Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future

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One of the distinctive legal developments of this century has been the wide use of systems of civil restraint as alternatives to the penal system of social defense. While purely preventive detention has been openly used in the shocking wartime detention of persons of Japanese ancestry¹ and remains a threat to persons regarded by the Government as "security risks,"² civil restraints are more commonly applied under the often fictional guise of curative treatment in the civil commitment of the mentally ill,³ juveniles,⁴ sexual deviants,⁵ narcotic addicts,⁶ and the mentally retarded.⁷ Despite the pervasive use of such forms of

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1. *Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); see Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

2. 50 U.S.C. §§ 811, 813 (1964). The quotation is from the heading of 50 U.S.C., ch. 23, Subchapter II, "Emergency Detention of Suspected Security Risks." The statutory basis for detention is an executive finding, subject to administrative review, that "there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." 50 U.S.C. § 813. 50 U.S.C. § 819(h)(3) (1964) provides that in determining such probability the Attorney General, preliminary hearing officer and Board of Detention Review are authorized to consider, among other things, evidence of "... the holding at any time after January 1, 1949, of membership in, the Communist Party of the United States or any other organization or political party which seeks to overthrow or destroy by force and violence the Government of the United States" The statute does not state whether membership alone is sufficient by itself to establish the necessary probability for detention. Of course there are substantial questions of the constitutionality of these provisions.

3. See the recent landmark study, Projects, *Civil Commitment of the Mentally Ill*, 14 U.C.L.A.L. REV. 822 (1967); see also T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963); F. LINDMAN & D. MCINTYRE, THE MENTALLY DISABLED AND THE LAW (1961); Kadish, *A Case Study in The Signification of Procedural Due Process—Institutionalizing The Mentally Ill*, 9 W. POL. Q. 93 (1956); Slovenko, *The Psychiatric Patient, Liberty and the Law*, 13 KAN. L. REV. 59 (1964).

4. Cf. *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

5. F. LINDMAN & D. MCINTYRE, *supra* note 3, at 298-312; Note, *The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence*, 41 NOTRE DAME LAW. 527 (1966); Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. CRIM. L.C. & P.S. 215 (1960); Cohen, *Administration of the Criminal Sexual Psychopath Statute in Indiana*, 32 IND. L.J. 450 (1957); Tappan, *Some Myths About the Sex Offender*, 19 FED. PROB., June 1955, at 7; Cf. *In re Maddox*, 351 Mich. 358, 88 N.W.2d 470 (1958); *Commonwealth v. Page*, 339 Mass. 313, 159 N.E.2d 82 (1959).

6. Aronowitz, *Civil Commitment of Narcotics Addicts*, 67 COLUM. L. REV. 405 (1967); Note, *Civil Commitment of Narcotic Addicts*, 76 YALE L.J. 1160 (1967); cf. Frankel, *Narcotic Addiction, Criminal Responsibility, and Civil Commitment*, 1966 UTAH L. REV. 581.

7. F. LINDMAN & D. MCINTYRE, *supra* note 3, at 298-99. Gordon & Harris, *On Investiga-*

restraint, until recently there has been little comment on their legality as such,⁸ and no adequate standards have been developed to restrict their use. Only recently, in fact, has any effort been made to distinguish curative from preventive rationales for civil restraints⁹ and to face the difficult questions raised by the civil detention of persons who cannot benefit from treatment, but who are nevertheless dangerous to others when free. The universal curative mask applied by legislators and accepted by the courts in dealing with civil restraints has obscured the legal issues which must be faced if individual liberty is to be protected and effective treatment provided.

Civil restraint, both for purposes of treatment and for purposes of detaining persons who are untreatable but dangerous, seems likely to be increasingly used in the future. Our society is developing sophisticated means of measuring deviance and detecting, even when it cannot cure, dangerous propensities.¹⁰ It seems unlikely that we will be able to resist the temptation to put this knowledge to work in the interest of community security, through the isolation of the deviant and dangerous. If it is utopian to dream of total prevention of crime through scientific identification and isolation of crime-prone persons before they commit offenses, a system incorporating these goals is no longer impossibly remote. In any event, we are developing institutions which often operate as if, in their domains, utopia has been achieved.

tion and Critique of the Defective Delinquent Statute in Massachusetts, 30 B.U.L. REV. 459 (1950); *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964); *Director of Patuxent Institution v. Daniels*, 243 Md. 16, 221 A.2d 397 (1966).

8. Morris, *Psychiatry and The Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1968); Comment, *Civil Restraint, Mental Illness and The Right to Treatment*, 77 YALE L.J. 87 (1967); Dershowitz, *The Role of Law in the Prediction and Prevention of Harmful Conduct*, unpublished paper printed in part in J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* 558 (1967) [hereinafter cited as KATZ, GOLDSTEIN & DERSHOWITZ]; Penegar, *The Emerging "Right to Treatment"—Elaborating The Processes of Decision in Sanctioning Systems of the Criminal Law*, 44 DENVER L.J. 163 (1967); Footc, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 995, 1125, 1165-75 (1965); Katz & Goldstein, *Dangerousness and Mental Illness*, 131 J. NERV. & MENTAL DISEASE, 404 (1960).

But see Note, *Civil Restraint, Mental Illness, and The Right to Treatment*, 77 YALE L.J. 87, 107-16 (1967); Note, *Due Process for All—Constitutional Standards for Involuntary Civil Commitment and Release*, 34 U. CHI. L. REV. 633, 642-60 (1967); Aronowitz, *Civil Commitment of Narcotic Addicts*, 67 COLUM. L. REV. 405, 424-29 (1967); Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1137-43, 1155-59 (1967); Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288 (1966); Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960). See generally *Hearings on Constitutional Rights of The Mentally Ill before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. pt. 1 (1961).

9. Note, *Civil Commitment of Narcotic Addicts*, 76 YALE L.J. 1160, 1168 (1967); Note, *Civil Restraint, Mental Illness, and The Right to Treatment*, 77 YALE L.J. 87, 96 (1967).

10. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 20-22 (1967). Cf. Morris, *supra* note 8, at 531-36. See also Diamond, *From M'Naghten to Currens, and Beyond*, 50 CALIF. L. REV. 189, 198-99 (1962).

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When the pursuit of utopia entails prolonged or even permanent deprivation of personal liberty, however, the constitutional issues involved cannot be ignored. If individual losses of freedom are to be justified by gains in collective security, it is time to analyze the processes for determining these gains and losses and, indeed, to consider whether such calculations are constitutionally permitted at all.¹¹

The gain to society from detention of dangerously deviant persons is obvious although difficult to evaluate: in each case it will depend upon some combination of the severity of the harm prevented and the probability of its occurrence, absent detention. The loss to the individuals involved is equally clear: apart from the deprivation of control over one's daily movements and affairs that is a necessary consequence of detention as such, there are in addition the loss of dignity and respect attaching to incarceration under whatever name, and the discomfort of life in understaffed, underequipped and barrenly responsive institutions.

In weighing the social gains and costs of preventive detention, it is all too easy, in our desire to protect society, to forget that there is a powerful countervailing interest, shared by all of us, in the protection of the freedom and dignity of each of us. As a practical matter our own liberty and dignity are threatened if the liberty of others is too cheaply valued. The next man to be deprived of liberty may be one of us.¹² Thus limitations on the vulnerability of the individual to restrictive sanctions are important to the security of us all.

But beyond the practical threat to all individuals if personal liberty may too easily be taken is the danger of weakening basic psychological and ideological commitments. Our need to establish a sense of personal dignity and autonomy in order to think and act as responsible individuals suggests that as a society we must commit ourselves to minimiz-

11. Given the primacy of personal liberty as a value in our society, a respectable argument can be made that preventive detention can never be justified where the person to be detained has not consented to his detention, will not benefit from it, and has not by prior blameworthy conduct merited detention as punishment. I find this contention very appealing on a priori grounds.

Nevertheless, I am forced to conclude that a complete constitutional bar to preventive detention should not be erected. Once it becomes possible to predict with substantial accuracy that someone constitutes a danger to the lives of others if he is allowed to remain free, I am not prepared to assert that he has in all cases an absolute right to freedom until he kills or tries to kill his first victim. The individuals composing our society are entitled to protection from dangers which can be prevented without too great a social cost. Fruitful evaluation of the price for such protection can only be made after consideration of remedies and procedures capable of minimizing the threat to personal liberty inherent in any preventive detention.

12. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 357-58 (1957).

ing the circumstances and conditions which will result in the organized deprivation of liberty and personal dignity of others—even where such deprivation is a means of protecting society or accomplishing therapy. This does not mean that individual autonomy or personal status are absolute values which cannot be curtailed when it is necessary to do so. But in developing rules for the governmental use of deprivations of liberty and status to achieve protection of the public or the improvement of the person so deprived, it is imperative that the rules authorizing deprivation be limited and conditioned as much as possible by principles vindicating our practical and ideological need for and commitment to the values of human liberty and human dignity. If protection of others from more serious harms requires us to restrain some persons and treat others by therapies they do not want, we must have means to limit such deprivations and, just as important, to insure that decisions to impose such deprivations are not made arbitrarily or for less than adequate reasons. The imposition of governmental restraints and involuntary treatment must not only be subject to limitations, but the limitations must be rational and in accordance with principles which are ideologically consistent with our society's adherence to notions of human liberty and the value of the human personality. Only by such limitations can we minimize the affront to our ideology implicit in the notion that some men cannot be allowed to retain the liberty or preserve the personal dignity that the rest of us hold so dear.¹³

Public concern with crime problems, greater public acceptance of psychiatric theory, wider dispersion of basic knowledge about psychiatric typology among laymen in welfare agencies, courts, schools and other public bodies, increasing exposure of individuals to psychological testing, and the increased use of computers in records retention and information retrieval, all point in the direction of greater visibility of persons regarded as socially and psychologically deviant. As deviance becomes more visible, the public demand for preventive action against deviants may be expected to increase even though it remains impossible to predict which persons in the identifiably deviant group are actually

13. Elsewhere I have referred to this ideological value as the moral-libertarian principle that punishment must be morally legitimate.

[T]he sanctions or restraints to which [an individual] is subjected must be so conditioned that it would not be irrational for him to agree to their propriety.

[T]he application of criminal sanctions can be legitimate in our society only where, in theory, it would be possible for those invoking the sanction process to say: "We know this is going to be unpleasant, but if you were rational and objective about this, you would concur that you deserve it and therefore it is just."

Frankel, *supra* note 6, at 592.

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going to commit harmful acts. In the face of such a trend the best hope for a judicial rule which will operate to protect personal liberty seems to lie not in outright prohibition of preventive detention as such, but in the development of narrower judicial doctrines capable of restricting and limiting legislative resort to preventive detention.

I. The Civil-Penal Distinction and a Unitary Preventive Correctional System

In developing the rational and principled limitations which should determine the proper balance between individual liberty and collective security, it is logical to begin with the lessons of past experience. Our law has long been concerned with the development of such a balance. Of course the pre-eminent body of legal precedent for charting the course of this development has for centuries been the criminal law and, more recently, cases interpreting the federal Bill of Rights. It is for this reason that, in attempting to prescribe standards for the future development of civil restraints, we must necessarily fall back upon past experience with this related body of law.

Traditional learning, however, distinguishes sharply between civil and penal sanctions and the procedures by which they are imposed.¹⁴ Judicial solicitude for the substantive and procedural rights of criminal defendants is matched only by the ease with which courts are able to dispense with similar requirements in cases involving civil proceedings. If limiting principles applicable to civil restraints are to be adopted from the criminal sphere, the traditional gulf between criminal and civil proceedings must first be bridged.¹⁵

14. The claim that involuntary commitments are penal rather than civil usually arises in the context of objections to the denial of procedural rights afforded in a criminal prosecution. The older cases tend to reject such claims by concluding that the proceedings are civil rather than penal. Examples from the sexual psychopath cases are *Miller v. Overholser*, 206 F.2d 415 (D.C. Cir. 1953); *People v. Levy*, 151 Cal. App. 2d 460, 311 P.2d 897 (1957). Similar statements are found in more recent cases as well. *People v. Loignon*, 250 Cal. App. 2d 386, 58 Cal. Rptr. 866 (1967); *Wise v. Director of Patuxent Institution*, 1 Md. App. 418, 230 A.2d 692 (1967); *State v. Madary*, 178 Neb. 383, 133 N.W.2d 583 (1965).

Until the Supreme Court's decision in *In re Gault*, 387 U.S. 1 (1967), similar statements were made with regard to juvenile court proceedings. *In re Holmes*, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied*, 348 U.S. 973 (1955); *Morton v. Hayden*, 154 Me. 6, 142 A.2d 37 (1958); *Ex parte Cromwell*, 232 Md. 305, 192 A.2d 775 (1963); *In re Johnson*, 227 Cal. App. 2d 37, 38 Cal. Rptr. 405 (1964). For a narcotic commitment case rejecting the applicability of the cruel and unusual punishment prohibition see *In re De La O*, 28 Cal. Rptr. 489, 378 P.2d 793 (1963).

For recent cases applying more stringent procedural requirements see notes 15 and 24 *infra*.

15. "These commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection clause of the Fourteenth Amendment . . . and to the

Despite the solemnity with which courts have purported to differentiate the two, any attempt to articulate the distinction is likely to result in tautology or in a semantic and conceptualistic formula unrelated either to the situation of the person subjected to the process in question or the public policies which are reflected in the attempt to make the distinction. In the most obvious sense there is no difference at all between civil and penal sanctions: the consequence for the person affected is involuntary confinement in a state institution subject to physical restraint, discipline by force, and the denial of relatively simple privileges and autonomy. That a warder may wear a uniform of a different color than a guard's is hardly significant.¹⁶ Nor is the purpose of the confinement a differentiating factor sufficient to justify material differences in the procedures by which the decision to incarcerate is made. Whether the deprivation of liberty be justified primarily as punishment, as a necessary condition of treatment, or as the means for preventing future dangerously deviant behavior, it inevitably involves some mix of punitive, restorative and preventive motives.¹⁷

Due Process Clause. We hold that the requirements of due process were not satisfied here." *Specht v. Patterson*, 386 U.S. 605, 608 (1967). The case struck down a commitment under the Colorado Sex Offenders Act, COLO. REV. STAT. ANN. § 39-19-1 *et seq.* (1963), because defendant could be committed for an indeterminate term following conviction on the basis of a psychiatric report, without a hearing and without the right to confront the expert witnesses. The Court concluded that the procedure involved was criminal. *See also* *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302 (3d Cir. 1966). A tendency of recent cases has been to impose more stringent procedural requirements in civil commitment proceedings and in the process to minimize the significance of the civil-penal distinction. Most noteworthy is *In re Gault*, 387 U.S. 1 (1967). *Cf. Kent v. United States*, 383 U.S. 541 (1966). Illinois has held that in proceedings under the Illinois Sexually Dangerous Persons Act, ILL. REV. STAT. ch. 38, §§ 105-1.01 *et seq.* (1964), the defendant must be accorded the same procedural safeguards available to an accused in a criminal trial though the proceedings are "civil" in nature. *People v. Olmstead*, 32 Ill. 2d 306, 309, 205 N.E.2d 625, 627 (1965). New York has held that an indigent mental patient, challenging his detention by habeas corpus, is entitled to the assignment of counsel as a matter of constitutional right, *People ex rel. Rogers v. Stanley*, 17 N.Y.2d 256, 270 N.Y.S.2d 573 (1966). In *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968), the court held that a person committed to a state training school for the feeble-minded had a constitutional right to counsel at the commitment proceedings.

16. "Incarceration, whether called hospitalization or by other euphemism means depriving a person of liberty. No matter how sweetly disguised or delicate the language, involuntary confinement is a loss of freedom." *In re Neisloss*, 8 Misc. 2d 912, 171 N.Y.S.2d 875, 876 (Sup. Ct. 1957); *People ex rel. Goldfinger v. Johnston*, 53 Misc. 2d 949, 280 N.Y.S.2d 304, 306 (Sup. Ct. 1967).

17. "It would be archaic to limit the definition of punishment to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *United States v. Brown*, 381 U.S. 437, 458 (1965). *See* F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 25-41 (1962); *Morris, Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, 637-44 (1966).

... [T]he sick role is also an institutionalized role, which shares certain characteristics with that of criminality but also involves certain very important differences. Instead of an almost absolute illegitimacy, the sick role involves a *relative* legitimacy,

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Is it then the place or conditions of incarceration, the intent of the legislature or adjudicating officials, or some imputed public attitude or understanding that is supposed to distinguish civil from penal detention? More than one court has held that civil detention can be served in the state prison and still be civil.¹⁸ The legislative intent for any involuntary commitment statute, moreover, is likely to be ambivalent, reflecting varying proportions of punitive, restorative and preventive purposes. As for the motives of prosecutor, judge and jury, these would seem to be irrelevant, so long as their actions are within the bounds of discretion accorded them by law. Finally any attitude or understanding imputed to the public is too inchoate and uncertain to serve as a basis for meaningful judgments on the civil or penal nature of a statute. It seems clear that the characterization of a given proceeding to deprive a deviant individual of his freedom as either "civil" or "penal" is conclusionary rather than analytical and cannot

that is so long as there is an implied "agreement" to "pay the price" in accepting certain disabilities and the obligation to get well.

T. PARSONS, *THE SOCIAL SYSTEM* (1951); quoted in R. DONNELLY, J. GOLDSTEIN & R. SCHWARTZ, *CRIMINAL LAW* 505 (1962) [hereinafter cited as DONNELLY, GOLDSTEIN & SCHWARTZ]. Cf. T. SZASZ, *supra* note 3, at 2-4, 18-22. See also note 14 *supra*.

18. *People v. Levy*, 151 Cal. App. 2d 460, 468, 311 P.2d 897, 902 (1957).

The emphasis that appellant places on the fact that he was originally convicted of a misdemeanor and now finds himself in San Quentin, possibly for life, is misplaced. This argument would be sound only were his confinement punishment. As we have already seen, the purpose of the confinement is to protect society and to try and cure the accused.

In *In re Gault*, 387 U.S. 1, 20 n.26 (1967), the Court pointed out that "[i]n about one-half of the States, a juvenile may be transferred to an adult penal institution after a juvenile court has found him delinquent" citing *DELINQUENT CHILDREN IN PENAL INSTITUTIONS* (Children's Bureau Pub. No. 415, 1964).

A graphic instance of a civilly committed person finding himself in prison as a method of "treatment" is presented by *In re Maddox*, 351 Mich. 358, 88 N.W.2d 470 (1958). Maddox, committed as a sexual psychopath, was transferred to the state prison because he was adamant in denying that he had committed the acts charged to him as the basis for his commitment. The Michigan Court ruled that imprisonment in the state prison was not an available prescription for civil treatment. See also note 24 *infra*.

In a case posing similar issues, the California Supreme Court upheld confinement in a state penal institution, unsegregated from convicted felons, for a narcotic addict who had consented to civil commitment. *In re Cruz*, 62 Cal. 2d 307, 398 P.2d 412, 42 Cal. Rptr. 220 (1965). Cruz, originally confined at the California Rehabilitation Center, was transferred to a penal institution for repeated violation of institutional rules, failure "to internalize controls and to function in the atmosphere of California Rehabilitation Center." The transfer to the penal institution was to be until he "shows the ability to handle responsibility and has learned to internalize controls." 62 Cal. 2d at 316, 398 P.2d at 417, 42 Cal. Rptr. at 225. While, presumably, a person who could handle responsibility and had internalized controls would not need commitment as an addict at all, the court sustained the transfer, noting that Cruz continued to receive treatment in the form of weekly participation in group counseling sessions, academic and vocational training plus regular work assignments and recreational and religious facilities (probably not very different from the treatment convicted felons received). The court noted that a total of 113 men had been transferred from the rehabilitation center to the penal institution as of October 1964, some two years after the civil program had commenced operation. 62 Cal. 2d at 316 n.6, 398 P.2d at 418 n.6, 42 Cal. Rptr. at 226 n.6. Nevertheless, the court approved of the

meaningfully be used to justify differences in the constitutional standards applied.¹⁹

Professor Glanville Williams has defined a crime as "an act capable of being followed by criminal proceedings having a criminal outcome."²⁰ The obvious tautology of this definition should not blind us to its real utility. When we distinguish crimes from non-crimes, we are really talking about whether the legal proceedings must follow certain historically developed rules for the purpose of determining whether certain traditional, ritualistic consequences may attach. Whether a process is civil or criminal is really a kind of pseudo-question, a shadow of the real questions: (1) Are the procedures for determining the issue to be decided consistent with the historically developed patterns for litigation in which state power is painfully focused on an individual? (2) Are the consequences resulting from a finding against the respondent fair and appropriate given the historical limitations on the power of the state to curtail the liberty and diminish the dignity of individuals?

If these questions are the essence of the pseudo-question of civil or penal proceeding, then one approach the courts can apply in resolving the issue of whether a sanction is civil or penal is to weigh all the characteristics of the statutory program in question, considering the legislative characterization, the purposes of the proceedings, and most important, its effects on persons subject to it, including the dispositions

practice since the need to minimize the external indicia of criminality in the Rehabilitation Center required in part that it be a minimum security institution. This in turn justified the practice of casting out rebellious and uncooperative inmates, by transferring them to the penal institution.

19. Outstanding examples of the shortcomings of the traditional civil-penal dichotomy and of the problems caused by those shortcomings are provided by the instructive cases of bail and pre-trial detention of material witnesses. In both instances the accepted rationale for detention is neither punishment nor detention for therapeutic treatment, but rather the need to insure the presence of the detainee at trial. For an excellent discussion of the confused state of the theory of bail, of resulting abuses, and of the social and constitutional issues involved in the tangled threads of prevention of flight and protection of society, see Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966).

While the bail system has recently been receiving attention, almost no concern has been shown for the outrageous use of detention of material witnesses. Nothing more than the convenience of the state can justify this practice, and yet witnesses have been deprived of their liberty for as much as five months under currently operative statutes. See *Quince v. Langlois*, 88 R.I. 438, 149 A.2d 349 (1959); *Barber v. Moss*, 3 Utah 2d 268, 282 P.2d 838 (1955). Falling somewhere outside the civil-penal dichotomy, detention of material witnesses is a low-visibility instance of deprivation of liberty to which neither civil nor penal limitations naturally apply. So long as the issues involved in all cases of detention are thought of in terms of these traditional poles, rather than as varying forms of deprivations of personal liberty, it will be difficult to evolve effective principles of limitation generally applicable to these ambiguous kinds of detention.

20. Williams, *The Definition of Crime*, 8 CURRENT L. PROB. 107, 123 (1955), in DONNELLY, GOLDSTEIN & SCHWARTZ 267-68.

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to be made, the restraints on the person, and the effects on his status in the community.²¹ Such an approach must lead to recognition that there are not two categories—civil and penal—but a broad spectrum of procedures manifesting characteristics traditionally penal or civil in varying degrees.

The recognition that the concepts of penal and civil proceedings are not discrete categories but characterizations of points on a spectrum should lead the courts to the next step, in which the civil and penal labels are discarded as not determinative. Instead, the courts should look at what is being done to the subject of the proceeding and why it is being done. The great proliferation of involuntary disposition and treatment statutes, the steady mitigation of the extremes of criminal punishment, the substitution of rehabilitative goals for vindictive treatment all tend to make civil and criminal proceedings more alike. But this is not to suggest that the historical restrictions on the criminal processes will be discarded. On the contrary, these restrictions should be seen not as historical accidents, but rather as necessary and appropriate limitations on state power, imposed to insure the accuracy of the fact-determining process and to preserve the dignity of the individual subjected to an uneven contest against the state. If these historical limitations have their own logic, we can expect that, with time, this logic will find increased expression in the judicial evaluation of all proceedings in which the power of the state is applied to an individual against his will for the purpose of imposing restraints on his liberty. Certainly this seems to be the trend of recent decisions.²² Most notable, perhaps, is the Supreme Court's recent refusal to allow the myth of *parens patriae* to obscure the need for procedural regularity and safeguards as a matter of constitutional due process in juvenile court proceedings.²³ But other courts have also begun to apply rigorous standards of procedural due process to other civil detention statutes.²⁴

21. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *United States v. Brown*, 381 U.S. 437 (1965).

22. See cases cited note 15 *supra*.

23. *In re Gault*, 387 U.S. 1 (1967).

24. It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process.

Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968) (due process requires counsel at proceedings to commit a person to a training school for the feeble minded).

Compare *In re Dowdell*, 169 Mass. 387, 47 N.E. 1033 (1897), and *In re LeDonne*, 173 Mass. 550, 54 N.E. 244 (1899), with *In re Rohrer*, 230 N.E.2d 915 (Sup. Jud. Ct. Mass. 1967).

In spite of such progress, until such time as the law has developed to the point at which there are no procedurally significant consequences to the characterization of a program as penal or civil, courts will still feel compelled to engage in such characterization. The immediate judicial approach is likely to be that of treating civilness and penalty as matters of degree. But the thrust must be toward minimizing the practical differences—both substantive and procedural—held to flow from the conceptual distinction. Thus even where a statutory program is found to be primarily curative or preventive in approach, any aspects of the program which are unduly harsh or painful to the subject of the proceedings, either intrinsically or in relation to the aims to be accomplished by the statute, should not withstand judicial evaluation.²⁵ One would hope, for example, that sterilization,²⁶ prefrontal lobotomy,²⁷ and castration²⁸ are no longer constitutionally available prescrip-

The Appellate Court of Illinois has held that the defendant in a sexually-dangerous-person proceeding is entitled to the protections of *Miranda v. Arizona*, 384 U.S. 436 (1966), including the appointment of counsel and warning of his privilege against self-incrimination before undergoing psychiatric examination. *People v. Potter*, 85 Ill. App. 2d 151, 228 N.E.2d 238 (1967). See also cases cited note 15 *supra*.

25. *In re Maddox*, 351 Mich. 358, 88 N.W.2d 470 (1958) (one "civilly" committed pursuant to a sexual psychopath law may not be transferred for treatment to the state prison); *White v. Reid*, 125 F. Supp. 647 (D.D.C. 1954) (a juvenile detained under a juvenile court act cannot be kept in the District of Columbia jail). But see note 18 *supra*.

26. *Mickle v. Henrichs*, 262 F. 687 (D. Nev. 1918), and *Davis v. Berry*, 216 F. 413 (S.D. Iowa 1914), held that vasectomy as punishment for crime was cruel and unusual punishment. A contrary result was reached in *State v. Feilin*, 70 Wash. 65, 126 P. 75 (1912). *Buck v. Bell*, 274 U.S. 200 (1927), upheld the validity of a state statute authorizing sterilization as a legitimate exercise of the police power. But cf. *Skinner v. Oklahoma*, 316 U.S. 535 (1942), holding unconstitutional an Oklahoma statute authorizing sterilization of persons convicted two or more times of crimes involving moral turpitude. The Court concluded that the statutory standard for persons subject to sterilization violated the equal protection of the law. Sterilization is still used in some states. *In re Simpson*, 180 N.E.2d 206 (P. Ct. Zanesville County, Ohio 1962) (permitting sterilization of 18 year-old retarded girl); Note, *Eugenic Sterilization in Indiana*, 38 IND. L.J. 275 (1963). In his concurrence in *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965), Justice White cited the *Skinner* case for the proposition that "... the liberty entitled to protection under the Fourteenth Amendment includes the right 'to marry, establish a home and bring up children ... and that these are among 'the basic civil rights of man' ...'" It seems to me that the constitutionality of involuntary sterilization for eugenic purposes is ripe for further judicial testing.

27. Psychosurgery has been carried out on probably some 30,000 mentally ill persons in the United States. Although considered a magic remedy at one time, now it is being used less and less—partly because new drugs are making patients more manageable and partly because many doctors question the wisdom and even the morality of psychosurgery. One form of the operation, prefrontal lobotomy, has caused some patients to become apathetic and unconcerned with life and activity. Some observers have described them as "vegetables" ...

F. LINDMAN & D. MCINTYRE, *supra* note 3, at 148.

28. Cf. *Davis v. Berry*, 216 F. 413 (S.D. Iowa 1914), in which the court equated vasectomy with castration in purpose and in humiliation of the person compelled to submit to such an operation. Castration seems never to have been used as a punishment in American law and to have disappeared from English law after the revolution of 1688. *Id.* at 417. R. SLOVENKO, *SEXUAL BEHAVIOR AND THE LAW* 104 (1965), reports that castration is authorized in Sweden and Finland for some offenses.

tions for the involuntary treatment of the mentally ill, the mentally retarded, and the sexually deviant and dangerous. Such treatments are no less an affront to the dignity of the human personality when applied civilly than when imposed as criminal penalties.²⁹ It is no great reconstruction of the past to conclude that when the founding fathers prohibited the infliction of cruel and unusual *punishments*, they intended to prohibit as well the imposition of similar treatment upon those who had committed no crime.³⁰ Here, too, the logic of history suggests that the law's restraints on legislative power over wrongdoers requires the development of parallel restrictions on legislative power over those who cannot be blamed for what they are. The point which needs emphasis however is not the barbarism of lobotomy or sterilization but the process of historical analogy which gives that value judgment a constitutional dimension.

The most obvious lesson of the penal law analogy is the need for stringent standards of procedural due process. Obviously a fair and adequate factual determination of the issue of the respondent's status as a committable person must be provided. Personal liberty and individual dignity are too precious to be confiscated by mistake. Accordingly, the individual should be entitled to notice and hearing, the assistance of counsel, the right to confront and cross-examine the witnesses against him and to call his own witnesses, and the right to a decision by a fair and impartial tribunal on objectively reviewable evidence.³¹ Further, evidentiary restrictions requiring that evidence

29. The Commander told us that he had three boys who needed to be punished. They had been talking in the dining hall. He called out their names. The boys came up, stood at the platform, held on with their hands and bent over, and the Commander took a paddle that was about a yard long and struck each of them three very hefty blows. All of the boys in the place stopped and watched rather sullenly, and I kind of flinched with each blow. The boy who was being punished, however, kept absolutely quiet and firm, and when the blow was over, he walked off as dignified as he could

D. STREET, R. VINTER & C. PERROW, *ORGANIZATION FOR TREATMENT* 156 (1966). This work reports a study of the aims, organization, and administration of selected juvenile detention centers which cover a spectrum from primarily custodial to primarily therapeutic in structure and approach. Such distinctions are reflected in a number of factors: the aims and personalities of the administrators, the resources and facilities available, community attitudes and the traditions of the institution itself. Even a program clearly intended to be civil seems likely, however, to develop significantly punitive and custodial aspects. The need to handle large numbers of people with a small number of staff assures some depersonalization of the inmate. E. GOFFMAN, *ASYLUMS* 5-12 (1961). Given this tendency of custodial and therapeutic detention to develop punitive aspects, judicial review of the administrative practices of such institutions seems to be necessary and desirable.

30. Cf. *Weems v. United States*, 217 U.S. 349, 373 (1910); Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846, 854-57 (1961).

31. "Due process . . . requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with the witnesses against him, have the right to

be relevant and probative should also be required.³² And, of course, the most important evidentiary rules, those relating to the burden of presenting an issue and persuading the trier of fact, would seem to be required in non-penal proceedings for detention since they too serve to prevent factually erroneous judgments. While proof "beyond a reasonable doubt" may not be required in all civil commitment proceedings,³³ clearly the respondent in any such proceeding should not be committable on a bare probability that he is within a detainable category.³⁴ Such procedural requirements seem necessary to the accuracy of any judicial process of fact finding, and there is reason to believe that the courts will in time quite generally require them.³⁵ The danger is that the courts may fail to recognize that, in civil commitment proceedings, procedural due process is not enough. What must be done is to develop substantive restrictions on legislative power to provide for restraint of individuals thought by the legislature to be dangerous. In developing such restraints the courts must look primarily to the lessons learned from the long history of the struggle to invest the human personality with safeguards against mistaken, arbitrary and unjust applications of state power. As these lessons are applied, the conceptual labels

cross-examine and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed." *Specht v. Patterson*, 386 U.S. 605, 610 (1967) (involving the Colorado Sex Offenders Act, which the Court categorized as penal after a strong hint that such categorization was not determinative); see note 15 *supra*. In *In re Gault*, 387 U.S. 1, 58 (1967), the Court declined to pass upon the question of whether a right to appeal was required as a matter of due process.

32. Cf. *Holm v. State*, 404 P.2d 740, 743 (Wyo. 1965).

33. Cf. *In re Whittington* — U.S. —, 88 S. Ct. 1507 (1968), remanding to the state court, for consideration of the impact of the *Gault* decision, a case in which petitioner, a juvenile, claimed among other things that an improper standard of proof had been used in making the determination that he was a delinquent. Compare *In re Urbasek*, 38 Ill. 2d 535, 232 N.E.2d 716 (1968), and *United States v. Costanzo*, — F.2d —, 3 CRIM. L. REP. 2142 (4th Cir. 1968), with *United States v. Borders*, 154 F. Supp. 214 (N.D. Ala. 1957). In *re Whittington*, 13 Ohio App. 2d 11, 233 N.E.2d 333 (1967). For a suggestion that proof beyond a reasonable doubt should be required in all civil confinement proceedings, see Note, *Civil Commitment of Narcotic Addicts*, 76 YALE L.J. 1160, 1181-82 (1967).

34. Note, *Due Process for All-Constitutional Standards for Involuntary Civil Commitment and Release*, 34 U. CHI. L. REV. 633, 654-56 (1967). While it might seem that psychiatric or other expert examinations and reports are sufficient to assure the accuracy of judgments to commit, see *Kittrie, Compulsory Mental Treatment and the Requirements of Due Process*, 21 OHIO ST. L.J. 28, 50 (1960). A recent empirical study indicates that such experts may premise their reports on a "presumption of insanity." Scheff, *The Societal Reaction to Deviance: Ascriptive Elements in the Psychiatric Screening of Mental Patients in a Midwestern State*, in S. SPITZER & N. DENZIN, *THE MENTAL PATIENT: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 276 (1968). See also *Kutner, The Illusion of Due Process in Commitment Proceedings*, 57 NW. U.L. REV. 383 (1962). See also *Dershowitz, Psychiatry in the Legal Process: "A Knife that Cuts Both Ways"*, 51 JUDICATURE 370, 377 (1968): "[I]t seems that psychiatrists are particularly prone to one type of error—overprediction. In other words, they tend to predict anti-social conduct in many instances where it would not, in fact, occur. Indeed, our research suggests that for every correct psychiatric prediction of violence, there are numerous erroneous predictions."

35. See cases cited in notes 15 and 24 *supra*.

“penal” and “civil” will become outmoded, and we shall reach a point at which the law is concerned only with the appropriateness of the restraint and the procedural adequacy and fairness of the proceeding.

The most perplexing task facing the courts in the evaluation and application of civil detention statutes will be the development of standards for making and reviewing determinations of committability. The problem must be faced on two levels: the application of statutory standards for commitment to particular individuals, and review of the appropriateness of the standards and criteria fixed by the legislature.

The judicial task of determining whether an individual falls within a statutorily defined category of committable persons will largely depend upon the criteria of committability adopted by the legislature. Assuming a case in which the legislature adopts dangerousness in some form as the standard for committability, it seems clear that the courts will be faced with an extremely difficult task. The nature of predictions of future conduct is such that, at least in the present state of the art, psychiatric diagnosticians can do little more than furnish advice in terms of rough and uncertain guides.³⁶ While a healthy judicial skepticism concerning the sufficiency of predictions based on psychiatric diagnosis would go far to cure the dangers inherent in such predictions, my own skepticism as to how skeptical judges are leads me to favor a requirement of evidence of behavior objectively manifesting dangerous tendencies to corroborate the psychiatric predictions.

Even if courts could obtain accurate predictions of probability, great problems would remain in applying such data to specific cases. Requiring proof of conduct indicating dangerousness would lessen the grave risk of detaining persons who are harmless, a risk implicit in reliance on any diagnostic or clinical test.³⁷ If a fifty per cent likelihood of future harmful conduct were sufficient to warrant commitment, many people subject to commitment would nevertheless cause no harm if they were allowed to remain free. Of course, the problem of determining the degree of danger is not just a matter of quantifying probabilities; some evaluation of the nature of the harmful

36. Morris, *supra* note 8, at 534-36.

37. Cf. Foote, *The Coming Constitutional Crisis in Bail* (pts. 1 & 2), 113 U. PA. L. REV. 959, 1125, 1169-74 (1965). See also Livermore, Malmquist & Meehl, *On the Justification for Civil Commitment*, 117 U. PA. L. REV. 75, 84-86 (1968) for the view that even a highly accurate clinical test for a statistically rare condition such as being a future killer is likely to indicate many false positives for each true positive found by the test. Thus, acting on the basis of such a test would result in the commitment of many harmless individuals. But this risk might be substantially reduced if the initial focus of the courts were on conduct substantially indicating dangerousness and the clinical or diagnostic predictions were used to supplement the inferences drawn from such conduct.

conduct feared and the interests threatened would have to be made. If, for example, the person whose liberty is in question has merely a tendency to commit petty larceny or write bad checks, a court should take a different view of the appropriateness of commitment than it would take toward someone whose propensities ran to homicide. One would hope that the courts would refuse to permit commitment merely to protect the public from minor property losses.³⁸

In practice, determinations of the seriousness and probability of harmful conduct which will justify commitment have rarely been made by the courts, largely because preventive detention statutes have been enacted with the question of dangerousness subsumed. Instead of directing the courts to determine whether a particular drug user or sexual deviant is dangerous enough to be committed, statutes typically provide for the commitment of drug addicts or sexual psychopaths as a group.³⁹ Faced with such statutes, the courts have considered only the question of whether the defendant fell within the legislatively defined class. While it may be argued that the legislature, in defining the committable category, has itself made a determination that all people in that category are sufficiently dangerous to warrant commitment, in fact no carefully considered legislative judgment on the question is likely to have been made. In part this has been a result of the therapy fiction; it is much easier to conclude that a group of people should be compelled to undergo treatment in the hope that it will benefit some of them than it is to face the fact that a group of people is being subjected to detention to prevent some portion of that group from engaging in undesirable conduct in the future. In addition, it is far simpler for legislatures to draft statutes in terms of broad, relatively objective criteria than to attempt to distinguish varying probabilities and degrees of danger as between persons falling within generally defined categories. This suggests that in cases where the courts are called upon to apply general commitment standards defining categories such as drug addicts, sexual psychopaths, and the like, they should read into the legislative

38. *But see* *Overholser v. Russell*, 283 F.2d 195 (D.C. Cir. 1960), (held, a continued proclivity to write bad checks is sufficient dangerousness to self or others to bar release); *Overholser v. O'Beirne*, 302 F.2d 852 (D.C. Cir. 1961) (held, a proclivity to larceny sufficient dangerousness to bar release).

39. *But see* *People v. Victor*, 62 Cal. 2d 280, 398 P.2d 391, 42 Cal. Rptr. 199 (1965), interpreting the provisions of the California narcotic commitment statute authorizing commitment of "persons in imminent danger of becoming addicted" as requiring a finding that the person has repeatedly used narcotics to the point where he is in imminent danger, in the common sense meaning of that phrase, of becoming emotionally or physically dependent on their use.

definition of the category some exceptions, recognizing that the category itself presumes a general legislative judgment of dangerousness or treatability or both. Thus, in cases where a person falling within the statutory category is neither dangerous nor likely to benefit from treatment, neither commitment nor mandatory treatment should be imposed. For example, an elderly drug addict whose addiction is a product of medical treatment for a prolonged terminal illness obviously should not be committed as an addict. So too, if a statute authorizes commitment of persons who repeatedly commit sexual offenses and a person is charged because he is a homosexual who has repeatedly engaged in unlawful but private homosexual relations with other adult homosexuals, the courts should decline to order commitment, reading into the statutory standard a requirement of substantial danger to the public. Judicial willingness to interpret commitment statutes so as to limit their applicability to persons constituting a significant threat would partially mitigate the risks to liberty inherent in such statutes.

But something more than the power to create exceptions by reading in requirements of substantial public danger is necessary to deal with the possibility of cases in which the legislature authorizes commitment of a category of persons *none* of whom pose any serious threat to the public. There is also need for judicial authority to review the reasonableness and appropriateness of legislatively defined civil detention categories themselves. While such review will be fraught with all the difficulties inherent in substantive judicial review of the exercise of legislative power, it seems just as necessary here as it is in the case of legislation impinging upon the rights of free expression. Experience indicates that in this country at least, legislatures have been less sensitive than the courts to the rights and liberties of individuals who can be considered threats to society. It is therefore desirable that the courts have effective means of curbing legislative excesses in appropriate cases by striking down statutory restraints upon personal liberty not reasonably necessary for the protection of the public.

There are, however, serious objections to reliance upon any approach which requires the courts to weigh degrees and probabilities of danger and the reasonableness of particular kinds of preventive sanctions. The problem is not lack of experience with such review; our courts have for years tested restraints on personal liberty by delicate balancing of competing individual rights, governmental interests, and alternative means of achieving legislative purposes in cases involving

freedom of association,⁴⁰ subversive activities,⁴¹ and marital privacy.⁴² But whenever a court seeks to strike down a governmental restraint on personal liberty by asserting that a legislatively determined need is really not necessary or a legislatively found danger not sufficiently dangerous on balance to justify legislative action, the court is at the outermost border of judicial authority. Not only is it open to the criticism that questions of reasonableness of legislation are not properly for judicial determination, but the very broadness of the judgmental question makes it difficult for the court to demonstrate the correctness of its conclusion as against that reached by the legislature. Accordingly, while such substantive review may be useful and necessary as a means of striking down extreme and unquestionable abuses of legislative power, it is not likely to prove effective as a limitation on legislative power in close cases. The tendency will always be for courts to defer to legislative findings of danger and legislative choices of appropriate means of dealing with it, particularly when public sentiment is running high. The stakes for the individuals involved in cases of civil detention are too high to allow reliance upon such flexible restrictions.

Consider for example the possibility of enactment by the state of Illinois of a statute authorizing the mayors of large cities to arrest any member of a black nationalist or white racist organization, following a declaration by the governor of an emergency condition in such city, when there was probable cause to believe that such person would participate in rioting or violent attacks on the lives or property of others.⁴³ Would such a statute be constitutional? Are reasonableness, necessity, or proportionality of restraint to danger adequate standards for judging the legislation? Habitual resort by the courts to a balancing test in such circumstances, emphasizing as it must the arguableness of the issue, may operate as an inducement to the enactment of such legislation and to official reliance upon it in planning for riot situations, thus rendering inevitable findings that the use of the statutes was reasonably necessary if for no other reason than that no other alter-

40. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960).

41. *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *United States v. Robel*, 389 U.S. 258 (1967).

42. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

43. The New York Senate recently passed a bill giving judges power during a state of emergency to set bail or hold defendants for up to 72 hours without a formal complaint when arresting officers were unable to produce complainants because of the emergency. *N.Y. Times*, May 22, 1968, at 94, col. 1.

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native could be considered to have been available at the time. This likelihood is reason enough to suggest the need for simpler and clearer limitations on resort to preventive detention.

Of course, over a long period of time, perhaps several generations, a sufficient body of precedent or legal tradition could perhaps develop from judicial reaction to extreme cases and extreme statutes so as to permit the formulation of articulated doctrines of necessity and appropriateness capable of enforcement by the courts. But until such rules are developed the naked standard of reasonableness promises to be an inadequate protection against legislative excess in the imposition of preventive restraints. What must be found are limited legal doctrines, well within the legal tradition, which, with stringent standards of procedural due process, can be used to brake and limit legislative power to impose preventive restraints while the courts are working out the content and scope of broader substantive restrictions like "necessity" and "appropriateness." Since, as I have suggested above, the trend of the law is toward a unitary sanction system, these judicial doctrines must, if they are to retain vitality, be consistent with that trend. I propose to elaborate, in the balance of this article, doctrines capable of limiting legislative power to impose restraints which can be applied consistent with the development of a unitary preventive correctional system.

II. Preventive Detention and the Capacity to Conform to Legal Rules

One obvious limitation which courts can and should impose upon legislative power to resort to preventive restraint is a requirement of narrow definition of the conditions or propensities warranting the imposition of detention. The magnitude of the individual losses of liberty suffered if abuses of discretion result in unjustified commitments renders the vice of vagueness particularly acute in this area. Thus, for example, the courts should not hesitate to strike down preventive legislation aimed at "psychopaths," sexual or otherwise, or at "agitators," "security risks," and the like, unless the statutes providing for measures against such classes of persons clearly define the class.⁴⁴ Nor should the courts tolerate statutes which provide for detainability

44. The claim of undue vagueness seems to have been uniformly rejected in cases challenging civil commitment statutes: e.g., *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940); *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964); *People v. Victor*, 62 Cal. 2d 280, 299-306, 398 P.2d 391, 402-08, 42 Cal. Rptr. 199, 210-16 (1965); *In re De La O*, 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489 (1963); *Director of Patuxent Institution v. Daniels*, 243 Md. 16, 221 A.2d 397 (1966). But the very fact that the issue is raised and reviewed suggests that there are constitutional limits to the indefiniteness of such statutes.

by association, any more than they tolerate statutes defining crimes of guilt by association.⁴⁵ But even certainty of categorization and a requirement of a showing that an individual is himself within the defined category because of his personal condition or propensities is insufficient as a judicial safeguard.

A further limitation must go to the sort of conduct prevention of which can justify the imposition of civil restraints. It is not enough that the conduct feared be simply deviant. Preventive detention should not be used unless there is a substantial probability of the future occurrence of behavior which is dangerous to the lives or safety of others and which could be punished under constitutional post hoc penal sanctions.⁴⁶ In a sense, preventive detention is merely the criminal law viewed in advance. Moral aversion which is insufficient to justify punishment after the fact should be equally insufficient to justify preventive detention before the fact.⁴⁷

Although the limitations on civil restraints already enumerated would go far to restrict their use to persons who are a sufficient danger to society to justify depriving them of their liberty, no principle has as yet been suggested for distinguishing cases in which civil detention is appropriate from those in which prevention should properly be left to the criminal law. The distinction is an important one because of the enormous difference in consequences to the potentially harmful individual. If penal sanctions are thought to be sufficient, he will be let alone, free to order his movements and affairs as he sees fit, until such time as he actually commits a criminally harmful act. If he is then convicted and sent to prison, it will normally be for some limited term thought to be commensurate with the gravity of the offense committed. Should he in fact manage to control his presumptively deviant proclivities and never engage in the harmful conduct feared, he will remain permanently free of this governmental interference with his

45. Cf. *Noto v. United States*, 367 U.S. 290, 299 (1961); *Scales v. United States*, 367 U.S. 203, 222 (1961); *Yates v. United States*, 354 U.S. 298, 330-31 (1957).

46. Civil commitment is widely used for harmless but senile or otherwise incurably incompetent persons. Cf. *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966). The propriety of such commitments depends on the impossibility of providing care by means short of institutionalization. Even where such commitment is necessary, it should, whenever possible, be to institutions which aim for pleasant and open care as a goal rather than therapy and protection, the goals of state mental hospitals. The establishment of institutional alternatives to state mental hospitals would probably decrease the need for *involuntary* commitment of harmless incompetents.

47. "Hippies," for instance, espouse attitudes, values and ways of life which threaten the ideals and values of many people, probably a majority, in this country. In a very real sense they could be considered dangerous to the middle class suburban way of life. But it would be unthinkable to make it a crime to behave like a hippy, and it should be impossible to enact statutes detaining hippies for the purpose of preventing such behavior.

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liberty. If, on the other hand, preventive detention is thought appropriate, the same individual could be deprived immediately of his liberty for an indeterminate and perhaps permanent period. Treatability cannot be the differentiating factor, because civil restraints are in fact imposed on the untreatably dangerous quite as readily as upon those for whom cure is a real possibility. And to say that the question is merely one of the probability and severity of the harm threatened is only to rephrase the problem of drawing the proper lines.

Basic to Anglo-American criminal law is a postulate of freedom of choice;⁴⁸ that the ordinary person can conform his conduct to the requirements of the law if he wants to do so. This postulate of freedom is not an empirically derived conclusion, but rather an ideological premise of the law which, like the precept of equality before the law, is normatively required by our legal system.⁴⁹ The postulate of freedom represents our society's judgment that the best way to prevent most people from causing harm to others is to deter them with the threat of punishment rather than to incapacitate or restrain them beforehand on purely predictive grounds. This way seems best not because it is most efficient as a preventive but because, given the primacy of personal autonomy as a value in our culture, it is the best balance between preventive security and personal liberty. If we impose preventive restraints on people who presumptively are as much responsive to traditional proscriptive restraints as the rest of us, we repudiate this balance and the presumption in favor of personal autonomy upon which it is based, creating greater risks to our own autonomy than the risk we assume in allowing the merely attitudinally dangerous their first bite.⁵⁰

48. The phrase is adapted from Dr. Bernard Diamond, testifying as a witness in the landmark case of *People v. Gorshen*, 51 Cal. 2d 716, 724, 336 P.2d 492, 497 (1959).

49. While philosophers, theologians, scientists and lawyers have debated for centuries whether such a thing as "free will" really exists, society and the law have no choice in the matter. We must proceed, until a firm alternative is available, on the scientifically unprovable assumption that human beings make choices in the regulation of their conduct and that they are influenced by society's standards as well as by personal standards.

Blocker v. United States, 288 F.2d 853, 857, 865 (D.C. Cir. 1961) (Burger, J., concurring). See also *Cardozo, J., in Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

50. The basic notion of the criminal law which makes punishment of offenders legitimate in a free society is that the offender has disregarded the law, has chosen to violate it even though he was capable of obeying it. It is such disregard which we impute to an offender when we speak of him as blameworthy or guilty, and it is his guilt which legitimates and justifies the imposition on him of sanctions which it would be unjust to impose on others. Frankel, *Criminal Omissions: A Legal Microcosm*, 11 WAYNE L. REV. 367, 392-93 (1965). It would be illegitimate to impose such sanctions on the blameless in part, of course, because it would be unfair. But behind the notion of fairness or justice is the basic precept or condition of a free society—the citizen's expectation of enjoying liberty

But the postulate of freedom is rebuttable, so far as particular individuals are concerned, by facts showing that they suffer from conditions precluding effective exercise of the mental and emotional faculties requisite to the processes of controlling their behavior in accordance with proscriptive rules.⁵¹ When the presumption of an individual's capacity to conform is rebutted by a showing of a special disability not shared by all men, it is possible to justify the imposition of preventive restraints without placing all men under the threat of a similar infringement of their personal autonomy. Thus a determination of mental illness or other control-related psychological deviance serves the same function for preventive detention that conviction of a crime serves for penal incarceration—it becomes a basis for separating out a class of restrainable persons without threatening all citizens with subjection to similar restraints. The concept of personal responsibility—the other side of the lack-of-control coin—may thus be seen as a functional concept, serving to protect individual liberty and dignity from prior restraint.

Traditionally, our law has taken the approach that an individual is either responsible or irresponsible, without recognizing degrees of partial responsibility. This all or nothing approach is not, of course, consistent with psychological reality. Nor does it seem to be a requirement of the postulate of freedom since there is no reason why the presumption of freedom cannot be rebutted in part as well as in whole, provided that we have available reasonably sophisticated and discrete means of dealing with degrees of partial responsibility by degrees of partial and limited restraints. In recent years attempts have been made to introduce doctrines of partial or diminished responsibility into the substantive criminal law. Their success has been limited, however, largely because there has not yet been developed an effective system of partial restraints which can operate to protect society without unduly sacrificing personal liberty.⁵² It makes good sense to speak of an alcoholic or narcotic addict as having diminished capacity to control his behavior, but full recognition of his diminished responsibility must await some means of disposition other than incarceration in a mental hospital as a substitute for imprisonment. Civil commitment itself

and avoiding sanctions if he obeys the law. Kadish, *supra* note 12. To impose sanctions on the law-abiding is to undercut this precept and thereby threaten the security and liberty of all citizens.

51. This is, of course, the basis for the insanity defense. See MODEL PENAL CODE § 4.01, Comments 2-4 (Tent. Draft No. 4, 1955). Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 752-57 (1937).

52. Cf. A. GOLDSTEIN, *THE INSANITY DEFENSE* 171-202 (1967).

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may be seen as an attempt, albeit rough and misguided, to develop alternatives to punishment as a means of restraining persons with certain kinds of diminished capacity to conform.

Preventive detention can legitimately be imposed only in cases where, at a minimum, the person to be restrained lacks ordinary capacity to conform his conduct to the requirements of the law.⁵³ One who cannot be expected to conform to the law cannot be blamed for nonconformity, but his inability to obey may justify preventive restraints if his inability is sufficiently threatening to the safety and welfare of others.⁵⁴

Such immobility is the real and legitimate basis for the requirement of some condition of incapacity or illness as a requirement for the imposition of preventive detention. It is not the therapeutic mask, the often unrealizable hope that effective treatment can be offered, but the recognition of some disability in their capacity to conform which justifies special treatment of the mentally ill, psychopaths and, perhaps, drug addicts. Therefore, a narrowly drafted statute authorizing commitment of opiate addicts—persons who have reached a state of psychophysical dependence on drugs which renders them unable to conform to legal proscriptions—does not pose the same danger to liberty that a statute authorizing commitment of marijuana users would pose.

The recognition that a condition of volitional incapacity affecting the person's ability to respond to legal rules is a necessary precondition to a libertarian system of preventive detention also provides a perspective which makes it possible to develop a unitary conception of the relationship of criminal and civil responsibility. The behavior of those whom we presume to be capable of choice is properly controlled with post hoc criminal sanctions; the behavior of those who cannot choose is appropriately subject, in cases where they are dangerous, to preventive civil detention. Just as it is blameworthiness for choosing to disregard the rules which is the legitimating factor for imposing sanctions under the criminal law, so it is incapacity to regard and obey the rules which is a legitimating factor for imposing detention upon the basis of a prediction of future violations. The significance of the

53. See Note, "Imminent Danger of Addiction" as a Ground for Involuntary Commitment in California—*People v. Victor*, 64 MICH. L. REV. 546 (1966); Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, *supra* note 8, at 1289-90.

54. Cf. Silving, "Rule of Law" in *Criminal Justice*, in *ESSAYS IN CRIMINAL SCIENCE* 77, 113-19 (G. Mueller ed. 1961), discussing the development of non-penal measures in continental Europe.

legitimizing factors in both cases is that they serve to maximize the liberty and security of every citizen capable of obeying the law.

Thus traditional concepts of personal responsibility serve a libertarian function. This may not, however, seem a sufficient point in their favor to those who recognize that such concepts are inseverable from our cultural traditions relating to choice and moral guilt; traditions which are rejected by schools of psychiatry which see notions of guilt and fault as imposing a major burden on the human psyche and contributing to a significant portion of mental illness. Yet psychiatric efforts to find means to alleviate a patient's excessive feelings of guilt do not necessarily require that the concept of guilt be extirpated from our social system. Indeed, though excessive guilt feelings may be a major cause or symptom of personality distress, we should beware of a young science's attempt to alleviate illness by a kind of psychiatric tonsilectomy; removal of a natural mechanism of personal adjustment which is still inadequately understood. It may well be that the emotion of guilt is a necessary component of human self-direction, a means by which conflicting drives are regulated so as to permit the necessary socializing of the human personality. In a society where human relationships are founded upon generally accepted standards of proper behavior, attempts to eliminate the emotion of guilt as a factor influencing behavior seem to me to be misguided.

Instead, given the extent to which we encourage individual autonomy and yet expect substantial conformity of behavior in social contexts, it seems that we should encourage inculcation of personal responsibility to the greatest degree obtainable by the individual. Civil restraint, at least for the treatable, should serve as a buttress to support the individual and protect society while he is encouraged to recognize that within the degree of his capabilities both self-esteem and guilt are products of his own efforts at self control.⁵⁵ In a system in which autonomous, self-directed conformity with accepted norms represents the highest form of social adjustment, imputations of partial or total irresponsibility are not merciful dispensations to the individual but severe determinations of social disability. An important aim of the legal and, in appropriate cases, therapeutic systems should thus be to develop autonomy through devices of self-direction including the

55. I do not mean to suggest here that guilt is a useful tool for dealing with those who are so irresponsible that concepts of choice and control do not apply to them at all. Only those who demonstrate the degree of ability to choose which we denominate partial responsibility can benefit from the pressures of a sense of guilt, and only they should be deliberately subjected to it.

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emotion of personal guilt. We have heretofore avoided such concepts in the civil commitment area because of traditions of a penal-civil dichotomy and because in our penal system we still retain savagely anachronistic punitive approaches with which the concept of guilt is associated. Only our barbaric treatment of responsible criminals could have misled us into believing that a finding of mental incapacity was a dispensation.⁵⁶ As our treatment of responsible prisoners improves, we will become more aware of the inappropriateness of our handling of irresponsible mental patients.

Critics have been contending for years that present concepts of criminal responsibility are outmoded.⁵⁷ Some have argued for a substitute approach in which the law would be concerned only with a preliminary question: did the subject of the proceedings engage in the harmful or dangerous conduct of which he is accused? A finding that he did would then be a basis for turning his case over to another official body of psychiatrists or correctional authorities to determine the appropriate disposition in his case.⁵⁸

56. "For all practical purposes the furor over M'Naghten is confined to the disposition of offenders convicted of murder. It is the death penalty which sparks the quarrel." Weintraub, *Criminal Responsibility: Psychiatry Alone Cannot Determine It*, 49 A.B.A.J. 1075, 1079 (1963). See also A. GOLDSTEIN, *THE INSANITY DEFENSE* 19-20, 214-217 (1967).

57. These criticisms tend to cluster about the problem of the insanity defense. See, e.g., Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 389-90 (1952); G. ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 120-36 (1954); Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 327 (1955); Roche, *Criminal Responsibility*, in *PSYCHIATRY AND THE LAW* 107, 113-14 (P. Hoch & J. Zubin eds. 1955); Weintraub, *supra* note 55; Remarks by Weintraub, J., at Annual Judicial Conference, Second Judicial Circuit, 37 F.R.D. 365, 369 (1964); Remarks by Biggs, J., *id.* 395; H.L.A. HART, *THE MORALITY OF THE CRIMINAL LAW* (1964); Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1963). The last article contains an appendix summarizing the view of several other critics of the law's approach to criminal responsibility. *Id.* 544-47.

58. Weintraub, Remarks, *supra* note 57; Biggs, *supra* note 57; B. WOOTON, *CRIME AND THE CRIMINAL LAW* 41-57, 74-84 (1963). Perhaps the most utopian, forceful, and frightening statement of this approach is that urged by Roche, *supra* note 57, at 113-14:

All persons irrespective of mental state could be regarded as responsible in the sense that they are susceptible to incapacitating legal sanctions in keeping with the aims of deterrence, security, treatment, and reformation. This would eliminate all trial issues irrelevant to the questions of fact of the unlawful behavior, and would leave open the question of the offender's disposition to administrative application of tested scientific knowledge. It would leave to the courts the public exercise of legal guilt-finding and relieve the courts of the sole responsibility for determining appropriate measures to insure community protection and the offender's reformation, if possible

. . . . Our idea contemplates an enhancement of the dignity and public respect for law enforcement. The view of universal responsibility cannot be applicable as long as the concept of responsibility is confined to its narrow, medieval meaning, a liability to punishment. It is applicable if the concept is brought to a broader social therapeutic meaning, a liability to comprehensive treatment provided by law Universal responsibility lays open to the law breaker, regardless of mental status, a liability to a rational clinical manipulation which has within its resources imprisonment, hospitalization, probation psychotherapy, and so on. And some proponents of this approach are seemingly prepared to apply it not only

This approach has some very real advantages. It would eliminate some of the anomalies in traditional legal tests of responsibility based on mixed psychiatric and moral judgments. Yet the attractiveness of such an approach is somewhat illusory; someone must still decide who shall be detained, who shall be treated, who shall be punished, and what is treatment and what is punishment.⁵⁹ Nor is it at all clear that such questions will necessarily be answered better by judges who are psychiatrists than they are answered by judges who are lawyers or judges who are jurymen. The point is that whoever makes the decision will in fact be functioning as a judge regardless of the title under which he exercises his commission. It may be that psychiatrists are better equipped than lawyers or laymen to make such judgments in most cases. But we must recognize that no matter who makes the decisions, the basic problem will remain the same: on what considerations shall such judgments be made? It is my belief that three basic considerations must be taken into account: (1) the need to protect society, (2) the need to help the individual to achieve a more meaningful and rewarding life, and (3) the recognition that the person whose freedom is at stake is a human being and that we all have a stake in the dignity and freedom of every other human being. When we ask how these considerations relate to the question of what should be done with someone who is dangerous, we can begin to focus our attention not on labels of punishment and treatment but rather on the development of effective measures for protecting the public, maximizing personal dignity and autonomy, and providing effective therapy.⁶⁰

where the acts are of minor criminal nature, but also where they are not necessarily criminal at all. Thus Dr. Lawrence Kolb, Director of the New York State Psychiatric Institute, speaking at a panel on "Insanity As a Defense" at the Annual Judicial Conference, Second Judicial Circuit (1964) stated:

If I were judging an individual who was accident prone and his accident proneness was exhibited on the road where he could maim repeatedly many many people, I would certainly withdraw his license, restrict his right to drive, and insist on continuing treatment. I might insist his *sentence* bind him longer than another man who performed a single murder under the force of some overwhelming emotion.

37 F.R.D. 399 (emphasis added).

Of course, Dr. Kolb may be using the term sentence to refer solely to denial of a driver's license rather than to treatment under custody. But what of the accident prone person whose accident proneness was exhibited off the road as well as on?

59. These terms would then be inappropriate, but the underlying concepts would remain the same.

60. I must confess that my own view of the basic appropriateness of an insanity defense and notions of criminal responsibility have been severely tested by the arguments of Professor Morris in his recent article, *supra* note 57. He demonstrates that in practice the insanity defense serves to impose a double stigma on those who are both mentally ill and commit crimes, *id.* 524-25, and that recognizing an insanity defense tends to perpetuate the injustice of holding to full responsibility and punishing those

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I have argued above that preventive detention cannot be imposed on a person with normal capacity to control his behavior without threatening the liberty and security of all free citizens. Thus there is a close relationship between behavioral incapacity and the constitutionality of civil detention. The relationship is not, however, that which has frequently been suggested—that civil restraint may only be imposed for the purpose of providing therapeutic treatment for the person so restrained.⁶¹ Paradoxically, the confusion of disability with treatability and the resulting tendency of legislatures, psychiatric agencies, and the courts to rationalize decisions to detain in terms of therapy has inhibited the development of adequate legal safeguards to protect persons who are civilly committed.⁶² Since it has been thought that the only justification for preventively detaining a dangerous person was the possibility of treatment, there has been a tendency to fictionalize the notion of treatment.⁶³ The result has been the justification as therapeutic of procedures and practices which are neither therapeutic nor imposed in conformity with traditional standards of due process of law for non-therapeutic confinement.

In the last few years the problem of preventive detention under the guise of treatment has produced discussion and several judicial

who by reasons of social and cultural causes commit crimes they are no less free to avoid committing. *Id.* 520. It seems to me, however, that the answer to Professor Morris's view lies in the fact that he is attacking an essentially valid moral and ethical principle—that those who are without guilt should not be punished—by demonstrations that we do punish such people in violation of this principle.

The question remains whether it is the principle that is wrong or the practice. And if we eliminated the principle would our practices improve, or can improvement be sooner achieved by retaining the principle and vigorously seeking to demonstrate the shortcomings in our practices when held up to the standard of our principles? There is no reason to accept either the double stigmatization of the mentally ill and dangerous or the failure to recognize social and cultural dynamics as a factor in determining criminal responsibility. Once we eliminate the either-or standard of criminal responsibility and begin to develop effective alternatives to incarceration as both a sanction and restraint, the concept of responsibility will be a useful, practical as well as conceptual, principle for dealing with dangerous people who commit crimes because they are more or less compelled to do so.

61. *E.g.*, Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960); Editorial, *A New Right*, 46 A.B.A.J. 516 (1960); *cf.* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1139-40 (1967).

62. See cases cited in note 14 *supra*. For a recent case interesting for its assertion of the antiquated notion that "The constitutional provisions relating to due process are not applicable to a person restrained as insane," see *Rose v. Haugh*, 259 Iowa 1344, 1346, 147 N.W.2d 865, 866 (1967). See also Note, *Civil Commitment of Narcotic Addicts*, *supra* note 9, at 1166-68.

63. Under some circumstances custodial care, standing alone, is a form of therapy for some conditions; the terms used in this record such as "environmental therapy" or "milieu therapy" are simply psychiatric descriptions of a form of treatment consisting of custody in an appropriate and protected atmosphere from which departure is not permitted.

Collins v. Cameron, 377 F.2d 945, 947 (D.C. Cir. 1967) (Burger, J.) (affirming dismissal of habeas corpus petition).

decisions invoking a "right to treatment."⁶⁴ Since the landmark case of *Rouse v. Cameron*⁶⁵ has been widely discussed,⁶⁶ its details will not be elaborated here. While *Rouse* found a statutory basis for the right to treatment it asserted,⁶⁷ the case also suggests a constitutional basis for the right, derived from the theory that civil commitment is constitutionally permissible only if treatment actually follows the commitment.⁶⁸ Unfortunately there are difficulties inherent in the right to treatment theory, as the progeny of the *Rouse* case demonstrate,⁶⁹ which makes it unworkable either as a theory or a meaningful protection for persons civilly committed. Obviously the courts will have great difficulty in resolving questions of the adequacy of treatment, not to speak of the problems inherent in determining what shall qualify as treatment in the first place. More troubling, however, is the failure of the theory to deal with the very real problems of purely preventive detention. Among the conditions which might legitimately induce a legislature to provide for the imposition of civil detention are illnesses or disorders for which there is no known effective cure. Most notable of course is the condition of sociopathy, the very condition from which Rouse was said to be suffering. Given the fact that cure is presently impossible, almost anything or nothing could be said to be treatment in such cases. Psychoanalysis, group therapy, and acupuncture could all be said in a sense to represent forms of treatment given the incurability of the illness.⁷⁰ In such cases "treatment"

64. *Cameron v. Mullen*, 387 F.2d 193 (D.C. Cir. 1967); *Dobson v. Cameron*, 383 F.2d 519 (D.C. Cir. 1967); *Creek v. Stone*, 379 F.2d 106 (D.C. Cir. 1967); *Tribby v. Cameron*, 379 F.2d 104 (D.C. Cir. 1967); *Collins v. Cameron*, 377 F.2d 945 (D.C. Cir. 1967); *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Nason v. Superintendent*,—Mass.—, 233 N.E.2d 908 (1968); *Eidinoff v. Connolly*, 281 F. Supp. 191 (N.D. Tex. 1968).

65. 373 F.2d 451 (D.C. Cir. 1966).

66. Note, 80 HARV. L. REV. 898 (1967); Note, 42 NOTRE DAME LAW. 573 (1967); Note, 45 TEX. L. REV. 777 (1967); Note, 42 TUL. L. REV. 407 (1968); Note, *The Nascent Right to Treatment*, *supra* note 8; Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, *supra* note 9.

67. 373 F.2d at 453-54.

68. *Id.* at 453, 455.

69. Cases cited notes 63 and 64 *supra*. The *Rouse* case itself came full circle when in *Rouse v. Cameron*, 387 F.2d 241 (D.C. Cir. 1967), the court ordered Rouse released on habeas corpus because he had been improperly committed pursuant to a determination of insanity, where the insanity defense was invoked by his lawyer against his wishes. Judge Danaher, in dissent, pointed out that in the hearing after the court's initial decision in the case, Rouse was unable to establish the inadequacy of the treatment afforded to him.

70. Cf. *Collins v. Cameron*, 377 F.2d 945 (D.C. Cir. 1967). I recall reading, some years ago, a description of a development in the People's Republic of China. In the wake of the victory of the Communist government efforts were made to improve the medical treatment of the population as part of the general effort to modernize and reform Chinese life. Shortly afterwards, however, the government began to recognize and approve the traditional folk medicine of acupuncture, the practice of curing illnesses by sticking pins

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can mean nothing more than benign and comfortable custody, which is treatment in the sense that the patient is kept from manifesting his symptoms. To so define treatment reduces the right to treatment to a right to be treated humanely, a worthy right but one existing, at least in theory, long before the *Rouse* case. On the other hand, if the right to treatment means a right to therapy promising a cure of the illness or condition for which detention was imposed, the right should not be considered a constitutionally commanded precondition of civil restraint. For quarantine as well as therapy would seem to be a legitimate basis for detention; society must have the right to protect itself from dangerously ill persons even if it is unable to cure them in the process.⁷¹ To suggest that the right to treatment means that commitment cannot be "civil" if there is no hope for cure largely misses the point of preventive detention. It is indefinite detention for being dangerous—regardless of specific criminal acts and whether or not cure is possible—which is the essence of preventive detention. And it is prevention rather than treatment which is the dominant motivation for the commitment of most dangerously deviant persons.

It has been suggested in a thoughtful comment in this journal that resolution of the *Rouse* problem could be achieved by requiring strict penal due process for purely preventive detention while allowing looser commitment procedures where the detention promises to be therapeutic.⁷² But given the uncertainties of what constitutes treatment and whether it can be effective, as well as the importance of accurate factual judgments in determining who should be committed in all cases, it would seem that stringently fair and accurate procedures should be required in both situations.⁷³ If this position is correct,

into different parts of the body. Apparently the Communist regime, unable to provide modern and adequate medical facilities, elected to legitimate and support the treatment and facilities which were available.

71. In *Fuller v. United States*, 390 F.2d 468, 470-71 (D.C. Cir. 1967), Judge Bazelon, the author of the *Rouse* opinion, seems himself to have recognized this principal. Noting that civil commitment of the defendant would probably be equivalent to commitment for life in view of the probability that his dangerous abnormality was caused by organic brain damage, he nevertheless concurred in the remand to the trial court to determine among other things whether defendant should be committed as a sexual psychopath. While Judge Bazelon suggests that the trial judge consider whether other lesser deprivations of liberty would sufficiently protect the public, his opinion makes it clear that, if necessary, civil confinement would be appropriate.

72. Note, *Civil Restraint, Mental Illness, and The Right to Treatment*, *supra* note 9, at 102-03, 115-16.

73. A shocking example of diagnostic error, compounded by administrative sloppiness leading to a mixup in patient records, is presented in *Egan v. United States*, 158 F. Supp. 377 (Ct. Cl. 1958), reprinted in KATZ, GOLDSTEIN, & DERSHOWITZ 735-38. Egan, in a

then the rule of *Rouse* offers no useful guides at all. Yet the *Rouse* case does stand for the fundamental proposition that even dangerously defective persons are human beings who cannot be ignored or dehumanized because of public apathy and lack of funds.⁷⁴ The importance of the *Rouse* case lies not in its holding but in the reason for its holding, in its search for a judicial solution to an intolerable social evil—the dehumanization of human beings because they happen to be dangerously deviant.⁷⁵

III. Civil Restraints and Compensation

The substantive and procedural limitations already elaborated would go far to keep the use of civil detention within bounds dictated by our society's commitment to the maximum of individual autonomy consistent with a reasonable degree of social order. But the individuals actually deprived of their liberty are still in the position of having their freedom taken from them against their will, although they are innocent of wrongdoing and will not benefit from the detention.⁷⁶ In effect their liberty is being taken for the benefit of the public. It can be small comfort indeed that such deprivations of liberty are relatively rare, factually appropriate and judicially determined to be reasonable. Those detained are still deprived of most of what makes life worth living: their freedom of movement, their creature comforts, and the basic dignity attaching to status as autonomous citizens responsible for directing their own lives.

Consider the case of a migrant worker, traveling with his family far from home, who is detained as a material witness.⁷⁷ Unable to raise bail, he can sit in jail with no means of providing for his family and no income other than the statutory pittance which some states are

military hospital for treatment of bronchitis, was mistakenly diagnosed as mentally ill when doctors erroneously concluded that an incident he reported had not occurred. Confined as mentally ill, his efforts to prove that the diagnosis had been mistaken were regarded as proof of his illness. Medical records of another man named Egan became part of his case history. For other examples of tragic diagnostic errors, see Beaver, *The "Mentally Ill" and the Law: Sisyphus and Zeus*, 1968 UTAH L. REV. 1, 21-22, 24-26.

74. Cf. D. VAIL, *DEHUMANIZATION AND THE INSTITUTIONAL CAREER* (1966).

75. Cf. Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, *supra* note 9, at 114.

76. In the case of untreatably dangerous individuals who are simply quarantined, no benefit whatever is received. In the case of the treatably dangerous the benefit received, if it is received, does not equal the price paid, since but for the need to protect society, similar treatment could in most cases be provided without the detention.

77. *Quince v. Langlois*, 88 R.I. 438, 149 A.2d 349 (1959). Pursuant to the statutes of many states an indigent person who has the misfortune to be an innocent witness to another person's crime may be jailed to assure his availability at that other person's trial.

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generous enough to allow in such cases.⁷⁸ To such a man his time is literally money, for it is time spent in labor which is the only asset he has to provide for himself and his family. He has done no wrong and is not dangerous to others in any way; the taking of his liberty is justified, if justified at all, only because the taking is temporary and his testimony is necessary for a public purpose—the need to do justice between the state and the defendant. Of course if the state were to take his property for a public purpose, it would have to pay adequate compensation as a matter of constitutional due process. But for some reason it is thought that when mere liberty is taken, compensation is, at best, a matter of legislative grace.

A radical proposal seems to me appropriate. Whenever the state finds it necessary to take an innocent man's liberty for a public purpose, due process should require the state to pay adequate compensation for the taking. I would concede of course that liberty is not identical to property, but the Fifth Amendment speaks of both together in the due process clause. In our modern world, distinctions between property and personal liberty do not seem so clear as they once were. Property, after all, is but the fruit of the productive use of personal liberty. Intangible rights are not without their value, and our law has found means of making monetary evaluations and providing compensation when intangibles are taken by private persons. Rights of action exist for tortious interference with reputation, privacy and even liberty itself. Our law has long recognized suits for false arrest and false imprisonment. It seems but a natural extension, though an extension it is, to suggest that when, for its own purposes, a state decides to take a man's liberty, justice and the Constitution require the state to pay compensation for the taking.

A requirement of compensation has more to support it than the obvious constitutional analogy; it would also serve to vindicate the compensated individual's dignity and status as a person. Like his rights to procedural due process and fundamental fairness, it would serve to affirm his continuing membership in society as an individual before the law. Paradoxically perhaps, the fixing of a cash price which must be paid for an innocent man's liberty would not cheapen his liberty but instead should give it greater meaning. Payment of compensation would serve significant practical purposes as well. Obviously, the obliga-

78. See *Barber v. Moss*, 3 Utah 2d 268, 282 P.2d 838 (1955). The New York statute allows the munificent sum of "not . . . greater than . . . three dollars for each day of actual detention." N.Y. CODE OF CRIM. PROC. § 618-b (McKinney 1958).

tion to pay when a person's liberty is taken would act to deter legislatures and administrators from resort to unnecessary seizures of liberty. The danger would have to be real and the necessity apparent before officials would be willing to pay out public funds in this way. More, important, the payment of adequate compensation could operate as a substantial impetus to the development of meaningful reforms in the treatment of inmates.

The need for reform is notorious. Denied all economic and political leverage, the civil inmate is powerless to cause any improvement in the inadequate facilities, insufficient staff, low staff morale and token treatment which result from minimal public financing.⁷⁹ The payment of compensation to persons committed because they are dangerous would give such persons greater leverage in relation to the administration of the institution in which they are held. It would enable them, for instance, to purchase adequate legal services rather than relying on the charity of the state or their families to provide counsel. Inmates able to benefit from treatment would be able to pay for adequate therapy and even, perhaps, for confinement in a private hospital in lieu of confinement at a state institution. Compensating the inmate could give him bargaining power, introducing market factors into the institutional system. The resulting demand might well lead to the supplying of more effective custodial and therapeutic alternatives to the present system. Just as important, there would be an increase in the personal autonomy of the inmate in direct proportion to his ability to pay for and thus command personal luxuries⁸⁰ not provided by a system in

79. Fried, *Impromptu Remarks*, 76 HARV. L. REV. 1319 (1963); Arens, *The Durham Rule in Action*, 1 LAW & SOC. REV. 41, 53-57 (June 1967); Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, *supra* note 9, at 88-89 nn.4&5. See *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966), quoting Dr. Harry C. Solomon, President of the American Psychiatric Association as follows:

After 114 years of effort, in this year 1958, rarely has a state hospital an adequate staff measured by the minimum standard set by our association, and these standards represent a compromise between what was thought to be adequate and what it was thought had some possibility of being realized.

Id. at 458 n.38, citing Solomon, *The American Psychiatric Association in Relation to American Psychiatry*, 115 AM. J. PSYCHIATRY 1, 7 (1958). THE JOINT COMMISSION ON MENTAL ILLNESS AND HEALTH, ACTION FOR MENTAL HEALTH (1961), (hereinafter cited as ACTION FOR MENTAL HEALTH) recommended that expenditures for public mental health should be doubled in the next five years and tripled in the next ten. *Id.* 284. It states that: "only by this magnitude of expenditure can typical state hospitals be made in fact what they are now in name only—hospitals for mental patients." *Id.* The report further states:

... the information we have leads us to believe that more than half of the patients in most state hospitals receive no active treatment of any kind designed to improve their mental condition.

Id. 22-23.

80. Economic power, permitting the patient some autonomy in the selection of therapists and persons providing other services from haircuts to legal advice, could well serve

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which appropriations and expenditures are made in terms of legislative and administrative priorities.⁸¹ Thus the development of some "consumer autonomy" for inmates would serve both as a means of increasing the individual dignity and autonomy of the inmate and as a means of encouraging the development of improvements in, and alternatives to, state administered institutions with limited budgets providing minimal treatment and minimal services.

Viewed strictly from the standpoint of the loss to the individual detained, the argument for compensation is strongest in cases of purely preventive detention of the incurably dangerous, from which the inmate derives no benefit. But in terms of the potential gain for society and the individual involved, compensation is particularly promising in application to the treatably dangerous, because of the possibilities for escape from the crippling effects of administrative duties and inadequate funds on institutional psychiatrists and other therapists. Providing inmates with the financial ability to pay for treatment should lead to the development of a group of independent psychiatrists who would provide treatment to mental patients without becoming part of the administrative staff of the custodial institution.⁸² Such a develop-

to minimize the patients "sense of powerlessness." Cf. Pine & Levinson, *A Sociopsychological Conception of Patienthood* in *THE SOCIOLOGY OF MENTAL DISORDERS* 219, 225 (K. Weinberg ed. 1967). D. VAIL, *supra* note 74, at 184-85, discusses the importance of economic autonomy. "We have always felt favorably inclined to a system in which patients would be paid true value for the work they do, charged for the services they receive, and taxed on the profit, just like the rest of us. There are many practical difficulties in the way however." Vail notes that in most public mental hospitals, patients perform menial tasks, necessary to the functioning of the institution, receiving token compensation or no compensation at all. See also Bartlett, *Institutional Peonage*, *ATLANTIC MONTHLY* (July 1964). The importance of personal possessions as a means of combatting institutional neurosis and thus helping in the therapeutic process is discussed in R. BARTON, *INSTITUTIONAL NEUROSIS* 49-50 (2d ed. 1966); cf. E. GOFFMAN, *ASYLUMS* 19 (1961).

81. This institution operates on a bedrock of primitive necessity. Discussions at general staff meetings focus upon such topics as the quality of food, fire hazards, providing ash trays, and getting enough patient-workers for the laundry. These topics may appear trivial to the outsider and may reinforce his conception of the state hospital as custodial in character, but in fact they reflect the realities of a daily struggle to keep patients housed, clothed, and fed.

While we did not study the bureaucratic apparatus tying hospital to state capital, we could not be there without becoming aware of some consequences of this political link for ward personnel. "Springfield" hovers in the air, the mysterious source of the means for survival, frustration and even punishment. Requisitions disappear into an administrative maze leading to Springfield. The lack of understanding of and control over this maze engenders a sense of hopelessness among the personnel: "Nothing can be done about it" becomes a familiar refrain while they "make do" with what is actually available.

A. STRAUSS, L. SCHATZMAN, R. BUCHER, D. EHRLICH & M. SABSHIR, *PSYCHIATRIC IDEOLOGIES AND INSTITUTIONS* 99 (1964); see Arens, *supra* note 79, at 53-54, 59-60.

82. The report of the Joint Commission on Mental Illness and Health notes a general shortage of psychiatrists and mental health professionals aggravated by the fact that the vast majority of psychiatrists go into private practice or devote a large part of their time

ment, moreover, could ultimately lead to a further appropriate reform—separation of the custodial and therapeutic functions.

In today's "total institutions"⁸³ for civil detention a single administrative system makes the decisions concerning both therapy and custodial administration. Yet the two functions are different and will often conflict. Psychiatrists who choose their profession because of an interest in providing therapy find themselves forced to be concerned with administrative supervision, custodial discipline, and security, to say nothing of effective public relations and lobbying to secure adequate funds for the decent administration of their institutions. Many of the ablest young psychiatrists soon leave such institutions because of their unwillingness to serve as custodians.⁸⁴ Those who stay are faced with the unhappy necessity of sacrificing the therapeutic needs of the individual patient in the interest of custodial efficiency and institutional security, so as not to jeopardize the position of the entire institution, and thus its other inmates, by unfavorable publicity. The conflict of purposes is likely to lead therapist-administrators to rationalize measures adopted for custodial convenience as intended for therapeutic purposes.⁸⁵ Since measures can be justified as treatment which could not be justified if imposed for reasons of custodial discipline, the confusion of therapeutic and custodial aims may be seriously unfair and even counter-therapeutic to patient-inmates.⁸⁶ Thus it would seem to be in the interest of both fair administration and effective therapy that administrative decision-making be separated from therapeutic judgments. The logical means of achieving such separation would seem to be the divorce of custodial administration from therapeutic responsibilities.⁸⁷ Adequately compensating the patient and then charging

to private practice, ACTION FOR MENTAL HEALTH 146-55. While economic considerations are no doubt involved, Goffman reports that "In many mental hospitals there is a record of disgruntled psychiatrists asserting they are leaving so they can do psychotherapy." E. GOFFMAN, ASYLUMS 92 (1961).

83. The phrase is Goffman's: "Their encompassing or total character is symbolized by the barrier to social intercourse with the outside and to departure . . . such as locked doors, high walls, barbed wire, cliffs, water, forests, or moors." *Id.* 4.

84. *Id.* 92.

85. D. VAIL, *supra* note 74, at 91, cites an example from a Minnesota manual of procedures for patients in institutions for the mentally retarded. A policy bars furloughs for children to visit their families at Christmas because of uncertainty of the weather which might lead to the children's "being disappointed," the danger of contagious diseases, and "staffing problems." As Vail notes: "What is so painfully obvious, of course, is that the procedure is devised for the convenience of the staff." *Id.* Vail adds, however, that the manual is now discarded.

86. See ACTION FOR MENTAL HEALTH 175, quoting M. SCHWARTZ *et al.*, NEW PERSPECTIVES ON MENTAL PATIENT CARE; *The Case of Bernard Goldfine, Transcript of Habeas Corpus Hearing* in KATZ, GOLDSTEIN & DERSHOWITZ, 687-93.

87. Szasz has recommended the creation of ". . . a corps of lawyers and psychiatrists

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him for therapeutic services would make such a divorce a more practical possibility.

The separation of custodial responsibility from therapeutic function would make it possible for professional therapists to commit themselves completely to the personal interests and needs of their patients, and to develop relationships with them untainted by ambivalence arising from conflicting obligations.⁸⁸ Physicians would thus be able to function in the role for which the training and values of their discipline have best fitted them. The isolation of the therapeutic function would make it easier for the therapist to make recommendations for treatment, supervision, and release solely in terms of what is in the patient's interest, rather than in terms of the compromise product of patient needs and institutional requirements.⁸⁹ The role of the therapist as agent and advocate of the patient, together with a power in the patient to select the therapist of his choice, would provide the patient with a greater degree of control over his institutional fate and might serve to encourage the development of responsible participation by the patient in his therapeutic regime.⁹⁰

Finally, the separation of therapeutic needs from institutional con-

... (who) would have a "watch dog" function [i]n the democratic tradition of checks and balances." They would not be part of the State Mental Hospital System. *Hearing on Constitutional Rights of the Mentally Ill, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. 258 (1961).

88. Conflicts between the therapeutic ideal of the mental health professions and the custodial actuality tend to create psychological discomfort. Unable to change the actualities, the staff member may leave the institution for another job where such discomfort can be avoided, or he may change his beliefs and understanding of the institutional conditions. See L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 1-4, 94-95 (1957). Thus one effect of the conflict between professional ideals and administrative realities may be to render administrative personnel less fit psychologically to perform treatment in accordance with the ideals of their profession. Their psychological need for a mental callus, desensitizing them to the gap between their professional ideals and the practices of the institutions they are administering, may explain how the deplorable conditions in many mental hospitals can continue to exist.

89. Since continued detention may be required for reasons other than therapy, of course, the therapist cannot have complete power of decision over institutional policies relating to the disposition and treatment of his patient. Social and institutional values must also be recognized and provided for. Thus, in some cases, it would seem necessary for the institution to reject or modify the therapist's proposals for treatment or disposition of his patients. Such decisions would still have to be made by the institutional official with ultimate administrative responsibility for the operation and functioning of the institutions. But this decision, essentially administrative or quasi-judicial in nature, can be better made where the needs and interests of the patient are unambiguously presented.

90. The patient-centered system, though aware of the patient's weaknesses, places emphasis on the more positive features of his personality. He is expected to be an active participant in his treatment program and, at some point to assume his share of responsibility for decisions affecting him.

Appleby, Smith, Ellis & Henry, *Institution and Patient Centered Mental Hospitals: A Comparative Analysis of Polar Types*, in *THE SOCIOLOGY OF MENTAL DISORDERS* 212, 216 (K. Weinberg ed. 1967). See generally R. RUBINSTEIN & H. LASSWELL, *THE SHARING OF POWER IN A PSYCHIATRIC HOSPITAL* (1966).

siderations would make it possible for more traditional standards of judicial review of administrative decisions to be applied by courts in reviewing the appropriateness of institutional decisions concerning patients.⁹¹ Specifically and most important, decisions on the appropriateness of the release of patient-inmates could be made on the basis of the recommendations of the therapist-advocate counterbalanced by the institutional superintendent's concern to protect society from dangerous persons. Since, in fact, the issues and interests bearing upon decisions to release or retain are inherently adversarial in nature,⁹² explicit recognition of this fact would sharpen the decisional process and make it more responsive to the issues involved.

Given these potential benefits derivable from a system of paying compensation to those deprived of their liberty by civil restraints, several important questions remain to be answered.

1. What categories of persons will be entitled to compensation?
2. How will the adequacy of the compensation paid be determined?
3. How will payments be administered, and what will be done with funds accruing to persons incompetent to handle their own financial affairs?

Very briefly, it would seem that all persons civilly committed, whether treatable or not, ought to be entitled to compensation. Perhaps compensation should be denied to persons committed following an acquittal by reason of insanity, because of the danger that courts and juries might tend to reject an insanity defense in order to avoid compensating the defendant during his incarceration. A better alternative would be to permit a criminal defendant pleading insanity to waive his right to compensation for a period of time equal to the minimum term he would be required to serve if convicted of the crime.

91. *Cf. Rouse v. Cameron*, 373 F.2d 451, 456 n.22 (D.C. Cir. 1967), suggesting the need for administrative procedures for considering complaints alleging lack of treatment, and suggesting the possibility that the absence of "adequate and available" administrative procedures might be argued to bring into play doctrines of primary jurisdiction and exhaustion of remedies. But effective administrative procedures would seem to be impossible so long as the needs of the patient and the operational demands of the institution are not separately evaluated and are not even seen to be at times in conflict.

92. While not all decisions involving treatment and disposition of inmates raise adversarial problems, some do, *i.e.*, those such as the decision to grant privileges or to release the inmate. The inmate's interest in freedom as soon as he is able to benefit by it must necessarily be set against the risk that if released he may cause injury to others and in the process damage the reputation and political position of the institution and its staff. The comparative risks from detaining an inmate too long as opposed to releasing him too soon suggest that administrators are likely to be overly cautious. *Cf. Schwartz, et al.*, quoted in *ACTION FOR MENTAL HEALTH* 174-75; A. GOLDSTEIN, *THE INSANITY DEFENSE* 152-53 (1967). *But see Hearings on Constitutional Rights of the Mentally Ill*, *supra* note 87 (Guttmacher testimony).

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Apart from this limited category, all persons civilly committed, simply because their liberty and dignity are being taken for the public benefit, should receive adequate compensation for such deprivation.

Adequate compensation requires, at a minimum, periodic payments providing the inmate with funds sufficient to support his dependents, if any, to purchase amenities and even some luxuries, to pay for psychiatric help and therapy if he is treatable, and to save funds to provide him with some financial stake upon his release from confinement if he is cured. The difficult question is whether payments should be uniform for all those compensated, or whether variable amounts—reflecting both the special needs and special losses of particular inmates—should be paid. To the extent that affirmation of the dignity and human worth of the inmate is the primary purpose of the compensation, uniformity would seem to be required. Clearly one man's liberty, as such, is worth as much as any other man's. To the extent that payments are designed to compensate for the economic deprivations of confinement, however, a measure such as that employed in wrongful death actions might seem appropriate. Even if a doctor were not paid the full amount of his lost income, his family should probably be entitled to receive more than the slum dweller's would. Perhaps a basic rate of compensation, sufficient to cover the needs of most inmates and their families, could be made adjustable in special cases to meet unusual costs of treatment or support of dependents.

Compensation paid to anyone adjudicated an incompetent⁹³ could be administered by a commission established by the legislature or a court appointed guardianship committee required to make periodic reports to the court and to the guardian or nearest relative of the inmate. It would seem to be appropriate to give such guardian or relative standing to challenge dispositions of the funds paid, but in administering the fund the primary factor should be the best interests of the inmate. Of course, if compensation is to be meaningful the commission or trustee administering the fund must be completely independent of the administration of the institution to which the individual is committed.

The further question arises whether a system of providing compensation to persons who are civilly committed is consistent with

93. A determination of incompetency should not, however, result automatically from a determination to commit. F. LINDMAN & D. MCINTYRE, *supra* note 3, at 228, recommend that determinations of capacity to handle one's affairs be dissociated from the question of need for hospital treatment.

development of the unitary system of preventive and rehabilitative measures advocated earlier. The danger is that if compensation is required for civil commitments but not for penal commitments, administrators charged with initiating such commitments will wait until the dangerous person commits an unlawful act and then prosecute for the crime. Legislatures may also be tempted to recast so-called civil measures such as juvenile programs and narcotic addiction commitments as penal measures in order to avoid the obligation to provide compensation.⁹⁴ These possibilities suggest that implementation of a system of compensation for confinement of the innocently dangerous must be accompanied by liberalization of current standards of criminal responsibility so as to accord recognition to degrees of partial inability to conform one's behavior to the requirements of the law. The courts must refuse to allow the concept of behavior considered to be beyond the control of the actor to be narrowed and should make every effort to move in the opposite direction.

I have suggested that the ideal system of civil restraints would be one in which personal dignity is maximized by measures administered in such a way that each person subject to sanction is accorded that degree of autonomy and responsibility which his capacity for self-controlled conformity warrants. Since the aim of the law should be to strengthen the individual's capacity for self-control, we ought to avoid measures which tend to reward inability to control oneself. Compensating those who lack the ability to control their behavior while denying compensation to those who can may appear to be inconsistent with the goal of building self-control. The answer to the dilemma lies not in denying compensation to the irresponsible but in re-examining our approach to correction of the responsible.⁹⁵ The thrust of correctional procedures applicable to the responsible wrongdoer must be aimed at building his voluntary adherence to standards of conforming behavior by building his personal status and self-esteem through a system of rewards and recognition of his autonomous efforts to adhere to the

94. Of course the principles enunciated in *Robinson v. California*, 370 U.S. 660 (1962), would limit resort to penal measures in cases where the only "offense" charged was in fact a status or condition.

95. In developing the arguments for compensation of persons restrained on preventive grounds without conviction of crime, I do not mean to suggest that similar requirements of compensation should not, some day, exist for convicted criminals. Indeed, the notion of a unitary sanction system would point in that direction as would the growing recognition that social and environmental factors may impair behavioral controls in persons suffering from no mental disability. For the present, however, I am content to urge the strongest case, that those who our society detains for reasons other than their blameworthiness are entitled to compensation for their liberty.

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expectations and requirements of the law.⁹⁶ Correctional programs should provide opportunities for useful and responsible labor, and should pay compensation for such labor proportionate both to the value of the labor performed and the degree of personal autonomy which the offender has achieved. In short the deprivation of liberty and personal status with which penal correction programs begin should be only a prelude to increased opportunities open to the offender to win a return of personal status and liberty by his own efforts at self-rehabilitation. In the context of such treatment of the responsible, compensation provided to the non-responsible would appear not as a reward for irresponsibility, but as true compensation for liberty taken from individuals not yet ready to earn a return of personal status and social esteem.⁹⁷

Two final, and fundamental, difficulties with the proposals suggested must now be confronted. The first is the economic cost of an adequate system of compensation; the second is the role of the courts in imposing

96. Cf. the recommendations of the PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORTS: CORRECTIONS 9-13, 49-50 (1967).

97. Bail and the problem of pre-trial detention, although conceptually distinct from the various forms of civil detention focused upon in this article, is a striking example of an important deprivation of liberty which could and should be revolutionized by the creative use of correctional tools. In particular the false choice between complete release and complete detention which bail seems to pose should be reexamined in light of possibilities for partial restraints. There is no inherent reason why release on bail or recognition must lead to a complete hiatus in official response to an offender until he is tried and convicted. Such hiatus is a major factor in recidivism pending trial, since the very motivational and causative factors which led to the first crime may still be operating when the defendant is released promptly after arrest. And a means to break this causation seems to me available through the strategic use of correctional and defense personnel.

When a person is arrested on a serious criminal charge, he should be provided not just with the assistance of counsel but with the assistance of a defense team: an attorney, a defense probation worker, and, where it seems appropriate to the defense attorney, the aid of a psychiatrist or clinical psychologist. The defense team would consult with the defendant and develop a program of pre-trial probation, to be submitted to the trial court for approval, which would serve to keep the defendant out of trouble pending trial and which could become a demonstration of the defendant's rehabilitation potential. The defendant's obvious stake in making the program work so as to influence sentencing and correctional decisions if he is convicted should operate as a powerful motivating factor to keep him from committing further offenses. It must be conceded, however, that in some cases the defendant's record and the circumstances of the crime will suggest that he is not a fit candidate for pre-trial release. Certainly where the circumstances or the defendant's record suggest that he is suffering from a disability in the capacity to control his behavior, prompt commitment for evaluation or merely for detention would be appropriate. But in such cases, I would require the recognition that the detention is preventive and would require compensation and detention under conditions different from those to which convicted offenders are subjected. In cases where the defendant is not shown to be suffering from a disability impairing his capacity to conform to the law in the future, pretrial preventive detention should not be used as a basis for denying bail to those who are currently entitled to it.

For discussion of the problems of pre-trial detention, see generally AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PRETRIAL RELEASE (1968); Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966).

this cost. To begin with the second, it must be conceded that there is no precedent specifically authorizing—much less requiring—the courts to compel payment of compensation as a condition for the imposition of civil detention.⁹⁸ Nor is it enough simply to assert that compensation ought to be required, and that the courts should impose it because legislatures will not. The courts are hardly likely to take such a step in any immediate future. The answer instead must be that the requirement of compensation should be imposed by the courts rather than the legislatures because compensation as a requirement for the taking of liberty is inherently a judicial remedy. The function of compensation would be in large part a symbolic allocation of relative status between the . . . state and the individual. Compensation judicially imposed on constitutional grounds would enhance individual liberty and rights of personality in a manner which could not be achieved by an exercise of legislative discretion. What is involved is the relationship of individual autonomy to state necessity, and recent history suggests that the courts are more appropriate arbiters of such conflicts than the legislatures. Once a right to compensation had been recognized, its implementation could properly be left to legislatures to fix specific procedures for compensation.

As to the cost, obviously what has been proposed would be extremely expensive. Yet in another sense compensation involves not additional costs for civil commitment but a reallocation of costs which are already being borne. For loss of liberty is costly to the loser in many ways, economic as well as intangible. Transferring the economic costs from the inmate and his family to society as a whole is just a shift in costs rather than an increase. The advantage of such a shift is that it makes the actual costs more visible, and by placing the costs on those whose representatives make the decision to impose them, renders it more likely that there will be an appropriate weighing of the social utility to be achieved in imposing such costs. So far as the translation of the intangible values of liberty into monetary terms is concerned, this too is worth doing if, in the process, we derive a sufficient social benefit from the translation. I have attempted to show that this would be the case, both in terms of better treatment and in maximizing the intangible

98. *But cf. Whitree v. State*, 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968), in which the court awarded damages in the amount of \$300,000 to a claimant who had been detained in Matteawan State Hospital. The court found that failure to provide adequate treatment had extended his confinement by some 12 years beyond the period in which he would have been cured and thus eligible for release if proper treatment had been provided.

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values implicit in our ideological commitment to the importance of individual freedom and dignity. Perhaps the ultimate answer to the question whether we can afford compensation was given by the Joint Commission on Mental Illness and Health in discussing the high cost of improving the treatment of the mentally ill:

An economy can afford to spend whatever it desires to spend. What society can spend (and ultimately what society should spend) depends on the value system that society holds.⁹⁹

Noting that its recommendations called for doubling or tripling expenditures for mental health, the Commission concluded:

[I]t is individually and socially important to us that as many persons as possible survive in good health as long as possible and that if they fall sick, we make every effort to restore their health. In the confidence that this is so, the healthy find a sense of security and peace of mind. We are speaking in short of faith in our fellow men. In conserving useful life, civilized man achieves his most glorious moments. It is our creed that life is sacred, that bodies should be healed when sick, and that law violators should have the opportunity to reform. Every living man has a right to be treated as a human being.¹⁰⁰

99. R. FEIN, *ECONOMICS OF MENTAL ILLNESS* 137 (1958), quoted in *ACTION FOR MENTAL HEALTH* 282.

100. *ACTION FOR MENTAL HEALTH* 283.

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