# COMMENT

# USING PAROLE TO CONSTITUTIONALLY RECONCILE THE CRIMINAL PUNISHMENT GOALS OF DESERT AND INCAPACITATION

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## INTRODUCTION

Many criminal justice systems incapacitate *potentially* dangerous offenders following the completion of their deserved sentences. Modes of incapacitation include lengthy prison sentences, recidivist statutes, and the post-sentence commitment of sexually violent predators. These efforts, however, are unjust in that they imprison many offenders long after their so-called "debt to society" has been paid and their dangerousness has passed. A just society should imprison more accurately.

Professor Paul H. Robinson[1] legitimately criticizes the use of the criminal justice system for incapacitating dangerous criminals beyond their deserved sentences.[2] He argues that incapacitation is wholly incompatible with retribution or "just deserts."[3] Therefore, he proposes first, tying prison sentence length to desert and second, using a post-sentence civil commitment system to incapacitate dangerous criminals.[4]

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[2] *See* Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429 (2001) ("[T]he trend of the last decade—the shifting of the criminal justice system toward the detention of dangerous offenders—is a move in the wrong direction. The difficulty lies not in the laudable attempt to prevent future crime but rather in the use of the criminal justice system as the vehicle to achieve that goal.").

[3] *Id.* at 1440; *see also* IMMANUEL KANT, THE PHILOSOPHY OF LAW 195 (W. Hastie trans., Augustus M. Kelley Publishers 1974) (1887) (explaining that punishment may never be justified solely by society's aims; instead, that it may "be imposed only because the individual on whom it is inflicted *has committed a Crime*"); Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 179 (Ferdinand Schoeman ed., 1987) ("*Retributivism* is the view that punishment is justified by the moral culpability of those who receive it. A retributivist punishes because, and only because, the offender deserves it.").

[4] *See* Robinson, *supra* note 2, at 1454 ("[T]he conflict between justice and prevention can be avoided by simply segregating the two functions into two systems.").

Professor Robinson's reliance on dangerousness as the sole criteria for civil commitment, however, raises many constitutional questions and is socially unpalatable. It is possible, instead, to use the existing parole structure to effectively and constitutionally achieve Professor Robinson's proposed goal of segregating desert from incapacitation. Following the portion of the sentence which an offender *deserves*, parole should be utilized to regularly assess the offender and effectuate his release from prison when he is no longer dangerous.

Part I of this article examines Professor Robinson's proposed post-sentence civil commitment system for incapacitating dangerous offenders. Part II addresses the constitutionality of this proposed commitment based on dangerousness alone. Part III proposes parole, rather than civil commitment, as a system to reconcile the justifications of incapacitation and desert. Part IV argues that a parole system, if properly utilized with a "just deserts" sentencing approach, most effectively and accurately incapacitates dangerous criminals.

## I. PUNISHING DANGEROUSNESS

### A. *The Conflict Between Punishment and Incapacitation*

Professor Robinson first questions the legitimacy of incapacitation as a justification for punishment: "[T]he use of the criminal justice system as the primary mechanism for preventing future crimes seriously perverts the goals of our institutions of justice."[5] He emphasizes the incompatibility of dangerousness, which is a "prediction of a future wrong," and desert, which "arises from a past wrong."[6] For example, a mentally ill offender is dangerous, but he may not deserve

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[5] *Id.* at 1434. Other commentators, however, justify incapacitation as achieving the utilitarian goal of specific prevention. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03[B][2] (2d ed. 1995) (describing incapacitation as one of the forms of utilitarianism in criminal law); Kent Greenawalt, *Punishment*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1336, 1340–41 (Sanford H. Kadish ed., 1983) (describing incapacitation as a generally regarded utilitarian theory of punishment intended to put "criminals out of general circulation"). Some commentators employ the label "consequentialism" instead of "utilitarianism." *See* Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 444 (discussing consequentialism as compared to retributivism).

However, some commentators distinguish punishment aims from sentencing aims. *See* Ewing v. California, 538 U.S. 11, 25 (2003) ("A *sentence* can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.") (emphasis added); ANDREW ASHWORTH, *Sentencing Aims, Principles, and Policies*, *in* SENTENCING AND CRIMINAL JUSTICE 57, 67 (2d ed. 1995) (distinguishing punishment from sentencing and placing incapacitation in the latter category).

[6] Robinson, *supra* note 2, at 1438; *see also id.* at 1441 ("The point is that the traditional principles of incapacitation and desert conflict; they inevitably distribute liability and punishment differently.").

criminal blame.[7] A system predicated on incapacitation, however, would imprison a mentally ill offender for his dangerousness despite his blamelessness (lack of desert).

Currently, the American legal system incapacitates mentally ill offenders by committing them to mental hospitals. However, such civil commitment is not the exclusive manner of incapacitation in our legal system. Instead, the two systems overlap; incapacitation occurs in both prison and mental hospitals because offenders in either system are separated from society. Depicted as a Venn diagram, the mental hospital would fit only into the non-overlapping section of the circle representing pure incapacitation.[8]

In addition, Professor Robinson argues that a system of incapacitation would set prison terms according to a prediction of future criminality.[9] Such a system, he explains, is "offensive to a system of just punishment. A person does not deserve more punishment for an offense because he has a poor employment history, is young, or has no father in the household."[10]

A system of incapacitation is incompatible with a *pure* system of desert-based (retributive) punishment. Yet, this does not prove that desert-based punishment is exclusively valid, or that incapacitation

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[7] *Id.* at 1438.

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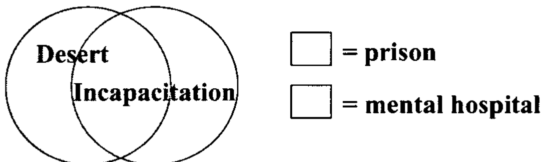


[9] Robinson, *supra* note 2, at 1439.

[10] *Id.* at 1440. In fact, Virginia uses just such a system. Sentencing guideline worksheets for rape and other forms of sexual assault include the offender's age, education, and employment in computing the offender's sentence. *See, e.g.*, Va. Criminal Sentencing Comm'n, Rape Sentencing Guidelines Worksheet (July 1, 2002), http://www.vcsc.state.va.us/worksheets/worksheets2002/Rape2002.pdf (illustrating how to compute the sentencing "score" for a rape conviction). Sentencing factors for fraud, larceny, Schedule I & II drugs, and other drugs include the offender's gender, age, employment, and marital status. *See, e.g.*, Va. Criminal Sentencing Comm'n, Fraud Sentencing Guidelines Worksheet (July 1, 2004), http://www.vcsc.state.va.us/worksheet_2004/Fraud%20Wkst%20.pdf (computing the sentencing "score" for a fraud conviction).

*See also* VA. CODE ANN. § 19.2-298.01 (2004) (implementing the discretionary use of "sentencing guidelines worksheets"); BRIAN J. OSTROM ET AL., OFFENDER RISK ASSESSMENT IN VIRGINIA 25 (2002), http://www.vcsc.state.va.us/risk_off_rpt.pdf (discussing the development of Virginia's risk assessment instrument based on a study that identified specific factors correlated with repeat offending, including juvenile behavior and delinquency); Emily Bazelon, *Sentencing by the Numbers*, N.Y. TIMES MAG., Jan. 2, 2005, at 18 (describing Virginia's 2002 sentencing laws, which tie the length of sentence to a prediction of future dangerousness). In response to Virginia's sentencing laws, Professor Robinson remarked, "[i]f you're punishing people because of a bunch of factors that have nothing to do with blame, well, you're not in the business of doing justice anymore." *Id.*

cannot exist as a justification for punishment. Instead, it simply reaffirms their concomitant existence.

### B. *Segregating Incapacitation*

In order to segregate punishment from incapacitation, Professor Robinson proposes a post-sentence civil commitment system.[11] If an offender is still dangerous following his sentence, he would be committed to a facility to hold him until he is deemed safe to rejoin society. He remains in confinement, albeit in the (theoretically) less punitive setting provided by the civil commitment system. In addition, the periodic review mechanism traditionally built into the civil commitment system can ensure a "sentence" of duration determined by dangerousness.[12] This flexible duration ensures the greater goal: following his deserved imprisonment, the offender should be incapacitated only as long as necessary to protect society.

## II. COMMITMENT FOR DANGEROUSNESS: CONSTITUTIONALITY

The state is unarguably empowered to utilize three manners of civil incapacitation: civil commitment, commitment following acquittal by reason of insanity, and sexually violent predator commitment.[13] Each of the these typically presupposes some type of mental illness or defect before permitting confinement. Professor Robinson, however, proposes the civil commitment of dangerous individuals. Therefore, jurisprudence surrounding these three domains must be examined for applicability to the civil commitment of non-mentally ill, but dan-

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[11] Robinson, *supra* note 2, at 1454. Earlier commentators have also argued for the detention of the dangerous. *See, e.g.*, Ledger Wood, *Responsibility and Punishment*, 28 J. AM. INST. CRIM. L. & CRIMINOLOGY 630, 639 (1938) ("Society has a right to isolate, not only an actual criminal, but also, anyone who can be conclusively shown to be a potential criminal.").

[12] *But cf.* Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1026 n.5 (2002) (responding to Professor Robinson's proposal by stating that such a scheme would not lead to earlier release than current prison terms and that civil commitment is not likely to be less punitive than prison). Furthermore, Professor Morse supposes that if commitment for dangerousness alone is acceptable, it will be generally used, with no prior conviction or sentence required. *See id.* ("If the civil commitment is preventive confinement based on future dangerousness alone . . . there is no need to rely on prior conduct at all.").

[13] Many cases also speak to the procedural requirements of such commitment schemes. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 499–500 (1980) (requiring a hearing, though not necessarily judicial, and counsel, though not necessarily legal, before transferring a prisoner to a mental hospital); Parham v. J.R., 442 U.S. 584, 604 (1979) (ruling that a hearing is not necessary to involuntarily commit a minor to a mental hospital); Addington v. Texas, 441 U.S. 418, 433 (1979) (requiring a burden of proof "greater than the preponderance-of-the-evidence" to involuntarily commit an individual to a state mental hospital). Because Professor Robinson does not address the procedural aspects of his scheme, it is unnecessary to analyze these cases. Presumably, the commitment of NMID individuals would conform to such precedent.

gerous individuals (henceforth, "NMID"). Such a commitment scheme, while arguably desirable, presents a constitutional challenge.

### A. *Civil Commitment*

Kenneth Donaldson was committed to a Florida State Hospital in 1957 and held for fifteen years.[14] He had never been a danger to himself or others.[15] The Supreme Court, in *O'Connor v. Donaldson*, declared that a state may not "constitutionally confine . . . a nondangerous individual" on the grounds of his mental illness alone.[16] The civil confinement of the non-dangerous mentally ill is thus prohibited. The instant issue, the commitment of non-mentally ill, but dangerous individuals, however, is the opposite of the class decided upon in *Donaldson.*[17]

Four years after its decision in *Donaldson*, the Court announced in *Addington v. Texas* that the burden of proof in civil commitment proceedings must be higher than a preponderance of the evidence.[18] The case confined its discussion to the burden of proof;[19] *Addington* never stated the constitutionally required criteria for civil commitment. Nonetheless, the decision has frequently been interpreted to

[14] O'Connor v. Donaldson, 422 U.S. 563, 564 (1975).

[15] *Id.* at 567.

[16] *Id.* at 576.

[17] Because *O'Connor v. Donaldson* decided the case of a mentally ill individual, it demonstrates only that danger is required for confinement. Though there is no explicit holding, the Court has logically stated that *Donaldson* "held . . . it was unconstitutional for a State to continue to confine a harmless, mentally ill person." Foucha v. Louisiana, 504 U.S. 71, 77 (1992); *see also* Zinermon v. Burch, 494 U.S. 113, 134 (1990) (drawing the same conclusion as *Foucha*); Barefoot v. Estelle, 463 U.S. 880, 898 (1983) (drawing the same conclusion as *Foucha*).

*Donaldson* did not present the opportunity to rule on the commitment of a non-mentally ill, but dangerous individual, as Professor Robinson proposes. *Donaldson* has, however, been more recently interpreted to require *both* mental illness and dangerousness. *See, e.g.*, Cooper v. Oklahoma, 517 U.S. 348, 368 (1996) ("[O]ur decision in *Donaldson* makes clear that due process requires at a minimum a showing that the person is mentally ill and either poses a danger to himself or others or is incapable of 'surviving safely in freedom.'" (citing *Donaldson*, 422 U.S. at 573–76)).

If this latter interpretation of *Donaldson* is correct—that both mental illness and dangerousness are required to hold an individual in the civil context—then *Donaldson* represents an outright dismissal of post-sentence civil commitment for dangerousness alone.

Federal appellate decisions since *Cooper*, however, have generally followed *Donaldson*'s original meaning, not the interpretation in *Cooper*. *See, e.g.*, Kerman v. City of New York, 374 F.3d 93, 110–11 (2d Cir. 2004) (relying on *Donaldson* for the proposition that the commitment of a non-dangerous individual is prohibited); Scott v. Hern, 216 F.3d 897, 910 (10th Cir. 2000) ("The Due Process Clause prohibits a state from involuntarily committing an individual unless he is a danger to himself or others."). *But see* Jensen v. Lane County, 312 F.3d 1145, 1147 (9th Cir. 2002) (interpreting *Donaldson* according to the *Cooper* understanding of its holding).

[18] 441 U.S. 418, 433 (1979).

[19] *Id.* at 419–20 ("The question in this case is what standard of proof is required . . . in a civil proceeding . . . to commit an individual involuntarily . . . to a state mental hospital.").

require mental illness and dangerousness as constitutional criteria for commitment.[20]

The Court has not had an opportunity to address the case of a civil commitment of an NMID offender. This follows logically because a non-mentally ill individual would likely be immediately released from a mental hospital setting. If, however, the *Donaldson* and *Addington* decisions are interpreted as criteria-defining cases, then the Court need not discover an opportunity to address such a case. The decisions' criteria for civil commitment, if they may validly be read as such, require both mental illness and danger.[21] Thus, Professor Robinson's proposed civil commitment of NMID individuals would be unconstitutional. However, since this author argues that they are not criteria-defining cases (despite their common interpretation as such), further constitutional jurisprudence must be examined.

### *B. Commitment Following Acquittal by Reason of Insanity*

A state has an obvious interest in imprisoning dangerous criminal offenders. Acquittals by reason of insanity, however, present a challenging scenario. The offender is not imprisoned;[22] instead, state

[20] *See* Demore v. Kim, 538 U.S. 510, 550 (2003) (Souter, J., dissenting) ("In *Addington v. Texas* we held that a State could not civilly commit the mentally ill without showing by 'clear and convincing evidence' that the person was dangerous to others.") (citations omitted); *Foucha*, 504 U.S. at 86 (citing *Addington* for the proposition that "in civil commitment proceedings the State must establish the grounds of insanity and dangerousness permitting confinement by clear and convincing evidence"); Jones v. United States, 463 U.S. 354, 362 (1983) ("[In *Addington*] the Court held that the Due Process Clause requires the Government in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous.").

Similar to *Donaldson*, described *supra* note 17, if *Addington* mandates mental illness and dangerousness as criteria for civil commitment, then the decision stands as a prohibition of post-sentence civil commitment for dangerousness alone. The issue of civil commitment criteria was not, however, before the Court, nor is there a clear holding in the opinion. Furthermore, *Addington* has not consistently been interpreted as a criteria-mandating decision. *See* Riggins v. Nevada, 504 U.S. 127, 135 (1992) (using *Addington* for the proposition that the "Due Process Clause *allows* civil commitment of individuals shown by clear and convincing evidence to be mentally ill and dangerous") (emphasis added); United States v. Salerno, 481 U.S. 739, 748–49 (1987) (citing *Addington* for the proposition that "the government *may* detain mentally unstable individuals who present a danger to the public") (emphasis added).

[21] State statutes regarding civil commitment criteria uniformly require both mental illness and dangerousness. *See, e.g.*, CAL. WELF. & INST. CODE § 5300 (West 1998) (requiring mental illness and danger for ongoing confinement in a mental hospital); OR. REV. STAT § 426.005 (2005) (requiring chronic mental illness and danger to self or others).

[22] *See, e.g.*, Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1137 (1985) (explaining that the insane "cannot fairly be blamed" because they lack rationality). *But see Foucha*, 504 U.S. at 110 (Thomas, J., dissenting) (arguing for the confinement of insanity acquittees even after they have regained their sanity).

statutes require immediate commitment to a mental hospital.[23] In many cases, the criminally insane offender continues to satisfy the traditional civil commitment criteria: mental illness and dangerousness. However, the dichotomy of the circumstances—that insanity is a *retrospective* examination of the offender's sanity at the time the crime was committed,[24] but commitment is a *present* evaluation of mental competency—presents a scenario very similar to the instant issue: the state's interest in holding non-mentally ill, yet dangerous offenders.

From an equal protection viewpoint,[25] one might expect the insanity-acquittees to be in the same position as ordinary citizens. Neither group has been adjudicated guilty, nor sentenced. Thus, one might expect that their commitment should be subject to the same criteria as civil committees, which, according to the standards apparently set forth in *Donaldson* and *Addington*, require both mental illness and dangerousness.[26] In fact, the Court has repeatedly distinguished these two classes.[27] Therefore, because post-insanity acquittal commitment may permit the incapacitation of NMID individuals, its jurisprudence must be considered.

In *Jones v. United States*, the Court examined the case of a shoplifter acquitted by reason of insanity.[28] He was committed to a mental

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[23] *See, e.g.*, ALA. CODE § 22-52-33 (1997) (requiring petition for continuing commitment following an adjudication of "not guilty by reason of insanity"); ALASKA STAT. § 12.47.090(b) (2004) (mandating immediate commitment following a verdict of not guilty by reason of insanity); OHIO REV. CODE ANN. § 2945.40 (West 2005) (requiring the trial court, following an insanity verdict, to conduct a hearing to determine if the person is subject to commitment). *See generally* Samuel Jan Brakel, *After the Verdict: Dispositional Decisions Regarding Criminal Defendants Acquitted by Reason of Insanity*, 37 DEPAUL L. REV. 181, 184 n.11 (1988) (finding ten states and the District of Columbia with such commitment processes).

[24] *See generally* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 7.1 (2d ed. 2003) (surveying the insanity defense); 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 173 (1984) (providing an overview of the insanity defense).

[25] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[26] *See supra* Part II.A.

[27] *See, e.g.*, *Foucha*, 504 U.S. at 94 (Kennedy, J., dissenting) (arguing that in "conflat[ing] the standards for civil and criminal commitment," the majority inappropriately applies *Donaldson* and *Addington* to a criminal context); *Id.* at 108 (Thomas, J., dissenting) ("Unlike civil committees, who have *not* been found to have harmed society, insanity acquittees have been found in a judicial proceeding to have committed a criminal act."); Jones v. United States, 463 U.S. 354, 367 (1983) (asserting that the petitioner, having been acquitted by reason of insanity, could not rely on *Addington* because of the "important differences between the class of potential civil-commitment candidates and the class of insanity acquittees"). *But see Foucha*, 504 U.S. at 84–85 (White, J., minority portion of the opinion) (arguing that by the Equal Protection Clause, now sane, recovered insanity acquittees should be treated the same as civil committees). Justice White attracted only three additional votes for this proposition.

[28] 463 U.S. 354 (1983).

hospital and remained there for almost ten years.[29] The Court decided the question of whether Jones "must be released because he ha[d] been hospitalized for a period longer than he might have served in prison had he been convicted."[30] The Court declined to require his release.[31]

The Court went on to declare that an offender may be held in "a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society."[32] While such a holding prohibits the commitment of NMID individuals, this was neither the posture before the Court, nor the question presented. Justice Thomas later remarked: "We specifically noted in *Jones* that *no* issue regarding the standards for the release of insanity acquittees was before us."[33]

Nearly a decade later, the Court examined the case of *Foucha v. Louisiana.*[34] Terry Foucha was charged with burglary and illegal discharge of a firearm, found not guilty by reason of insanity, and committed to a mental hospital.[35] Four years later, the hospital recommended his release, seeing no sign of mental illness since his admission.[36] A trial court ruled, however, that Foucha should remain in the mental hospital due to his danger to himself and others, despite his sanity.[37] The Louisiana Supreme Court affirmed, distinguishing *Jones* and permitting commitment "based on dangerousness alone."[38]

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[29] *See* RALPH SLOVENKO, LAW IN PSYCHIATRY 943 (2002) (examining the case of Michael Jones and its outcome); *see also Consumer Finds Services Helpful: Road to Stability Bumpy but Successful*, CONNECTING (D.C. Department of Mental Health, Washington, D.C.), Feb. 2004, at 2, http://dmh.dc.gov/dmh/lib/dmh/pdf/Jan_Feb_04_Newsletter.pdf (profiling Michael Jones, who, as of 2004, was still receiving mental health services from Washington, D.C., almost thirty years after his insanity plea); Jamie Talan, *Trapped in System: 20 Years in Psych Facilities Follow Teen Insanity Plea*, NEWSDAY, Aug. 20, 2001, at A5 (recounting another nearly twenty year commitment to a mental hospital following an insanity plea, as a seventeen-year-old, after robbing a thirteen-year-old of two dollars).

[30] *Jones*, 463 U.S. at 356.

[31] *Id.* at 370. *Jones* was decided on the heels of John Hinckley's insanity acquittal following his attempted assassination of then-President Reagan. The *Jones* decision may have been an attempt to assuage the public's outcry over his acquittal. *See* Editorial, *Instead, Prove Insanity*, N.Y. TIMES, Jul. 6, 1983, at A22 (suggesting that the *Jones* decision may help to quell the public protest); *see also Foucha*, 504 U.S. at 111 (Thomas, J., dissenting) ("Surely, the citizenry would not long tolerate the insanity defense if a serial killer who convinces a jury that he is . . . insan[e] is returned to the streets immediately after trial . . . .").

[32] *Jones*, 463 U.S. at 370.

[33] *Foucha*, 504 U.S. at 120 (Thomas, J., dissenting) (citing *Jones*, 463 U.S. at 363 n.11).

[34] 504 U.S. 71 (1992).

[35] *Id.* at 73–74.

[36] *Id.* at 74.

[37] *Id.* at 75.

[38] *Id.*

The United States Supreme Court reversed, relying on *O'Connor v. Donaldson*, *Addington v. Texas*, and *Jones v. United States* for the proposition that commitment requires both mental illness and dangerousness.[39] The Court further distinguished *United States v. Salerno*, which permits confinement for dangerousness alone, though only for the limited time prior to trial.[40] Because Foucha was not mentally ill, even though he was dangerous, the Court ordered his release.[41]

Aside from the Court's immediate order pertaining to Mr. Foucha, the decision left no clear holding. Justice O'Connor, while concurring with the majority's decision in this case, wrote separately to assert that a state may be able to confine an NMID insanity acquittee if "the nature and duration of detention" were appropriately "tailored."[42] More "narrowly drawn laws," Justice O'Connor argued, may permit the incapacitation of an NMID insanity acquittee.[43]

All nine *Foucha* justices would prohibit post-sentence *punitive* incarceration.[44] The majority, while forbidding confinement immediately following trial for dangerousness alone, added, directly on point to the instant issue, "[t]he same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system . . . ."[45] Justice Thomas, in his dissent, specifically addressed post-sentence confinement:

> To acknowledge, as I do, that it is constitutionally permissible for a State to provide for the continued confinement of an insanity acquittee who remains dangerous is obviously quite different than to assert that the State is allowed to confine *anyone* who is dangerous for as long as it wishes.[46]

Nonetheless, the four dissenting Justices, who would permit the state's confinement of a non-mentally ill insanity acquittee on the basis of his dangerousness alone,[47] and Justice O'Connor, who would have presumably joined their side in a case presenting a narrowly tai-

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39 *Id.* at 75–77.

40 *Id.* at 80–83; *see* United States v. Salerno, 481 U.S. 739, 747 (1987) (emphasizing that the duration of confinement is restricted by the "stringent time limitations of the Speedy Trial Act").

41 *Foucha*, 504 U.S. at 86.

42 *Id.* at 87–88 (O'Connor, J., concurring); *see also* Jackson v. Indiana, 406 U.S. 715, 738 (1972) ("[D]ue process requires that the *nature and duration* of commitment bear some reasonable relation to the purpose for which the individual is committed.") (emphasis added).

43 *Foucha*, 504 U.S. at 87 (O'Connor, J., concurring).

44 *Id.* at 80, 82–83, 98–99, 101, 122 n.16.

45 *Id.* at 82–83.

46 *Id.* at 122 n.16 (Thomas, J., dissenting).

47 Chief Justice Rehnquist and Justice Scalia joined Justice Thomas's dissent. *Id.* at 102. Justice Kennedy wrote a separate dissenting opinion which Chief Justice Rehnquist also joined. *Id.* at 90–102.

lored confinement statute, could be expected to distinguish post-sentence *civil* commitment. A clue as to their jurisprudence lies in the majority opinion of *Kansas v. Hendricks*, where the same five justices ruled on the post-sentence commitment of sexually violent predators.[48]

### C. *Sexually Violent Predator Commitment*

To pass constitutional muster, a state's post-sentence confinement for dangerousness alone would need to resemble the constitutionally-valid post-sentence commitment of sexually violent predators ("SVP"). Since civil commitment and post-insanity acquittal cases are both useful for delineating the constitutionally mandated criteria for holding individuals outside of the traditional prison sentence setting, the Court's analysis of post-sentence SVP commitment draws heavily from *Donaldson*, *Addington*, *Jones*, and *Foucha*.

SVP statutes typically require a hearing following the expiration of an offender's prison sentences to determine if the offender represents a continuing danger.[49] If so found, the SVP is committed indefinitely, subject to periodic review.

The nature of the offender's sexual abnormality facially distinguishes SVP commitments from the issue of general commitment for dangerousness. However, since SVP commitments are designed for dangerous offenders who do not have the type of mental disease or defect generally required by civil commitment statutes,[50] they are actually rather similar. Thus, arguments concerning SVP commitments are directly relevant to the constitutionality of commitment for dangerousness alone.

In *Kansas v. Hendricks*, the Court examined and upheld the constitutionality of Kansas's SVP commitment system.[51] The Court analyzed the case in terms of *Addington* and *Foucha*, finding that Hendricks's sexual deviance met the mental illness requirement of those cases.[52]

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[48] 521 U.S. 346, 349–70 (1997).

[49] Such commitment processes exist in at least sixteen states and the District of Columbia. *See* ARIZ. REV. STAT. ANN. §§ 36–3701–36–3717 (2003); CAL. WELF. & INST. CODE §§ 6600–6605 (West 1998 & Supp. 2005); FLA. STAT. ANN. §§ 394.910–.918 (West 2002); IOWA CODE ANN. § 901A.1 (West 2003); KAN. STAT. ANN. § 59–29a01 (1994); MINN. STAT. ANN. §§ 253B.185–253B.19 (2003); TEX. HEALTH & SAFETY CODE ANN. §§ 841.001–.103 (Vernon 2003); WASH. REV. CODE ANN. §§ 71.09.010–71.09.902 (2002); WIS. STAT. ANN. § 980.06 (West 1998).

[50] *See* Steven J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 84–85 (1996) (discussing the appropriate uses of the civil system as a "gap-filler" for the dangerous, though not mentally ill, in the traditional sense).

[51] 521 U.S. at 350.

[52] *Id.* at 356–59.

Thus, a casual reading of *Hendricks*, noting its mental illness requirement, would seem to bar a more general post-sentence commitment for dangerousness alone. Such a reading is supported by the Court's statement that, "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'"[53] The Court proceeded to state that Hendricks's pedophilia qualified as a mental abnormality.[54]

Despite this ostensible obstacle, a deeper analysis might reveal otherwise: any dangerous recidivist might be committed under the *Hendricks* logic.[55] The Kansas statutory definition of a mental abnormality which permits commitment is "a 'congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses....'"[56] A congenital or acquired condition, indubitably, is *any* condition (one is either born with a condition or develops it later). Likewise, cognitive and volitional capacities are *every* capacity. Kansas's SVP mental abnormality definition should therefore read, "a condition which predisposes the person to commit sexually violent offenses," or more concisely, "a predisposition to commit sexually violent offenses."

Similarly, the Kansas statute that permits the commitment of "any person... who suffers from a mental abnormality... which makes the person likely to engage in... sexual violence"[57] might read, "any person... who suffers from a predisposition to commit sexually violent offenses... which makes the person likely to engage in sexual violence," or more concisely, "any person... likely to engage in sexual violence."

The statute amounts merely to the commitment of sex crime recidivists. If this logic seems tortured, one need only look to the legislative findings: "'[A] small but extremely dangerous group of sexually violent predators exist who.... [are] likely to engage in sexually violent behavior. The legislature further finds that sexually violent

[53] *Id.* at 358 (citing Heller v. Doe, 509 U.S. 312, 323 (1993); Allen v. Illinois, 478 U.S. 364, 366 (1986); and Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 271–72 (1940)).

[54] *Hendricks*, 521 U.S. at 360.

[55] *See* Stephen J. Morse, *Bad or Mad?: Sex Offenders and Social Control*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS 165, 176 (Bruce J. Winick & John Q. LaFond eds., 2003) (explaining that although the Kansas statute upheld in *Hendricks* subjects to civil commitment sexual predators whose behavior is caused by a "*mental abnormality*," a closer look shows that "*mental abnormality*" is "simply a description of the causation of *any* behavior").

[56] *Hendricks*, 521 U.S. at 352 (quoting KAN. STAT. ANN. § 59-29a02(b) (1994)).

[57] *Id.* (quoting KAN. STAT. ANN. § 59-29a02(a) (1994)).

predators' likelihood of engaging in repeat acts of predatory sexual violence is high.'"[58]

When one views pedophiles as a class, they do not appear inherently more blameworthy or more essential to incapacitate than other specific classes of violent criminals. Recidivist murderers, for example, have no greater claim to the streets following their prison sentence than pedophiles.[59] The mental abnormality requirement, therefore, ought easily to extend from sexual recidivists to generally violent recidivists. Many, if not all, violent recidivists probably display characteristics such as "failure to conform to social norms with respect to lawful behaviors, . . . deceitfulness, . . . reckless disregard for safety of self or others[,] . . . [and] consistent irresponsibility,"[60] thereby falling into the category of mental abnormality that the psychiatric community labels Antisocial Personality Disorder ("ASPD"), if not a more serious psychiatric illness.[61]

Thus the constitutional "door" is left slightly ajar: if recidivists are classified as suffering from the "mental abnormality" of ASPD, the *Hendricks* logic may permit their commitment. The Court's majority opinion comes close to admitting this logical extension: "It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty."[62]

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[58] *Id.* at 351 (alteration in original) (quoting KAN. STAT. ANN. § 59–29a01 (1994)).

[59] Of course, recidivist murderers are not likely to see the streets again. Sexually violent predators, by contrast, may be the fortuitous beneficiaries of "improvident plea bargain[s]." *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring).

However, as Justice Kennedy points out, it is not the role of the civil commitment system "to impose punishment after the State makes an improvident plea bargain on the criminal side . . . ." *Id.*

Moreover, it is improbable that sexually violent predators are the only dangerous criminals in need of further incapacitation. A Department of Justice study that surveyed more than two-thirds of all prisoners released from prison in 1994 found that, in the three years following their release, 1.2% of murderers were re-arrested for homicide and 16.7% of murderers were re-arrested for any violent crime. *See* PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 at 9 (2002) (tracking 272,111 offenders for three years following their release). A similar survey of sex offenders released in 1994 revealed that sex offenders are only slightly more prone to recidivism than the general population of released prisoners. *See* PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf (tracking 9,691 male sex offenders, more than two-thirds of all sex offenders released that year, for three years following their release from state prisons in 1994). Of the sex offenders released, 5.3% were re-arrested for a sex offense during the three-year period after their release. *Id.* at 30. During the same period, 17.1% of sex offenders were re-arrested for any violent crime. *Id.* at 40.

[60] AM. PSYCHIATRIC ASS'N, QUICK REFERENCE TO THE DIAGNOSTIC CRITERIA FROM DSM-IV-TR 291–92 (2000) (describing Antisocial Personality Disorder).

[61] *See id.* (describing the symptoms for a range of psychiatric disorders).

[62] *Hendricks*, 521 U.S. at 357. Justice Thomas, the author of the *Hendricks* opinion, also wrote the *Foucha* dissent, in which he would have permitted post-insanity acquittal commitment for

Such a reading may have prompted the Court's retreat six years later in *Kansas v. Crane*, when the Court required a volitional defect for Kansas to commit an SVP.[63] This volitional requirement may have been specifically added to (or discovered in) the *Hendricks* logic to inhibit the commitment of general recidivists. Nonetheless, despite Justice Scalia's vociferous and cogent dissent that neither the Constitution nor *Hendricks* requires a volitional prong,[64] *Crane*'s volitional requirement adds little. Any recidivist lacks, or at least can be said to lack, the ability to control himself.[65] Thus, *Crane* does not close the constitutional "door" opened by *Hendricks* for the commitment of violent recidivists, including non-mentally ill, but dangerous offenders.[66]

### *D. Constitutional Conclusion*

*Donaldson* and *Addington* appear to have set the constitutional criteria for civil commitment: mental illness and dangerousness. This author argues that this is a misreading of these cases. In any event, their progeny display their declining relevance. *Jones* and *Foucha* prepare the jurisprudence for commitment for dangerousness alone. *Hendricks* and *Crane* very nearly approach the possibility. It is not implausible to foresee an expansion from *Hendricks* to general post-sentence commitment for dangerousness alone.

## III. A RECONCILIATION OF PUNISHMENT THEORIES

Even if there is a narrow opening in the constitutional jurisprudence that would permit the post-sentence civil commitment of dangerous offenders, such a system would likely be socially unpalatable. Commitment for dangerousness alone would raise broad objections, evoking images of "Big Brother,"[67] or *Minority Report*,[68] in which per-

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dangerousness alone. *See Foucha*, 504 U.S. at 111 (Thomas, J., dissenting) ("A State may reasonably decide that the integrity of an insanity-acquittal scheme requires the continued commitment of insanity acquittees who remain dangerous.").

[63] 534 U.S. 407, 412 (2002) ("We do not agree . . . that the Constitution permits commitment of the type of dangerous sexual offender considered in *Hendricks* without *any* lack-of-control determination.").

[64] *See id.* at 420 (Scalia, J., dissenting) ("[T]he notion that the Constitution requires in every case a finding of 'difficulty if not impossibility' of control does not fit comfortably with the broader holding of *Hendricks* . . . .").

[65] *But see id.* at 413 (stating that the lack of control "must be sufficient to distinguish the dangerous sexual offender . . . from the dangerous but typical recidivist convicted in an ordinary criminal case" (citing *Hendricks*, 521 U.S. at 357–58)).

[66] *See* Morse, *supra* note 55, at 178 ("All people convicted of crime are potentially civilly committable according to the [*Hendricks* and *Crane*] logic.").

[67] *See* GEORGE ORWELL, 1984 (1950) (depicting a totalitarian state where Big Brother is always watching).

[68] MINORITY REPORT (Twentieth Century Fox 2002).

sons are arrested based on the prediction that they will commit a crime in the future.

Parole is a superior alternative for incapacitating dangerous offenders.[69] An offender should serve his *deserved* time as a determinate minimum sentence. Following this term, he should become eligible for parole. After his parole eligibility date, the justification for his incarceration becomes incapacitation; when he is no longer dangerous, he should be released. Thus, the parole system permits an unconventional view of punishment theory in which punishment justifications are viewed consecutively instead of concurrently (mixed). Furthermore, such a parole system implements Professor Robinson's goal of tying sentence duration to desert and subsequently incapacitating dangerous offenders.[70]

### A. *The Reality: Incarceration is Used for Incapacitation*

Despite calls for a purely desert-based system of criminal punishment, the criminal justice system is being used for incapacitation. At least since the promulgation of the Model Penal Code in 1962, incapacitation has been an accepted goal of punishment.[71] Recidivist statutes, such as three strikes laws, prove the law's aim of incapacitation. Three strikes laws dramatically increase sentence length from an individual crime's "deserved punishment."[72] In fact, any determi-

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[69] Parole and probation are frequently confused. Instead of a prison sentence, a judge may order probation, where the offender remains "on the street" but is subject to a period of supervision. BLACK'S LAW DICTIONARY 557 (2d Pocket ed. 2001). Parole, on the other hand, is the supervised release of a prisoner before the completion of his sentence. *See generally* John H. Lombardi, *Parole*, *in* CRIME AND THE JUSTICE SYSTEM IN AMERICA: AN ENCYCLOPEDIA 180–81 (Frank Schmalleger & Gordon M. Armstrong eds., 1997) (describing the parole process and the reasons behind the parole system).

[70] Professor Robinson would likely oppose a parole-based system because it departs from a purely desert-based model of punishment. *See* Robinson, *supra* note 2, at 1451 ("A system that instead allows a subsequent reduction of sentence, as by a parole board, undercuts deserved punishment."); Paul H. Robinson, Dissenting View of Commissioner Paul H. Robinson to the Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3986, 3988 (Feb. 6, 1987) ("I have always applauded the Sentencing Reform Act's abolition of early release on parole . . . for this moves us toward honesty in sentencing . . . .").

[71] *See* MODEL PENAL CODE § 1.02 (Proposed Official Draft 1962) (defining the general purposes of punishment and attempting to merge, inter alia, incapacitation and desert). *But see* MODEL PENAL CODE: SENTENCING § 1.02, *available at* http://www.ali.org/forum6/MPCPD3.pdf (Preliminary Draft No. 3, 2004) (proposing a revised § 1.02, which would limit incapacitation to the interior of the duration of deserved punishment). Since the 2004 draft has not yet been considered by the Council or membership of the American Law Institute, it does not represent the position of the Institute.

[72] *See, e.g.*, CAL. PENAL CODE § 667(e)(2)(A) (West 1999) (requiring a life sentence for a third felony conviction); WASH. REV. CODE § 9.92.090 (2003) (requiring a life sentence for a third conviction of fraud, petit larceny, or any felony); *see also* Ewing v. California, 538 U.S. 11, 14 (2003) (affirming the constitutionality of California's three strikes law and stating that "California's three strikes law reflects a shift in the State's sentencing policies toward *incapacitating*

nate sentencing guidelines that rely on criminal history are plainly structured by incapacitation.[73] Prior criminal history is simply being used as an indicator of dangerousness in order to predict necessary sentence length.

Thus, the shift from punishment to prevention is not novel.[74] Supreme Court jurisprudence has consistently accepted incapacitation as a valid justification for criminal punishment.[75] Prevention simply continues the progression from pure retribution, when the death penalty was imposed for all felonies, to the utilization of broader aims of punishments.[76]

### B. *Reconciliation Using a Consecutive Punishment Justification*

A shift to using post-sentence civil commitment for incapacitation, as Professor Robinson proposes, is improbable. Incapacitation will most likely continue to be achieved through imprisonment, despite the injustice that sometimes results from such a practice. For in-

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and deterring . . . .") (emphasis added); Rummel v. Estelle, 445 U.S. 263, 265 (1980) (affirming the constitutionality of Texas's third-strike life sentence, where the Petitioner's third strike was obtaining $120 by false pretenses).

[73] If a sentence was purely retributive, everyone would get the same sentence for the same crime. The fact that sentence duration varies according to prior criminal history indicates that sentence duration is based, at least partly, on a different justification. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2004), *available at* http://www.ussc.gov/2004guid/CHAP4.pdf (tying sentence length to prior criminal history); Pennsylvania Criminal Sentencing Guidelines, 204 PA. CODE §§ 303.4–303.8 (2004) (providing guidelines for determining sentence length according to "prior record score").

Andrew Von Hirsch has suggested that a repeat offender "thumbs his nose" at the justice system, and therefore retributively deserves a longer sentence. *See* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 84–85 (1976) ("A first offense, in our view, is deserving of less punishment than a second or third. . . . [R]epetition alters the degree of culpability that may be ascribed to the offender."). The added desert, however, cannot amount to more than a minor enhancement in sentence duration. *See* Robinson, *supra* note 2, at 1437 ("[N]ose-thumbing may justify a minor portion of the dramatic increases imposed for a prior record . . . .").

[74] *But see* Robinson, *supra* note 2, at 1432 (suggesting that the shift from punishment to preventive detention of dangerous offenders has occurred only in the past decade).

[75] *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 379 (1997) (Breyer, J., dissenting) (referring to Blackstone for the proposition that "incapacitation is one important purpose of criminal punishment" (citing WILLIAM BLACKSTONE, 4 COMMENTARIES *11–*12)); Foucha v. Louisiana, 504 U.S. 71, 99 (1992) (Kennedy, J., dissenting) ("Incapacitation for the protection of society is not an unusual ground for incarceration."); Powell v. Texas, 392 U.S. 514, 539 (1968) (Black, J., concurring) ("[I]solation of the dangerous has always been considered an important function of the criminal law.").

[76] *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 301 (1976) ("[O]ne of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense."); *see also* J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 279 (1971) ("[P]enal theory at common law was very simple. Felony, with a few exceptions, attracted the death penalty.").

stance, there are numerous cases of seemingly undeserved third-strike life sentences.[77] These life sentences are imposed for the purpose of preventing future crimes that will likely never occur because the offender is so elderly or crippled that he simply cannot recidivate.[78] At the opposite extreme, three strikes laws do nothing to incapacitate even the most violent first or second-time offenders who show all the signs of being likely recidivists, and from whom society most needs protection.[79]

Though Professor Robinson cogently argues that punishment and incapacitation must be wholly segregated, the reality is that incapacitation through imprisonment is broadly accepted. But the two goals can properly coexist when viewed consecutively, not concurrently.

If imprisonment is used for incapacitation, it should be done accurately in order to be valid. If an offender is not dangerous, he should be released immediately following his desert. Dangerous offenders should, of course, remain incarcerated for the duration of their sentence. The use of mandatory *eligibility* parole (but non-mandatory *release*) can achieve this goal of incapacitation consecutive to desert.

### C. *Un-blending Punishment Theories*

The standard criminal law text explains each justification of punishment, then proceeds to state that most punishments are the result of "mixed theories."[80] However, in an indeterminate sentencing scheme, with mandatory parole eligibility, the punishment justifications may be viewed as separate and sequential instead of mixed. The

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[77] *See, e.g.*, BLOW (New Line Cinema 2001) (recounting the true story of a drug dealer going straight and raising his daughter, only to be much later convicted of his third strike). *See generally* JOE DOMANICK, CRUEL JUSTICE: THREE STRIKES AND THE POLITICS OF CRIME IN AMERICA'S GOLDEN STATE (2004) (describing the deleterious effects of California's three strikes laws).

[78] *See, e.g.*, Robinson, *supra* note 2, at 1451 (criticizing three strikes laws because they can only be applied to career criminals who are generally at the age where recidivism is unlikely, and finding that "[s]uch a scheme produces a costly prevention system of prisons full of geriatric life-termers"); Torsten Ove, *Growing Old in Prison*, PITTSBURGH POST-GAZETTE, Mar. 6, 2005, at A1 (using SCI Laurel Highlands, Pennsylvania's geriatric prison, to describe the challenges in imprisoning elderly prisoners who are unlikely to recidivate, and to present the arguments for and against continuing the practice).

[79] This class of offenders includes young offenders upon conviction of their first crimes not as minors. It also may include domestic batterers who have eluded a criminal history by convincing their victims not to report the abuse to the police. *See* Robinson, *supra* note 2, at 1450 n.78 ("[B]attering spouses are often able to persuade their victims not to press criminal charges . . . .").

[80] *See, e.g.*, DRESSLER, *supra* note 5, at § 2.05 (describing the mixed theories of punishment and the justifications given by scholars for having such a hybrid system); *see also* Robinson, *supra* note 2, at 1442 (arguing that some "blended" or mixed theories of punishment deny that any conflict exists between incapacitation and desert).

initial portion of an offender's incarceration, prior to parole eligibility, should be viewed as his "just deserts," or retribution.[81] Following the time he "deserves," the offender should become eligible for parole. Any time that he continues to serve is justified solely by incapacitation.

Professor Robinson critically states that a "reduction of sentence, as by a parole board, undercuts deserved punishment."[82] Parole would not, however, undercut deserved punishment if an offender becomes eligible for parole only after the conclusion of his desert. Thus, indeterminate sentences, coupled with a paroling mechanism, permit prison sentences to achieve both desert and incapacitation.[83]

If punishment justifications are viewed consecutively, Professor Robinson's quandary over the "former Nazi concentration camp official" is solved.[84] The posited example is that the former official is an elderly man and now a "productive member of society."[85] Under an incapacitation model, he would "escape the punishment he deserves" because there is now no need for incapacitation or rehabilitation.[86] To the contrary, under a consecutive model of punishment, the former Nazi official would still receive the punishment he deserves, as it would be served first (and presumably of very long duration) before he might be entitled to parole.

Even if incapacitation *can* exist as a separate justification of punishment, it may still be contended that it *should* not. Professor Robinson argues that "distribut[ing] punishment according to predictions of future dangerousness rather than blameworthiness for past crimes can only undercut the system's moral credibility."[87] Such moral credibility, Professor Robinson explains, provides functionality to criminal law. The law's credibility can stigmatize offenders, and the fear of stigma will deter criminal acts.[88] Furthermore, this permits the

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[81] *See* KANT, *supra* note 3, at 194–204 (arguing for an equalization of punishment with the crime in order to allocate both the quality and quantity of a just punishment).

[82] Robinson, *supra* note 2, at 1451.

[83] At least one study has found that decreasing prison term length does not affect recidivism rates. *See* JOHN E. BERECOCHEA ET AL., CAL. DEP'T OF CORR. RESEARCH DIV., TIME SERVED IN PRISON AND PAROLE OUTCOME: AN EXPERIMENTAL STUDY (REPORT NO. 1 *in* RESEARCH REPORT NO. 49) 25 (Oct. 1973) (finding no difference in the recidivism rates between a sample of 494 offenders who had their prison terms reduced, and a similar size control group whose terms were not reduced). The study, however, was based on only a six-month reduction in prison term.

[84] Robinson, *supra* note 2, at 1438.

[85] *Id.* at 1438 n.35.

[86] *Id.* at 1438.

[87] *Id.* at 1444.

[88] *Id.* at 1443.

law to condemn conduct that was not previously condemned and to "shape community norms."[89]

The "work" of Professor Robinson's argument is accomplished by its underlying axiom, that incapacitation deprives the system of its moral credibility. The validity of this axiom appears to rest upon his contention that an incapacitation-based system is unjust in that it intentionally assigns punishment inaccurately.[90] This is true when considering the geriatric third-striker or the Nazi official escaping prison. The system will, however, maintain its moral credibility if the sentence requires a period of desert followed by a well-understood and fairly-determined parole system.[91]

In fact, Professor Robinson's proposal for post-sentence commitment acknowledges the validity of incapacitation following desert. Both this author and Professor Robinson are concerned that the current criminal justice system incapacitates for a duration greater than desert. Though Professor Robinson's proposal for post-sentence civil commitment would successfully segregate incapacitation and promote accurate sentence duration, it is constitutionally questionable. Instead, parole permits incapacitation to be provided within the current incarceration system. Incarceration duration would be the same as in Professor Robinson's proposal, but the constitutionality would not be in doubt.[92] Therefore, integration of punishment and incapacitation is the preferred option.[93]

## IV. PAROLE FUNCTIONING AS PREVENTIVE RESTRAINT

The history of parole in the United States dates back more than a century.[94] New York initiated an indeterminate sentencing scheme

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[89] *Id.*

[90] Paul H. Robinson, The Provost's Lecture Series at the University of Pennsylvania: Does Giving People the Punishment They Deserve Help Reduce Crime? (Jan. 27, 2005).

[91] In addition, that period of incapacitating parole may be served under the theory of minimum restraint. For example, the parole period might be served under house arrest, by electronic ankle "bracelet," or perhaps under supervision of a parole officer. In short, the proposal is for a well-tailored parole.

[92] It may be argued that the *punitive* sentence duration is shorter in Professor Robinson's proposal, where prison time would be followed by *civil* commitment. It is doubtful, however, that the civil commitment would be meaningfully less punitive than low-security prison. *See* Morse, *supra* note 12, at 1026 n.5 ("I can see little reason to believe, however, that allegedly beneficial 'protections' of indefinite civil commitment would effectively protect liberty. . . . For example, . . . I doubt that many courts would be likely to find means less intrusive than confinement sufficient to protect the public from criminals with a history of sexual violence.").

[93] *But see* Robinson, *supra* note 2, at 1432 ("Segregation of the punishment and prevention functions offers a superior alternative.").

[94] *See generally* EDWARD E. RHINE ET AL., PAROLING AUTHORITIES: RECENT HISTORY AND CURRENT PRACTICE 5–26 (1991) (describing the development of the parole system in the United States from the 1840's through the 1980's).

and parole board in 1889.[95] In Massachusetts, parole is traced to the opening of its first "modern" reformatory in 1884.[96] The manual given to prisoners of the Massachusetts Reformatory provided: "In deserving cases, however, where it can be reasonably assumed that a man will be better off outside of the reformatory, he may be given the privilege of parole . . . ."[97] In Illinois, parole dates to its pre-statehood period (pre-1818), when the President of the United States effectively granted parole by employing conditional pardons.[98]

More than seventy years ago, a study of the parole system of Massachusetts found that forty-three percent of parolees had their parole revoked for "violation of the conditions of parole, or . . . because of new crimes."[99] By 1950, accuracy in parole determinations was recognized as critical: "One of the most crucial problems of the entire institutional program is the determination of when the inmate's return to society will be safe for the public and desirable for his welfare."[100] Current parole decision making methods include non-discretionary methods, such as mandatory release at a date determined at the original sentencing, and discretionary methods, such as judgment-based (clinical) and guideline-based (actuarial) decisions. Under all parole methodologies, accuracy in assessing danger and recidivism remains a crucial problem.[101]

While all fifty states had parole systems by the mid-twentieth century,[102] the "tough on crime"[103] and "truth in sentencing"[104] movement

[95] *See* STATE OF N.Y., FIRST ANNUAL REPORT OF THE DIVISION OF PAROLE OF THE EXECUTIVE DEPARTMENT 10 (1931) (detailing the historical use of indeterminate sentencing and parole in New York state).

[96] *See* SHELDON GLUECK & ELEANOR T. GLUECK, 500 CRIMINAL CAREERS 25 (1930) (noting the opening of the Massachusetts Reformatory in 1884 and discussing the goals of the Reformatory to "discipline, instruct, enlighten, qualify, and equip the offender, so that he will not again have the desire or necessity for wrongdoing").

[97] *Id.* at 31 (citation omitted).

[98] *See* Andrew A. Bruce, *The History and Development of the Parole System in Illinois*, *in* THE WORKINGS OF THE INDETERMINATE-SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS 1, 9 (1928) (describing the types of pardoning powers the State of Illinois vested in the President of the United States, who had the exclusive right to grant pardons under Illinois state law).

[99] GLUECK & GLUECK, *supra* note 96, at 167.

[100] COMM. ON CLASSIFICATION & CASEWORK OF THE AM. PRISON ASS'N, HANDBOOK ON PRE-RELEASE PREPARATION IN CORRECTIONAL INSTITUTIONS 16 (1950) (recommending preparations for release to parole so that parolees do not recidivate).

[101] In 1979, 24.9% of new crimes were committed by "avertable recidivists," offenders who would still have been in prison but for parole. DEAN J. CHAMPION, PROBATION AND PAROLE IN THE UNITED STATES 209 tbl.6.1 (1990). This number underrepresents the extent of the inaccuracy because it fails to account for false negatives (offenders who could have been safely released). In 1999, 58% of state parolees failed to successfully complete their terms of supervision, and in 1997, 70% of parole violators returned to prison for committing a new offense. TIMOTHY A. HUGHES ET AL., U.S. DEP'T OF JUSTICE, TRENDS IN STATE PAROLE, 1990–2000, at 10, 14 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/tsp00.pdf.

[102] CHAMPION, *supra* note 101, at 120.

of the Reagan era has reduced the utilization of parole systems. If used correctly and accurately, however, parole can reconcile the punishment justifications of incapacitation and desert, as well as capture and improve the benefits of post-sentence civil commitment. To meet these aims, two conditions must be fulfilled: first, parole *eligibility* must be tied to desert; second, parole *release* must be tied to non-dangerousness.

### A. *Mandatory Parole Release*

In 1927, mandatory parole release was already criticized in a survey of several parole systems published by the Pennsylvania State Parole Commission:

> Other parole boards release everybody [,] . . . [and] the parole law becomes an automatic reduction of all sentences, a thing which is even worse, perhaps, because it gives liberty without reference to fitness for liberty and reduces the period during which stone and steel guarantee society protection from those who endanger its peace.[105]

Today, sixteen states and the federal government have either entirely abolished their parole systems or created mandatory parole release mechanisms.[106] Parole release dates are pre-determined by various methods, including mandatory serving of half of the sentence length, or deferring to the judge's danger assessment intuition.[107] The first condition, tying parole eligibility to desert, can be fulfilled where the parole eligibility date is matched to the period of desert.[108]

Fully determinate sentences and mandatory parole release, however, both neglect the second condition, because they fail to tie parole *release* to non-dangerousness. In Pennsylvania, for example, offenders receiving sentences of fewer than two years are automatically paroled at the completion of half of their sentence.[109] Such a system

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[103] *See, e.g.*, Bernard Weinraub, *Reagan, Lobbying for Bork, Calls Judge Tough on Crime*, N.Y. TIMES, Aug. 29, 1987, at A6 (reporting on Reagan's heralding of his nomination to the Supreme Court as "tough, clear-eyed").

[104] *See, e.g.*, *New York's Unfinished Business; Still Time for Truth in* Sentencing, N.Y. TIMES, June 20, 1985, at A26 (calling for determinate sentencing in New York State).

[105] GEORGE W. WICKERSHAM, NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON PENAL INSTITUTIONS PROBATION AND PAROLE 133 (1931) (quoting CLAIR WILCOX, PA. STATE PAROLE COMM'N, SURVEY OF PAROLE ADMINISTRATION (1927)).

[106] *See, e.g.*, Parole Commission Phaseout Act of 1996, 18 U.S.C. §§ 4201–18 (2000) (abolishing the federal parole system).

[107] *See* HUGHES ET. AL., *supra* note 101, at 2 (describing the rise in the number of states using determinate sentencing and mandatory supervised releases instead of discretionary parole).

[108] *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997) (arguing that penal codes drafted to comport sentence length with desert are morally superior).

[109] *See* 61 PA. STAT. § 316 (2005) ("Any convict serving any sentence in a State penitentiary, the minimum of which sentence exceeds one-half the maximum sentence, shall be eligible to

is inherently flawed because it releases the offender without regard to his danger. Not surprisingly, successful parole completion is much lower under mandatory parole release systems than discretionary parole systems.[110]

### *B. Discretionary Parole Release*

The other thirty-four states utilize discretionary parole release mechanisms. Unlike mandatory parole release, discretionary systems allow a parole board to assess danger before making a parole decision. Such systems can, but do not always, reconcile desert and incapacitation. The first condition can be met by a clearly defined parole eligibility date that is set to an offender's deserved punishment.

Following the date of parole eligibility, the offender's dangerousness should be assessed. The basis of any clinical judgment or actuarial decision making is risk assessment: is the offender safe for the streets? Such a prediction is inherently difficult and has been widely questioned.[111] However, a prima facie dismissal is unwarranted.[112] Methods have been developed to more reliably and validly estimate dangerousness.[113] Such methods include judgment-based (clinical) and guideline-based (actuarial) systems.

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apply for release on parole, under present existing parole laws or any hereinafter passed, when said convict has served or will have served one-half of the maximum sentence thereof."); *see also* 61 PA. STAT. ANN. § 331.17 (West 1999) (providing for state parole board supervision of offenders sentenced to terms of at least two years).

[110] *See* HUGHES ET. AL., *supra* note 101, at 11 ("Among parole discharges in 1999, 54% of discretionary parolees were successful compared to 33% of those who had received mandatory parole.").

[111] *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 938 (1983) (Blackmun, J., dissenting) ("In view of the total scientific groundlessness of these predictions [of future violence], psychiatric testimony is fatally misleading."); Robinson, *supra* note 2, at 1450 ("A scientist's ability to predict future criminality using all available data is poor . . . .").

[112] *See* Kansas v. Hendricks, 521 U.S. 346, 358 (1997) ("As we have recognized, '[p]revious instances of violent behavior are an important indicator of future violent tendencies.'" (quoting Heller v. Doe, 509 U.S. 312, 323 (1993))); *see also* Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 543–44 (1986) (arguing that critics' assessments of prediction capability are flawed in their failure to distinguish non-difficult cases, but arguing that it would be inappropriate to characterize all unverified predictions as wrong). Professor Alschuler writes, "[a]lthough predicting the weather is a difficult task, almost anyone can do it when a funnel cloud is headed in his direction." *Id.* at 544.

[113] *See generally* JOHN MONAHAN ET AL., RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISEASE AND VIOLENCE (2001) (reviewing the MacArthur Violence Risk Assessment Study, a ten-year study based on 134 actuarially-derived variables and a risk assessment tool with a 76% true positive rate); VERNON L. QUINSEY ET AL., VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK (1998) (assessing the use of the Violence Risk Appraisal Guide ("VRAG"), an actuarial "cookbook" for predicting violence); Kevin S. Douglas & Christopher D. Webster, *The HCR-20 Violence Risk Assessment Scheme: Concurrent Validity in a Sample of Incarcerated Offenders*, 26 CRIM. JUST. & BEHAV. 3 (1999) (assessing the validity of the Historical, Clinical, and Risk

### 1. *Judgment-Based (Clinical) Parole Release*

As of 1991, among states with a discretionary parole system, all but nine were making release decisions by clinical judgment.[114] Unlike mandatory parole release, discretionary systems allow a parole board to assess the potential for danger before making a parole decision. While some parole boards are guided purely by discretion, others are steered by statutorily defined criteria. Such criteria, typically based on lay intuitions of violence prediction, generally comport with scientifically known violence predictors.[115]

Even so, accuracy remains a problem. For example, in Pennsylvania's state prison parole release program (for offenders serving more than two years), which is based on clinical judgment, approximately one in two parolees is recommitted.[116] Furthermore, such statistics underrepresent the extent of the inaccuracy in parole decisions because they fail to account for the false negatives: those denied parole who could have been safely released, and those who re-offend but are not caught. Of the 8,365 prisoners denied parole in Pennsylvania during 2004,[117] at least some, if not a high percentage, could have been safely paroled. These false negatives are expensive, because each one represents another warehoused body which must be fed and sheltered. Still, parole boards err on the side of safety, possibly to avoid political backlash from a high-profile wrong decision (false positive).

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Management (HCR-20) violence risk assessment scheme, a structured clinical interview that is scored actuarially); Grant T. Harris et al., *Violent Recidivism of Mentally Disordered Offenders: The Development of a Statistical Prediction Instrument*, 20 CRIM. JUST. & BEHAV. 315 (1993) (describing the initial development of the VRAG as a method for using statistical or actuarial methods to predict recidivism).

[114] *See* RHINE, *supra* note 94, at 67 (noting that only nine states use statistical or actuarial tables, referred to as "grid guidelines," while the remainder relied more on "guiding principles").

[115] *See, e.g.*, 61 PA. STAT. ANN. § 331.19 (West 1999) (setting criteria for the parole board to consider, including "the nature and circumstances of the offense committed[,] . . . the conduct of the person while in prison[,] . . . his physical, mental and behavior condition[,] . . . his history of family violence[,] and his complete criminal record").

[116] *See* COMMONWEALTH OF PA., BD. OF PROB. & PAROLE, MONTHLY PROGRAM REPORT tbls.2 & 7 (Dec. 2004), *available at* http://www.pbpp.state.pa.us/pbpp/lib/pbppinfo/stats/2004_12_Monthly_Program_Report.pdf (reporting 825 newly paroled prisoners and 466 recommitted); COMMONWEALTH OF PA., BD. OF PROB. & PAROLE, MONTHLY PROGRAM REPORT tbls.2 & 7 (Nov. 2004), *available at* http://www.pbpp.state.pa.us/pbpp/lib/pbppinfo/stats/2004_11_Monthly_Program_Report.pdf (reporting 855 newly paroled prisoners and 348 recommitted); COMMONWEALTH OF PA., BD. OF PROB. & PAROLE, MONTHLY PROGRAM REPORT tbls.2 & 7 (Oct. 2004), *available at* http://www.pbpp.state.pa.us/pbpp/lib/pbppinfo/stats/2004_10_Monthly_Program_Report.pdf (reporting 766 newly paroled prisoners and 478 recommitted).

[117] COMMONWEALTH OF PA., BD. OF PROB. & PAROLE, MONTHLY PROGRAM REPORT tbl.8 (Dec. 2004), *available at* http://www.pbpp.state.pa.us/pbpp/lib/pbppinfo/stats/2004_12_Monthly_Program_Report.pdf.

### 2. *Guideline-Based (Actuarial) Parole Release*

In Illinois, there were early attempts at creating actuarial (non-clinical) parole guidelines. Published in 1928, one study evaluated the use of twenty-two characteristics, and attempted to harness their relative weights to guide the parole board.[118] The author's early, yet sagacious, conclusion is worthy of note:

> Do not these striking differences, which correspond with what we already know about the conditions that mould the life of the person, suggest that they be taken more seriously and objectively into account than previously? These factors have, of course, been considered, but in a common-sense way so that some one or two of them have been emphasized out of all proportion to their significance.[119]

More than fifty years later, the U.S. Parole Commission requested the help of scientists to develop a modern actuarial parole system.[120] In 1973, their recommended guidelines were formally adopted to predict "parole prognosis" (likelihood of successful parole) by assessing underlying offense severity as well as an offender profile, known as a Salient Factor Score ("SFS"). The SFS was revised in 1976[121] and again in 1981. SFS 81, as the test is known, is a simple, yet fairly reli-

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[118] The following were the twenty-two factors considered as indications of the future success or failure of parole:

> (1) nature of offense; (2) number of associates in committing offense for which convicted; (3) nationality of the inmate's father; (4) parental status, including broken homes; (5) marital status of the inmate; (6) type of criminal, as first offender, occasional offender, habitual offender, professional criminal; (7) social type, as ne'er-do-well, gangster, hobo; (8) county from which committed; (9) size of community; (10) type of neighborhood; (11) resident or transient in community when arrested; (12) statement of trial judge and prosecuting attorney with reference to recommendation for or against leniency; (13) whether or not commitment was upon acceptance of lesser plea; (14) nature and length of sentence imposed; (15) months of sentence actually served before parole; (16) previous criminal record of the prisoner; (17) his previous work record; (18) his punishment record in the institution; (19) his age at time of parole; (20) his mental age according to psychiatric examination; (21) his personality type according to psychiatric examination; and (22) psychiatric prognosis.

Ernest W. Burgess, *Factors Determining Success or Failure on Parole*, *in* THE WORKINGS OF THE INDETERMINATE-SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS, *supra* note 98, at 203, 221.

[119] *Id.* at 246; *see also* WICKERSHAM, *supra* note 105, at 135 ("Little attention is yet given in many States to a scientific selection of prisoners for parole release. . . . Too little use is made of psychological and psychiatric tests . . . .").

[120] *See* DON M. GOTTFREDSON ET AL., U.S. DEP'T OF JUSTICE, PAROLE DECISION MAKING: THE UTILIZATION OF EXPERIENCE IN PAROLE DECISION MAKING: A PROGRESS REPORT 1 (1973) (describing the efforts to enhance the parole decision making process through the use of computer technology to analyze statistical data in order to assist parole boards and other decision points in the criminal justice field).

[121] *See* Federal Parole Guidelines, 42 Fed. Reg. 31, 785–86 (June 23, 1977) (announcing determinate federal parole guidelines based on the "salient factor score" and offense characteristics).

able and valid predictor of parole success.[122] More recent actuarial devices have used SFS 81 as a basis or guide.[123]

### C. *Applying Parole Mechanisms to Punishment Theory*

While danger prediction in all systems remains difficult, a prediction of the distant future is logically more difficult than a prediction of the immediate. Fully determinate sentences are "highly inappropriate for effective prevention"[124] because judges cannot effectively determine duration of dangerousness ex-ante ("After how many years of incapacitation will he cease to be dangerous?"). A discretionary parole board's prediction of the immediate ("Will he be dangerous if released tomorrow?") can be more accurate. Thus, paroling systems increase prediction ability by shifting the occasion of the danger assessment.

Even where predictions are impossible, the use of parole as a mechanism for incapacitating is superior to current attempts to use incarceration for incapacitation, such as disproportionately long sentences or recidivist statutes. With a discretionary parole system, an offender assessed to be a clear continuing danger will remain incarcerated. If the assessment is equivocal, the state can err towards caution by not releasing him. In both of these cases, the result is the same as in a system without parole: incapacitation is provided by lengthy sentences.

If, however, an offender is clearly *not* a danger to society, parole provides a mechanism for his release. This parole option, even if only used in relatively few cases, represents an advantage over predetermined sentences.

A properly designed parole mechanism captures the benefits of Professor Robinson's proposal for post-sentence civil commitment.[125] First, parole permits periodic review, allowing release to be tied to non-dangerousness. Second, although post-sentence commitment would be served in the less punitive conditions of *civil* commitment, it is difficult to imagine that a facility could be devised for violent re-

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[122] *See* Peter B. Hoffman, *Screening for Risk: A Revised Salient Factor Score (SFS 81)*, 11 J. CRIM. JUST. 539 (reporting, as a member of the U.S. Parole Commission, on the development, reliability, and validity of the SFS 81). The SFS 81 scores the following: prior convictions; prior commitments of more than thirty days; age at current offense; recent commitment-free period; whether the offender was a parolee, probationer, confined, or escapee at the time of the current offense; and heroin or opiate dependence. *Id.* at 546.

[123] *See* CHAMPION, *supra* note 101, at 154 (describing how the SFS 81 is used to determine parole prognosis); *see also* FLA. STAT. ANN. § 947.165 (West 2001) (mandating the use of salient factor scores in the development of objective parole guidelines).

[124] Robinson, *supra* note 2, at 1452.

[125] *See id.* at 1454–56 (summarizing the benefits of his proposal for a post-sentence civil commitment system).

cidivists that is less punitive than a low- or medium-security prison. Next, parole also permits the possibility of minimal restraint: house arrest, ankle bracelets, or other alternatives. Unlike post-sentence civil commitment, the institutional framework is already in place for such techniques. Finally, a parole system does not necessarily inhibit mental health treatment.

Thus, a discretionary parole release system is at least as good as the proposed post-sentence civil commitment system. In fact, a properly-designed parole system is superior to post-sentence civil commitment because there is no constitutional objection.[126] Using a guideline-based (actuarial) parole release mechanism will provide a clear statement to the public of predictable sentence formulation, preserving the system's moral authority.[127] In addition, if prisoners know the exact release guidelines, they will have incentives to work towards their own release while still in prison.[128]

### D. *Incentive Theories*

Instead of *Wizard of Oz*[129] parole decision making, where parole board members retreat behind a curtain only to emerge at some later date with a decision,[130] a determinate and publicly known parole system should be implemented. A parole system according to determinate guidelines will provide an incentive for incarcerated offenders to meet its requirements. Offenders will know what it takes to be released from incarceration.

The failure of the SFS 81 is its lack of attention to behavior and performance during incarceration. Though at least one study has

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[126] *See, e.g.*, Bd. of Pardons v. Allen, 482 U.S. 369, 381 (1987) (finding that Montana's statutory framework created a liberty interest because of a presumption in favor of parole release).

[127] *See* Robinson & Darley, *supra* note 108, at 474 (discussing the criminal law's power as a moral authority).

[128] There are other well known, albeit debatable, benefits of a parole system. These include the reintegration of parolees into society and the decreasing of the prison population. *See* CHAMPION, *supra* note 101, at 20–23 (describing the primary functions of parole: crime control, community reintegrations, punishment, and deterrence).

[129] THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

[130] *See* HARRY E. ALLEN ET AL., PROBATION AND PAROLE IN AMERICA 99 (1985) ("[T]here is nothing more cruel, inhumane, and frustrating than serving a prison term without knowledge of what will be measured and what rules determine release readiness." (citing Everette M. Porter, *Criteria for Parole Selection*, *in* PROCEEDINGS OF THE EIGHTY-EIGHTH ANNUAL CONGRESS OF CORRECTION OF THE AMERICAN CORRECTIONAL ASSOCIATION 227 (1958))); FREDERICK A. HUSSEY & DAVID E. DUFFEE, PROBATION, PAROLE, AND COMMUNITY FIELD SERVICES: POLICY, STRUCTURE, AND PROCESS 137 (1980) ("The fact that inmates do not really know what a parole board may consider important, coupled with the brief encounters they are likely to have with the board, puts a tremendous strain on inmates who are probably not very accomplished at presenting themselves verbally."); RHINE, *supra* note 94, at 23 ("[P]arole release decision making was arbitrary and unfair, secretive, not subject to review and thus, inherently flawed.").

called for the inclusion of deleterious conduct during the incarceration period,[131] and some parole risk assessments incorporate pre-incarceration social factors,[132] few, if any, determinate parole risk assessments incorporate in-prison positive social factors.

For example, tying parole release to participation in prison educational or job training should create a desirable and nicely circular result: educated and trained offenders will be statistically less dangerous upon release and they may be released earlier because they will be less dangerous.[133] Today there are only twelve college degree programs for prisoners in the United States.[134] The money saved by paroling educated, non-dangerous offenders following their desert could be used to create additional programs.

## CONCLUSION

As Professor Robinson convincingly argues, desert should be segregated from incapacitation. He proposes that offenders should serve their deserved sentences and then be held in post-sentence civil commitment only as long as necessary to protect society. Indefinite post-sentence civil commitment, however, raises serious constitutional questions. In addition, such a system fails to conform with American society's "preference for liberty."[135]

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[131] *See* Michael R. Gottfredson & Kenneth Adams, *Prison Behavior and Release Performance: Empirical Reality and Public Policy*, 4 L. & POL'Y Q. 373, 379 (1982) (studying the use of assaultive infractions, escape history, and prison punishment in assessing parole success).

[132] *See, e.g.*, RHINE, *supra* note 94, at 180–83 (reprinting the State of Minnesota Assessment of Client Risk factors, which incorporate substance abuse problems and employment history into parole risk assessment, as well as the Maine Adult Caseload Management System factors, which assess risk by evaluating severity of instant offense, prior record, education, occupation, substance abuse, living arrangements, residence, and mental stability).

[133] In 1931, New York's report on parole already stated: "Penal institutions must be schools of industry and training in the responsibilities of right living . . . ." STATE OF N.Y., *supra* note 95, at 19.

[134] *See, e.g.*, Ian Buruma, *Uncaptive Minds: What Teaching a College-Level Class at a Maximum-Security Correctional Facility Did for the Inmates—and for Me*, N.Y. TIMES MAG., Feb. 20, 2005, at 38 (noting the decline in higher education programs for prisoners in the 1990s, but describing positive experiences that the author had in teaching and the prisoners had in attending a college course inside a prison).

[135] Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54, 54 (1982); *see also* United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); Jones v. United States, 463 U.S. 354, 361 (1983) ("It is clear that 'commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'" (quoting Addington v. Texas, 441 U.S. 418, 425 (1979))). *But see* Kansas v. Hendricks, 521 U.S. 346, 356 (1997) ("Although freedom from physical restraint 'has always been at the core of the liberty . . .' that liberty interest is not absolute. The Court has recognized that an individual's constitutionally protected interest . . . may be overridden even in the civil context . . . ." (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992))).

Today, many offenders receive life or otherwise lengthy sentences, not for desert, but as "a particularly crude form of consequentialism" to ensure that dangerous offenders remain incapacitated.[136] It is widely agreed that all offenders should serve their just deserts. Following that initial period, however, if an offender is clearly safe for release, instead of suffering unnecessary incapacitation, he should have the opportunity to be granted parole. Thus, a parole mechanism can ensure desert while also fulfilling the aim of incapacitating dangerous prisoners.

Furthermore, the legal and institutional framework for parole is already in place and there is no constitutional objection. There is even a well-established regular review mechanism. Despite protests to the contrary,[137] the criminal justice system, by way of parole, is an effective "vehicle" to achieve incapacitation.

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[136] Kyron Huigens, *Dignity and Desert in Punishment Theory*, 27 HARV. J.L. & PUB. POL'Y 33, 38 (2003–2004) (describing the failure of the state criminal justice systems that engage in "quarantine schemes" or purely preventative detention).

[137] *See* Robinson, *supra* note 2, at 1432 (describing the criminal justice system as the wrong "vehicle" for incapacitation).