determination, there is evidence that for certain crimes, such as sexual abuse, offenders tend to be recidivists. See the excellent discussion of preventive detention in Alschuler, *Preventive Pretrial Dentention and the Failure of Interest-Balancing Approach to Due Process*, 85 MICH. L. REV. 510, 537-51 (1986).

420. This is the most constitutionally troubling criterion. But it is necessary if we are to pose rational solutions to problems that affect grossly different sized populations: one might "detain" every suspected psychopathic serial killer, but that remedy that would be unworkable for suspected illegal drug users.

421. Publishing would fall into this category. The First Amendment embodies the idea that publishing is a benefit to society. The state is limited to prohibiting narrowly described activities such as child pornography.

422. For example, the right to fly an airplane is heavily regulated because of the risk to society of incompetent pilots.

423. This is the domain of criminal law.

424. This is the traditional domain of public health jurisprudence.

425. As *Barefoot* illustrates, due process and strict standards of proof offer scant protection when the underlying issue to be proved is as insubstantial as an arbitrary probability of future dangerousness.

426. *Salerno*, 794 F.2d at 74.

an improper detention would be outweighed by the risk of the airliner's destruction.

Modifying the facts shifts the risks dramatically. If the concern is that a student organization has been infiltrated by extremists who might incite the students to violent action, then (T) and (D) will be critical. Because the nature of the violent action is unknown, it will be difficult to determine its threat and thus (T) will be low. Since there is also great uncertainty about the probability of any action, (D) will be small. Thus, the risk associated with this activity is insignificant, (T)(D)(N) is small, and detention would require a heavy burden of proof.

Although risk calculus is not meant to provide an algorithmic model for judging individual liberty deprivations, it is a useful tool for discussing prevention questions in a more rigorous manner than is allowed by traditional constitutional formulations. Because risk analysis splits complex problems into simple components, a risk analysis may also help in the recognition of polycentric problems that defy single component solutions.[427]

Courts and legislatures have often based their actions on an implicit risk analysis.[428] The problem with these implicit analyses is that their underlying assumptions are not open to scrutiny and challenge.[429] An explicit analytical risk analysis is most sorely needed when courts and legislature attempt to make scientifically valid legal policy, because although scientific research can provide valuable insights on the nature of social problems, it seldom provides unambiguous answers that can be executed through statutory rules. A science-based legal policy must rely on expert decisionmakers to apply knowledge to specific factual situations; a legislatively or judicially imposed risk analysis would serve to

427. The best example may be drug use. Drug laws treat opiates (heroin, morphine, codeine, etc.) the same way as stimulants (cocaine, amphetamine, etc.). Pharmacologically and psychologically they are profoundly different. Even a heavy opiate user can lead a productive life and not pose a threat to society. Opiate-associated crime is driven by the unavailability of the drug, rather than the pharmacology of the drug. Conversely, heavy stimulant usage leads to an agitated, paranoid psychosis. This psychosis is incompatible with everyday responsibilities and leads to antisocial actions, irrespective of access to the drug. By ignoring these differing risk profiles, the United States has allowed illegal drug usage to shift from potentially manageable substances to unmanageable stimulants.

428. *See* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 514 (1980).

429. The Supreme Court used an implicit risk analysis in Florida v. Riley, 109 S. Ct. 693, 697 (1989) to extend the "plain view" exception of the Fourth Amendment to anything visible to a police officer in a helicopter. In his dissent, Justice Brennan criticized this implicit analysis because it ignores the value of privacy to non-criminals: "By casting its "risk analysis" solely in terms of the expectations and risks that 'wrongdoers' or 'one contemplating illegal activities' ought to bear, the plurality opinion, I think, misses the point entirely. . . ." *Id.* at 703 n.6.

limit the discretion of these experts.[430] The alternative is to have jurors evaluate the expert's decisions based on no more than the personal credibility of the expert. As illustrated in *Barefoot*, a "beyond a reasonable doubt" standard is little protection if the underlying substantive issue is improperly framed.[431]

Explicit risk analysis may seem to undermine constitutional protections. Yet the Supreme Court has always balanced the individual's right to liberty against the state's right to protect itself. From the "clear and present danger" limitation on free speech, to restrictions on free exercise of religion by military personnel, the Court has shown time and again that there are no absolutely protected freedoms. Explicit risk analysis would give greater rigor to vague, legalistic formulations such as "strict scrutiny" and "reasonable relationship".

The analogy between detention to prevent crime and isolation to control disease is not perfect, but the parallel is more than a surface resemblance. A systematic attempt should be made to apply risk analysis techniques that have been developed for disease spreading behavior to the larger universe of socially destructive behavior. Risk analysis would provide a basis for more humane imposition of individual restriction than is practiced by the Supreme Court today.

Conclusions

The right of self-defense is fundamental to the sovereignty of a state. From its earliest decisions, the Supreme Court has recognized that individual liberty must be subrogated to the protection of the state. The clearest example of the subrogation of individual liberty to community welfare has been in the control of communicable diseases.

For the first 150 years of the Republic, communicable diseases posed a great threat to society. Controlling communicable diseases required scientific and medical expertise, combined with the authority to impose coercive restrictions on infected individuals. The courts allowed public health officials to restrict an individual's liberty without prerestriction due process protections when the purpose of the restriction was to

430. In Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980), the Court invalidated OSHA's benzene regulations because they were not supported by a proper risk analysis as required by Congress. The Court used the requirement of a risk analysis to check the otherwise unlimited power of OSHA to promulgate workplace exposure standards. 448 U.S. at 653.

431. *See supra* note 231 and accompanying text. Arguably, Texas capital murder defendants would be better protected by a law that requires the expert to make specific findings on the probability of dangerousness (D) and the nature of that dangerousness (T). The jury would then determine if the product of these factors outweighed the value of the defendant's life.

protect the public and not to punish. While a restricted individual could petition for *habeas corpus*, the public health authority had only to prove a scientifically reasonable basis for the restrictions. There was no requirement that restrictions be supported by proof "beyond a reasonable doubt." Despite an expansion of civil liberties in other aspects of life, the Supreme Court has never limited this broad grant of authority to public health officials.

Even with the spectre of AIDS, contemporary societal fears revolve around crime, not communicable diseases. Correctly or incorrectly, legislators perceive that full criminal law due process protections make controlling crime more difficult. They have responded with laws that use civil restrictions, analogous to certain public health restrictions, to prevent criminal activity. In a series of cases, discussed in this article as the prevention cases, the Supreme Court has upheld such laws.

The prevention decisions narrow the constitutional protections available to persons accused of posing a threat to society. Based on an expert's determination of future dangerousness, individuals adjudged to be dangerous may be incarcerated without a determination of guilt. Because the Supreme Court decisions upholding these incarcerations use public health rationales, it is assumed that these cases also revitalize traditional public health precedents. The prevention decisions, combined with traditional public health authority, substantially erode the constitutional protections available to persons who are accused of posing a threat to the state. It is proposed that these persons would be better protected if the courts and legislatures explicitly balanced the risk of harm against the individual's liberty interest. An explicit risk analysis would constrain the power of experts, and would facilitate community debate on the value of liberty in our society. Without a proper debate on these issues, we face ever more Draconian laws against politically unpopular behavior, while groups with political power will continue to escape effective regulation.