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SUPREME COURT REVIEW

FOREWORD: THE CRIMINAL-CIVIL DISTINCTION AND DANGEROUS BLAMELESS OFFENDERS

PAUL H. ROBINSON*

Our legal system distinguishes criminal law from civil law, and criminal commitment from civil commitment. We speak of a "crime," rather than a "violation" or a "breach," and "punishment," rather than "sanction" or "liability." Why is criminal law kept distinct? One can conceive of a system in which no such criminal-civil distinction exists. An actor who commits a *violation of the legal rules of conduct* (not a "crime") would have *jurisdiction* taken over him (not "convicted"), during which time he would be *corrected* or *sanctioned* (but not "punished"). Under this system, what is now dealt with as criminal law would be treated as just another aspect of civil law. In fact, because it is not unusual for different aspects of civil law to have different procedures, perhaps even current criminal procedures could be followed. Some academics have proposed just such a system,¹ although I know of no society in which such a system currently operates. Why are societies persistent in maintaining a distinct system labelled as "criminal"?

Criminal law is not unique in the conduct it punishes; some conduct violates criminal and civil law.² Nor is criminal law unique in the deprivations that it imposes; civil commitment, tort law, and a variety of other civil measures can deprive a person of his or her

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¹ See, e.g., BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW* chs. 2-3 (1963); Jay Campbell, *A Strict Accountability Approach to Criminal Responsibility*, 29 *FED. PROBATION*, Dec. 1965, at 33; SHELDON GLUECK, *LAW AND PSYCHIATRY* ch. 4 (1963).

² In this Article, the phrase "civil law" refers to all law that is not criminal. That is, the criminal-civil distinction is taken to be comprehensive in its coverage. Other definitions of "civil law" are possible, of course.

liberty, put restrictions on what a person can do, and compel the payment of money. If criminal law is not unique in either the conduct it prohibits or the deprivations it dispenses, why is it kept distinct? Its existence must have an explanation apart from its prohibitions, deprivations, or procedures.

Conventional lay wisdom holds that criminal liability and criminal commitment are different from civil liability and civil commitment in that the former generally reflect moral blameworthiness deserving condemnation and punishment, while this is not necessarily so for the latter.³ The notion that the distinctiveness of criminal law is its focus on moral blameworthiness, is supported by the traditional requirements for criminal liability, which *as a group* are not characteristic of civil liability.

Criminal law addresses only harms of a sufficient seriousness; situations analogous to civil law's liability-with-nominal-damages typically do not result in criminal liability. Under the Model Penal Code's "de minimis infraction" defense, for example: "The Court shall dismiss a prosecution if . . . it finds that the defendant's conduct . . . did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent *too trivial to warrant the condemnation of conviction* . . ."⁴ In the same vein, the Code distinguishes "crimes" from "violations": "A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense."⁵ Thus, parking violations, infractions of motor vehicle codes, and other such transgressions generally are not "crimes," although they are enforced by the same officers who enforce the criminal law.

Also characteristic of criminal law is the fact that an actor generally must have a culpable state of mind. Bringing about a prohibited harm or evil, even wrongfully, is not itself sufficient for criminal liability. Generally, a minimum of recklessness is required as to every offense element;⁶ that is, an actor must have some degree of awareness of the facts that make his or her conduct criminal. Still higher culpability, consisting of knowledge or purpose, commonly is required as to one or more offense elements. Lower culpability than

³ This Article does not address the issue of whether tort law or other aspects of civil law are or should be guided by notions of moral desert.

⁴ MODEL PENAL CODE § 2.12(2) (1985) (emphasis added). Where the damage is minor under civil law, in contrast, liability nonetheless is imposed but only nominal damages are awarded.

⁵ *Id.* § 1.04(5). See *id.* for a definition of what constitutes a "violation."

⁶ *Id.* § 2.02(3).

recklessness, criminal negligence, is used infrequently; strict liability generally is limited to "violations"⁷ (which, recall, are distinguished from "crimes").

Even if the actor has the required culpable state of mind for the offense, criminal liability is barred if the actor's conduct is justified because it avoids a greater societal harm. Such an actor is exculpated under a justification defense. Even if the actor has the required culpable state of mind and is not justified, criminal liability is again barred if the person commits the offense because he or she suffers a significant mental or emotional dysfunction. Such an actor is exculpated under an excuse defense. Criminal codes recognize a wide range of justification and excuse defenses, such as lesser evils, law enforcement authority, insanity, immaturity, involuntary intoxication, and duress.⁸

Some aspects of civil law may recognize doctrines similar to these, but criminal law is unique in its reliance upon such a collection of doctrines which, taken together, serve "to safeguard conduct that is without fault from condemnation as criminal."⁹

While the notion of criminal liability as moral condemnation may have public appeal, would such a criterion for criminal liability leave society dangerously unprotected? Consider the problem of the dangerous person who causes serious harm blamelessly, such as a person who is violent because of severe mental illness. A system of criminal law committed to personal blameworthiness would offer an insanity defense to such a person. Yet, society is not left defenseless because civil commitment generally is available to incarcerate such a dangerous, mentally ill person. But what if civil commitment did not reliably protect society from dangerous offenders who escape the criminal system because of their blamelessness? Consider, for example, a person who is acquitted of an offense because the offense was the product of then-present insanity, but the actor is no longer insane yet is still dangerous. The actor's dangerousness may

⁷ *Id.* § 2.05(2). The most notorious exception to the rule limiting strict liability to "violations" is the common law's use of strict liability in statutory rape, a serious offense. Modern codes commonly recognize two forms of statutory rape. The first form punishes persons who have intercourse with any person under age 16 (or similar age). Here, criminal negligence is required. A second form of statutory rape punishes persons who have intercourse with any person under age 10 (or similar age). Here, strict liability is imposed, typically in the belief that no one in good faith could mistake a person under age 10 for a person over age 16. Where a defendant does hold such a mistaken belief, he no doubt will be exculpated from criminal liability under an excuse defense, such as insanity. *See, e.g.*, MODEL PENAL CODE §§ 213.1(1)(d), 213.3(1)(a), 213.6(1), 213.6(1) cmt. 2 (1980).

⁸ *E.g.*, MODEL PENAL CODE §§ 2.08(4), 2.09, 3.02, 3.07, 4.01, 4.10 (1985).

⁹ *Id.* § 1.02(1)(c).

arise from conditions independent of the former mental illness, from the potential for reoccurrence of the mental illness and its accompanying violence, or from a combination of the two. How should the law, criminal or civil, handle the problem of such a dangerous blameless offender? The answer to this question reveals much about the nature of criminal law and its distinctiveness.

The problem of the blameless dangerous offender can be dealt with in either of two ways. First, one might keep the criminal law focused upon blameworthiness and expand civil commitment, if necessary to take control of such persons. This approach maintains a clear criminal-civil distinction, as that distinction is popularly conceived: criminal law would remain committed exclusively to punishment upon moral blameworthiness and civil law would provide protection as needed through non-condemnatory incarceration or supervision. A second approach would have criminal law, rather than civil law, take control of such dangerous blameless offenders. By convicting an admittedly blameless violator, this second approach rejects the exclusive focus of criminal law on blameworthiness and blurs the criminal-civil distinction.

The Supreme Court considered this problem last term in *Foucha v. Louisiana*.¹⁰ Foucha, in a drug-induced psychosis,¹¹ entered the home of a married couple with the intent to steal from them, chased the couple from their home, and fired on police officers who confronted him.¹² He was held to be unable to distinguish right from wrong at the time of the offenses, acquitted under an insanity defense, and civilly committed. He subsequently regained his sanity but remained dangerous, according to psychiatrists. Could he be retained under civil commitment? The relevant Louisiana statute provided that he could be retained if he remained either insane or dangerous. In a 5-4 decision, the Court held the Louisiana statute unconstitutional as a violation of substantive due process.¹³

A majority of the Court appears to have chosen the second course for dealing with the dangerous blameless offender: dropping the criminal law's focus on blameworthiness in order to allow the criminal system to fill the protective gap. Justice O'Connor, the

¹⁰ 112 S. Ct. 1780 (1992). See Ellen Papadakis, Case Note, *Fourteenth Amendment—The Continued Confinement of Insanity Acquittees*, 83 J. CRIM. L. & CRIMINOLOGY 944 (1993).

¹¹ *Foucha*, 112 S. Ct. at 1782.

¹² *Id.* at 1780, 1791 (Kennedy, J., concurring).

¹³ *Id.* at 1781. "[An insanity acquittee] may be held as long as he is *both* mentally ill and dangerous, but not longer," *Id.* at 1794 (emphasis added). For discussion of the substantive due process point, see *id.* at 1785.

swing vote, is explicit about the approach. In her concurrence, she reminds the states that they are not helpless to protect their residents from dangerous offenders who, because of the Court's decision, can no longer be civilly committed:

I write separately . . . to emphasize that the Court's opinion addresses only the specific statutory [civil commitment] scheme before us. . . . This case does not require us to pass judgment . . . on statutes that provide for *punishment* of persons who commit crimes while mentally ill. . . .

. . . .

[The Court's holding] places no new restrictions on the States' freedom to determine whether and to what extent mental illness should excuse criminal behavior. The Court does not indicate that States must make the insanity defense available. See Idaho Code § 18-207(a) (1987) (mental condition not a defense to criminal charges); Mont. Code Ann. § 46-14-102 (1991) (evidence of mental illness admissible [only] to prove absence of state of mind that is an element of the offense). It likewise casts no doubt on laws providing for prison terms after verdicts of "guilty but mentally ill." See, e.g., Del. Code Ann., tit. 11, § 408(b) (1987); Ill. Rev. Stat., ch. 38, ¶ 1005-2-6 (1989); Ind. Code § 35-36-2-5 (Supp. 1991). If a State concludes that mental illness is best considered in the context of criminal sentencing, the holding of this case erects no bar to implementing that judgment.¹⁴

In other words, if the state is dissatisfied with the resulting lapse in civil commitment protection brought about by *Foucha*, it should criminally convict the dangerous persons whom it previously had civilly committed.¹⁵

No doubt Justice O'Connor is right in what Supreme Court cases currently allow states to do: states constitutionally may use criminal commitment as an alternative to civil commitment. Many states certainly will follow her suggestion. Indeed, as I describe below, Justice O'Connor simply echoes a strategy that many states have already tried and found effective since courts have begun imposing constitutional limitations on civil commitment. I will argue, however, that such views of the interchangeability of criminal and civil commitment blur the criminal-civil distinction in a way that ultimately will make our society more dangerous and less just.

I will argue that *Foucha* is both a troubling case and part of a troubling trend because of states' predictable response to it. Constitutional restrictions on civil commitment, such as *Foucha's*, fre-

¹⁴ *Id.* at 1789-90 (O'Connor, J., concurring) (emphasis added).

¹⁵ Criminal commitment does not require the regular showings of continuing mental illness and dangerousness that civil commitment does; in this respect, criminal commitment is unconditional, at least until the date that the sentencing court sets for parole eligibility.

quently compel states to turn to the criminal justice system for protection from dangerous persons who are insufficiently blameworthy for criminal conviction. And such reforms, which permit conviction of such blameless persons, undercut the criminal law's moral credibility. In that sense, decisions like *Foucha* carry a heavy hidden cost; it is criminal law's moral credibility, I will argue, that not only allows it to satisfy the desire to have justice done but also gives criminal law much, if not most, of its power as a mechanism of compliance. I will argue that the better course is to expand civil commitment to include seriously dangerous offenders who are excluded from criminal liability as blameless for any reason, than to divert the criminal law from its traditional requirement of moral blame.

THE INTERDEPENDENCE OF CRIMINAL AND CIVIL COMMITMENT AS PROTECTIVE MECHANISMS

Many aspects of existing law are designed to protect us from harm by others. The threat of criminal conviction may be the most effective deterrent, although the potential for regulatory sanctions and tort and other civil liability also deter. For some persons bent on harm, deterrence will be ineffective and incapacitation will be necessary. Where the threatened harm is serious, incapacitation will be achieved through incarceration. Incarceration typically is authorized through criminal commitment if an offender deserves the condemnation of criminal conviction, and through civil commitment if, because of mental illness, he does not. With this traditional division of labor, these two forms of commitment, criminal and civil, work together to protect society from dangerous offenders.

Let me illustrate the interdependence of criminal and civil commitment with a brief history of the insanity defense as it has evolved over 150 years to keep pace with expanding community notions of the potential exculpatory effects of mental illness. (The history of the insanity defense also includes instances in which it was reduced in scope because it exceeded the community's notions of exculpation.¹⁶) In 1843, the House of Lords in *McNaghten* expanded the

¹⁶ See, e.g., *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc). *Brawner's* overruling of the "the *Durham* product" test is the clearest example of this. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), *overruled by United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc). This kind of reform is not criticized here but rather encouraged, because it promotes the community's respect for the criminal law as embodying their shared notions of justice.

In other instances, however, insanity defense reforms have narrowed the defense to an extent that it fails to exculpate offenders who are likely to seem blameless. Illustrative is the recent federal exclusion of a defense for mental illness causing a control dys-

insanity defense and more carefully articulated its criteria. Previously limited to persons having no more understanding "than an infant, than a brute, or a wild beast,"¹⁷ the defense was defined to include anyone who, due to mental illness at the time of the offense, did not "know the nature and quality of the act he was doing, or, if he did know it, [he] did not know he was doing what was wrong."¹⁸ As early as 1887, the *McNaghten* test was criticized as failing to reflect the growing understanding of human behavior. Mental illness, it was observed, can as effectively take away the *power to choose* as it does the *knowledge* of what is right and what is wrong.¹⁹

In order to permit a defense for an exculpating control dysfunction, an "irresistible-impulse" test was added, which provided a defense to an actor, "if, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed."²⁰ In the 1950s, the *McNaghten*-plus-irresistible-impulse test, in turn, was criticized as providing too narrow a defense by apparently requiring absolute dysfunction: requiring that the actor "did not know" the nature and quality of his act or that it was wrong or that his free agency was "destroyed."²¹ The then-current understanding of human behavior suggested that mental dysfunction, both cognitive and control, could range over a continuum of degrees of impairment. Prevailing notions of criminal responsibility suggested that insufficient responsibility might be found anywhere along the high range of the impairment continuum, not just at its end point. The American Law Institute's insanity test was substituted by many jurisdictions because it better reflected these changed perspectives. The American Law Institute test re-

function, no matter how severe. See 18 U.S.C. § 17 (1992). This reform cuts the insanity defense further back than community views would have it. See *infra* note 32. The reform was sparked in part by public disapproval of John Hinckley's insanity defense for his attempt to assassinate President Reagan. But, one can argue, the improper result in the Hinckley case, if that is what it was, came about because the existing law allocated the burden of proof to the state to *prove* the defendant's *sanity*. Under this allocation, the inherent subjectiveness and complexity of mental health issues worked in favor of giving an insanity defense. Unfortunately, the public dissatisfaction spawned reform that narrowed the scope of the defense, rather than just shifting the burden of proof to the defendant. (The reform also was sparked by concern for the release of dangerous insanity acquittees from civil commitment. See *infra* notes 32-33 and accompanying text.)

¹⁷ *Arnold's Case*, 16 How. State Tr. 695, 765 (1724).

¹⁸ *McNaghten's Case*, 8 Eng. Rep. 718, 722 (1843).

¹⁹ *Parsons v. State*, 2 So. 854 (1887).

²⁰ *Id.* at 866. It also required that "at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect [to the duress of mental illness], as to have been the product of it *solely*." *Id.* at 866-67.

²¹ Text accompanying *supra* notes 18, 20.

quired only that the actor, due to mental illness, lacked “*substantial capacity*” to “appreciate the criminality . . . of his conduct or to conform his conduct to the requirements of law.”²²

In each instance of reform, criminal law doctrine changed with current thinking, to exclude from criminal liability persons who had come to be seen as insufficiently responsible for their conduct to be blamed for it. Each reform was possible, without jeopardizing the safety of the public, because protective jurisdiction was shifted to the civil commitment system. Dangerous offenders who escaped criminal liability under increasingly broader insanity tests did not go free to maul a defenseless public, but rather were civilly committed under a system that did not carry the condemnation of criminal conviction.²³

The point is that the natural development of the criminal law, as a system that imposes the condemnation of criminal conviction only upon those who are seen to deserve it, requires a civil commitment system that will pick up the slack to protect the public from dangerous offenders. One can conceive of further advances in behavioral sciences and further changes in public views on what makes a person sufficiently blameworthy for criminal conviction. If the criminal law is to be free to evolve to reflect such changes, it must be free to exclude blameless offenders from criminal liability without fear that by doing so, it leaves society unprotected.²⁴

Current restrictions on civil commitment, however, make it difficult for the civil commitment system to assure continuing protection from dangerous offenders who are excluded from criminal liability as not sufficiently blameworthy. Indeed, it appears that restrictions on civil commitment have already caused retreat from past criminal law advances, creating criminal liability for persons that current community notions would hold insufficiently blameworthy

²² MODEL PENAL CODE § 4.01(1) (1985).

²³ Most states have special statutes for the civil commitment of persons acquitted of criminal charges by reason of insanity. See, e.g., N.H. REV. STAT. ANN. § 651:8-b (1991); N.Y. CRIM. PROC. LAW § 330.20 (Consol. 1992); UTAH CODE ANN. § 77-16a-302 (1992); WASH. REV. CODE § 10.77.110(2) (1991) and statutes cited at *infra* note 37. Occasionally, separate arrangement is made for the commitment of mentally retarded or “developmentally disabled” acquittees. See, e.g., WASH. REV. CODE § 10.77.005 (1991). For examples of general civil commitment statutes not requiring a prior criminal acquittal, see *infra* note 44.

²⁴ Some people may suggest that eventually all human conduct will be shown to be sufficiently caused by factors beyond an actor’s control, that notions of blame will be outmoded. See STEPHEN J. MORSE, *Psychology, Determinism & Legal Responsibility, The Law as a Behavioral Instrument*, in NEBRASKA SYMPOSIUM ON MOTIVATION 35, 50 (1985). I, for one, do not believe that this will occur but, if it did and was generally understood by the public, one might well argue that we should not maintain the criminal-civil distinction.

to deserve criminal conviction. In other words, instead of the civil commitment system catching dangerous offenders dropped from the criminal justice system, the criminal justice system has been turned into society's safety net for dangerous persons excluded from civil commitment.

Consider, for example, the new verdict of "guilty but mentally ill," which has been adopted by some jurisdictions and is under consideration by others.²⁵ The verdict replaces the insanity defense in a few states; more frequently, it provides the trier of fact with an additional verdict in cases where mental illness is an issue. On its face, the special verdict is to be returned where a defendant is mentally ill but where his or her mental illness is insufficient to provide either an insanity defense or a defense of mental illness negating an offense element. Upon a verdict of "guilty but mentally ill," the court typically imposes the same criminal sentence that would have been imposed had the defendant been found simply "guilty" of the offense charged. However, after such a verdict, the defendant must be examined by psychiatrists before beginning to serve the sentence and, if the defendant is determined to be in need of treatment, he or she is criminally committed to a facility designed for the mentally ill.

Initially, one may wonder why the lay fact-finder in a criminal trial is the appropriate body to determine whether an offender is in need of a psychiatric examination. The jury reflects the community's notions of blameworthiness and responsibility. The issue of the need for a psychiatric examination is a clinical one. Indeed, most prison systems routinely screen for mental illness during their normal intake and classification procedures and incarcerate mentally ill offenders in different settings than non-mentally ill offenders.²⁶ Why, then, would we ask a lay jury to make a clinical screening recommendation that prison clinicians already make in the normal course of business?

The fact is that the "guilty but mentally ill" verdict serves, and apparently is designed to serve, a different purpose than to provide a clinical screening judgment. The legislative history suggests that the verdict arose as a response to court-mandated limitations on the use of civil commitment. The Michigan statute, the first "guilty but mentally ill" verdict, was enacted in response to public outcry over

²⁵ See authorities collected at 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 173(h) nn.93, 94 (1984).

²⁶ For a description of the procedures for physical and psychiatric examinations of new prisoners required by statute in Michigan, for example, see MICH. COMP. LAWS § 791.267 (1991).

the Michigan Supreme Court decision in *People v. McQuillan*,²⁷ which required that insanity acquittees be released from civil commitment if they could not be shown to be *presently* insane. Responding to public concern that the ruling would require the release of dangerous offenders, the Michigan Legislature promptly enacted the "guilty but mentally ill" provision.²⁸ The Legislative Analysis of the bill describes the "Apparent Problem to Which the Bill Addresses Itself" by citing the Michigan Supreme Court decision and noting the concern that "the release of persons acquitted by reason of insanity creates a potential threat to the public safety."²⁹

The operation of the "guilty but mentally ill" verdict is indirect in achieving its goal of avoiding the release of dangerous insanity acquittees. It works, not by making continued civil commitment easier, but by diverting mentally ill offenders from civil to criminal commitment. With public skepticism about the ability of the civil commitment system to protect them from dangerous insanity acquittees, a jury may pass up a verdict of "not guilty by reason of insanity" in favor of a "guilty but mentally ill" verdict, not because the jury finds the defendant blameworthy but because only the latter verdict guarantees that the offender will receive needed confinement. The difficulty with the verdict is that it invites jurors in a criminal trial to consider matters unrelated to guilt and blameworthiness at a time when those issues alone are before them. The use of such a compromise verdict may do as much to undermine the insanity defense as would its abolition.³⁰

Some states have simply abolished their insanity defense, and thereby shifted to criminal commitment persons who previously had been civilly committed after a verdict of "not guilty by reason of insanity."³¹ Idaho, for example, repealed its insanity defense, in part, out of concern for protection of the community.³² The state's new law provides that "mental condition shall not be a defense to any charge of criminal conduct," and adds a new code section di-

²⁷ 221 N.W.2d 569 (1974), *superseded by statute as stated in* *People v. Ramsey*, 375 N.W.2d 297 (Mich. 1985).

²⁸ See, e.g., George D. Mesritz, Note, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 J. URB. L. 471, 483 (1976); John M. Grostic, Comment, *The Constitutionality of Michigan's Guilty But Mentally Ill Verdict*, 12 U. MICH. J.L. REF. 188, 188 (1978).

²⁹ MICH. HOUSE LEG. ANALYSIS SECTION, THIRD ANALYSIS OF MICH. H.B. 4363, 78th Leg. at 1 (1975).

³⁰ If effective abolition is the objective, it would seem to further the interests of informed debate and reform if it were done openly.

³¹ See, e.g., IDAHO CODE § 18-207(a) (1992); UTAH CODE ANN. § 76-2-305 (1992); MONT. CODE ANN. § 46-14-102 (1992).

³² See IDAHO HOUSE OF REP., MINUTES OF JUDICIARY RULES & ADMIN. COMM., at 2 (Mar. 17, 1982).

recting that mentally ill prisoners be incarcerated "in an appropriate facility for treatment."³³ Thus, persons previously civilly committed after acquittal may now be criminally committed to the same facility to which they previously were civilly committed.

Still other jurisdictions, like the federal system, have narrowed their insanity defenses to avoid release of dangerous offenders from civil commitment. Citing, *inter alia*, the absence of a federal provision for the civil commitment of persons acquitted by reason of insanity,³⁴ Congress narrowed the federal insanity defense to exclude cases of control dysfunction (a ground of exculpation, recall, first recognized as appropriate for excuse by addition of the irresistible impulse test in the late 1800s).³⁵ Many states have followed the lead

³³ See 1982 Idaho Sess. Laws 368, codified as IDAHO CODE § 18-207(a)-(b) (1992). Before this reform, insanity acquittees were civilly committed to the custody of the Director of the Department of Health and Welfare, if they met the requirements for such commitment. IDAHO CODE § 18-214 (1972) (repealed by 1982 Idaho Sess. Laws 368).

³⁴ See H.R. No. 577, 98th Cong., 1st Sess. at 41 (1983). See also *Insanity Defense Hearing on S.818, S.1106, S.1558, S.2669, S.2672, S.2678, S.2745, and S.2780 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 38 (1982)(Statement of Rudolph W. Giuliani, Associate Attorney General). The federal government has now created federal civil commitment authority. This was done in the same legislation that narrowed the federal insanity defense.

³⁵ See 18 U.S.C. § 17 (1993). As one witness before the Senate Committee on the Judiciary noted: "First, it is clear to us all, I believe, that present dissatisfaction with the insanity defense is largely rooted in public concern about the premature release of dangerous persons acquitted by reason of insanity." *Insanity Defense Hearing on S.818, S.1106, S.1558, S.2669, S.2672, S.2678, S.2745, and S.2780 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 256 (1982)(Statement of Richard J. Bonnie, Professor of Law and Director, Institute of Law, Psychiatry and Public Policy, University of Virginia). A congressman testifying before the House committee on the bill described a case from his district in which the defendant, Russell Maguire, was charged with sexual abuse and transporting a minor across state lines for immoral purposes. The jury returned a verdict of not guilty by reason of insanity.

Because there is no Federal procedure by which to commit persons acquitted of a crime on the basis of insanity, Maguire was able to walk out of the courtroom a free man. As one of the jury members said in a letter to me: "As it stands, the law reads something like 'Alice in Wonderland,' but it is not humorous."

The administration's proposals on the insanity defense . . . would remedy these problems. . . .

. . . [I]t is incumbent upon those of us who make the laws to insure that in the future our citizens are protected from any such distortions of the law.

I would urge you and the members of the subcommittee to act quickly to make these necessary reforms to the insanity defense.

Reform of the Federal Insanity Defense: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 98th Cong., 1st Sess. 566-567 (1983) (Statement of Hon. Rod Chandler, Congressional Representative from the State of Washington). See also *id.* at 241.

The narrowing of the federal insanity defense might be defended on the ground that, like *Brauner's* overruling of *Durham*, *supra* note 3, it cuts back on an insanity defense that exceeds the community's notions of exculpation. This possibility cannot be entirely discounted, but it seems more likely that the reform cuts back further than the commu-

of the federal system in dropping the volitional prong from their insanity defense.³⁶

The same dynamic—altering the criminal justice system to compensate for weaknesses in the civil commitment system—is seen in some states' attempts to abolish their "diminished capacity" defense, in which evidence of mental illness is used to negate a required offense culpability element.³⁷ While most states have procedures for automatic civil commitment for examination of persons held not guilty by reason of insanity,³⁸ few have analogous procedures for persons acquitted because their mental illness negates a required culpability element.³⁹ Some jurisdictions have sought to close this hole, not by expanding automatic civil commitment to include mentally ill persons acquitted under diminished capacity, but by abolishing their diminished capacity defense.⁴⁰ Similarly, legal

nity view would support. Available evidence suggests that the community *does* recognize an insanity defense for both cognitive and control dysfunction as a ground of exculpation. PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (forthcoming 1994). Thus, to exclude the possibility of exculpation on either ground is to create the possibility for convicting blameless offenders. The federal reform, in my view, is an example of the kind of miscalculation that can occur in the confusion created by a society's fear of the release of dangerous mentally ill persons from civil commitment.

³⁶ See, e.g., 1982 Alaska Sess. Laws § 42, ch. 143 (repealing the control prong of Alaska's insanity defense, ALASKA STAT. § 12.45.083(a); cognitive prong retained, ALASKA STAT. § 12.47.010 (1992)); 63 Del. Laws 328 (1982) (repealing control prong; cognitive prong retained, DEL. CODE ANN. tit. 11, § 401 (1992)). See *Daniels v. State*, 538 A.2d 1104, 1107 (Del. 1988).

³⁷ See, e.g., *Bethea v. United States*, 365 A.2d 64, 83-84 (D.C. App. 1976), *cert. denied*, 433 U.S. 911 (1977) (evidence of mental disease or defect may not be introduced to negate the culpable state of mind as an element of the offense); *Johnson v. State*, 439 A.2d 542, 549-50 (Md. 1982) (declining to adopt "diminished capacity" doctrine which permits evidence of abnormal mental condition to negate specific intent); *Bates v. State*, 386 A.2d 1139, 1142-43 (Del. 1978) (rejecting, absent legislative directive, "diminished responsibility" doctrine to negate intent element of murder charge); *State v. Wilcox*, 436 N.E.2d 523 (Ohio 1982) (rejecting "diminished capacity" defense; defendant may not offer psychiatric testimony to show lack of requisite mental state). The United States Supreme Court has not yet decided the issue of whether rejection of mental illness negating an element is constitutional. The Court denied certiorari in *Bethea*.

³⁸ *Jones v. United States*, 463 U.S. 354 (1983), authorizes automatic civil commitment after a verdict of "not guilty by reason of insanity" for a period long enough to perform an examination of the person committed. Most commitment schemes require that commitment beyond the initial examination period must be justified in periodic reviews. See, e.g., *id.*; D.C. CODE ANN. § 24-301(e) (1992).

³⁹ The jurisdictions abolishing the diminished capacity defense cited in *supra* note 36 had automatic civil commitment only for defendants acquitted under the insanity defense verdict of "not guilty by reason of insanity." See DEL. CODE ANN. tit. 11, § 403(a) (1992); D.C. CODE ANN. § 24-301(d) (1992); MD. CODE ANN., HEALTH-GEN. § 12-111(a) (1992); OHIO REV. CODE ANN. § 2945.40(A) (Baldwin 1992).

⁴⁰ The Ohio Supreme Court explains its rejection of a diminished capacity defense, in part, in this way:

challenges and restrictions on systems for the civil commitment of offenders judged to be "sexual psychopaths," have brought repeal of such statutes in many states, leaving such offenders to be committed under criminal process.⁴¹

In each instance, where civil commitment is made unavailable, difficult, or ineffective in committing dangerous offenders, pressure to criminally convict such offenders is increased. The resulting criminal law reforms increase the likelihood that offenders will be held criminally liable because of their apparent dangerousness, despite the absence of the blameworthiness. Instead of the civil commitment system serving as society's protective safety net where

[One writer] notes that '[s]eriously disturbed defendants can avoid an indefinite commitment to a mental hospital for the criminally insane by relying on the diminished responsibility defense which frequently leads to a reduced term in prison.' According to this view, the principle practical effect of the diminished capacity defense is to enable mentally ill offenders to receive shorter and more certain sentences than they would receive if they were adjudged insane. Having satisfied ourselves that Ohio's test for criminal responsibility [under its general insanity defense] adequately safeguards the rights of the insane, we are disinclined to adopt an alternative defense that could swallow up the insanity defense with its attendant commitment provisions.

State v. Wilcox, 436 N.E.2d 523, 527 (Ohio 1982) (quoting Professor Peter Arenella). The *Bethea* Court offered a similar reason: "the future safety of the offender as well as the community would be jeopardized by the possibility that one who is genuinely dangerous might obtain his complete freedom merely by applying his psychiatric evidence to the threshold issue of intent." *Bethea v. United States*, 365 A.2d 64, 91 (D.C. Cir. 1976).

⁴¹ See FLA. STAT. chs. 917.011 to .019 (1981), *repealed in part* by 1983 Fla. Laws ch. 109; IND. CODE § 35-11-3.1 (1976), *repealed* by 1979 Ind. Acts 294, § 1, 1979 Ind. Acts 87; IOWA CODE §§ 225A.1 to .15 (1975), *repealed* by 1976 Iowa Acts 66; MICH. COMP. LAWS §§ 780.501 to .509 (1948), *repealed* by 1966 Mich. Pub. Acts 267, 1968 Mich. Pub. Acts 143; MINN. STAT. § 246.43 (1978), *repealed* by 1978 Minn. Laws 723, § 19, 1979 Minn. Laws 258, § 25; MO. REV. STAT. §§ 202.700 to .770 (1978), *repealed* by 1980 Mo. Laws 503; OHIO REV. CODE ANN. §§ 2947.24 to .29 (Baldwin 1978), *repealed* by 1978 Ohio Laws 202; R.I. GEN. LAWS §§ 14-2-1 to 14-2-8 (1956), *repealed* by 1969 R.I. Pub. Laws 238, 1979 R.I. Pub. Laws 293; VT. STAT. ANN. tit. 18, § 8501 (1968), *repealed* by 1977 Vt. Acts 219. See generally Elyce H. Zenoff, *Controlling the Dangers of Dangerousness: The ABA Standards and Beyond*, 53 GEO. WASH. L. REV. 562, 580 (1985); Carol Veneziano & Lewis Veneziano, *An Analysis of Legal Trends in the Disposition of Sex Crimes: Implication for Theory, Research and Policy*, 15 J. PSYCHIATRY & L. 205, 216 (1987).

Similarly, the decision to waive civil juvenile jurisdiction in favor of criminal jurisdiction frequently rests, in part, upon the dangerousness of the juvenile, thus making routine the use of the criminal system to protect the community where the civil system cannot. See, e.g., ALASKA STAT. § 47.10.060(d) (1992). An analogous dynamic is seen in the rejection of "civil" in favor of "criminal" sentencing options. For example, Wisconsin repealed provisions that had sexual offenders (after criminal conviction) treated and confined by the Department of Public Welfare until they were no longer dangerous. "Legislative concern that the Sex Crimes Act allowed parole of persons who might still be dangerous was a major factor in the repeal decision." Marie Therese Ransley, Note, *Repeal of the Wisconsin Sex Crimes Act*, 1980 WIS. L. REV. 941, 953. The repeal means that sex offenders are now to be dealt with by the Department of Corrections, as are other criminal offenders. See generally *id.*

criminal liability is inappropriate, the increasing restrictions on civil commitment have reversed the roles. The criminal system is modified as necessary to protect us from the dangerous offenders that the civil system does not, without regard to the offender's blameworthiness. Under this arrangement, there is little hope for further refinements of criminal law that will broaden defenses to keep up with changing notions of criminal responsibility.

In *Foucha*, the Supreme Court appears to further reduce a state's ability to use civil commitment to protect itself from dangerous blameless offenders. *Foucha* is a *McQuillan* case for the entire country, and one can reasonably expect a similar narrowing of criminal law defenses and solidification of support for past narrowing. If it was unclear to a jurisdiction how it should counter the danger of releases from civil commitment created by *Foucha*, Justice O'Connor's concurrence, quoted in the introduction above,⁴² directs the way: abolish the insanity defense or adopt a verdict of "guilty but mentally ill," and take account of mental illness only after criminal conviction, at the sentencing stage.

A better approach would be to expand civil commitment to include dangerous offenders who are excluded from criminal liability as blameless for any reason. This would allow criminal conviction to be reserved exclusively for blameworthy offenders without concern that the community will be endangered by release of the blameless. Civil commitment would be in all respects non-punitive in nature, with incarceration or non-incarcerative supervision that minimizes infringement of the offender's freedoms consistent with society's protection. Commitment would be permitted only after proceedings in which the state demonstrates by clear and convincing evidence that the actor did engage in conduct prohibited by the criminal code and is likely to commit offenses in the future.

CRIMINAL LIABILITY OF THE BLAMELESS VS. CIVIL COMMITMENT OF THE SANE

If the justification for criminal liability and punishment is non-consequentialist desert, the need to limit criminal conviction to instances of moral condemnation is self-evident. For utilitarians, however, my objection to using the criminal law to commit blameless but dangerous offenders presumably cannot be sustained unless at least two propositions can be supported: (1) the effectiveness of the criminal law in controlling crime is diminished when the criminal law is modified to convict persons who do not have sufficient blame-

⁴² See text accompanying *supra* note 13.

worthiness to deserve the condemnation of criminal conviction, and (2) injury to societal interests would be less (than those I allege to the criminal justice system) if the civil commitment system were expanded, as I suggest, to allow the commitment of dangerous offenders who are excluded from criminal liability as blameless for any reason.

As to injury to the effective operation of the criminal justice system, I will argue that there is disutility in a criminal justice system that imposes punishment that is not seen as deserved. First, the imposition of criminal liability and punishment that is not seen as deserved has a broader effect than simply the injury and injustice to the offender at hand. Moral condemnation is an inexpensive yet powerful form of deterrent threat. It demands none of the costs associated with imprisonment or even supervised probation; yet, for many persons, it is a sanction to be very much avoided. This marvelously cost-efficient sanction is available, however, only if the system retains its moral credibility. If the system is seen to convict where no community condemnation is appropriate, the condemnation of criminal conviction is weakened.⁴³

An even greater compliance mechanism than the deterrent effect of shame and condemnation is suggested by recent empirical studies.⁴⁴ The studies suggest that most persons are motivated to obey the law, not because they fear being caught and punished (or shamed), but because they believe in the moral weight of the law. That is, most people obey the law, not because they fear the pain of

⁴³ Note that only one of the two kinds of inconsistencies between community views and criminal law has this adverse effect on the moral credibility of the criminal law: punishing a blameless offender. The reverse kind of deviation—failing to punish a blameworthy offender—may give rise to claims that the system is too lenient or too ineffective but does not tend to undercut the moral condemnation that would attach where persons are convicted.

⁴⁴ See THOMAS TYLER, *WHY PEOPLE OBEY THE LAW* chs. 3, 4 (1990). Tyler cites a number of other studies that suggest similar conclusions. *Id.* at 30-39. Other research supports the conclusion that a tension or contradiction between legal code and community standard has some of the consequences suggested. Studies show that the degree to which people report that they have obeyed a law in the past and plan to obey it in the future correlates with the degree to which they judge that law to be morally valid. See also Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval, and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. AND CRIMINOLOGY 325 (1980); HERBERT JACOB, *DEBTORS IN COURT: THE CONSUMPTION OF GOVERNMENT SERVICES* (1969); Robert F. Meier & Weldon T. Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 AM. SOC. REV. 292 (1977); Matthew Silberman, *Toward a Theory of Criminal Deterrence*, 41 AM. SOC. REV. 442 (1976); CHARLES R. TITTLE, *SANCTIONS AND SOCIAL DEVIANCE: THE QUESTION OF DETERRENCE* (1980). Tyler's recent study, *supra*, comes to similar conclusions. The degree to which his respondents saw the legal authorities as having legitimate power predicted their willingness to obey various laws promulgated by those authorities.

criminal sanction, but because they want to do what is right. They are driven, in large part, by their perception of themselves as honest, law-abiding people. But the effectiveness of the law in gaining compliance in this way is again a function of the law's credibility for doing justice. If the law closely matches people's shared intuitive notions of justice, it grows in its power to act as a model for their conduct. If the law is seen as being unjust, its power as a moral force is diminished. A society that imposes criminal liability on persons that the community regards as not sufficiently blameworthy risks destroying this motive to adhere to the laws. It risks becoming a society in which the only motive not to commit criminal conduct is to avoid being caught and punished.

Aside from the added deterrent effect of the shame of conviction and the compliance derived from the moral credibility of criminal law, the perceived "justice" of criminal law is crucial to gaining the cooperation and acquiescence of those persons involved in the process (including offenders, witnesses, and jurors). Greatest cooperation will be elicited where the criminal liability rules and the community's views of justice generate identical results. Conflict between the two undercuts the moral credibility of the system and thereby engenders resistance and subversion.⁴⁵

If these arguments are correct, it would be better to limit the criminal law so that only those offenders clearly perceived as blameworthy are convicted, and to extend the civil commitment system beyond the commitment of the mentally ill, to include offenders who are excluded from criminal liability as blameless for any reason but who are predicted to commit serious offenses if released. Is it possible, however, that such an expansion of civil commitment would be more detrimental to society than allowing the criminal law to punish blameless offenders?

One might argue that such an expansion of the civil commitment system would set a dangerous precedent. To give the government power to restrict liberty in such a dramatic way, with no prior objective limit on the length of confinement, creates the potential for governmental oppression on a large scale. This is preventive detention at its worse, one might argue, for at least preventive detention ends when the offender goes to trial.

⁴⁵ See, e.g., SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* (1988); Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 *LAW AND CONTEMPORARY PROBLEMS* 52-115 (1980); MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY* (1973); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 *YALE L.J.* 315 (1984).

Certainly there are dangers in creating such civil commitment authority but there is much that can be done to limit the danger. Civil commitment of non-mentally-ill offenders could be limited to threats of certain enumerated serious offenses, where the government shows⁴⁶ that the likelihood of future criminality meets a given level of probability, where a given minimum level of confidence in the prediction is met, and where these determinations are made in conjunction with procedural safeguards analogous in many respects to those provided criminal defendants: assistance of counsel, an evidentiary hearing, an opportunity to respond to the state's evidence, and appellate review. (The process necessarily would be different from a criminal trial, however, because a central issue here—the likelihood of future criminality—frequently would call for different kinds of evidence than would the issue in a criminal trial—culpability and responsibility with respect to a past offense.) In some respects, the procedural protections would exceed those given criminal defendants because the process would appropriately call for periodic reviews to confirm the offender's continuing dangerousness, reviews not needed for criminal commitment if the latter is justified as deserved punishment for a past offense.

Still, some might argue that such a system, while justifiable on its own terms, would set a dangerous precedent. But consider whether such a system would break new ground. Precedent already exists for commitment based on dangerousness alone for mentally ill persons; most jurisdictions presently provide for such.⁴⁷ In upholding the constitutionality of such commitment, courts have said:

⁴⁶ One can appropriately argue for a clear-and-convincing-evidence standard (rather than the criminal law's beyond-a-reasonable-doubt standard). This is typically required for current civil commitment. See *Addington v. Texas*, 441 U.S. 418 (1979). The civil commitment determination here does not serve the same general-deterrence-through-moral-condemnation function that a criminal verdict must serve and therefore need not reflect the kind of strong consensus demanded by a beyond-a-reasonable-doubt standard. Also, prediction of future events, the dangerousness issue, can never be shown to the same degree of certainty that one can have as to a past event, the issue in a criminal case. A beyond-a-reasonable-doubt standard might well make the system ineffective as a protective device. (On the other hand, if the ultimate issue to be proven was not terribly demanding, even a beyond-a-reasonable-doubt standard could be satisfied. That is, instead of requiring proof that it was *probable* that the offender would commit another offense, the system could be effective even if it required proof beyond a reasonable doubt that a significant *possibility* existed that the offender would commit another serious offense.)

⁴⁷ See, e.g., CONN. GEN. STAT. ANN. § 17a-498 (West 1992); IDAHO CODE § 66-329 (1989); LA. REV. STAT. ANN. § 28:55 (West 1989); MASS. ANN. LAWS ch. 123, § 12 (Law. Co-op. 1992); MINN. STAT. § 253B.02, subs. 13, 17 (1990); MO. REV. STAT. § 552.040 (1991); N.H. REV. STAT. ANN. § 135-C:34 (1991); N.J. STAT. ANN. § 30:4-27.1 (West 1992); N.Y. MENTAL HYC. LAW § 9.37 (Consol. 1993); UTAH CODE ANN. § 62A-5-312 (1992); WASH. REV. CODE § 71.05.280 (1991); WIS. STAT. § 51.20 (1989-90); WYO. STAT.

"There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts . . ." ⁴⁸ Note that current systems for the civil commitment of the mentally ill have less demanding criteria than the expansion of civil commitment proposed here; they do not require proof of a prior criminal offense as this proposal does, but premise incarceration *exclusively* on a prediction of future dangerousness.

Nor does the proposed expansion of civil commitment break new ground in the commitment of dangerous persons who are not mentally ill. Dangerousness is the rationale and the criterion for special extended terms of incarceration for habitual offenders.⁴⁹ Under such provisions, an offender may be sentenced to life imprisonment for obtaining \$120.75 by false pretenses, for example, upon a showing that he committed two previous felonies related to credit card and check fraud.⁵⁰ Some jurisdictions use dangerousness as the primary criterion for deciding whether consecutive sentences should be imposed for multiple offenses: "[A] consecutive sentence should be imposed only after a finding by the trial judge that confinement for such a term is necessary in order to protect the public from further criminal conduct by the defendant."⁵¹ Dangerousness

§ 25-10-101 (1992). Not all jurisdictions have provision for the civil commitment of the dangerously mentally ill. See *supra* note 16.

⁴⁸ O'Connor v. Donaldson, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring), quoted in State v. James, 534 S.W.2d 41, 44 (Mo. 1976).

⁴⁹ See, e.g., ARIZ. REV. STAT. ANN. § 13-604(K) (1992); ARK. CODE ANN. § 5-4-501 (Michie 1987); DEL. CODE ANN. tit. 11, § 4214 (1987); FLA. STAT. ch. 775.084 (1991); MISS. CODE ANN. § 99-19-83 (1991); NEV. REV. STAT. ANN. § 207.010 (Michie 1991); N.M. STAT. ANN. § 31-18-17 (Michie 1990); S.D. CODIFIED LAWS ANN. §§ 22-7-7, 22-7-8, 22-7-8.1 (1988); W. VA. CODE § 61-11-18 (1992); WYO. STAT. § 6-10-201 (1992). See also Am. Jur. 2d, *Habitual Criminals and Subsequent Offenders* (1968).

⁵⁰ Such sentencing was upheld as constitutional. See *Rummel v. Estelle*, 445 U.S. 263 (1980). As one court explains:

[T]he sentence imposed for a subsequent offense [under a habitual violent offender statute] is enhanced on the theory that the defendant's prior conviction of a violent felony indicates the *'incorrigible and dangerous character of the accused'* and establishes the necessity for enhanced restraint.'

Tillman v. State, 609 So. 2d 1295, 1298 (Fla. 1992) (emphasis added). Another court explains, "Our habitual criminality statute exists to enable the criminal justice system to deal determinedly with career criminals who pose a serious threat to public safety." *State v. Sessions*, 789 P.2d 1242, 1245 (1990). See also *Rummel*, 445 U.S. at 276:

[T]he interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another's property; it is in addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.

⁵¹ *Gray v. State*, 538 S.W.2d 391, 393 (Tenn. 1976) (citing Sentencing Alternatives and Procedures, § 3.4(b)(IV), American Bar Association Project on Standards for Criminal Justice (1968)).

similarly is the rationale and the criterion for extended terms for several classes of offenders, such as those determined to be a "sexually dangerous person."⁵² Under a Colorado statute, for example, a sex offender is committed to an indeterminate term, from one day to life imprisonment, upon a finding that he "constitutes a threat of bodily harm to members of the public."⁵³ The release decision for such offenders similarly is keyed to the continuing dangerousness of the offender.⁵⁴ Indeed, extended term may be authorized for nearly any serious felony where the offender is found to be dangerous.⁵⁵ And many jurisdictions have their parole commissions make release decisions for all offenses by assessing, *inter alia*, the dangerousness of the offender. Typically, an offender may be released only if such "will not increase the likelihood of harm to the public."⁵⁶

Nor is commitment of dangerous non-mentally-ill persons limited to cases labelled as "criminal." Non-criminal detention of legally sane persons has been authorized in a variety of instances in which commitment is needed to protect the community. Statutes for the detention of persons with a communicable disease are com-

⁵² See, e.g., 725 ILCS 205/1.01 to 1.11 (Michie 1993) (*originally enacted as* ILL. REV. STAT. ch. 38 § 105-1.01); see *People v. Lovett*, 600 N.E.2d 893 (Ill. App. Ct. 1992) (underlying conviction need not be for a sexual offense); UTAH CODE ANN. § 76-5-403.1 (Supp. 1988) (extended term for those committing sodomy upon a child); WIS. STAT. § 975.12 (1989-90) (extended term for those committing crimes motivated by desire for "sexual excitement"); COLO. REV. STAT. § 16-13-203 (1992) (indeterminate commitment for sex offenders). Some jurisdictions achieve the same result through judicial decision. See, e.g., *State v. Barnes*, 818 P.2d 1088 (Wash. 1991) (considering dangerousness as an aggravating factor in the sentencing of sex offenders).

⁵³ COLO. REV. STAT. § 16-13-211(2) (1992).

⁵⁴ The board is authorized to release a person "if the board deems it in the best interests of that person and the public and that the person, if at large, would not constitute a threat of bodily harm to members of the public." COLO. REV. STAT. § 16-13-216(5) (1992).

⁵⁵ See, e.g., OR. REV. STAT. §§ 161.725, 161.735 (1991).

⁵⁶ TEX. CODE CRIM. PROC. ANN. art. 42.18, § 8(a) (West 1993). See also ALASKA STAT. § 33.16.100 (1986); ARK. CODE ANN. § 16-93-701 (Michie 1987) (release when there is a reasonable probability that the prisoner can be released without detriment to the community); COLO. REV. STAT. § 17-22.5-404 (1992) (the board shall first consider the risk of violence to the public in every release decision it makes); DEL. CODE ANN. tit. 11, § 4347 (1987) (parole shall be ordered only when in the best interest of society); FLA. STAT. ANN. § 947.18 (West 1985) (no person shall be placed on parole until and unless the commission finds that there is a reasonable probability that, if he is placed on parole, his release will be compatible with his own welfare and the welfare of society); KY. REV. STAT. ANN. § 439.340 (Michie/Bobbs-Merrill 1985) (parole shall be ordered only for the best interest of society); MO. ANN. STAT. § 217-690 (Vernon 1983) (when in the board's opinion there is a reasonable probability that an offender can be released without detriment of the community, the board may in its discretion release or parole such person); MONT. CODE ANN. § 46-23-201(1) (1992) ("release when . . . reasonable probability that the prisoner can be released without detriment to the prisoner or to the community").

mon.⁵⁷ In supporting the state's use of its police power to detain two women who were thought to have a venereal disease but who refused medical examination, the Illinois Supreme Court concluded:

Among all the objects sought to be secured by governmental laws none is more important than the preservation of public health. The duty to preserve the public health finds ample support in the police power, which is inherent in the state, and which the state cannot surrender. . . . The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deny to any person within its jurisdiction equal protection of the laws, were not intended to limit the subjects upon which the police power of a state may lawfully be asserted in this any more than in any other connection.⁵⁸

In the same vein, many jurisdictions provide for the civil commitment of persons with a chemical dependence,⁵⁹ "not only for the protection of the addict . . . against himself, but also for the prevention of contamination of others and the protection of the public."⁶⁰ Every jurisdiction has a civil system for the commitment of juvenile delinquents. The justification for such commitment frequently is "for the safety and protection of the public."⁶¹ Commitment and

⁵⁷ See, e.g., ALA. CODE §§ 22-11A-10 (tuberculosis), -14 & -18 (sexually transmitted diseases), -24 (notifiable diseases) (1992); COLO. REV. STAT. § 25-1-650 (1992) (communicable diseases); DEL. CODE ANN. tit. 16, § 505 (1983) (communicable diseases); FLA. STAT. ch. 384.28 (1991) (sexually transmissible diseases); HAW. REV. STAT. § 325-8 (1985) (infectious, communicable, or other disease dangerous to public health); IOWA CODE ANN. § 139.3 (West 1989) (communicable diseases); KAN. STAT. ANN. § 65-128 (1991) (infectious or contagious diseases); MINN. STAT. § 144.4180 (1992) (communicable diseases); N.H. REV. STAT. ANN. § 141-C:11 (1990) (communicable diseases); N.C. GEN. STAT. § 130A-145 (1992) (communicable diseases); OHIO REV. CODE ANN. § 3707.08 (Baldwin 1989) (communicable diseases); R.I. GEN. LAWS. § 23-8-4 (1989) (communicable diseases); TENN. CODE ANN. § 68-5-104 (1992) (communicable or contagious diseases); WIS. STAT. ANN. § 143.05 (West 1989) (communicable diseases).

⁵⁸ *People ex rel. Baker v. Strautz*, 54 N.E.2d 441, 444 (Ill. 1944). See also *Varholy v. Sweat*, 15 So. 2d 267 (Fla. 1943); *Reynolds v. McNichols*, 488 F.2d 1378 (10th Cir. 1973); *State v. Hutchinson*, 18 So. 2d 723 (Ala. 1944); *Welch v. Shepherd*, 196 P.2d 235 (Kan. 1948).

⁵⁹ See, e.g., CAL. WELF. & INST. CODE § 3000 to 3311 (Deering 1993); D.C. CODE ANN. § 24-601 to 24-611 (1992); MINN. STAT. § 253B.02, subd. 14 (1990); S.C. CODE ANN. § 44-52-50 to 44-52-210 (Law. Co-op. 1991).

⁶⁰ CAL. WELF. & INST. CODE § 3000 to 3311 (Deering 1993). Similarly, "The purpose of [the D.C. Code provisions for commitment of those with a chemical dependence] is to protect the health and safety of the people of the District of Columbia from the menace of drug addiction . . ." D.C. CODE ANN. § 24-601 (1992). Under the South Carolina statute, the court is to be given reports on "the chemical dependency alleged, whether or not the individual poses a substantial risk of physical harm to himself or others if allowed to remain at liberty, [and other matters]." S.C. CODE ANN. § 44-52-90 (Law. Co-op. 1991). See also MISS. CODE ANN. §§ 41-31-3, 41-31-5 (1981).

⁶¹ See, e.g., ALA. CODE § 12-15-1.1 (1992) (defining purposes and goals of juvenile court); ALA. CODE § 12-15-74 (1986) (such action is necessary to protect the welfare of

release frequently are based in part upon the juvenile's dangerousness to others.⁶² Frequently, detention beyond the normal statutory period is authorized if "discharge from control of the Youth Authority . . . would be physically dangerous to the public."⁶³ Because behavioral scientists until recently did not consider repeated criminal conduct itself to be a mental illness,⁶⁴ "sociopaths" or "psychopaths," as some habitual offenders are clinically diagnosed, are not subject to the provisions for civil commitment of the mentally ill. Many states, however, provide special provisions for the civil commitment of such persons.⁶⁵ Persons suffering mental retardation, which is not considered a "mental illness" in some jurisdictions, are nonetheless civilly committed under special statutes.⁶⁶ Commit-

the child or the public interest); CAL. WELF. & INST. CODE § 202 (West 1984); *Baker v. Smith*, 477 S.W.2d 149 (Ky. 1971).

⁶² See, e.g., ALA. CODE § 12-15-71.1 (1992) (defining and authorizing the commitment of "serious juvenile offenders"); KY. REV. STAT. ANN. § 645.180 (Baldwin 1992) (physician may authorize convalescent leave of an involuntary patient only if he concludes that patient would not present a danger or a threat of danger of himself or others during such a leave); N.C. GEN. STAT. § 7A-574 (1989) (when a request is made, the judge may order secure custody only where he finds there is a reasonable factual basis to believe that the juvenile actually committed the offense as alleged and that the juvenile is presently charged with a felony and has demonstrated that he is a danger to property or persons); UTAH CODE ANN. § 78-3a-30 (1992) (officer in charge of detention or shelter care facility shall order the release of a child unless he finds or has reasonable cause to believe, for reasons of public safety, that it is not sage to release the child). The decision to waive civil juvenile jurisdiction in favor of criminal jurisdiction frequently rests in part upon the dangerousness of the juvenile, making routine the use of the criminal system to protect the community where the civil system cannot.

⁶³ CAL. WELF. & INST. CODE § 1800 (Deering 1993); MASS. ANN. LAWS ch. 120, § 17 (Law. Co-op. 1993).

⁶⁴ See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 43 (2d ed. 1968). The current edition does recognize "antisocial personality disorder," manifested in repeated criminal behavior. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 342-46 (3d ed. rev. 1987). For a discussion of the Model Penal Code's exclusion of such cases from the definition of mental illness, see MODEL PENAL CODE § 4.01(2) cmt. 4 (1985).

⁶⁵ MINN. STAT. § 526.10(1) (1992) ("psychopathic personality" is defined in MINN. STAT. § 526.09 (1992) to mean a person who suffers

emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any such conditions, as to render such person irresponsible for personal conduct with respect to sexual matters and thereby *dangerous to other persons*).

MASS. ANN. LAWS. ch. 120, § 14 (Law. Co-op. 1975) (emphasis added); NEB. REV. STAT. § 29-2921 (1989). Such civil commitment has been constitutionally approved. See *State ex rel. Pearson v. P. Ct. of Ramsey County*, 287 N.W. 297 (Minn. 1939); *Minnesota ex rel. Pearson v. P. Ct. of Ramsey County*, 309 U.S. 270 (1940).

⁶⁶ See, e.g., ALA. CODE § 12-15-90 (1986); ALA. CODE § 22-52-55 (1990); CAL. WELF. & INST. CODE § 4426 (West 1984); CONN. GEN. STAT. ANN. § 17a-274 (West 1992); D.C. CODE ANN. § 6-1924 (1989); D.C. CODE ANN. § 6-1926 (1989); MD. CODE ANN., CTS. & JUD. PROC. § 3-820 (1989); MINN. STAT. § 253B.02, subd. 14 (1990); MISS. CODE ANN. § 41-21-73 (1992); MO. REV. STAT. § 211.203 (1991) (providing for civil commitment of

ment and release decisions typically depend upon the retarded person's dangerousness.⁶⁷ Finally, pretrial detention of dangerous arrestees is permitted in the District of Columbia and the federal system if "no condition or combination of conditions [of release] . . . will reasonably assure the safety of the community."⁶⁸

Note that the preconditions for civil commitment in all of these instances are less demanding than the requirements for civil commitment proposed here. None but the last—preventive detention pending trial—require even a claim that the actor has committed an offense; and preventive detention requires only an allegation of criminal conduct. The civil commitment authority proposed here would require proof of commission of an offense.

DANGEROUSNESS IN CRIMINAL GRADING AND SENTENCING

I have argued above against the criminal conviction of persons on the basis of dangerousness rather than blameworthiness. The logic of the arguments also may suggest that the *extent* of criminal liability and punishment ought to be determined according to an actor's blameworthiness rather than his dangerousness. This, of course, would call for a significant alteration of current criminal law practice. Noted above are many instances in which the criminal justice system presently uses dangerousness as grounds for longer terms of incarceration: special extended terms for habitual offenders, consecutive sentences for multiple offenses, special extended terms for several classes of offenses, and delay of release on parole

mentally retarded or developmentally disabled children); NEV. REV. STAT. § 62.193 (1986); N.Y. JUD. LAW § 231 (McKinney 1983).

⁶⁷ See, e.g., CAL. WELF. & INST. CODE § 4801 (West 1984) (the court may order the release of an adult who is committed pursuant to § 6500 if the court finds there is no longer a basis for finding the adult a danger to self or others); MD. CODE ANN., HEALTH-GEN. § 12-113 (1990); MO. REV. STAT. § 633.125(1) (release unless "the resident present[s] a likelihood of serious physical harm to himself or others").

⁶⁸ See D.C. CODE ANN. § 23-1322(a)(1) (1992); 18 U.S.C. § 3142(e) (1993). Such detention has been constitutionally approved. As *Salerno* explains:

There is no doubt that preventing danger to the community is a legitimate regulatory goal. . . . While the government's general interest in preventing crime is compelling, even this interest is heightened when the government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these circumstances, society's interest in crime prevention is at its greatest.

United States v. Salerno, 481 U.S. 739, 747, 750 (1987). See also United States v. Edwards, 430 A.2d 1321 (D.C. 1981), cert. denied, 455 U.S. 1022 (1982); Kleinbart v. United States, 604 A.2d 861, 868 (D.C. 1992) (post-*Salerno* application of D.C. preventive detention statute); Lynch v. United States, 557 A.2d 580 (D.C. 1989) (finding of dangerousness under pretrial detention statute must use standard of clear and convincing evidence); State v. Simpkins, 826 F.2d 94 (D.C. Cir. 1987) (post-*Salerno* application of federal preventive detention statute).

of dangerous offenders.⁶⁹ With qualifications that I shall note, I support such a purge of dangerousness considerations from the criminal justice system, if it would significantly enhance the moral credibility of criminal convictions.

From this prospective, Washington State's much criticized new "sexual predator" law, for example, is the ideal approach. The statute provides for the civil commitment of sexual offenders if, at the conclusion of their criminal sentence (presumably based upon desert, not dangerousness), they remain likely to repeat their sexual offenses.⁷⁰ It permits minimum use of dangerousness considerations in criminal commitment decisions by relying on the civil commitment process to provide any additional protection needed beyond the criminal term.

If restricting civil liberties is the concern, the Washington approach seems preferable to that of many states that sentence such sex offenders to life imprisonment to avoid the possibility of release of an offender who remains dangerous after a shorter term.⁷¹ Oddly enough, the latter scheme, life imprisonment for all sexual offenders, is the safer constitutional course for states, given the current restrictions on civil commitment, which require periodic review of both continuing mental illness and dangerousness.⁷² The periodic review requirement is not applied to criminal commitment, presumably because criminal commitment is justified as punishment for a past offense, which provides no rationale for periodic review.

But this simply illustrates the deceptiveness of the present system. By considering dangerousness in setting *criminal* terms, the state avoids the periodic review requirement that appropriately ought to attach whenever dangerousness is the justification for commitment. But because the commitment is labelled as "criminal," and thus apparently based upon blameworthiness for a *past* offense, no periodic review is thought to be required. Logic would suggest that if the criminal law is not purged of its reliance upon dangerousness in setting incarceration terms, the standard civil commitment requirements, including periodic review, should be applied to that additional portion of the term imposed on dangerousness grounds.⁷³

⁶⁹ See *supra* notes 45-52 and accompanying text.

⁷⁰ WASH. REV. CODE § 71.09 (1991).

⁷¹ See *supra* note 48 and accompanying text.

⁷² *Jones v. United States*, 463 U.S. 354 (1983) (requiring periodic reviews of mental illness and dangerousness for civil committees found not guilty by reason of insanity). See *supra* note 37.

⁷³ As noted above, in some jurisdictions, some periodic review for continuing dangerousness does take place, in the form of parole release decisions. But because the

Except for these last comments, this Article generally has not addressed the issue of dangerousness as a criterion in grading or sentencing. It has focused on dangerousness as a criterion for the initial liability decision, as in abolishing, limiting, or undermining the insanity or diminished capacity defense. This has been the focus, not because the use of dangerousness in grading is unimportant, but rather because the use of dangerousness in making the initial liability decision generally has a greater potential to undercut the moral credibility of the criminal law than does dangerousness in grading or sentencing. That is, it may be less of an injustice, or at least perceived as less of an injustice, to impose greater punishment than is deserved on a blameworthy offender than to impose undeserved criminal liability on a blameless offender.

One can conceive of extreme cases, however, where the punishment imposed on dangerousness grounds so far exceeds the punishment deserved that the potential for injustice or perceived injustice is as great. Consider, for example, the crossing-guard convicted of sexually fondling a child. He may deserve punishment; but a criminal sentence of life imprisonment, even if based upon a well-founded prediction of future offenses, would hardly enhance the moral credibility of the criminal law. A better approach would be to impose the criminal term that is deserved for the past offense, and to impose any additional liberty restrictions needed for societal protection under a civil process, thereby making explicit the dangerousness rationale and adhering to its attendant limitations, such as periodic review.

CONCLUSION

I have argued here that it would be better to expand civil commitment to include seriously dangerous offenders who are excluded from criminal liability as blameless for any reason, than to divert the criminal justice system from its traditional requirement of moral blame. Admittedly, such an expansion of civil commitment is potentially problematic. Most notably, behavioral science still does a poor job in predicting future dangerousness.⁷⁴ This fact counsels cau-

punishment and dangerousness portions of a term are unspecified, two kinds of errors are inevitable. Periodic review (in the form of parole review) might start too late, after a substantial part of the dangerousness portion of the term has begun. Or, conversely, a person might be released too soon, as no longer dangerous but before their punishment portion had been served.

⁷⁴ See, e.g., Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54, 74 (1982); Joseph J. Cocozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976); Bernard L. Diamond, *The Psychiatric Predicting*

tion. Nonetheless, it seems unwise for courts, as the Michigan Supreme Court did in *McQuillan* and as the United States Supreme Court now does in *Foucha*, to constitutionally restrict the use of civil commitment to cases of mental illness and thereby compel use of the criminal justice system to pick up the protective slack. At the very least, by *constitutionalizing* limitations on civil commitment, the courts prevent legislatures from experimenting with combinations of criminal and civil commitment that might better preserve both individual rights and society's protection.

One can hope that *Foucha* is given a narrow reading, as invalidating Louisiana's civil commitment scheme only because of inadequate procedural safeguards or because the nature or place of detention (a mental hospital) was inappropriate (for commitment of a person who is no longer mentally ill). Justice O'Connor's concurrence can be read to take this view,⁷⁵ and her vote is needed for the bare majority supporting the judgment. Perhaps a subsequent case will give the Court the opportunity to reinvigorate the use of civil, rather than criminal, commitment for dangerous blameless offenders. Such a course seems the only means by which the moral credibility of the criminal law and the compliance that it generates is likely to be preserved.

tion of Dangerousness, 123 U. PA. L. REV. 439 (1974-75); Edwin I. Megargee, *The Prediction of Dangerousness Behavior*, 3 CRIM. JUST. & BEHAV. 3 (1976); James M. Mullen & Robert C. Reinehr, *Predicting Dangerousness of Maximum Security Forensic Mental Patients*, 10 J. PSYCHIATRY & L. 223 (1982); Henry J. Steadman, *Predicting Dangerousness Among the Mentally Ill: Art, Magic and Science*, 6 INT'L J. L. & PSYCHIATRY 381 (1983); Franklin E. Zimring & Gordon Hawkins, *Dangerousness and Criminal Justice*, 85 MICH. L. REV. 481 (1986).

⁷⁵ "It might . . . be permissible for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness." *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992).