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Protecting Liberty and Autonomy: Desert/Disease Jurisprudence

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Protecting Liberty and Autonomy: Desert/Disease Jurisprudence

STEPHEN J. MORSE*

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I. INTRODUCTION

Some prisoners pose a substantial threat of violence when they are released at the end of their sentence. Many other people present a genuine danger to the public whether or not they have ever been to prison. The interesting question is whether there are fair means to preventively restrain such potentially dangerous agents, especially the released prisoners who have been previously convicted and thus have acted on their dangerous propensities.

This Article begins by describing the positive law of preventive detention, which I term “desert/disease jurisprudence.”¹ Then it provides a brief excursus about risk prediction (estimation), which is at the heart of all preventive detention practices. Part IV considers whether proposed expansions of desert jurisprudence are consistent with retributive theories of justice, which ground desert jurisprudence. I conclude that this is a circle that cannot be squared. The following Part canvasses expansions of disease jurisprudence, especially the involuntary civil commitment of mentally abnormal, sexually violent predators, and the use of post-insanity acquittal involuntary commitment. This Part also considers whether disease jurisprudence might justifiably be extended to problematic classes of agents such as psychopaths. I argue that sexual predator commitments are blatantly punishment by other means despite the Supreme Court’s approval of them as forms of civil commitment² and that other attempts to expand disease jurisprudence are artificial or unworkable. Next, I consider frankly consequentialist approaches to preventive detention. I suggest that they are conceptually coherent but politically and practically unacceptable. A brief conclusion suggests that the respect for liberty and autonomy is best guaranteed by genuine desert and disease limitations on detention, although there will be a cost to public safety.

II. DESERT/DISEASE JURISPRUDENCE

At present, the state’s ability to deprive people of their liberty is constrained by desert/disease jurisprudence. The state may imprison people in the criminal justice system if they deserve punishment for crimes they have committed,³ and it may civilly commit dangerous

1. See generally Stephen J. Morse, *Neither Desert nor Disease*, 5 LEGAL THEORY 265, 266, 271–94 (1999) (noting, also, exceptions that may be considered pure preventive detention).

2. *Kansas v. Crane*, 534 U.S. 407, 409, 415 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 364–65, 371 (1997).

3. For the purposes of this Article, the notion of desert I am employing is simply the traditional retributive conclusion that if an offender’s behavior satisfies the elements of a charged offense and no justification or excuse obtains, then the offender is culpable and deserves the ensuing blame and punishment. To avoid confusion, I should add that

people if they are not responsible agents—usually because they have a mental abnormality, such as a major mental disorder.⁴ Otherwise, with rare, limited exceptions, such as rejecting bail for dangerous agents,⁵ the state must leave people at liberty no matter how potentially dangerous they may be. The concern with justifying and protecting liberty that produces the desert/disease constraints is deeply rooted in the conception of rational personhood. Only human beings self-consciously and intentionally decide how they should live; only human beings have projects that are essential to living a good life. Only human beings have expectations of each other and require justification for interference in each other's lives that will prevent seeking the good. If liberty is unjustifiably deprived, a good life is impossible. In sum, both the criminal and the medical/psychological systems of behavior control require a justification in addition to public safety—desert for wrongdoing or nonresponsibility (based on disease)—to justify the extraordinary liberty infringements that these systems impose.

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

the two generic excusing or nonresponsibility conditions are lack of rational capacity and lack of control or compulsion. Lack of “free will” and “causation” are not legal excusing conditions.

4. I have explored the criminal/civil distinction as a basis for confinement elsewhere and will therefore provide only the briefest sketch here. See generally Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 116–22 (1996) [hereinafter Morse, *Blame and Danger*]; Morse, *supra* note 1, at 266, 269; Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025 (2002).

5. See *United States v. Salerno*, 481 U.S. 739, 741, 755 (1987).

even if their future wrongdoing is quite certain. We are willing to take great risks in the name of liberty.

For people who are dangerous because they are disordered or because they are too young to “know better,” the usual presumption in favor of maximum liberty yields. Because the agent is not rational or not fully rational, the person’s choice about how to live demands less respect, and the person is not morally responsible for his or her dangerousness. The person can therefore be treated more “objectively,” like the rest of the world’s dangerous but nonresponsible instrumentalities, ranging from hurricanes to microbes to wild beasts.⁶ In brief, agents incapable of rationality do not actually have to cause or attempt harm to justify nonpunitive intervention. We can take preemptive precautions, including broad preventive detention, with nonresponsible agents based on an estimate of the risk they present. Justified on consequential grounds, such deprivation will be acceptable if the conditions of deprivation are both humane and no more stringent than necessary to reduce the risk of harm. Such deprivations are forms of greater or lesser quarantine and may include “treatment,” but in theory they are not punishment, and they should never have a punitive justification or effect.⁷

In sum, the normative basis of this system of desert/disease jurisprudence is that it enhances liberty, dignity, and autonomy by leaving people free to pursue their projects unless they responsibly commit a crime or unless through no fault of their own they are nonresponsibly dangerous. Responsible agents are left free on the theory that a rational agent may always recognize the wrongness and danger to oneself of criminally infringing the legitimate interests of others. Therefore, the state may not intervene unless the agent has attempted or committed a crime. If agents are not responsible for their danger, then the usual presumptions in favor of liberty and autonomy yield because they are based on rational agency that is lacking in such cases.

This is a satisfyingly neat account, but desert/disease jurisprudence leaves a “gap.” It provides no mechanism to restrain dangerous people who may not be punished because they have committed no crime or they have completed their sentence and who may not be civilly committed because they are responsible agents. The state tries to fill the gap by

6. Such people of course continue to deserve enhanced concern and respect in virtue of their being human, and they can never be completely objectified.

7. The civil and nonpunitive characterization of such interventions often justifies lesser procedural protections for the potential subject. *See, e.g., Allen v. Illinois*, 478 U.S. 364, 374–75 (1986) (holding that the Fifth Amendment guarantee against compelled self-incrimination does not apply in a proceeding to determine whether a person is a “sexually dangerous person” because the proceeding is not “criminal”).

expanding desert and disease jurisprudence. For example, desert jurisprudence is widened by lengthening sentences or by recidivist sentencing laws. Disease jurisprudence is expanded by widening the definition of nonresponsibility, most egregiously in sex offender civil commitment statutes. Both types of expansion are open to substantial normative and practical problems, however, so the gap inevitably remains. There is no seamless set of alternative means to preventively detain dangerous agents. Nonetheless, legislatures continue to try and the courts usually approve.⁸

III. AN EXCURSUS ON RISK PREDICTION (ESTIMATION)

However preventive detention is justified theoretically, a crucial empirical question is how well we can successfully predict whether the feared behavior will occur.⁹ The topic of prediction is empirically and conceptually complex. Covering it adequately is vastly beyond the scope of this Article and, indeed, is a subject unto itself. I shall therefore address the major issues briefly, and mostly in conclusory terms, based on my own experience of three decades of forensic practice and the material in the accompanying notes. I make no pretense to comprehensiveness but simply provide sufficient background for the reader to understand the issues. In later Parts of this Article, I shall simply rely on this Part unless there is something more specific to be addressed.

Prediction may be performed using clinical (unstructured), semi-structured clinical, or actuarial (mechanical) methods.¹⁰ In clinical, unstructured prediction, the risk factors are chosen based on the clinician's experience and theoretical commitments, and there is no set algorithm for how they should be measured or aggregated. In semi-

8. *Ewing v. California*, 538 U.S. 11, 14–15, 30 (2003) (upholding enhanced sentences under California's three-strikes law).

9. Although many people prefer the term *risk estimation*, in the remainder of the Article I shall use the more familiar term *prediction*.

10. Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, 20 *CURRENT DIRECTIONS PSYCHOL. SCI.* 38, 39–41 (2011), available at <http://cdp.sagepub.com/content/20/1/38> (providing an excellent brief introduction to the various methods and arguing that the choice of a prediction instrument or method should be based on the purpose of the assessment); John Monahan, *Structured Risk Assessment of Violence*, in *TEXTBOOK OF VIOLENCE ASSESSMENT AND MANAGEMENT* 17, 19–27 (Robert I. Simon & Kenneth Tardiff eds., 2008) (describing the various forms of assessment in detail and noting that research has not been kind to unstructured violence risk prediction). These types of prediction may be arrayed along a continuum, but the text will offer a snapshot summary of each that elides differences.

structured assessment, the choice of risk factors, and how they should be combined, is structured, that is, decided *ex ante* by specific rules. The clinician has no discretion at this stage, but in generating a final prediction, the clinician has the discretion to alter the conclusion reached from the structured components of the prediction using unstructured data not included in the structured component, such as further interview information. In structured, actuarial prediction, all three components—choice of variables, combination of the variables, and the final prediction—are all structured. In the pure case, the clinician has no discretion whatsoever, a method that has been both applauded and criticized by commentators.¹¹ All methods that use structure seem equally accurate, which some attribute to common factors that they are measuring.¹² It is impossible to know the frequency with which the various types of methods are used in forensic settings in the United States; the literature is “thin.”¹³ According to the little data available¹⁴ and to anecdotal information, only a minority of predictors use structured assessment methods. Some states do require the use of semi-structured or structured methods for certain types of predictions, such as violence among alleged sexual predators.

Predictions can generate two types of errors: false positives and false negatives. In the former, it is predicted that the dangerous conduct will occur, but in fact it will not. This is analogous to convicting the innocent. In the latter, it is predicted that the dangerous conduct will not occur, but in fact it will. This is analogous to acquitting the guilty. For any prediction method applied to any potential group of subjects that is trying to predict specific outcomes based on methodologically sound studies, it is possible to generate the rate of each type of error that will occur in that context. Which type of error is considered costlier is a normative question. In the criminal justice system, for example, the prosecution’s burden to prove the elements of a crime beyond a reasonable doubt means that the false positive—convicting the innocent—is the error we wish to minimize, although it may mean freeing many guilty and perhaps dangerous defendants.

Two important but difficult accuracy issues are the effect of trying to predict low base rate behaviors and whether group data can predict the

11. See VERNON L. QUINSEY ET AL., *VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK* 196, 223, 267 (2d ed. 2006) (applauding the pure, structured prediction method); see also David J. Cooke & Christine Michie, *Violence Risk Assessment: Challenging the Illusion of Certainty*, in *DANGEROUS PEOPLE: POLICY, PREDICTION, AND PRACTICE* 147, 149–57 (Bernadette McSherry & Patrick Keyzer eds., 2011) (criticizing the pure, structured prediction method).

12. Skeem & Monahan, *supra* note 10, at 40.

13. Monahan, *supra* note 10, at 27.

14. *Id.* at 27–28 & tbl.2-1.

outcome for an individual member of that group. Low base rate behavior refers to behavior that is very infrequent in a given population. The serious violent conduct preventive detention seeks to avoid is typically low base rate, even among high-risk populations.¹⁵ Low base rate behavior is difficult to predict accurately,¹⁶ although more recent methods have reduced the problem somewhat.¹⁷ Indeed, if base rate behavior is quite low, and the prediction method is not exquisitely sensitive, the prediction that would generate the fewest total errors would be that no subject is predicted to be positive on the outcome measure.¹⁸

Whether individual behavior can be accurately predicted based on group data is highly contested.¹⁹ Here, in brief, is the problem. Group data predicts what percentage of the group will meet the outcome criterion, but legal decisionmakers have to decide the case of the individual person before them. The actual ex ante risk for the individual is 0 or 1, but we do not know which it is. The best we can do at present is to estimate the risk based on the probability for the whole group of which the individual is a member. Whether we can improve individual predictions is an open

15. QUINSEY ET AL., *supra* note 11, at 46.

16. See PAUL E. MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND A REVIEW OF THE EVIDENCE (1954) (finding that statistical prediction is more accurate); QUINSEY ET AL., *supra* note 11, at 47. Some of the problems may stem from the methodology of the studies. For example, using longer follow-up periods tends to produce higher base rates. *Id.* But the problem persists if base rates are low. *Id.*

17. See Kevin S. Douglas et al., *Risk for Criminal Recidivism: The Role of Psychopathy*, in HANDBOOK OF PSYCHOPATHY 533, 545 (Christopher J. Patrick ed., 2006); see also QUINSEY ET AL., *supra* note 11, at 155–96 (describing in detail the Violence Risk Appraisal Guide (VRAG)).

18. With low base rate behavior, predicting that no one will offend will produce the greatest number of overall accurate predictions. Consider the prediction of future sexual violence, which is a cornerstone of existing sexual predator commitments. A recent study of the most widely used instruments for predicting sex offending finds that they have only moderate success and that these instruments are better at predicting lack of danger than at predicting danger. Terrence W. Campbell, *Predictive Accuracy of Static-99R and Static-2002R*, 3 OPEN ACCESS J. FORENSIC PSYCHOL. 82 (2011), <http://forensicpsychologyunbound.ws/> (including an excellent review of prediction technology and the problem of low base rate behavior).

19. Compare Stephen D. Hart et al., *Precision of Actuarial Risk Assessment Instruments: Evaluating the 'Margins of Error' of Group v. Individual Predictions of Violence*, 190 BRIT. J. PSYCHIATRY s60, s60 (2007), available at <http://bjp.rcpsych.org/content/190/49/s60.short> (noting the inaccuracy of risk evaluations made by unaided judgment and discussing how actuarial risk assessment instruments help evaluate risk of future violence), and Cooke & Michie, *supra* note 11, at 154, 157–60 (noting that some progress may be possible), with Skeem & Mohanan, *supra* note 10, at 40 (describing the question as contested and arguing that group data are useful).

empirical question. My practical response is that we can and must use group data although it is admittedly imperfect.²⁰ In any case, there are certain variables—past history, age, sex, psychopathy—that have substantial empirical support as risk factors for violent conduct.²¹

How accurate are violence risk predictions? It is impossible to give an uncontroversial, uniform answer. Much depends on a study's methodology, including the sample and the outcome criterion. I think it is fair to say that prediction prior to the most recent technology was only modestly successful, but that the newer techniques have increased accuracy substantially, especially with high-risk groups and if the outcome criterion is not terribly low base rate.²² With less high-risk groups, low base rate behavior, and the use of purely clinical prediction, accuracy is likely to be poor, and the false positive error of predicting future violent conduct when it will not occur will be the vastly more common error.

Finally, let us consider two further problems. In all cases of predictions when there has been extended incarceration in a prison or a hospital, as time passes, the basis for the prediction would increasingly be the inmate's behavior in the institution, but the object of the prediction would be the agent's behavior at liberty in the community. The change in context makes the predictive accuracy even more questionable. Last, there are substantial gatekeeper concerns in response to predictions. State officials have little to lose by false positive predictions—keeping an inmate or patient who would not act dangerously in a prison or a hospital—and everything to lose by false negatives—releasing early an inmate or patient who will act dangerously. Gatekeepers, such as judges, parole boards, and state hospital employees, are conservative because false negatives tend to be more politically costly even though they are infrequent. The costs of unnecessary imprisonment of false positives are not before the public eye, it is uncertain whether these cases are false positives because they are confined, and the people affected seldom have much sympathy from the public. On the other hand, if grave harm is done by a formerly imprisoned or hospitalized person who has been released although a longer term of incarceration

20. See Skeem & Monahan, *supra* note 10, at 39–40.

21. See JEREMY F. MILLS ET AL., CLINICIAN'S GUIDE TO VIOLENCE RISK ASSESSMENT 34–39 (2011) (indicating some differences in risk factors between people with and without mental disorder); Cameron D. Quanbeck & Barbara E. McDermott, *Inpatient Settings*, in TEXTBOOK OF VIOLENCE ASSESSMENT AND MANAGEMENT, *supra* note 10, at 259, 259–60; Skeem & Monahan, *supra* note 10, at 39–40. See generally QUINSEY ET AL., *supra* note 11.

22. See MILLS ET AL., *supra* note 21, at 65–107 (describing the results from accuracy studies for a wide range of instruments); QUINSEY ET AL., *supra* note 11, at 39–41, 155–95 (describing earlier studies and more recent studies using the VRAG—a purely actuarial method—with various groups of potential offenders).

was possible, the public is outraged. The incentive structure predisposes decisionmakers in cases involving danger to overpredict and thus to imprison or hospitalize longer than is necessary. Even if decisionmakers tried to do the right thing, after the first hideous, publicized crime committed by a prisoner or patient released early, decisionmakers would inevitably become more conservative in their predictions.

IV. EXPANDING DESERT

The three most popular proposals in the United States for restraining dangerous criminals are expanding the lengths of sentences—including the use of wide ranges for most crimes of violence—recidivist sentencing enhancements, and creating new crimes that aim to criminalize dangerous conduct.²³ For the retributivist who believes that desert is a necessary precondition for punishment and sets a proportionality limit to the amount of punishment that may be imposed, all three are difficult to justify.

A. Increasing Sentence Length

For much of the twentieth century, American sentencing schemes strongly favored indeterminate sentencing with very wide ranges for most serious crimes. Although in theory and to some degree in practice, desert set a cap to the permissible ranges, the justification for this practice was largely a rehabilitation model. Deciding when to release the prisoner would depend on the professional judgment of the parole officers concerning the prisoner's rehabilitation progress. At the maximum term, the prisoner would of course have to be released even if he or she had not been rehabilitated and was still dangerous, but the maximum was typically quite long. Thus, lengthy incapacitation was possible and many otherwise unrehabilitated prisoners would simply "age out" of future violent conduct.

Although the indeterminate sentencing model was conceptually coherent, in practice it was subject to severe problems that led to its demise in many jurisdictions. First, it led to unprincipled and arbitrary discretion. Parole officials had virtually unreviewable authority to make release decisions, but they had neither a coherent conceptual approach to the issues nor accurate predictive validity about who would be dangerous if

23. For the English experience, see ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 160–97 (3d ed. 2000).

released. The alleged rehabilitative programs available in the prisons were either paltry or unvalidated. In a word, the officials were “flying blind,” and this produced differential treatment that could not possibly be justified and was widely believed to be racially biased. In addition, many believed that the sentences actually served in general and the maximum terms in particular bore insufficient relation to the punishment that offenders deserved.

In the late 1960s and early 1970s the critiques of indeterminate sentencing reached an unusually bipartisan crescendo. Critics and politicians from across the political spectrum called for a new regime that would tie offenders’ punishments to their just deserts, and the legislatures responded.²⁴ Simultaneously, and in response to concerns about arbitrary discretion and unjustifiably unequal treatment, legislatures also began to adopt determinate sentences with relatively limited ranges for most crimes and sentencing guidelines that limited judicial sentencing discretion to various degrees. Although the new regime also faces substantial criticisms, it has been adopted in a considerable number of jurisdictions, including federal criminal jurisdiction, and it exerts influence on those jurisdictions that still retain more indeterminate sentencing.

The just deserts/determinate sentencing system lacks the resources differentially to preventively detain particularly dangerous offenders, but incapacitation can be achieved simply by increasing the sentences for serious crimes and ensuring through “truth in sentencing” that few offenders are released early. Escalating sentence length has indeed been the American response. Although dangerous offenders are incapacitated for lengthy terms, the problem is that many nondangerous offenders are incapacitated as well. This is not an effective means of differentially incapacitating the most dangerous classes of offenders.

More importantly, many of the authorized prison terms seem disproportionately harsh, especially compared with prison lengths for the same crimes in other developed Western nations. I recognize that there is no proportionality template in the sky, but comparative analysis within and between jurisdictions—the methodology suggested in *Solem v.*

24. See, e.g., AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 134–53 (1971); MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 69–73, 103–19 (1972); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 19–34 (1976); ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 60–61, 157–63 (1975). There were also proposals to use selective incapacitation more effectively. See JAMES Q. WILSON, THINKING ABOUT CRIME 145–61 (First Vintage Books rev. ed. 1985) (1975). This was not coupled, however, with calls for extensive lengthening of sentences. See, e.g., Uniform Determinate Sentencing Act, ch. 1139, 1976 Cal. Stat. 5062.

*Helm*²⁵—offers a useful approach and provides a principled basis for arguing that some sentences are simply too harsh. Of course, legislators have imposed these sentences, and who am I to second-guess the will of the majority? One can only respond that legislators setting sentences are motivated by the desire to be tough on crime and to achieve the consequential goals of deterrence and incapacitation. Even if it is conceded that these are worthy goals, they may exceed retributively based proportionality.

B. Recidivist Offender Enhancements

This type of enhancement of detention simply increases a multiple offender's sentence beyond the range normally imposed for the crime based on the offender's criminal history. Jurisdictions vary substantially concerning which prior crimes should suffice as a basis for enhancement and how much enhancement is justified. In principle, this type of penal program can work effectively to preventively incapacitate a specific, targeted group of offenders who apparently pose a particular threat to society. The question for the law, of course, is whether these controversial enhancements are fair and efficacious. As one commentator says of such programs generally, there is "no easy way out."²⁶ Rights and social safety are inevitably in conflict.

English law, for most of the twentieth century, allowed such enhancements for offenders deemed especially dangerous, but judges were loath to impose them because they seemed too much like double punishment for the same crime.²⁷ Various substitutes for enhancement, such as increased use of life imprisonment and some limited enhancements, have resulted since the early 1990s.²⁸ England's parliamentary system has ensured that such schemes will be upheld if duly passed by Parliament. Thus, the politics of the issue are crucial, and there is little sympathy for repeat, dangerous offenders.

The United States Supreme Court considered on numerous occasions whether such enhancements violate the Eighth Amendment prohibition

25. 463 U.S. 277, 291–92 (1983), *overruled by* Harmelin v. Michigan, 501 U.S. 957 (1991).

26. Richard Lippke, *No Easy Way Out: Dangerous Offenders and Preventive Detention*, 27 LAW & PHIL. 383, 387–88 (2008).

27. Anne-Marie McAlinden, *Indeterminate Sentences for the Severely Personality Disordered*, 2001 CRIM. L. REV. 108, 109 (2001).

28. *Id.*

of cruel and unusual punishments,²⁹ but there was no clear general answer until *Ewing v. California*.³⁰ *Ewing* considered the constitutionality of the State of California's so-called three-strikes-and-you're-out law, which imposed a minimum term of twenty-five years for any defendant convicted of a third felony.³¹ Defendant Gary Albert Ewing, who was thirty-six years old, shoplifted three golf clubs worth just over \$1000. He had numerous prior convictions, including one armed robbery that did not result in an injury, for which he served six years of a nine-year term in state prison.³² The three-strikes law was imposed, and Ewing received a sentence of at least twenty-five years, although the felony that triggered the enhancement, grand larceny, carried a penalty of no more than one year in either county jail or state prison and most people convicted of this offense received less.³³

A plurality opinion upheld the constitutionality of the law, holding that the proportionality requirement of the Eighth Amendment was strictly limited when applied to a legislatively mandated term of years in prison.³⁴ Only extreme sentences that are grossly disproportionate violate the Eighth Amendment, the Court held, and this is to be determined in light of great deference that should be granted to legislative decisions about what penal justifications to adopt and about what terms of years are warranted.³⁵ The Court was unable to fashion a retributive justification for enhancements but deemed it sufficient that they could easily be justified on the consequential grounds of general prevention and incapacitation.³⁶ In short, legislatures are free to impose draconian enhancements and thus to preventively detain dangerous offenders for far longer than the triggering offense alone would permit.

Just desert is the moral shoal upon which enhancements founder. By definition, convicted offenders have already been punished for their prior offenses as much as the state was willing and able to do so. In

29. Compare, e.g., *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding life imprisonment with possibility of parole for a three-time offender whose third crime was larceny of a small amount by false pretenses), with *Solem*, 463 U.S. at 281–82 (prohibiting life imprisonment *without* the possibility of parole for a seven-time offender whose seventh offense was uttering a “no account” check for a small amount of money).

30. 538 U.S. 11 (2003).

31. *Id.* at 26–27.

32. *Id.* at 18–19.

33. See *id.* at 19–20.

34. *Id.* at 30–31.

35. *Id.* at 23–24 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)).

36. See *id.* at 26–27. In his concurrence, Justice Scalia, who believes that constitutional proportionality analysis does not apply at all to terms of years, argued that proportionality would impose a coherent limit on prison terms only if it was justified retributively, but he was probably wrong about this. See *id.* at 31 (Scalia, J., concurring). A consequentially based sentence could be said to be disproportionate if it were longer than necessary to achieve its consequential goals.

metaphorical terms, the “slate has been wiped clean” for the prior offenses, and the triggering offense does not alone warrant the enhancement. Most criminal justice theorists and commentators in the United States recognize the important limit desert places on just punishment, so there have been many attempts to justify recidivist enhancements retributively. It would go beyond the purposes of this Article to canvas all the attempts. It suffices to say summarily, however, that there is general agreement that most of them fail or cannot begin to command a consensus among criminal law theorists.³⁷ Even those that appear promising, such as R.A. Duff’s proposal that some courses of criminal conduct indicate such a complete rejection of respect for society that “banishment” by enhancements is just³⁸ or the proposals in the other articles in this Symposium, are highly controversial or undeveloped.

It is especially difficult to justify such enhancements retributively if one believes that criminal punishment should respond to what the criminal did and not to who the criminal is.³⁹ Repetitive offending certainly indicates that the agent has antisocial dispositions and has done far more than a fair share of criminal harmdoing. Nonetheless, it is not a crime to have a criminal predisposition or a criminogenic character, and people do not deserve punishment for their characters.⁴⁰ Persistent offenders have received substantially more punishment than less recidivist criminals for the disproportionate amount of crime the former commit. If the persistent offenders received lesser sentences for earlier crimes because they did not have bad records yet or seemed to have reform potential, that was the state’s decision. Because an offender received less than the maximum term for a previous crime does not entail that the offender

37. See, e.g., Richard S. Frase, *Prior-Conviction Sentencing Enhancements: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals*, in PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 117, 117–19 (Julian V. Roberts & Andrew von Hirsch eds., 2010) (concluding that desert-based rationales are unconvincing and unworkable).

38. R.A. Duff, *Dangerousness and Citizenship*, in FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH 141, 141–42, 152–56 (Andrew Ashworth & Martin Wasik eds., 1998).

39. Adopting the “whole life” view of desert requires a substantial argument that is almost never made, especially in the context of whether the criminal justice system can plausibly justify doing so.

40. A character is a status and presumably cannot be punished. *Robinson v. California*, 370 U.S. 660 (1962). The literature on the meaning of character is vast and contested. I take the position that people may deserve moral criticism for their characters if one believes, as I do, that people must take responsibility for the behaviors that are supposedly indicative of or constitute their characters.

should receive more than the current crime deserves. Even if the unimposed punishment for previous crimes may be coherently said to be “reserved,” the enhancement could be no more than the reserved desert.

Recidivism does not make the last crime worse or more culpable in itself than if it had been the agent’s first offense. It simply indicates that the agent is a worse and more dangerous person, but again, it is not a punishable crime to be a bad, dangerous agent. Defenders of a retributive justification for such enhanced punishment schemes are an extremely rare species precisely because it is so difficult, and perhaps impossible, to provide an adequate retributive justification for enhanced punishment.⁴¹

Although prior conviction does increase the risk of future offending because past behavior is the best predictor of future behavior, present use of recidivism is too empirically blunderbuss to be fair. For example, the twenty-five-years-to-life enhanced sentence that Gary Albert Ewing received was vastly more than could be rationally justified on incapacitative or deterrent grounds. Now, Ewing was no choir boy. He had a long history of criminal offenses, and even though his triggering offense was quite minor, it is legitimate to conclude that he presented a continuing danger to the public. A lengthy prison term for prior burglary and robbery had failed specifically to deter him. Apparently, only incapacitation could prevent him from re-offending, but twenty-five years for a thirty-six-year-old convict seems unnecessarily long. Although he was not deterred by the possibility of lengthy sentences, others might well be. Even if some enhancement were warranted, we have no sensible idea how much. One might argue that Ewing or others subject to enhancements “assumed the risk” by offending again while knowing that they were subject to enhancement, but no citizen should be asked to assume such a risk of irrational state infliction of pain.

Empirical problems may be solved by research. Increasing knowledge may allow us accurately to estimate the need for enhanced sentences based on recidivism and other factors, such as sex and age, that we know

41. See MICHAEL DAVIS, *Just Deserts for Recidivists*, in *TO MAKE THE PUNISHMENT FIT THE CRIME: ESSAYS IN THE THEORY OF CRIMINAL JUSTICE* 121, 129–45 (1992) (noting the scarcity of retributive justifications and offering an account of the “special advantage” recidivists receive by re-offending). I should add briefly that I do not believe that recidivist enhancements are consequentially justified even though that is their best theoretical justification. Additional imprisonment is costly and prevents the imprisonment of more people unless the state is willing to build more prison cells to hold all the new offenders who also need to be imprisoned. Also, predictions problems are substantial. R.A. Duff tries to avoid this problem by claiming that dangerousness is not a prediction of future conduct but instead a present state assessment of predisposition to re-offend. Duff, *supra* note 38, at 152. Thus, there is no genuine actuarial problem. *Id.* at 155–56. We do not think a person has a predisposition, however, unless we also think that there is some substantial probability that it will produce action. If no such probability exists, we think that there is no predisposition or that it has eroded.

are related to the risk of re-offending.⁴² Reliable information may permit rational enhancement and will decrease the especially worrisome false positive rate. But it might also lead to extremely lengthy confinement unless the technology of treatment increased simultaneously and we were willing to release offenders serving enhanced sentences prior to the termination of the enhanced term.

In conclusion, recidivist offender enhancements would be, in principle, effective to incapacitate some undeniably dangerous offenders for lengthy periods, but these enhancements violate retributive constraints on just punishment, suffer from empirical problems concerning prediction and treatment, and are enormously costly. Such programs are politically popular, but they are not good criminal justice policy.

C. Criminalizing Dangerousness

The third means to enhance the preventive detention of dangerous agents consistent with retributive desert principles is to criminalize dangerous propensities. Such proposals must not run afoul of the prohibition on punishing pure status, which the Supreme Court announced in *Robinson v. California*,⁴³ but criminalization can be done indirectly while still requiring a culpable act or omission. For example, I previously attempted to provide a retributively sound way to detain dangerous people. I argued that we could properly criminalize a failure to take the steps necessary to prevent future danger for agents who were consciously aware that they posed a grave risk and were aware of the means necessary to neutralize their danger.⁴⁴ More recently, Professor Youngjae Lee made a similar proposal.⁴⁵ I recognize that there is an argument that such statutes might be unconstitutional, but given the enormous deference the Supreme Court grants legislatures' decisions about how to

42. See John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 414–16 (2006). There is a strong argument, based on our history of discrimination and negative stereotyping, that race is the only variable that might have validated predictive validity but nevertheless should not be used. See *id.* at 417.

43. *Robinson*, 370 U.S. at 666–67.

44. Morse, *Blame and Danger*, *supra* note 4, at 152–54.

45. Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 589–92 (2008).

define crimes and defenses,⁴⁶ let us assume for the purpose of argument that they would be constitutional.

Professors Andrew Simester and Andreas von Hirsch have recently considered a related proposal that would require a preliminary civil order that the agent desist from qualifying antisocial behavior that is not criminal.⁴⁷ Then, failure to desist following such an order would be a crime. Adapted to the present discussion, the civil order would require the potentially dangerous person to take those steps necessary to avoid the danger.

Although I have raised the possibility of criminalizing dangerous proclivities as a type of omission, I now believe that such proposals are unsound on theoretical and practical grounds. These proposals would vastly expand the reach of the criminal law and would massively intrude on liberty. Simester and von Hirsch recognize the same objections.⁴⁸ Such proposals therefore require powerful justification, especially because recent general critiques of overcriminalization have been so powerful.⁴⁹ Criminalizing omissions requires that the agent has a duty not to omit, but it is questionable to some whether any agent, whether or not previously convicted of crime, has a legal duty not to offend. Professor Michael Tonry forcibly argues against such proposals that it is unclear where the obligation comes from and that no one is obligated not to offend. Free moral agents may choose to offend or not.⁵⁰ And every potential criminal, especially an agent previously convicted and punished, knows that further crime may similarly be punished. Why should citizens be further forced into virtue for failure to make the right choices? It is sufficient to properly punish the primary criminal behavior itself rather than add a further charge and punishment for the omission.

46. See, e.g., *Montana v. Egelhoff*, 518 U.S. 37, 55–56 (1996); *Patterson v. New York*, 432 U.S. 197, 201–02 (1977).

47. A.P. SIMESTER & ANDREAS VON HIRSCH, *CRIMES, HARMS, AND WRONGS: ON THE PRINCIPLES OF CRIMINALISATION* 213–14 (2011).

48. *Id.* at 214–28.

49. See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3–4 (2008) (providing a general critical theory); John R. Emshwiller & Gary Fields, *Federal Asset Seizures Rise, Netting Innocent with Guilty*, *WALL ST. J.*, Aug. 22, 2011, at A10.

50. Michael Tonry, *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*, in *PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES*, *supra* note 37, at 91, 104. Professor Tonry's argument may be too strong. He is correct that free moral agents may choose whether to offend or not, but that agentic capacity is not necessarily inconsistent with a duty not to offend. If people have a legal right not to be unjustifiably harmed, then potential harmdoers may have a correlative legal obligation not to harm. Everyone has a moral duty not to unjustifiably harm others, but perhaps everyone also has a legal obligation to obey the law by not violating a criminal prohibition. It is an open question beyond the scope of this Article whether the criminal prohibition produces obligation independent of the moral prohibition it instantiates.

Further, criminalizing this type of omission goes far beyond the bounds of traditional criminalization of omissions.⁵¹ Whether agents have such a duty is a matter of political and jurisprudential theory. It seems the burden of persuasion should be on proponents of expanded criminalization to provide such a defense. I do not do so and believe that any such defense would be too controversial to ground such an expansion of criminal law. Professor Lee, whose account is relational, responds that the nature of associative obligations is grounded only in the existence and nature of the associative account.⁵² This is the logical response, but it is far too controversial to ground massive criminalization.

The amount of preventive detention these crimes would produce might be scant if retributive proportionality limited the amount of punishment that could be imposed. How much punishment would be deserved for conscious failure to take the necessary preventive steps? Compare the somewhat analogous crime of “reckless endangerment,” which seems equally if not more culpable and yet typically carries a very limited, uniform penalty for any risky behavior that passes the threshold.⁵³ One could define the omission crime to include degrees pegged to the amount of danger the defendant is aware he or she might create and impose penalties accordingly. The penalty for failure to take the steps necessary to prevent homicide or rape, for example, would be far higher than failure to prevent burglary or assault. Most criminals are versatile,⁵⁴ however, and it would be difficult to prove that they were aware of the risk that they would commit crimes they had not committed before. Even for previously committed crimes, criminals might plausibly claim that they were certain they would never do *that* crime again. Determining precisely what risk the offender was aware of would probably be unworkable, and penalties would be light based on the one-size-fits-all general awareness of the risk of committing any further felonies and failure to take preventive steps.

Determining what the proper preventive steps were and whether the defendant was aware of them would present further practical problems. In some cases, this would not be a problem. Pedophilic sex offenders

51. *Id.* at 105–06.

52. Youngjae Lee, *Repeat Offenders and the Question of Desert*, in PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES, *supra* note 37, at 49, 63 n.10.

53. See MODEL PENAL CODE § 211.2 (1962) (suggesting a one-year prison sentence).

54. MICHAEL GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 91–94 (1990).

know that they should not frequent children's playgrounds, and prosecutors, judges, and juries are not likely to believe them if they say they were not aware. Further, although individual offenders are individually responsible for their crimes no matter what situational variables may have predisposed them to offend, most can reasonably claim that those situational variables are so extensive that it is difficult to know what steps are reasonable. If the predisposition were linked to an abnormality that could be treated, then treatment is the necessary preventive step, but that would only apply for crimes linked to the abnormality. And if the defendant could not afford the treatment, would not the state have the duty to provide it if it would be a crime not to obtain it? These sorts of problems, too, render the proposed crime unworkable.

I conclude that expanding desert jurisprudence to achieve enhanced preventive detention cannot succeed consistent with reasonably uncontroversial desert principles. The next Part considers whether expanding disease jurisprudence would work better.

V. EXPANDING DISEASE

The two major, plausible means to expand disease jurisprudence would be the allegedly civil but quasi-criminal commitment of certain classes of dangerous offenders, such as so-called mentally abnormal sexually violent predators, and the expansion of the number of people who qualify for the insanity defense and who may be civilly committed if they succeed. I do not address the expansion of traditional civil commitment because the modern approach generally limits the length of commitments⁵⁵ and because the extremely dangerous classes of people who are the likely candidates for lengthy preventive detention by expanded civil commitment are not proper subjects for purely civil commitment.⁵⁶

This Part begins by describing the classes of agents who most plausibly qualify for expanded disease jurisprudence in addition to people with sexual disorders. Then it considers quasi-criminal commitment, concluding that expanding this method would be constitutional but unwise. Then it turns to post-insanity acquittal and concludes that in some cases expanding the disorders that might support an insanity defense may be

55. Samuel Jan Brakel, *Involuntary Institutionalization*, in *THE MENTALLY DISABLED AND THE LAW* 21, 72 (Samuel Jan Brakel, John Parry & Barbara A. Weiner eds., 3d ed. 1985); *see, e.g.*, CAL. WELF. & INST. CODE §§ 5250, 5300 (West 2010) (providing that people who are dangerous to others as a result of mental disorders may be committed for fourteen days but can be detained for an additional 180 days if necessary). This is hardly a lengthy confinement for a person who may have committed a serious crime and may still be quite dangerous.

56. Paul S. Appelbaum, *Dangerous Severe Personality Disorders: England's Experiment in Using Psychiatry for Public Protection*, 56 *PSYCHIATRIC SERVICES* 397, 398 (2005), available at <http://ps.psychiatryonline.org/cgi/reprint/56/4/397>.

theoretically sound but that it will be practically unworkable to achieve substantial preventive detention.

A. Three Classes of Offenders

Psychopathy is a condition characterized by emotional traits, such as lack of empathy, conscience, and concern for others, and by conduct abnormalities, such as repetitive antisocial behavior.⁵⁷ A substantial proportion of convicts serving prison terms have elevated levels of psychopathy,⁵⁸ which is a major risk factor for crime.⁵⁹ Psychopathy is also a major risk factor for antisocial conduct among those suffering from other mental disorders.⁶⁰ There is considerable controversy about whether psychopathy is a mental disorder, but the dominant position is that it is a personality disorder and that its signs and symptoms are pathological. At the least, psychopaths lack psychological attributes that seem central to successful, cooperative life. At present, psychopaths are considered criminally responsible, psychopathy is not considered a mitigating condition for sentencing, and psychopathy is not a sufficient mental abnormality to qualify for ordinary civil commitment.

Psychopathy must be distinguished from Antisocial Personality Disorder (APD), which, unlike psychopathy, is a diagnostic category included in the fourth edition of the American Psychiatric Association's authoritative *Diagnostic and Statistical Manual of Mental Disorders-Text Revision*

57. The "gold standard" for measuring psychopathy is ROBERT D. HARE, *PSYCHOPATHY CHECKLIST-REVISED* (2d ed. 2003). An earlier, influential clinical description is HERVEY CLECKLEY, *THE MASK OF SANITY* (5th ed. 1988). Although psychopathy is a well-validated diagnostic entity, it is not included in the fourth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*. Psychopathic characteristics can be of greater or lesser severity. My discussion will assume that a potentially excusable defendant is severely psychopathic.

58. See Thomas A. Widiger, *Psychopathy and DSM-IV Psychopathology*, in *HANDBOOK OF PSYCHOPATHY* 156, 157–59 (Christopher J. Patrick ed., 2006) (noting that there is strong overlap between psychopathy and Antisocial Personality Disorder (APD), but the relation is asymmetric in that APD is more prevalent among prisoners, and virtually all prisoners who score high on psychopathy meet the criteria for APD, but not the reverse); Kevin S. Douglas et al., *Risk for Criminal Recidivism: The Role of Psychopathy*, in *HANDBOOK OF PSYCHOPATHY*, *supra*, at 533, 534 (urging caution on methodological grounds).

59. Widiger, *supra* note 58, at 156, 157–59; Douglas et al., *supra* note 58, at 533, 534.

60. JOHN MONAHAN ET AL., *RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE* 65–72 (2001); Douglas et al., *supra* note 17, at 534.

(*DSM-IV-TR*).⁶¹ All but two of the criteria for APD are repetitive antisocial behaviors, and neither psychological criterion is necessary to make the diagnosis. Large numbers of prisoners have APD,⁶² and there is substantial overlap with psychopathy. Despite inclusion of APD in *DSM-IV-TR*, there is great controversy about whether, as defined, it should be considered a mental disorder. People with APD are considered criminally responsible, the disorder is not a basis for mitigation in sentencing, and the disorder does not qualify for ordinary involuntary civil commitment.

Some recidivist, dangerous offenders are neither psychopaths nor suffering from APD. There may be various causes that predispose them to be at enhanced risk for offending, including genetic or psychological variables, such as self-control difficulties or genetically caused enzyme deficiencies that are causally linked to crime.⁶³ Unlike psychopaths or people with APD, there is no hypothesized mental abnormality that would justify attribution of a diagnostic category of mental disorder. In short, this is a diverse category of dangerous but otherwise normal people. Not surprisingly, there is no question about their criminal responsibility, mitigation is not warranted unless they also have some independent mitigating condition, and such people cannot be civilly committed. All behavior has causes, and causation is not the equivalent of abnormality or a recognized responsibility-diminishing condition. Therefore, with limited exceptions, the rest of this Part will be concerned with people with psychopathy and APD.

B. *Quasi-Criminal Commitment*

The most plausible disease-jurisprudence means to preventively detain potentially violent offenders would be by a broad law analogous to the quasi-criminal commitments of so-called mentally abnormal sexually violent predators. These laws, unlike commitment of a person following acquittal by reason of insanity, permit the conviction and punishment of the person for an offense *and* potentially indefinite civil confinement *after* the prison term has been completed. They are a strange hybrid of desert/disease jurisprudence, but the ultimate rationale for the commitment

61. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-TEXT REVISION 701 (4th ed. 2000) [hereinafter *DSM-IV-TR*].

62. QUINSEY ET AL., *supra* note 11, at 86.

63. See GOTTFREDSON & HIRSCHI, *supra* note 54, at 85–120 (claiming that lack of self-control is the predominant psychological cause of crime); see also Avshalom Caspi et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*, 297 SCIENCE 851, 851, 853 (2002) (finding that a genetic abnormality affecting the enzyme MAO-A, which affects neurotransmitter levels, increases the risk of violence nine times if the subject was also maltreated in childhood).

is an expansion of disease jurisprudence. They are apparently the most promising means under current law to accomplish preventive detention, so let us consider them in detail to understand how they are justified and what problems they raise.

Sexual predators fall into the gap between criminal and civil confinement. They are routinely held fully criminally responsible and blameworthy for their behavior because they almost always retain substantial capacity for rationality, they remain entirely in touch with reality, and they know the applicable moral and legal rules. Consequently, even if their sexual offending is in part caused by a mental abnormality, they do not meet the usual standards for an insanity defense.⁶⁴ For the same reason, they do not meet the usual nonresponsibility standards for civil commitment, and they retain the competence to make rational decisions about treatment. Moreover, as we have seen, in most cases in which civil commitment is justified, states no longer maintain routine indefinite involuntary civil commitment but instead tend to limit the permissible length of commitment.

To fill the gap, Kansas and a substantial minority of other states have adopted a form of indefinite involuntary civil commitment that applies to “sexually violent predators who have a mental abnormality or personality disorder.”⁶⁵ Kansas defined the term *sexually violent predator* similarly to other states that have adopted such legislation: “[A]ny person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.”⁶⁶ In turn, the term *mental abnormality* is defined as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes

64. Consider the remarks of Justice Owen Dixon of Australia:

[A] great number of people who come into a Criminal Court are abnormal. They would not be there if they were the normal type of average everyday people. Many of them are very peculiar in their dispositions and peculiarly tempered. That is markedly the case in sexual offences. Nevertheless, they are mentally quite able to appreciate what they are doing and quite able to appreciate the threatened punishment of the law and the wrongness of their acts, and they are held in check by the prospect of punishment.

King v Porter (1933) 55 CLR 182, 187 (Austl.).

65. KAN. STAT. ANN. §§ 59-29a01 to -29a20 (2005 & Supp. 2010). Kansas amended its statute after *Kansas v. Hendricks*, 521 U.S. 346 (1997), was decided. The version of the statute considered by the Court, which can be found at KAN. STAT. ANN. §§ 59-29a01 to -29a15 (LEXIS through 1994 Legis. Sess.), applied to mentally abnormal sexual predators.

66. KAN. STAT. ANN. § 59-29a02(a).

the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.”⁶⁷ The statute did not define the term *personality disorder*.

The state may impose this form of civil commitment not only when a person has been charged with or convicted of a sexual offense, but also after an alleged predator has completed a prison term for precisely the type of sexually violent conduct that provides part of the basis for commitment. Commitment is for an indefinite period, and thus potentially for life, although an annual review of the validity of the commitment is required.

In *Kansas v. Hendricks*, the Supreme Court rejected a substantive due process challenge to the constitutionality of the Kansas statute.⁶⁸ The majority’s primary rationale was that the Kansas criteria were similar to civil commitment criteria that the Court had long approved and that the purpose of the commitment was not punitive.⁶⁹ The Court emphasized that legislative judgments were entitled to great deference and that states were free to use any terminology they wished and did not need to use the specific nomenclature of any professional group, such as psychiatrists.⁷⁰ Thus, Kansas was permitted to make mental abnormality, which is *not* a recognized diagnostic term in psychiatry or psychology, a predicate for allegedly civil involuntary commitment. Personality disorder is a traditional diagnostic category class, but states are free to define this class differently from psychiatric or psychological standards.

The Court properly looked beyond labels, however, to determine what potentially justifiable ground for civil commitment the criterion represented. In this case, civil commitment was justified because the mental abnormality or personality disorder criterion limited confinement

to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Kansas Act . . . requires a finding of future dangerousness, and then links that finding to the existence of a “mental abnormality” or “personality disorder” that makes it difficult, if not impossible, for the person to control his dangerous behavior. The precommitment requirement of a “mental abnormality” or “personality disorder” . . . narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.⁷¹

Thus, loss of control was apparently the crucial nonresponsibility condition that triggered the disease jurisprudence justification for the commitments. Indeed, this was precisely the type of problem allegedly exhibited by Hendricks, who had a history of multiple convictions for sexual molestation of children and who described himself as having uncontrollable urges to

67. *Id.* § 59-29a02(b).

68. *Hendricks*, 521 U.S. at 360, 371.

69. *Id.* at 357–58.

70. *Id.* at 358–59.

71. *Id.* at 358 (citation omitted).

molest children when he was stressed.⁷² According to Hendricks, only death could prevent those urges from occurring.⁷³

In *Kansas v. Crane*,⁷⁴ the Supreme Court was asked to decide “[w]hether the Fourteenth Amendment’s Due Process Clause requires a State to prove that a sexually violent predator ‘cannot control’ his criminal sexual behavior before the State can civilly commit him for residential care and treatment.”⁷⁵ *Crane* thus presented an opportunity for the Supreme Court to clarify both the nonresponsibility condition that justifies civil commitment of sexually violent predators and the constitutional limits on preventive detention.

Justice Stephen Breyer’s majority opinion rejected pure preventive civil detention based on dangerousness alone and held that substantive due process required “proof of serious difficulty in controlling behavior” as a predicate for the civil commitment of mentally abnormal sexual predators.⁷⁶ Although the Court constitutionalized the lack of control standard, it rejected the argument that the lack had to be “total or complete” because such a standard was unworkable.⁷⁷ The Court reiterated that both the mental abnormality or personality disorder criterion and the lack of control criterion were necessary to narrow the class of persons eligible for confinement.⁷⁸ These strict eligibility requirements prevent such commitments from becoming mechanisms for retribution or deterrence, which are justifications for criminal punishment but not for civil commitment.⁷⁹ The Court noted that, in *Hendricks*, the presence of an undeniably serious mental disorder that created a “special and serious lack of ability to control behavior” was crucial to justify the civil nature of the commitment.⁸⁰

Defining the quantum of lack of control necessary to justify these onerous civil commitments thus assumes supreme constitutional importance, but the *Crane* opinion provides little guidance. The relevant language is worth quoting in full:

In recognizing that [lack of control is required], we did not give to the phrase “lack of control” a particularly narrow or technical meaning. And we recognize

72. *Id.* at 355.

73. *Id.*

74. 534 U.S. 407 (2002).

75. Petition for Writ of Certiorari at i, *Crane*, 534 U.S. 407 (No. 00-957).

76. *Crane*, 534 U.S. at 413.

77. *Id.* at 411.

78. *Id.* at 413.

79. *Id.* at 412.

80. *Id.* at 412–13.

that in cases where lack of control is at issue, “inability to control behavior” will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.⁸¹

The Court characterized this language as a description of the inability to control behavior in a “general sense.”⁸²

The Court recognized that this is not a precise constitutional standard but asserted that constitutional safeguards of liberty in mental health law “are not always best enforced through precise bright-line rules.”⁸³ The Court defended this assertion with two arguments. First, states have considerable discretion to define the mental abnormalities and personality disorders that are predicates for civil commitment. Second, psychiatry, “which informs but does not control [mental health law] determinations, is . . . ever-advancing,” and its “distinctions do not seek precisely to mirror those of the law.”⁸⁴ Consequently, Justice Breyer concluded, the Court has provided constitutional guidance in the area of mental health law “by proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives as specific circumstances require.”⁸⁵ Finally, the Court implied, but did not decide, that the Constitution does not require that a serious control problem be caused by a volitional impairment. The Court suggested that an emotional or cognitive impairment that caused a sufficient control problem would also pass constitutional muster.⁸⁶

To summarize, the disease rationale for these commitments was furnished by the requirements that the offender suffers from a personality disorder or “mental abnormality,” that the offender has serious difficulty controlling himself or herself, and that the mental impairment must “cause” the person to have serious control difficulty. As a result of these three requirements, the offender is allegedly not fully responsible for sexually violent conduct and comes squarely within the realm of disease jurisprudence.

81. *Id.* at 413.

82. *Id.* at 414.

83. *Id.* at 413.

84. *Id.*

85. *Id.* at 414.

86. *Id.* at 414–15.

C. Expansion of Sexual Predator Commitments to Violent Offenders

To see why this form of commitment is a potentially promising model for the preventive detention of our two classes of offenders, imagine the following changes to the definitions of *predator* and of *mental abnormality*. Recall that the Court indicated that it would be very deferential to legislative judgments in this area. Assume that the legislature has announced, as the Kansas legislature did about sexual predators, that people with psychopathy and APD—classes of dangerous offenders with a recognized disorder—create a very acute need for social protection, which requires special legislation. Then, it defines *dangerous predator* and *mental abnormality* as follows, in each case using the definitions in sexual predator legislation,⁸⁷ but simply removing any reference to sex and retaining references to violence:

Any person who has been convicted of or charged with a violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in repeat acts of violence.

A congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit violent offenses in a degree constituting such person a menace to the health and safety of others.

In principle, the new statute could cover *all* three classes of offenders, including offenders with no officially recognized mental disorder. There would be no trouble concluding that most within each class suffer from a mental abnormality or personality disorder.⁸⁸ The only question would be whether they have serious difficulty controlling themselves or some other emotional or cognitive impairment resulting from the mental abnormality or personality disorder.

There are grave difficulties, however, with every aspect of sexual predator commitments that would apply equally to any extension of

87. See, e.g., KAN. STAT. ANN. § 59-29a02 (2005 & Supp. 2010).

88. Although Justice Breyer's partial concurrence in *Hendricks* approved Kansas's definition of *mental abnormality*, he did note that he was concurring only because he believed that the sex offender would have to suffer from a recognized abnormality. See *Kansas v. Hendricks*, 521 U.S. 346, 373–77 (1997) (Breyer, J., dissenting). In the case of *Hendricks*, the abnormality was pedophilia, a recognized paraphilia according to *DSM-IV-TR*. See *id.* at 375 (citing *DSM-IV-TR*, *supra* note 61, at 524–25, 527–28). Nonetheless, the *Hendricks* majority never imposed any such limitation, and the Court has not done so since. Thus, many apparently normal dangerous offenders might be diagnosed with personality disorders or a mental abnormality. And, as I argue immediately below, the mental abnormality definition the Court approved in fact applies to all offenders and, indeed, to all people.

commitment to dangerous offenders more generally. They employ (1) a problematic differential responsibility standard compared with criminal responsibility, (2) an empty mental abnormality definition, and (3) a vague, unoperationalized nonresponsibility criterion.

The state can of course adopt different responsibility standards in different contexts. When indefinite confinement is at stake, however, the state has a heavy duty to justify the lesser standard for nonresponsibility, which is the foundation for indefinite commitment. Should not the state be more “forgiving” when it is blaming and punishing for crime than when it is imposing involuntary commitment on people who, at the moment, cannot be punished for any offense? No state or commentator has yet provided an adequate justification for the distinction. If potential predators are insufficiently responsible to be left at liberty until they commit another offense, why should they be held criminally responsible for such an offense in the first place? After all, offenders held responsible enough to warrant fully the state’s most severe infliction—the imposition of criminal blame and punishment—are now being committed at the end of a prison term justified by *desert* because they allegedly are not responsible for precisely the same type of behavior for which they were convicted and punished.

Assuming that there is an adequate justification for the criminal/civil responsibility differences, there are problems with all three criteria that support the disease justification. The justifiable purpose of the personality disorder and mental abnormality criterion in sexual predator statutes is to identify those dangerous offenders who are not responsible, but neither “disease” criterion will serve the purpose.

Personality disorder is a recognized category of psychiatric diagnoses, but people with personality disorders rarely suffer on that basis alone from the types of psychotic cognition or extremely severe mood problems that are the standard touchstones of a finding of nonresponsibility.⁸⁹ Most are perfectly in touch with reality, their instrumental rationality is intact, and they have adequate knowledge of the applicable moral and legal rules that apply to their conduct.⁹⁰ Although their abnormalities might make it harder for them to behave well, they seldom manifest the grave problems that might satisfy an insanity defense or even warrant a commonsense excuse on the ground that they cannot “help” themselves.

89. DSM-IV-TR, *supra* note 61, at 685, 688–89.

90. In many cases, the conduct that is the basis for the diagnosis does not per se cause the person distress. For example, an agent whose conduct warrants the diagnosis of APD may be distressed by the reactions of the police, creditors, and others, but the conduct itself might not be distressing. *See id.* at 702–03. Moreover, the degree of distress or impairment such disorders cause is very much a function of the particular social, moral, and legal regime in which the person lives, which once again suggests the highly value-relative nature of the judgment of disorder in these cases.

Even if interpreted to exclude less severe defects, the term would still be overinclusive as a predicate for genuine nonresponsibility in the case of most people who fit within our three classes of violent offenders.

Mental abnormality, as Kansas defines it, may be constitutionally acceptable after *Hendricks*, but it cannot possibly satisfy the nonresponsibility condition because it would apply to every person who is potentially violent, whether or not the person's conduct warranted a recognized diagnosis or a finding of any psychological abnormality whatsoever. The mental abnormality criterion is obscure, circular, and mostly incoherent. The definition states that a person is abnormal if any genetically inherited or prenatally acquired (congenital) or environmental (acquired-through-life-experience) variable that affects the person's emotional or volitional ability predisposes the person to engage in violent crime. It is not clear what is meant by "emotional" or "volitional" ability. Neither word is a term of art or a technical term in the behavioral or philosophical literature. The former has a commonsense, intuitive meaning. In contrast, the concept of volition is extraordinarily vexed.⁹¹ If it refers to the ability of agents to execute their intentions, no offender who successfully executes an intention to offend suffers from any volitional disability.⁹² If it refers to states of desiring or wanting, it is redundant with the requirement of a "predisposition" to criminal violence. Predisposing cognitive variables were evidently excluded from Kansas's definition probably because cognitive problems are rarely factors in sexual abnormalities. *Hendricks* appears to recognize, however, the possibility that cognitive impairments would suffice, and a statute could be rewritten or interpreted to include them. If a cognitive factor were included and did seem relevant, as in the case of manifest delusions about what the offender was doing, standard nonresponsibility conditions, such as gross irrationality, would obtain.

Assume that we have a clear understanding of the meaning of emotional, volitional, and cognitive abilities. What else would predispose any agent to any conduct—criminal and noncriminal, normal and abnormal—if not biological and environmental variables that affect the agent's emotional,

91. The meaning of volition is controversial in philosophy and psychology. See MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 113–65 (1993) (providing the most extensive discussion of volition in legal literature, criticizing the view that volitions are desires, and arguing that a volition is an intention to execute a basic action).

92. See HERBERT FINGARETTE & ANN FINGARETTE HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 61 (1979).

volitional, and cognitive abilities? In other words, the definition is simply a partial, generic description of the causation of all behavior, and it is not a limiting definition of abnormality. All behavior is caused by emotional, volitional, and cognitive abilities that have themselves been caused by congenital and acquired characteristics. The conditions that make violent predators mentally abnormal—congenital or acquired causes of a predisposition—apply to all behavior, and the definition is thus vacuous. It certainly cannot explain why the inevitable presence of congenital and acquired causes of a predisposition means that the agent cannot control and is not responsible for action that expresses the predisposition. Indeed, according to this criterion, no one would ever be responsible for any conduct.

To limit the definition to violent predators, the hypothesized revised criterion is entirely dependent on the requirement of a specific predisposition to commit violent offenses, but it is not a definition of mental abnormality even in the case of violent people. If any agent who has a predisposition to commit violent offenses is mentally abnormal, as the revised definition implies, then the definition of the term *mental abnormality* is circular, and abnormality does not independently provide even part of the necessary causal link. The definition presupposes what it is trying to explain. Moreover, such a circular definition collapses the clichéd, but important, distinction between “badness” and “madness,” which is precisely the distinction the definition is meant to achieve to justify civil, rather than criminal, commitment.

Despite the glaring flaws in this crucial criterion for the disease justification, the Supreme Court has upheld its constitutionality. Let us therefore see how it might apply to our three classes of offenders. The emotional predisposing capacities might straightforwardly describe abnormalities psychopaths exhibit. One reason they may be predisposed to crime is that they have no concern or empathy, which can plausibly be construed as emotional capacities. If cognitive capacities are considered, it is clear that psychopaths are not psychotically out of touch with reality. But if one were to interpret their empathy and conscience impairments as producing cognitive impairments in their practical reasoning about rights infringements, then the conclusion that a cognitive abnormality is present might be warranted. Note again, however, that this interpretation would be inconsistent with criminal responsibility standards. Moreover, it is not clear that people with APD and other dangerous offenders have such emotional and cognitive impairments, but the emptiness of the definition would probably permit diagnosing these people as suffering from mental abnormality.

Recall that a criterion for these commitments is that there must be a causal link between the mental impairment and serious difficulty

controlling oneself or some other nonresponsibility condition. When mental abnormality is causally related to legally relevant behavior, such as violent future conduct, two effects are possible: the abnormality may simply play a predisposing causal role, and the abnormality may undermine the agent's responsibility for the legally relevant behavior. Consider first how a mental abnormality may operate as a predisposing cause of behavior. A mental abnormality does not cause legally relevant bodily movements to become mere biophysical mechanisms, such as a neuromuscular spasm. Abnormal thoughts, desires, perceptions, and the like are not simply irresistible mechanical causes of further conduct, even if, ultimately, biophysical explanations can be given for them—and for normal thoughts, desires, and perceptions. Rather, such abnormalities create irrational reasons for action or compromise the agent's general capacity for rationality or self-control. A mental abnormality thus sometimes plays a causal role by affecting the agent's practical reasoning that leads to the legally relevant behavior. If such irrationality had not existed, the legally relevant behavior would have been less likely to occur. A mental abnormality is not a necessary cause of legally relevant behavior—and it is virtually never sufficient—but it may be a strongly predisposing cause. As we have seen, however, mental abnormalities that impair cognition are likely to play this role only for psychopaths among our three classes of offenders if the defects of psychopaths are interpreted to satisfy the cognitive impairment criterion. Consequently, the “serious difficulty controlling oneself” criterion may assume the paramount role for the other two classes and perhaps for psychopathy as well.

Lack of self-control was at the heart of the disease justification for quasi-criminal commitment in *Hendricks* and *Crane*, so it is crucial to understand what it means and how successfully we can assess it. The rationale for an independent control test is that some agents allegedly do not have rationality defects and therefore cannot satisfy cognitive tests, but they nonetheless cannot control their conduct and therefore are not responsible for the behavior they cannot control. The question for quasi-criminal commitment law is whether an independent control test for excuse or mitigation is conceptually sound and practically feasible. I suggest that, at present, control tests are poorly conceptualized and cannot be adequately assessed. Thus, they are poor predicates for disease jurisprudence within any doctrine, including the insanity defense, and not just for quasi-criminal commitment.

Four false starts or distractions bedevil clear thinking about control tests: (1) the belief that allegedly uncontrollable behavior is not action, (2) the belief that behavior must be out of control if it is a sign or symptom of a disease, (3) the belief that the metaphysical argument about free will and responsibility has any relevance to the criminal law problem of whether a control test is necessary, and (4) the belief that causation at any level of causal explanation, including abnormal causation, is per se an excusing condition or the equivalent of compulsion.

Control test cases uniformly involve human action and not mechanism. If the agent's conduct is a literal mechanism, such as a reflex, or if it is performed in a state of substantially clouded or dissociated consciousness, then the defendant does not act at all and there is no need for a control test. The legally relevant behavior in cases in which a control test seems necessary, such as seeking and using drugs or intentional sexual contact with a minor, is allegedly the sign of a disease, but that does not mean that the defendant is not acting. Seeking and using drugs and intentionally molesting children are quintessentially intentional human actions and at least potentially subject to the control of reason.

Conduct is not per se out of control simply because it is the sign or symptom of an alleged disorder. Most signs and symptoms of diseases are literally mechanisms and not human action. Once the disease process begins, one cannot stop it immediately only by intentionally deciding to end it. In contrast, the signs and symptoms for which a control test is allegedly necessary are per se human actions, and simply refraining from acting in the objectionable way is sufficient to end the sign of the disease. If actions that are signs and symptoms of a disease are to be excused because they are involuntary, involuntariness or compulsion must be independently demonstrated to avoid begging the question.⁹³

Control tests have nothing to do with free will understood as contra-causal freedom or agent origination. All criminal law responsibility doctrines are compatible with the truth of determinism.⁹⁴ Control problems must be demonstrated independent of the external metaphysical debate about free will and responsibility because doctrines of excuse are internal to law. Moreover, if some behavior is randomly caused or is the product of causal indeterminacy, such causation would not be a secure foundation for responsibility or nonresponsibility. Even if it were, there is no reason to believe that random or indeterminate causation plays a greater role in supposed control test cases.

93. *Id.* at 148–53.

94. See Stephen J. Morse, *The Non-Problem of Free Will in Forensic Psychiatry and Psychology*, 25 BEHAV. SCI. & L. 203, 203 (2007).

Causation of behavior is not per se an excusing condition, and it is not the equivalent of compulsion or involuntariness. To believe otherwise is to make the “fundamental psycholegal error.”⁹⁵ In a causal universe that is massively regular, that satisfies what philosopher Galen Strawson terms the “realism constraint,” all behavior is presumably caused by necessary and sufficient conditions.⁹⁶ If causation were per se an excuse or the equivalent of compulsion, then no one could ever be responsible for any behavior. Causation is not the equivalent of compulsion because the nonliteral compulsion that control tests address is normative. It applies only to some defendants. All behavior is caused, but only some behavior is compelled. The external critique of all responsibility practices based on universal causation does not explain or improve understanding of positive law.

Even if the causal process is considered “abnormal,” it does not follow that the caused behavior cannot be controlled. For example, the dominant biological theory of addiction hypothesizes that persistent use of rewarding substances usurps the brain’s normal mechanisms of reward.⁹⁷ Even so, lack of control must be proved independently by showing how this account indicates lack of control.⁹⁸

Lack of control must be explained and understood in the terms of folk psychology. Folk psychology refers to the theory of explaining behavior that treats mental states, such as desires, beliefs, intentions, plans, and reasons, as genuinely causal and that treats people as agents who can potentially be guided by reason and are potentially reasons responsive.⁹⁹ It is the law’s implicit theory of action because all legal criteria presuppose folk psychology. Evidence concerning action, disease or disorder mechanisms, and causation may be relevant to the proof of whether a control problem exists, but the definition of and the criteria for a control problem must be folk psychological. To claim that folk

95. Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1592–94 (1994).

96. Galen Strawson, *Consciousness, Free Will, and the Unimportance of Determinism*, 32 INQUIRY 3, 12 (1989) (emphasis omitted).

97. See Steven E. Hyman, *The Neurobiology of Addiction: Implications for Voluntary Control of Behavior*, 7 AM. J. BIOETHICS 8 (2007), available at http://bioethics.net/journal/j_articles.php?aid=1108.

98. See FINGARETTE & FINGARETTE HASSE, *supra* note 92, at 148–53.

99. See Terence Horgan & James Woodward, *Folk Psychology Is Here To Stay*, 94 PHIL. REV. 197, 197 (1985); Katrina L. Sifferd, *In Defense of the Use of Commonsense Psychology in the Criminal Law*, 25 LAW & PHIL. 571, 571 (2006). Mental states are only partial causes, but they are a crucial part of the causal explanation for intentional behavior.

psychology is “wrong” or unscientific is an external attack on all current conceptions of law. Such critiques should be addressed directly and should not be smuggled in partially through a control test.

I suggest that an adequate, independent folk psychological account of loss of control must fulfill at least five criteria. First, it must be a capacity account. Otherwise, simple failure to exercise the self-control capacity that the agent possesses would be sufficient for excuse, which would be a morally and legally indefensible result. Second, the account must be distinguishable from weakness of will, which is considered a moral failure. Drawing this distinction will be difficult because the definition of weakness of will is fraught. Third, loss of control must be a continuum capacity. It is virtually inconceivable that control capacity would be all-or-none. Fourth, the capacity should be applicable in an ordinary environment broadly conceived. Agents’ ability to restrain themselves under extraordinary restraining influences does not entail that they can control themselves under ordinary circumstances. Fifth, the criteria must be folk psychological because the law is resolutely folk psychological. Virtually all proposed loss of control theories already meet most of these criteria, except perhaps the second and last. Finally, a nonconceptual criterion would be that the capacity must be practically subject to reasonably objective evaluation.

Let us begin with the phenomenology. Suppose that a person has a powerful desire to do something that is unwise, immoral, or illegal. That is, the agent really, really, really wants to do something wrong, such as violently attack another. Desires, whether “normal” or “abnormal,” may be strong or weak, persistent or sudden. It is of course easier, in the colloquial sense, to behave wisely, morally, and legally if an agent does not have suddenly arising, strong desires to do something wrong. Moreover, failure to satisfy strong desires can cause very unpleasant feelings, such as tension and anxiety. The agent’s instrumental practical reason may seem unimpaired when powerful desires arise, and virtually all agents who yield to strong and even sudden or surprising desires to behave unwisely, immorally, or illegally fully recognize that yielding is wrong. What does it mean to say that an agent “can’t help it” when the agent yields?

Scientific discoveries about behavior often furnish mechanistic causes, but the problem of control remains. Causation per se, at any level of causation and whether or not it is “normal,” is not an excusing condition or the equivalent of compulsion. Humans clearly have “stop” folk psychological processes—techniques that they have developed and apply consciously and unconsciously to achieve self-command in the face of temptation—that are influenced by mechanistic causes. Successful human interaction would otherwise be impossible. Nevertheless, we still need

an adequate, independent folk psychological account of why psychopaths or other dangerous offenders have trouble controlling themselves.

A common approach is to conceive of loss of control as motivational compulsion—as occurring when a desire has too much motivational force to be resisted under ordinary circumstances. The analogy is to overwhelming physical force, but rather than being compelled by external force majeure, agents are compelled by their own “overpowering” desires. Some desires are stronger than others, but desires are not like external physical forces that physically overwhelm the agent’s ability to resist. If this were true, the claim would be no action. The agent who loses control nonetheless acts.

There are no “forces” of desire. Physical forces can bypass intentionality and assent; desires cannot.¹⁰⁰ It is more likely that strong desires redirect rather than bypass intentionality. Resisting a desire causes the agent so much effort and discomfort that resisting is not worth the effort, even though it is possible, so the agent collaborates with the desire. The “forces of desire” account also fails to distinguish among different strong desires because all strong desires would appear to be sources of loss of control. Focusing on “abnormal” desires will not solve the problem because “normal” desires may be equally strong and abnormal desires may be weak. Moreover, once the desire is considered resistible with effort, how is this case different from weakness of will? The motivational compulsion account of loss of control leaves all the important issues unresolved.

Another theory hypothesizes that compulsion arises from a conflict between first-order desires—what the agent wants to do now—and second-order desires—the desires that agents reflectively have about what they should want.¹⁰¹ Conflict between first- and second-order desires may make it more difficult to avoid acting on one’s first-order desires,

100. Gary Watson, *Disordered Appetites: Addiction, Compulsion, and Dependence*, in *ADDITION: ENTRIES AND EXITS* 3, 6–7 (Jon Elster ed., 1999).

101. This influential account was first developed by the eminent philosopher Harry Frankfurt. See HARRY G. FRANKFURT, *Freedom of the Will and the Concept of a Person*, in *THE IMPORTANCE OF WHAT WE CARE ABOUT* 11, 11–12, 24 (1988) (claiming that “[a] person’s will is free only if he is free to have the [kind of] will he wants”). It by no means commands universal assent, however. See ALFRED R. MELE, *IRRATIONALITY: AN ESSAY ON AKRASIA, SELF-DECEPTION, AND SELF-CONTROL* 73–74 (1987) (rejecting hierarchical accounts because they do not resolve the problem of self-control); Gary Watson, *Free Action and Free Will*, 96 *MIND* 145, 149–51 (1987). These accounts have spawned an industry of criticism. See, e.g., ROBERT KANE, *A CONTEMPORARY INTRODUCTION TO FREE WILL* 85 (2005).

but this theory has weaknesses, and why it is a theory of compulsion is unclear. The observation that an agent is in conflict does not mean that the agent cannot control his or her conduct, unless there is an account of why that conflict produces lack of control.

A promising approach to control difficulty is based on “reasons responsiveness.”¹⁰² If agents cannot be persuaded, actually or hypothetically, by good reasons to avoid acting, or if they cannot bring those reasons to bear, then the agents probably cannot control themselves.¹⁰³ The reasons must be ordinary reasons or the criteria would be too demanding. A gun at the head would constitute an extraordinary reason. If the agents can control themselves in such circumstances, it would not follow that the agents could control themselves in ordinary circumstances.

Although this account is subject to objections and difficulty distinguishing weakness of will, it is intuitively appealing because it does not suffer from the failed analogy to physical force and because it provides a commonsense folk psychological process for loss of control. Nonetheless, to the extent it is valid, it is a rationality account. The capacity to grasp and be guided by good reason is the heart of normative rationality. Once again, this might be an attractive characterization of the deficits that psychopaths have.

A final theory for an independent self-control failure is the analogy to the two-party excuse of duress, but we do not excuse in duress cases because the agent had a volitional or control problem. The agent’s reasoning is intact, and her will operated effectively to save her from the threat. We excuse the agent because she faced a dreadfully hard choice for which she is not responsible, and we could not fairly expect her not to yield. According to this analogical theory of loss of control, the agent faced with the threat of frustration of strong internal desires is essentially claiming an “internal duress” excuse. Such accounts may seem plausible for “disorders of desire,” such as addiction and the paraphilias, but it does not seem applicable to psychopaths and the other types of offenders under consideration in this Part.

Proponents of an independent control test have not yet provided a persuasive folk psychological account independent of a rationality problem. In addition, control tests suffer from the defect that I have termed the “lure of mechanism,” the tendency to analogize allegedly out-of-control

102. *See generally* JOHN MARTIN FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* 1–91 (1998) (providing a theory of responsibility based on responsiveness to reasons).

103. In one of the earliest attempts to propose a control test, Sir James Fitzjames Stephen recognized that the inability to be guided by future consequences, that is, by good reasons, was the primary source of failures of self-control. It is essentially a cognitive test despite being labeled a control test. 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 170 (1883).

agents to literal mechanisms.¹⁰⁴ Sophisticated proponents do not do this, but many academic lawyers, practitioners, and mental health experts do. The usual basis is the mistaken belief that if behavior is caused, the agent could not have acted otherwise. Control tests inadvertently fuel this pernicious problem because they mask the difference between the folk psychological sense of loss of control and the metaphysical question of whether determinism or universal causation undermines all deontological responsibility.

Control tests also raise difficult practical problems. The American Bar Association and the American Psychiatric Association both supported the movement to abolish control tests for legal insanity on the ground that it was impossible to evaluate lack of control objectively.¹⁰⁵ Recall that in *Crane*, Justice Breyer provided a typically thin and seemingly commonsense test:

[W]e did not give to the phrase “lack of control” a particularly narrow or technical meaning. And we recognize that in cases where lack of control is at issue, “inability to control behavior” will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior.¹⁰⁶

It would have been hard for Justice Breyer to do better because there is essentially nothing to say that is not conclusory or circular. There is no consensual scientific definition or measure of lack of control. Nor is there yet an adequate folk psychological process that has been identified as normatively justifiable for legal purposes.

Justice Breyer’s vague and unhelpful “serious difficulty” control criterion was the wrong test. How would a factfinder know if the defendant had serious difficulty controlling himself or herself except on the bases of the defendant’s self-report and observations of the defendant’s seemingly self-destructive conduct? Justice Scalia’s dissent observed that the test would give trial judges “not a clue” about how to charge juries.¹⁰⁷ Justice Scalia speculated that the majority offered no further elaboration because “elaboration which passes the laugh test is

104. Morse, *supra* note 95, at 1590–92.

105. CRIMINAL JUSTICE STANDARDS COMM., AM. BAR ASS’N, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.1 cmt., at 340–42 (1989); Insanity Def. Work Grp., *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 685 (1983).

106. *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

107. *Id.* at 423 (Scalia, J., dissenting) (emphasis omitted).

impossible.”¹⁰⁸ Justice Scalia wondered whether the test was a quantitative measure of loss of control capacity or of how frequently the inability to control arises.¹⁰⁹ In the alternative, he questioned whether the standard was adverbial, a descriptive characterization of the inability to control one’s penchant for sexual violence.¹¹⁰ The adverbs he used as examples were *appreciably*, *moderately*, *substantially*, and *almost totally*.¹¹¹ Justice Scalia’s commonsense criticism of the test was apt. To date, advocates of an independent control test have not demonstrated the ability to identify “can’t” versus “won’t.”

Although we do talk colloquially about and appear to have an everyday understanding of loss of control, we do not, in fact, have a good understanding. Moreover, successful human interaction does not depend on successfully assessing control capacity. Even when we appear to be making commonsense, ordinary judgments of lack of self-control, the psychological process is unspecified. If it were analyzed, rationality impairments would appear. And as H.L.A. Hart recognized long ago, it is much easier to assess rationality defects than control defects.¹¹²

In most cases of alleged “loss of control,” agents raise claims that, for some reason, they could not “think straight” or bring reason to bear. The “control” language used in *Crane* and in other cases and statutes is metaphorical and better understood in terms of rationality defects. Human beings control themselves by using their reason. “Stop” mechanisms are primarily cognitive. If agents cannot use their reason, it is difficult to behave properly and it explains why some people seem “out of control.” I suggest that this is the best understanding of why psychopaths may have difficulty “controlling themselves”: they do not have access to empathy, concern, and conscience that give agents the normatively best and empirically most motivating reasons not to harm others.

The mental abnormality, causal link, and serious control difficulty criteria are not adequate nonresponsibility standards. They cannot conceivably limit quasi-criminal commitment to only those mentally abnormal potentially violent predators who cannot control themselves and thus are not responsible for their potential violence. Using such

108. *Id.*

109. *See id.* at 423–24.

110. *Id.* at 424.

111. *Id.*

112. H.L.A. Hart, *Legal Responsibility and Excuses*, in DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE 95, 99 (Sidney Hook ed., 1958), *reprinted in* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28, 33 (1st ed. 1968).

criteria, virtually every violent offender would be both convictable and committable. This would be unjust.

Even if we could limit the class of offenders who somehow properly met the quasi-criminal commitment criteria, we would still have the problems of prediction and treatment that all preventive detention justifications present. Although psychopathy is a serious risk factor for crime and enhances the probability of recidivism, there will still be large numbers of false positives, adequate treatments will still not exist,¹¹³ and gatekeepers will still tend to be conservative. The result will be lengthy and often life-long commitments for people who might otherwise be released earlier and lengthy commitments for some offenders who might not be dangerous at all. And unlike recidivist enhancements, which suffer from the same defects but are at least based on intentional wrongs for which the offender is culpable, the ground for preventive detention in this case—psychopathy or some other disease criterion—is a disorder, an attribute of the person for which the offender is not responsible. Many violent offenders committed quasi-criminally might spend the rest of their lives unnecessarily in institutions at immense cost to them personally and at immense fiscal and moral cost to society.

D. Traditional Insanity Acquittal Followed by Commitment

Legal insanity is the only current American doctrine that instantiates an excuse for adults for lack of rational or control capacity.¹¹⁴ The most common is a “cognitive test,” which adopts some variant of the traditional English rule derived from *M’Naghten’s Case*.¹¹⁵ That test holds that people will be excused if they were acting under such a defect of reason arising from disease of the mind that (1) they did not know the nature and quality of the act that they were doing, or (2) if they did know it, they did not know that what they were doing was wrong.¹¹⁶ A minority of American jurisdictions have adopted a “control” test in addition to a cognitive test.¹¹⁷ These tests excuse if, as a result of mental disorder, the defendant was acting under an irresistible and uncontrollable impulse or

113. QUINSEY ET AL., *supra* note 11, at 269 (asserting that there is no treatment for psychopathy).

114. Morse, *Blame and Danger*, *supra* note 4, at 129–30.

115. [1843] 8 Eng. Rep. 718 (H.L.). For a complete description of the tests in use in the United States, see *Clark v. Arizona*, 548 U.S. 735, 749–53 (2006), which provides a description of the various rules and the number of jurisdictions that have adopted each.

116. *M’Naghten*, 8 Eng. Rep. at 719, 722.

117. See *Clark*, 548 U.S. at 751.

had lost the ability to choose the right conduct.¹¹⁸ No jurisdiction has adopted a control test as its sole test for legal insanity.¹¹⁹ A minority of jurisdictions have adopted the American Law Institute's Model Penal Code test, which includes both a cognitive and a control test.¹²⁰ It excuses defendants if, as a result of mental disease or defect, they lack substantial capacity either to appreciate the criminality—or in the alternative, the wrongfulness—of their conduct or to conform their conduct to the requirements of the law.¹²¹

Cognitive tests provide a distinct folk psychological mechanism for excuse or mitigation, including the inability to attend to the proper considerations for guiding conduct in a specific context and the inability to use those considerations actually to guide conduct. An agent who lacks these abilities for any nonculpable reason has a rationality defect. Such explanations make sense of the commonsense claim that defendants could not control themselves. Indeed, I have no problem calling this standard a control standard as long as one understands clearly that the problem that undermines self-control is a cognitive defect and not some overwhelming force or the like. The rationality standard is a genuine and limiting condition of nonresponsibility rather than a metaphoric ground. It can be applied workably and fairly and leaves room for moral, political, and legal debate about the appropriate limits on responsibility.

If we consider the legal and moral standards of responsibility, it is clear that the capacity for rationality is the primary criterion. Only lack of rational capacity can explain the diverse conditions that undermine responsibility, including, among others, infancy, mental disorder, dementia, and extreme stress or fatigue. Reflection on the law's concept of the person and on the nature of law itself suggests that the capacity for rationality must be the central criterion. What distinguishes human beings from the rest of the natural world is that we are endowed with the capacity for reason—the capacity to use moral and instrumental reasons to guide our conduct. Law would be powerless to achieve its primary goal of regulating human interaction if it did not operate through the practical reason of the agents it addresses and if agents were not capable of rationally understanding the rules and their application in the various

118. See, e.g., *Parsons v. State*, 2 So. 854, 866–67 (Ala. 1887). As noted *supra* note 103, one of the first criminal law theoreticians to argue for the necessity of an independent control test was Sir James Fitzjames Stephen, the great English criminal law historian, theorist, judge, and public intellectual. See 2 STEPHEN, *supra* note 103, at 170–72. Stephen's rationale was that self-control difficulties flow from the inability of the agent to keep long-term consequences in mind and to guide one's conduct by them. See *id.* at 170. Note, however, that this is a classic rationality problem.

119. See *Clark*, 548 U.S. at 749–52.

120. See *id.* at 751 & n.16.

121. MODEL PENAL CODE § 4.01(1) (1962).

circumstances in which agents act. The central reason why an agent might not be able to be guided by moral and legal expectations is that the agent may not have been capable of being guided by reason. It is sufficient if the agent retained the capacity for rationality even if the capacity was not exercised on the occasion.

The potential capaciousness of the language of all the tests quoted above suggests that there is a reasonable argument for including psychopathy as a potential predicate for an insanity plea but almost no argument for including APD. Nonetheless, American law, either explicitly by statute or by judicial interpretation, excludes psychopathy as a basis for an insanity defense. A further provision of the Model Penal Code is characteristic and instructive. Referring to its insanity defense test quoted above, it says that “the terms ‘mental disease or defect’ do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.”¹²² According to the strict language of this provision, neither psychopaths nor those with APD are excluded from the definition of the term *mental disease or defect* because neither is manifested *only* by repeated criminal or otherwise antisocial conduct.¹²³ Psychopathy, as clinically described¹²⁴ and as measured by Hare’s *Psychopathy Checklist-Revised*,¹²⁵ includes many psychological criteria and is not manifested solely by repetitive criminal or antisocial behavior. The criteria for APD include two psychological variables—lack of remorse and impulsivity. Only the former is a plausible candidate for an excuse, neither needs to be present to make the diagnosis, and all of the other criteria are repetitive criminal or antisocial behaviors.¹²⁶ One could argue that APD is not excluded because the diagnostic criteria include a psychological criterion. On the other hand, because it is not a necessary criterion, perhaps APD should be excluded. A third possibility would be that APD would be included only in those cases in which lack of remorse was one of the diagnostic criteria used, but this criterion alone does not suggest that people with APD are the equivalent to those with psychopathy. Despite the logic suggesting that perhaps psychopathy could be the basis of an insanity defense, the Model Penal Code’s influential provision has been

122. *Id.* § 4.01(2).

123. This point was recognized by at least one United States court. *See* United States v. Currens, 290 F.2d 751, 774, 761–62 (3d Cir. 1961).

124. CLECKLEY, *supra* note 57, at 337–38.

125. HARE, *supra* note 57.

126. *See* DSM-IV-TR, *supra* note 61, at 706.

interpreted to exclude psychopathy and, *a fortiori*, APD as a sufficient mental abnormality to satisfy the insanity defense test.¹²⁷

Despite U.S. law's exclusion of psychopathy as a basis for an insanity defense, the argument for excusing psychopaths, or at least some of them, is that they lack the strongest reasons for complying with the law, such as an understanding that what they are doing is wrong and an empathic understanding of their victim's plight.¹²⁸ Most people have the capacity to use empathy, conscience, understanding of the reason underlying a criminal law's prohibition, and prudential reasons to guide behavior. Psychopaths can be guided only by strictly prudential, entirely egoistic reasons, such as the fear of being caught and punished. In other words, they cannot grasp or be guided by the good moral reasons not to offend, which could be expressed as either a cognitive or control defect. And according to the same argument, psychopaths with lesser psychopathy should qualify for mitigation, which is considered virtually entirely at sentencing in the United States.

In response, most advocates for the continued exclusion of psychopathy as a basis for the insanity defense argue that it is sufficient for criminal responsibility if psychopaths can reason prudentially about their own self-interest.¹²⁹ First, psychopathy does not prevent agents from acting as the law defines action, nor does it prevent psychopaths from forming prohibited mental states. For example, a psychopath who kills another human being intentionally fully meets the elements of the *prima facie* case for murder. Further, psychopaths are not excused because they do possess many rational capacities. They usually know the facts and are generally in touch with reality, they understand that there are rules and consequences for violating them, which they treat as a "pricing" system, and they feel pleasure and pain, the anticipation of which can potentially guide their conduct. This is a relatively thin, prudential conception of rational capacity, but the law deems it sufficient to justify punishment on desert and deterrence grounds. Finally, psychopaths do not suffer from lack of self-control as it is traditionally understood. They do not act in response to desires or impulses that are subjectively experienced as

127. See MODEL PENAL CODE § 4.01 cmt., at 176–77 (1962).

128. Paul Litton, *Responsibility Status of the Psychopath: On Moral Reasoning and Rational Self-Governance*, 39 RUTGERS L.J. 349, 350 (2008); Stephen J. Morse, *Psychopathy and Criminal Responsibility*, 1 NEUROETHICS 205, 208–09 (2008), available at <http://www.springerlink.com/content/9534141h38470r30/fulltext.pdf>.

129. Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 746–47 (1992). For an intermediate position, see Walter Glannon, *Moral Responsibility and the Psychopath*, 1 NEUROETHICS 158, 158–59 (2008), which argues that psychopaths are capable of instrumental reasoning and are capable of being guided by moral considerations to some degree, but their cognitive and affective impairments warrant mitigation.

overwhelming, uncontrollable, or irresistible. Proponents of holding psychopaths responsible argue that there is no need to excuse according to either a desert or deterrence justification for punishment. In short, the law should view the psychopath as bad and not as mad.

Criminal defendants with major mental disorders, such as schizophrenia, also do not qualify for the insanity defense if the defendants know that what they are doing is criminal or wrong. Consequently, there is even less reason to excuse the psychopath who knows the rules, as virtually all do, because the psychopath is in touch with reality. Moreover, even if defendants with a major mental disorder know technically that what they are doing is against the law, they may not, unlike the psychopath, even retain substantial prudential reasoning ability. In contrast, psychopaths always know that the rule applies to them. Defendants who are grossly out of touch with reality and delusionally believe that they are doing the right thing, such as God's will, are paradoxically the mirror image of psychopaths. Their general capacity for moral reasoning remains intact, but their psychotic reasons for action undermine the potential of the rules to guide them prudentially.

Suppose one accepts on normative grounds, as so many do, that the capacity for prudential reasoning is sufficient for criminal responsibility. There remains one final argument for excusing at least extreme psychopaths based on their lack of even prudential reasoning ability. According to one plausible but controversial, broad characterization of psychopathy, most ably advanced by Paul Litton, psychopaths are not rational at all because they lack any evaluative standards to assess and guide their conduct.¹³⁰ They do not even possess evaluative standards related to the pursuit of excitement and pleasure. Psychopaths, Litton argues, are like Frankfurt's concept of the "wanton."¹³¹ They do not feel regret, remorse, shame, or guilt—feelings that are typically experienced in reaction to our failure to meet the standards we have set for ourselves. They may feel frustration or anger if they fail to get what they want, but these are not reactive emotions. Such frustration or anger does not entail negative self-evaluation. Moreover, severe psychopaths are out of touch with ordinary social reality. They say that they have goals but act in ways inconsistent with an understanding of what having and achieving a

130. Litton, *supra* note 128, at 350–51, 375–77. The argument in the text follows Litton.

131. See Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5, 11, 19–20 (1971).

goal entails. They do not consistently follow life plans and are impulsive. Litton concludes that “[i]t is not surprising that agents with a very weak capacity for internalizing standards act on unevaluated whims and impulses.”¹³² Much of their conduct appears unintelligible because we cannot imagine what good reason would motivate it. In brief, psychopaths have a generally diminished capacity for rational self-governance that is not limited to the sphere of morality. They cannot even reason prudentially. Again, it is possible that future research may convince legislatures or courts to accept such an understanding of some psychopaths and to extend the insanity defense to them, but this is not the current law, even for such extreme cases.

Suppose the insanity defense were extended to psychopaths. In all jurisdictions, commitment of people who have been acquitted by insanity is automatic in one form or another, although subject to periodic review.¹³³ Because these commitments are triggered *ab initio* by proof beyond a reasonable doubt of a criminal offense—if the defendant is able to cast doubt on the prima facie case, there is no need to raise the insanity defense—they are considered distinguishable from ordinary civil commitment, which does not require any criminal act for incarceration. Thus, more onerous conditions may be imposed on the person committed. The Supreme Court held in *Jones v. United States* that both mandatory initial commitment and indefinite confinement of such people are constitutional.¹³⁴ The reasoning behind the holding was the commonsense view that it is presumed that the mental disorder and dangerousness of people acquitted by reason of insanity will continue. Therefore, public safety requires commitment if the person remains mentally disordered and dangerous. In a later opinion, the Court made clear that an insanity acquittee had to be released from commitment if the person were either no longer mentally disordered or no longer dangerous.¹³⁵ The reasoning for the

132. Litton, *supra* note 128, at 382.

133. JOHN PARRY, CRIMINAL MENTAL HEALTH AND DISABILITY LAW, EVIDENCE AND TESTIMONY 169–70 (2009).

134. *Jones v. United States*, 463 U.S. 354, 370 (1983).

135. *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992). Justice O’Connor partially and cryptically concurred. She noted that an insanity acquittee had been found to have committed the prima facie case beyond a reasonable doubt. She then wrote obscurely, as follows:

It might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee’s continuing dangerousness. . . . [A]cquittees could not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent.

latter decision was straightforward. If the person were no longer suffering from a disorder, there would be no disease justification for preventive detention. If the person were no longer dangerous, even if still suffering from disorder, the public safety rationale for preventive detention would not be satisfied. But as *Jones* made clear, if mental disorder and dangerousness were to continue, there would be no constitutional limit on the length of these commitments. In short, post-insanity acquittal commitment would seem an excellent means to incapacitate psychopathic offenders.

Despite the initial attractiveness of this solution to the danger psychopaths present, there is nevertheless a major practical objection. The insanity defense cannot be imposed on a competent defendant who does not wish to raise it,¹³⁶ and virtually no psychopath would then raise the insanity defense. At present, there is no effective treatment for adult psychopaths, so any psychopath acquitted by reason of insanity would be facing a lifelong commitment to an essentially prison-like facility.¹³⁷ In contrast, except for crimes carrying the possibility of the death penalty or

Id. at 87–88 (O'Connor, J., concurring) (citations omitted). Justice O'Connor also noted that the seriousness of the crime should also affect whether the state's interest in continued confinement would be strong enough. *See id.* at 88.

If the subject is no longer mentally disordered and therefore no longer nonresponsible, it is hard to imagine what possible "medical justification" there could be for continuing civil commitment to protect the public. It is not clear from the O'Connor concurrence if she would require some finding of mental abnormality, as did the statute upheld in *Kansas v. Hendricks*, see 521 U.S. 346, 352, 371 (1997), to make the commitment analogous to traditional civil commitment. If not, however, then five Justices of the Supreme Court, the four *Foucha* dissenters and Justice O'Connor, would have been willing to countenance pure preventive detention, at least of a person who had committed a crime without being responsible and who continued to be dangerous.

For an attempt to apply Justice O'Connor's suggestion, see *State v. Randall*, 532 N.W.2d 94, 107–09 (Wis. 1995), which permitted continued confinement if there was a medical justification and the subject was still dangerous, but which limited the term to the maximum sentence for the crime charged. Needless to say, I believe that this practice is simply criminal punishment by other means. The "medical justification" criterion is a transparent and fraudulent attempt to bring this type of commitment within the disease justification for preemptive confinement. The limitation on the term of the commitment to the maximum term for the crime charged is simply a salve to the legislative conscience and a signal that the continued commitment is punitive.

136. *E.g.*, *United States v. Marble*, 940 F.2d 1543, 1548 (D.C. Cir. 1991).

137. QUINSEY ET AL., *supra* note 11, at 269. There has been at least one quite promising treatment program for adolescent psychopaths that seemed overall cost effective. See Michael Caldwell et al., *Treatment Response of Adolescent Offenders with Psychopathy Features: A 2-Year Follow-Up*, 33 CRIM. JUST. BEHAV. 571, 589–90, 592 (2006). I am not aware of any comparable programs with adults, and the potential generalizability of this program to adults may be limited because it is an open question whether psychopathy is a valid diagnosis for juveniles.

life without possibility of parole, the defendant would be much more sensible to arrange a favorable plea bargain for a lesser term of years or to face conviction and imprisonment for the maximum term the law permits for the crime charged, which would be shorter than the potential commitment. Even in cases involving the potential for life without possibility of parole, a plea bargain to a lesser charge or sentence would be preferable. Moreover, a conviction and the imposition of life without the possibility of parole might be successfully appealed, whereas the only hope for release from an indefinite involuntary commitment would be the discovery of a successful treatment for psychopathy or the hope that the hospital would release the psychopath when he or she would clearly have “aged out” of dangerousness.

In short, even if American law came to the conclusion that psychopaths should be excused, few psychopaths would be willing to accept such “lenient” treatment, and we would still have to rely on a pure criminal justice response. Finally, the potential use of post-insanity acquittal would not apply to offenders with APD or other dangerous offenders. There simply is no credible argument that such offenders are not criminally responsible unless they also suffer from some comorbid disorder that does negate responsibility.

VI. BYPASSING DESERT/DISEASE JURISPRUDENCE: PURE PREVENTIVE DETENTION FOR DANGEROUSNESS

Rather than artificially expanding our concepts of desert and disease to fill the gap that dangerous, responsible, and currently unpunishable people present, many would like to move to a more honest, outright scheme of pure preventive detention solely for dangerousness. Some might treat pure preventive detention within the criminal justice system based on the claim that many of our seemingly retrospective, nonconsequential practices, such as holding others responsible, can in fact be justified by a fully prospective, consequential theory.¹³⁸ Or they might retain a more robust version of blame but use conviction as a trigger for preventive

138. See, e.g., DANIEL C. DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* 153–72 (1984). This alternative view recognizes that evolution has designed us to be intentional, self-conscious creatures, but practices such as holding others responsible are allegedly simply stimuli that increase the probability of safe (good) behavior and decrease the probability of dangerous (bad) behavior. No one, in other words, is “really” responsible. In the words of H.L.A. Hart, it is an “economy of threats.” HART, *supra* note 112, at 43–44. The economy-of-threats approach does not successfully explain our practices, however, and suffers from defects of its own. Nothing in this approach would prohibit blaming and punishing innocent people if doing so would maximize the good. This is a familiar criticism but one that has no answer if it is unjust to intentionally punish the innocent, as virtually all theories of justice hold.

measures in addition to or instead of the proper sentence for the crime.¹³⁹ A third would treat sentences as based purely on prevention.¹⁴⁰ A related alternative would be a purely civil form of pure preventive detention imposed after the offender's prison term has ended, as Professor Paul Robinson has proposed.¹⁴¹ The most radical proposal, which I think is entailed by some who argue for a fully consequential criminal justice system, would be to deny that anyone is ever genuinely responsible, to completely abandon the criminal/civil, desert/disease distinctions, and to move to a pure prediction and prevention system of public protection.¹⁴² Such proposals are surely coherent and many would be constitutional. I shall argue, however, that they suffer from serious theoretical and practical

139. This approach is common in Europe. *See generally* M. v. Germany, App. No. 19359/04, 2010 Eur. Ct. H.R., *available at* http://www.echr.coe.int/ECHR/Homepage_EN (follow "Case-Law" hyperlink; then follow "Decisions and Judgments" hyperlink; then follow the "HUDOC database" hyperlink and locate case by citation) (describing these statutory provisions in various nations); Norwegian General Civil Code, § 39.c, *available at* <http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf>.

140. This is how I interpret Christopher Slobogin's interesting proposal. *See generally* Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO L. REV. 1127 (2011) (arguing that once a person is convicted of an offense, the sentence should be determined based on back-end decisionmaking by recidivism reduction experts and should fall within a broad range pronounced by lawmakers).

141. *See, e.g.*, Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001). Professor Robinson agrees that various criminal justice methods that substantially enhance criminal incarceration, such as habitual offender laws, are being used improperly to fill the gap. *Id.* at 1435–36. He affirms that such methods are a form of pure preventive detention because such enhanced prison terms are disproportionate to the offender's desert. *See id.* Professor Robinson proposes that rather than "cloaking" preventive detention in the guise of criminal punishment, social safety and respect for criminal law would be better served if the law straightforwardly segregated proportionate punishment and preventive detention and adopted postconviction civil commitment based solely on dangerousness. *Id.* at 1444–46. He claims that using civil commitment to protect society in the segregated system would provide more checks on unjustified loss to liberty than would using the criminal justice system to impose disproportionate sentences. *Id.* at 1452–55.

It is not clear if such commitments would be constitutional because the Supreme Court has often reiterated that we do not incarcerate for dangerousness alone, but I will assume for the sake of argument that such commitments could be justified constitutionally under limited circumstances.

142. *See, e.g.*, Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, in *LAW & THE BRAIN* 207, 217–18 (Semir Zeki & Oliver Goodenough eds., 2006). If no one is genuinely responsible, what is the point of a criminal/civil distinction? Thus, Greene and Cohen should not concede that "punishment" practices will need to be continued because punishment for acting agents is intimately tied to blame, which is predicated on responsibility. The logic of their argument entails a pure prediction/prevention social control mechanism.

defects, although some of the latter may be remedied by scientific advances. Rather than treat all these variants individually, I shall raise considerations that apply with variable force to all of them.

If an agent is responsible—and by definition the agent is responsible in all except the radical proposal—then pure preventive detention fails to treat the person as an autonomous moral agent who can be guided by reason. People have an undoubted right not to be harmed unjustifiably, and we can certainly blame and punish those who intentionally commit such harms, but pure preventive detention treats the agent as a wild beast who is not governed by reason and who must be objectified and controlled.¹⁴³ No matter how dangerous agents may be, it is a massive infringement on their liberty and autonomy to institute pure preventive detention for responsible agents. I concede that responsible agents who know that this may happen can use such knowledge to guide their behavior to avoid wrongdoing and thus they are responsible for the pure preventive detention that might be imposed. The implication of this concession, however, comes very close to the proposal to criminalize the omission to take steps to prevent one's own wrongdoing, and as we have seen, that proposal has problems of its own. We would all be safer, I suppose, if everyone were constantly monitored in proportion to the threat they posed, whether or not they had committed a crime, but this would be an authoritarian regime that failed to respect people as moral agents. I do not wish to live in such a world. In the interests of respect for the liberty and autonomy of responsible agents, I am willing to take substantial risks. This is especially the case given the practical problems with such schemes that I discuss below.

Relatedly, the proposals omit the attitudinal aspect of blaming that is central to our self-conception and moral and legal practices.¹⁴⁴ To hold an agent responsible and to blame that agent is not simply a behavioral disposition, whose purpose is the maximization of some future good. Blaming fundamentally expresses retrospective disapproval and respect for persons. Even if it has the good consequence of decreasing future harmdoing, our current practice is undeniably focused in large measure

143. I recognize that the state has an uncontroversial right to quarantine innocent, responsible agents if such agents have communicable diseases and no less intrusive intervention will prevent infection of others. Although many forms of communicable disease can be spread by conduct, the justification of pure quarantine requires no action or potential action. It is a purely public health measure directed toward microorganisms that has the undesirable effect of limiting freedom of action. I address only the preemption of dangerous intentional conduct. *See generally* Michael Corrado, *Punishment, Quarantine, and Preventive Detention*, 15 CRIM. JUST. ETHICS 3, 10–11 (1996) (distinguishing punishment and discussing how those “who are presently of a mind to infect others” may be detained as punishment but not those “who will voluntarily harm in the future but *do not presently intend to do so*”).

144. R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* 55–58 (1994).

on past events.¹⁴⁵ In sum, many of our most important moral and political concepts depend on taking people seriously as people, as practical reasoners and potentially moral agents.

To the extent that pure preventive detention is *not* based on blame and does not express condemnation, one wonders why a conviction or any dangerous behavior should be a necessary triggering event except epistemically. Suppose we could predict future violent conduct with equal accuracy with or without a triggering dangerous action. Once we have decided that it is justifiable to deny the liberty and autonomy of responsible agents if they are sufficiently dangerous, what is the theoretical basis for not taking intrusive preventive action in any case in which the danger is sufficient and can be properly demonstrated? As our ability to predict becomes more sophisticated, as it surely will, what we now consider bedrock civil liberties will be threatened. Further, if preventive detention is not deserved punishment because it is not being imposed for blameworthy conduct, then the state arguably would be morally bound to compensate for the restraint of liberty and autonomy by making the conditions of confinement—or other restraints—sufficiently positive. In other words, a regime of “funishment” would be morally required.¹⁴⁶

The practical problems at present would be enormous. Even with high-risk people and especially for the low base rate, seriously violent conduct that most concerns us, highly accurate predictions would be difficult and false positives would be a particular problem. For most of the people preventively detained, there would be few validated treatment methods and little incentive to fund them in times of budgetary constraints, even if the state has the duty to do so.¹⁴⁷ If there is genuine periodic

145. Finally, the economy-of-threats approach makes the world entirely too “safe for determinism.” Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, in 23 CRIME AND JUSTICE 329, 348 (Michael Tonry ed., 1998). The determinist anxieties that seem inevitably to arise cannot be banished so easily without doing violence to our conceptual concerns. A full, satisfying account of responsibility and blaming, paradoxically, should be subject to anxieties about determinism.

146. See Saul Smilansky, *Hard Determinism and Punishment: A Practical Reductio*, 30 LAW & PHIL. 353, 355 (2011). Smilansky’s argument is directed at hard determinists, but it is *a fortiori* directed at any scheme that deprives people of liberty and autonomy in the absence of blame. See *id.* I leave the perverse incentives this would create to the reader’s imagination.

147. See *Youngberg v. Romeo*, 457 U.S. 307, 323–24 (1982). In the course of holding that a developmentally disabled inmate of a state hospital has a right to habilitation and training for limited purposes, the state’s professional would have a good-faith immunity defense to a claim for damages if budgetary constraints prevented the professional from providing the otherwise required training. *Id.* at 323.

review, as there constitutionally should be, then the problem of the difference between the context of the prediction (the institution) and the context of the outcome (the community) arises. Finally, the “gatekeeper” problem has already been discussed. The incentives for decisionmakers will inevitably lead to “conservative” judgments that would only compound the technological problem of false positives’ predominating. Thus, I strongly doubt that periodic review of preventive detention on the ground of dangerousness alone would lead to earlier release rather than enhanced prison terms.

Let me conclude with a few words about the radical proposal that no one is really responsible for any behavior and therefore we should move to a prediction/prevention regime for social control of dangerous agents. This proposal can be made in nonreductive or reductive form. In the former, exemplified by Daniel Dennett, our mental states do play a causal role in explaining our behavior, but people are nonetheless not responsible. This is simply a version of the alleged incompatibility of determinism and the potential for responsibility, even if we are the kinds of agents who act for reasons. If it is not just to say to harmdoers that they should *not* have done it, however, what is the source of normativity for imposing “shoulds”?¹⁴⁸ The reductive version seems to suggest, as Greene and Cohen do, that we are just victims of neuronal circumstances. If so, we are not the kind of creatures who could conceivably be responsible because our mental states are not really explanatory at all but at most illusions the brain creates to make sense of what the brain has already done. If that is true, which the science does not remotely prove today,¹⁴⁹ then it is not clear what reason people have to do anything. It is normatively inert and certainly does not entail consequentialism.

VII. CONCLUSION: PREVENTIVE DETENTION AND FUTURE SCIENCE

The law already allows pure preventive detention in a wide variety of contexts, but they are virtually all limited in temporal scope and borrow from desert/disease jurisprudence to some extent. Denial of bail on grounds of dangerousness is an excellent example, but the accused is brought to trial relatively quickly, and the incarceration is justified by probable cause to believe that the accused has culpably committed a criminal offense. Suppose, however, that society could identify an

148. Mitchell N. Berman, *Punishment and Justification*, 118 ETHICS 258, 271 n.34 (2008).

149. See Stephen J. Morse, *Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience*, 9 MINN. J.L. SCI. & TECH. 1, 19–34 (2008); Stephen J. Morse, *Lost in Translation? An Essay on Law and Neuroscience*, in LAW AND NEUROSCIENCE 529, 543–54 (Michael Freeman ed., 2011).

identifiable class of people, say those with certain recidivist records or patterns of childhood misconduct, for whom a subset could be predicted, with great accuracy, to commit very violent acts unless they were incapacitated or otherwise treated. Would society be justified in screening people in that class and purely preventively intervening for those predicted to be violent if the person were responsible and no criminal punishment were justified at the time? The argument in favor would be that although desert/disease jurisprudence protects liberty and autonomy interests that we cherish and that are constitutionally protected, no individual right, including those protected specifically by the Constitution, is absolute. Any might yield in the face of a sufficiently compelling state interest.

Preventing serious violence is certainly a compelling state interest. I suspect that the political and constitutional acceptability of the screening of limited classes followed by preventive intervention would depend entirely on the accuracy of the screening and predictive methods. If the classes screened were strictly limited by clear criteria and the predictions were exceptionally accurate—very few false positives—and especially if there were nonincapacitative, nonintrusive successful interventions possible, I expect that such screening and preventive detention would be upheld.

Despite vast amounts of research, the ability to accurately predict serious violence over considerable time periods is limited at present. But if we ever reach the exceptional levels of accuracy just described, increased abandonment of desert/disease jurisprudence could result. Although predictability does not mean nonresponsibility, the lure of accurate social engineering may be irresistible. Important protections for liberty and autonomy may hang by a technological thread. For now, however, desert/disease jurisprudence remains the template for thinking about how society may protect itself consistent with human rights. The cost of such protection, however, is reduced public safety. Such tradeoffs are inevitable in a free society that believes that liberty is worth substantial costs. The best hope for the future is that we discover preventive, nonintrusive techniques that will lower the risk of violent offenses for everyone and nonintrusive interventions that will reduce the risk of recidivism for offenders.

