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Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons

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PREDICTION OF CRIMINAL CONDUCT AND PREVENTIVE CONFINEMENT OF CONVICTED PERSONS *

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I. INTRODUCTION

Preventive confinement—incapacitating an allegedly dangerous individual in order to prevent him from engaging in predicted criminal conduct—is a concept that seems rather foreign to our traditions of justice. We would be prone to assert that a person may be deprived of his liberty, not on the basis of a prediction of criminal behavior, but only on the basis of a determination of guilt for a past offense. As the recent controversy over pre-trial preventive detention in the District of Columbia illustrates,[1] it can arouse our concern or alarm when the state seeks to incarcerate preventively those suspected of criminal tendencies, even for brief periods. While predictions of dangerousness

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This article was aided and inspired by the Committee's discussions. The conclusions stated herein, however, are to be taken as an expression of the author's own views—as the Committee is still conducting its deliberations on the subject.

The author wishes to note his particular indebtedness to the writings, comments and suggestions of Professor Alan Dershowitz, who is currently conducting an extensive inquiry into the role of predictions of deviant conduct in the law.

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1. For a summary of arguments against pre-trial preventive detention, see Ervin, *Foreword: Preventive Detention—A Step Backward for Criminal Justice,* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 291 (1971); Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell,* 56 VA. L. REV. 371 (1970).

have historically been used to justify confining mentally ill persons, this practice also is beginning to generate criticism and doubts.[2]

Yet once a person has been convicted of a crime, our scruples about preventive confinement seem to disappear. Predictions of criminal conduct regularly enter into decisions concerning the disposition of convicted criminal offenders. With little public notice and few voiced objections, the state has been free to impose prolonged terms of confinement upon convicted persons predicted to be dangerous, for the express or implied purpose of incapacitating them from engaging in future criminal conduct; the duration of these individuals' confinement may far exceed what would ordinarily seem justified as punishment for their past offenses. Thus one is tempted to ask: "If we are so distrustful of preventive confinement in cases where there has been no conviction for a crime, why should we so readily accept it after there has been a conviction?" This paper will attempt to deal with that question.

A. *Prevalence of the Practice of Preventive Confinement*

Numerous examples could be cited in existing law involving essentially preventive confinement of convicted persons predicted to be dangerous. I shall mention just a few.

Canada has adopted a system explicitly termed "Preventive Detention," authorizing the imprisonment of convicted multiple offenders for an indeterminate term if:

> [T]he court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.[3]

England, having had a system of Preventive Detention similar to the Canadian one until 1967, still permits a judge to sentence an

2. For critical analyses of the use of psychiatric predictions in civil commitment proceedings for the mentally ill, see Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions,* 23 J. LEGAL ED. 24 (1970) [hereinafter cited as Dershowitz, *The Law of Dangerousness*]; Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways,* 4 TRIAL 29 (Feb.-Mar. 1968); Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment,* 117 U. PA. L. REV. 75 (1968); Note, *Civil Commitment of the Mentally Ill: Theories and Procedures,* 79 HARV. L. REV. 1288 (1966).

3. CAN. REV. STAT. c. 34, § 688 (1970). According to the statute, an "habitual criminal" is one who has been previously convicted of three separate offenses punishable by five years or more of imprisonment, and who is "leading persistently a criminal life." For a description and history of the Canadian Preventive Detention law see MacDonald, *A Critique of Habitual Criminal Legislation in Canada and England,* 4 U.B.C. L. REV. 87 (1969).

offender for a term well beyond the maximum term for his last offense, if, in the words of the statute, the court

> is satisfied, by reason of his previous conduct and of the likelihood of his committing further offences, that it is expedient to protect the public from him for a substantial time . . .[4] .

One of the most overt schemes of preventive confinement in this country is the Maryland Defective Delinquent Law.[5] Under the Maryland statute, an individual who has been convicted for the first time of any of a wide variety of offenses (some rather minor), may be indefinitely confined if he is found by a court, on the basis of recommendations by a state medical board, to be a "defective delinquent." To be classified as such, the individual must meet two sets of criteria, one predictive and one quasi-psychiatric. The predictive criterion is that the individual

> by the demonstration of persistent aggravated anti-social or criminal behavior, evidences a propensity toward criminal activity . . . as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment.[6]

The quasi-psychiatric criterion is that the individual, *though legally sane,* manifests "emotional unbalance" or "intellectual deficiency." [7] If the individual is found to meet these criteria, then he will be confined in a special institution for defective delinquents, Patuxent Institution. The term of his confinement is indeterminate, can exceed the maximum term of punishment for the offense of which he was convicted, and can even be for life.[8] He is entitled to release only when it is determined that he no longer meets the criteria for "defective delinquency" that justified his confinement.[9] During confinement, he is supposed to be

4. Gr. Brit., Criminal Justice Act of 1967, §§ 37-38. For a history of the British Preventive Detention law prior to 1967 see MacDonald, *supra* note 3.

5. MD. ANN. CODE art. 31B (Supp. 1971). For a useful analysis of the Maryland statute, see Note, *"Defective Delinquent" and Habitual Criminal Offender Statutes—Required Constitutional Safeguards,* 20 RUTGERS L. REV. 756 (1966) [hereinafter cited as *Rutgers Note*]. The Supreme Court has recently granted certiorari on a constitutional challenge to the Maryland law in Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971), *cert. granted sub nom.* Murel v. Baltimore City Court, 92 S. Ct. 567 (1971).

6. MD. ANN. CODE art. 31B, § 5 (1971).

7. *Id.*

8. *Id.* § 9(b).

9. *Id.* § 9(a).

subjected to an intensive program of rehabilitative treatment, although a Maryland court has recently found that such treatment is not being made available to the more recalcitrant prisoners.[10]

Colorado authorizes the preventive confinement of persons convicted for sexual offenses, if the court finds that such individuals constitute "a threat of bodily harm to members of the public." [11] Confinement is for an indeterminate term, up to the lifetime of the defendant.[12] According to a recent survey conducted under the auspices of the American Bar Foundation, seventeen other jurisdictions authorize the indeterminate confinement of sex offenders or so-called "sexual psychopaths," with or without a prior conviction.[13]

The Model Sentencing Act proposes that a felony offender convicted of certain serious crimes be sentenced for an extended term of up to thirty years (thrice the maximum term of confinement he otherwise could receive for such offenses) if the court, after ordering a psychiatric examination, finds that "because of the dangerousness of the defendant, such period of confined correctional treatment or custody is required for the protection of the public" and if it further finds that he "is suffering from a severe personality disorder indicating a propensity toward criminal activity." [13a] The Model Penal Code provides that a trial judge, in sentencing a person convicted of a felony, may extend the term of his imprisonment well beyond the maximum provided for that category of felony, when "the defendant is a dan-

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10. McCray v. Maryland, Misc. Pet. No. 4363 (Md. Cir. Ct., Montgomery County, Nov. 11, 1971).

11. COLO. REV. STAT. ANN. § 39-19-11(2) (Supp. 1969). This is the current version of the Colorado statute, revised since the U.S. Supreme Court held an earlier version unconstitutional, in Specht v. Patterson, 386 U.S. 605 (1967). For comment on the Colorado statute, see Note, *Indiana's Sexual Psychopath Law*, 44 IND. L.J. 242 (1969).

12. COLO. REV. STAT. ANN. § 39-19-3 (1969 Supp.).

13. S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW ch. 10 (American Bar Foundation rev. ed. 1971). According to this survey, these jurisdictions are Alabama, California, Florida, Illinois, Indiana, Iowa, Kansas, Massachusetts, Missouri, Nebraska, New Hampshire, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, and the District of Columbia. The statutory definitions of "sexual psychopath," along with the statute citations, are set forth in this survey. Generally, the term "sexual psychopath" is used to refer to an individual who is not legally insane, is suffering from some kind of emotional or mental disturbance that makes him "disposed" to commit sex crimes, and is deemed to constitute a danger to the community if permitted to remain at large.

13a. ADVISORY COUNCIL OF JUDGES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT § 5 (1963); NATIONAL COUNCIL ON CRIME AND DELINQUENCY, GUIDES TO SENTENCING THE DANGEROUS OFFENDER (1969).

gerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public." [13b]

The California indeterminate sentence law gives an independent sentencing board—the Adult Authority—plenary discretion to determine release dates within the widest maximum and minimum statutory limits.[14] The Adult Authority may—and apparently does—determine the duration of an offender's confinement in part upon the basis of informal estimates of his supposed individual dangerousness.[15]

Essentially predictive judgments are also frequently made in conventional parole situations. Since 1933, Illinois has made regular use of statistical prediction techniques in its parole system. An actuarial prediction table of parole outcomes has been prepared for each of the major institutions in the state. A sociologist-actuary at each institution prepares a routine prediction report based upon the tables for each inmate appearing at a parole hearing. He computes the prisoner's statistical chances for making a successful adjustment on parole; the final sentence in the report reads: "This inmate is in a class in which __% may be expected to violate the parole agreement." Together with sociological, psychiatric and psychological reports and interviews by the parole board, the predictive score is used to determine whether the prisoner is granted or denied parole.[16]

Based on the Illinois experience, several noted criminologists have advocated more extensive and systematic use of prediction tables in sentencing and parole decisions.[17] According to a nationwide survey conducted in 1962,[18] three other states—Ohio, California and Colorado—had developed formal prediction tables for application in individual parole decisions. While not using tables, parole boards in other states regularly make informal estimates

13b. MODEL PENAL CODE § 7.03(3) (Proposed Official Draft, 1962).

14. CAL. PENAL CODE §§ 1168, 3020 (West 1970).

15. *See* Johnson, *Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine*, 58 CALIF. L. REV. 357, 379-83 (1970); Mitford, *Kind and Usual Punishment in California*, THE ATLANTIC, March 1971, at 46.

16. Evjen, *Current Thinking on Parole Prediction Tables*, 8 CRIME AND DELIN. 215 (1962).

17. L. OHLIN, SELECTION FOR PAROLE (1951); Glaser, *Prediction Tables as Accounting Devices for Judges and Parole Boards*, 8 CRIME AND DELIN. 239 (1962). Ohlin and Glaser developed the prediction tables in use in Illinois. Evjen, *supra* note 16.

For a valuable analysis and summary of prediction studies, see, H. MANNHEIM & L. WILKINS, PREDICTION METHODS IN RELATION TO BORSTAL TRAINING (1955).

18. Evjen, *supra* note 16, at 216-17.

of individual inmates' potential for future anti-social conduct in determining whether to grant or deny parole; a recent American Bar Foundation survey of sentencing and parole procedures found that "the principal consideration in the decision to grant or deny parole is the probability that the inmate will violate the criminal law if he is released." [19]

B. *Scope of the Inquiry*

Before proceeding, it is appropriate to define the scope of this inquiry more precisely. Imprisonment has or may have as one of its functions, the prevention of future crimes—even without any attempt at prediction of individual dangerousness. *Any* decision to confine a person convicted of a crime incapacitates him from committing, during his period of confinement, any criminal acts he might otherwise choose to commit against the outside community. That is true even if the decision to confine is made *solely* with reference to his past criminal conduct, and no effort is made to forecast his individual future behavior. So long as it is assumed that *some* convicted robbers (never mind which individual ones) would be inclined to commit further offenses if allowed to remain at large, imprisoning *all* convicted robbers for a specified period of time might prevent *some* future robberies from occurring. This kind of prevention is what might be called prevention in the *collective* sense. It raises some important questions, worthy of careful study.[20] However, it is outside the scope of the present article.

19. R. DAWSON, SENTENCING ch. 11, at 263 (American Bar Foundation, Administration of Criminal Justice Series, 1969).

20. If a specified term of confinement is imposed upon persons convicted of a criminal offense, without any attempt at predicting individual dangerousness, that will (by temporarily incapacitating such of those offenders as would otherwise be disposed to commit further offenses) prevent *some* crimes from occurring. The question remains, however, whether the use of imprisonment will prevent a sufficient number of offenses from occurring (considering only its incapacitating effect, and leaving general deterrence aside) to provide the public with a significant degree of net protection against crime. It also might be asked whether the public protection that is achieved is sufficient to warrant the costs and other negative side effects of the institution of imprisonment. Here, the following issues might be explored in further detail:

(a) What percentage of the total number of actual offenders are apprehended, convicted and incarcerated for a given offense? For most types of crime—except, perhaps, murder, bank robbery and a few others—the percentage appears to be quite small. If this percentage is small, then the public may obtain little added protection from the incapacitating effect of incarceration upon confined criminals.

(b) What is the average rate at which persons incarcerated for a specified crime could be expected to commit further offenses, if permitted to remain at large? If the rate is low,

Instead, this article has a narrower scope. It is concerned with prevention in the *individual, predictive* sense—where decisions to confine persons turn upon official forecasts of their particular future conduct. More exactly, it focuses on this specific question: *is it appropriate to decide whether and how long to confine a sane adult who has been convicted of a crime, on the basis that he is deemed likely to engage in certain criminal conduct in the future?*

This topic is of particular interest for two reasons. It raises questions of the reliability of predictions of individual dangerousness and of the policy consequences of erroneous predictions. It also raises questions of the propriety of confining an individual who is deemed of sound mind and full age for what he *will* do, not what he has done.

It is to this kind of prevention—in the individual, predictive sense—that I will be referring in this article when I use the term "preventive confinement."

C. *Conceptual Nature of the Inquiry*

Techniques for predicting criminal behavior are still relatively primitive, and existing schemes of preventive confinement generally lack even minimal legal safeguards, as the discussion below indicates. Thus it is easy enough to criticize preventive confinement in the state in which it exists today.

The more difficult question—and the one with which this article will primarily be concerned—is whether the *concept* of preventive confinement is a sound one, assuming that prediction techniques and legal safeguards are improved. If the *concept* is sound,[21] then preventive confinement may be an important and

again, little public protection is achieved by incarceration. Generally, the rate is relatively low for the more serious offenses.

(c) To what extent does the experience of imprisonment *increase* the propensity of those confined to commit criminal acts upon release? If imprisonment is criminogenic—as some studies suggest it might be—it may have a *counter-preventive* effect, by prompting more crimes after release than are prevented during confinement.

(d) How cost-effective is imprisonment as a device for preventing crime by incapacitating criminals, in view of the high per prisoner cost of confinement?

For a useful analysis of these issues, with some empirical data, see J. Robison, The California Prison, Parole and Probation System (Tech. Supp. 2, Cal. Assembly, Preliminary Report on the Costs and Effects of the California Criminal Justice System, April, 1969).

21. In evaluating the soundness of the concept of preventive confinement, I will be examining its broad implications for social policy, rather than the narrower question of its compliance or lack of compliance with legal and constitutional standards under the present state of the law.

fruitful area for further innovation and development. If not, it may be a dangerous blind alley. In making this conceptual analysis, theoretical models have been found helpful and will be used.

II. Preventive Confinement—A Theoretical Model

We might start our analysis by examining the following theoretical model:

> *The Preventive Confinement Model. In an imaginary jurisdiction, a person convicted of a criminal offense would be subject to preventive confinement for an indeterminate term, if specified predictive criteria indicated a high probability of his committing a serious offense in the future. Following completion of his term in prison for the offense of which he was convicted, he would be transferred to and confined in a special facility designed solely for preventive purposes, in which living conditions would be made as "pleasant," i.e., as little punitive, as possible, consistent with the fact of incarceration itself. The individual would not be subjected to mandatory rehabilitative treatment during confinement in this special facility. The duration of confinement could substantially exceed the maximum statutory term of punishment prescribed for the offense of which he had been convicted. He would be released only at such time as he is found no longer to meet the predictive criteria for dangerousness.*

In actual practice, preventive confinement frequently is mixed with other elements. The Maryland Defective Delinquent Law combines preventive confinement with mandatory treatment.[22] By giving the Adult Authority plenary discretion to determine an adult offender's release date, the California indeterminate sentence law allows preventive considerations to be mixed with judgments concerning punishment, treatment and institutional convenience.[23] In these contexts, it is difficult to isolate and analyze the preventive component of decisions to confine.

In our theoretical model, however, the preventive component is separately identified. The offender serves an indeterminate term

22. *See* text accompanying *supra* note 5.
23. *See supra* note 15.

in a special facility in which confinement is *for preventive purposes only*. The duration of confinement in that facility would be set *solely on the basis of a prediction of his individual future dangerousness, without regard to the nature of his past offense.*

Thus the model gives us the opportunity to evaluate preventive confinement in its more or less "pure state." Once we have done that, we will examine the effect of adding other components to the model, such as mandatory rehabilitative treatment.

A. *Threshold Requirements: Explicit Legal Standards of Dangerousness; Validation of Prediction Method; Procedural Safeguards*

To have any possible merit, the model should satisfy three important threshold requirements: (1) there must be reasonably precise legal standards of dangerousness; (2) the prediction methods used must be subjected to careful and continuous validation; and (3) the procedure for commitment must provide the defendant with certain minimal procedural safeguards. These requirements, however, are seldom met by current practices of preventive confinement.

1. *Explicit Legal Standards of Dangerousness.* As Dershowitz [24] and Goldstein and Katz [25] have pointed out in connection with the law of commitment of the insane, a supposedly "dangerous" person should never be preventively confined, unless the "danger" he poses is of sufficient gravity—and sufficient likelihood—to warrant deprivation of his freedom. That determination —of the seriousness and likelihood of the predicted misconduct required to justify confinement—is a value judgment the *law* should make; it is not a factual judgment within the professional competence of psychiatrists or other expert witnesses. Failure to provide explicit legal standards of "dangerousness" creates the unacceptable situation where, for example, one psychiatrist can decide that only those mental patients who are likely to perpetrate violent crimes ought to be confined, while another psychiatrist, depending upon his personal philosophy, can employ the

24. Dershowitz, *The Law of Dangerousness, supra* note 2.

25. Goldstein & Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225 (1960).

concept of "dangerousness" to confine potential minor offenders, as well.

These considerations apply with equal force to the preventive incarceration of convicted persons. Yet existing preventive confinement schemes seldom, if ever, provide legal standards of dangerousness which have any definiteness. The Maryland Defective Delinquent Law, for example, authorizes commitment of individuals who demonstrate an "actual danger" to society.[26] No definition is supplied of what constitutes such a danger; nor is there even a statutory requirement that the supposed "dangerousness" be seriously criminal in character.

Unless "dangerousness" is defined by law with some minimal degree of precision, the entire preventive model may well be unconstitutional on grounds of vagueness.[27] Thus a threshold requirement for acceptability of the model would be a reasonably precise statutory definition of "dangerousness": one that specifies what kind of future criminal conduct, and what degree of likelihood of that conduct, warrants preventive confinement.

2. *Validating the Predictive Method.* In commitment proceedings for the mentally ill, there is rarely any effort made to check the accuracy of psychiatric predictions of dangerousness by following up and tabulating their results.[28] The same absence of validation pervades the existing preventive confinement practice for some offenders. No systematic follow-up is made, for example, of the predictions of dangerousness under the Maryland Defective Delinquent Law. Even among states that utilize prediction tables as an aid to parole decisions, validation is not always attempted.[29]

Not surprisingly under these circumstances, unverified pre-

26. *See* text accompanying *supra* note 6.

27. *See Rutgers Note, supra* note 5. This 1966 *Rutgers Law Review* Note argues that the Maryland Defective Delinquent Law is void for vagueness because the criterion for dangerousness—"actual danger to society"—is so imprecise as to leave the crucial decision of what kind of future conduct warrants incarceration wholly to the discretion of individual psychiatrists, without giving the courts any workable criteria for decision-making. The Note contends that the law's invalidity for vagueness does not depend upon whether it is classified as a civil or criminal statute. The vagueness question may be considered in the coming Supreme Court test of the constitutionality of the statute, Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971), *cert. granted sub nom.* Murel v. Baltimore City Court, 92 S. Ct. 567 (1971). *See also* Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems,* 56 VA. L. REV. 602 (1970).

28. Dershowitz, *The Law of Dangerousness, supra* note 2.

29. Glaser, *supra* note 17, at 257.

dictions of dangerousness prove fallible, indeed, when their accuracy is subsequently examined by scholars. In his ongoing study of the accuracy of psychiatric prediction in commitment proceedings for the mentally ill, Dershowitz notes:

> [I] was able to discover fewer than a dozen studies which followed up psychiatric predictions of antisocial conduct. And even more surprisingly, these few studies strongly suggest that psychiatrists are rather inaccurate predictors; inaccurate in an absolute sense, and even less accurate when compared with other professionals, such as psychologists, social workers and correctional officials, and when compared to actuarial devices, such as prediction or experience tables. Even more significant for legal purposes: it seems that psychiatrists are particularly prone to one type of error—overprediction. In other words, they tend to predict anti-social conduct in many instances where it would not, in fact, occur. Indeed, our research suggests that for every correct psychiatric prediction of violence, there are numerous erroneous predictions.[30]

Predictions by supposedly "expert" correctional personnel show the same proneness to error, as a study by Hakeem suggests.[31] He requested ten trained parole officers and ten laymen with no correctional experience to make a series of predictions of parole survival on the basis of case summaries of 200 parolees, half of whom had been recommitted for parole violations and half of whom had not. He found that the laymen were substantially *more* accurate predictors than the parole officers. Moreover, both groups combined made fewer correct identifications of the nonviolators than would have been made by random selection.[32]

Aside from inaccuracy, hazards of class and racial discrimination inhere in giving psychiatrists, correctional officials or other supposed "experts" *carte blanche* powers to make predictive determinations of dangerousness—unless the predictive criteria used are first carefully validated. Psychiatrists or parole board members of middle class backgrounds can and do, all too easily, misinter-

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30. Dershowitz, *The Law of Dangerousness, supra* note 2, at 46. *See also,* J. RAPPEPORT, CLINICAL EVALUATION OF THE DANGEROUSNESS OF THE MENTALLY ILL (1967); Morris, *The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York,* 17 BUFFALO L. REV. 651 (1968).

31. Hakeem, *Prediction of Parole Outcome from Summaries of Case Histories,* 52 J. CRIM. L.C. & P.S. 145 (1961).

32. *Id.* at 149-50.

pret lower-class or nonconforming styles and attitudes as symptoms of supposed "dangerousness." [33]

If this kind of laxity is carried over to the model system of preventive confinement, that alone would be sufficient to condemn it.

Thus a second threshold requirement for acceptability of the model would be that its predictive method carefully be validated *in advance* of being applied in actual decisions to confine; and be subject to continual follow-up and review.

Adequate validation studies of the predictive technique in the model are required, regardless of whether the predictive method is purely statistical, purely clinical, or a mixture of the two.[34] Clinical evaluation avoids statistics in the projection itself, but the statistician must always have the last word in judging the accuracy and utility of the evaluation method; as Meehl points out in his *Clinical vs. Statistical Prediction:*

> All clinicians should make up their minds that of the two uses of statistics (structural and validating), the validating use is unavoidable. Regardless of one's theory about personality and regardless of one's choice of data . . . ; regardless of how these data are fused for predictive purposes—by intuition, table, equation, or rational hypotheses developed in a case conference—the honest clinician cannot avoid the question 'Am I doing better than I could do by flipping pennies?' . . .
>
> Is any clinician infallible? No one claims to be. Hence, sometimes he is wrong. If he is sometimes wrong, why should we pay any attention to him? There is only one possible reply to this 'silly' question. It is simply that he *tends* (read: 'is likely') to be right. 'Tending' to be right means just one thing—'being right in the long run.' . . . [We thus] have no recourse except to record our predictions at the time, allow them to accumulate, and ultimately tally them up. . . . If the clinical utility is really established and not merely proclaimed, it will have been established by procedures which have all the earmarks of an acceptable validation study.[35]

3. *Procedural Safeguards.* Certain basic procedural safeguards—too often lacking today—should be built into the preventive model.

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33. AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE ch. 5 (1971) [hereinafter cited as AFSC REPORT].

34. *See* text accompanying note 47, *infra.*

35. P. MEEHL, CLINICAL VS. STATISTICAL PREDICTION 136-38 (1954).

At minimum, a full hearing should be required before any convicted individual is committed for preventive confinement. That hearing should be separate from the trial for his past offense, because the issues involved (for example, his supposed dangerousness) are distinct from the issues at trial. At this hearing, he must have the rights of counsel, confrontation and cross-examination of witnesses, and the right to call his own witnesses.[36] The Supreme Court has struck down a sexual psychopath law which denied such a hearing,[37] but many such state laws still abridge full implementation of these rights.[38] The Maryland Defective Delinquent Law, while providing a hearing and a right to counsel at the hearing, denies the defendant the right to confront and cross-examine staff psychiatrists whose reports are used in determining his status as a defective delinquent.[39]

A requirement more difficult to satisfy but equally important relates to indigents' right of representation. To conduct any kind of effective defense, an indigent defendant would not only need to have competent counsel provided for him but also to have access to competent expert witnesses able to challenge the state's prediction of his supposed dangerousness.[40] That would involve very considerable expense, which would have to be assumed by the state. The defendant's expert witnesses, to testify effectively on behalf of their client, would need, for example, to conduct extended psychiatric observations of the defendant, or run validation studies to check the accuracy of past predictions of dangerousness made by the state's expert witnesses. This will require a very much more ambitious and costly legal services program than is available today. But without it, indigent defendants will be virtually helpless to defend themselves, and the entire model would violate basic standards of procedural fairness.

A still more difficult question relates to the privilege against

36. *See* Specht v. Patterson, 386 U.S. 605 (1967).

37. *Id.*

38. For a summary of state court decisions concerning the applicability of procedural due process safeguards in sexual psychopath proceedings, see Annot., 34 A.L.R.3d 652 (1970).

39. MD. ANN. CODE art. 31B (Supp. 1971); Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971).

40. The Maryland Defective Delinquent Law provides an indigent defendant with a psychiatric witness at state expense, but no provision is made to enable the witness to conduct the kind of extended psychiatric observation needed to challenge the state's psychiatrists—who have had the defendant confined under prolonged observation. MD. CODE ANN. art. 31B § 7(b) (Supp. 1971); *Rutgers Note, supra* note 5.

self-incrimination. If the privilege applies to preventive confinement under the model—and there are arguments to suggest that it should[41]—then the individual could be confined only if a prediction could be made on the basis of independently obtained data; the individual could not be compelled to cooperate with psychiatric investigations designed to determine whether he is dangerous. If that were so, the preventive model probably could not be implemented unless and until the predictive art had progressed to the point where it could rely safely upon "objective" data and dispose with psychiatric investigations in making predictions.

B. *Theoretical Impediments to Prediction: The False Positive Problem*

Even if these threshold requirements are satisfied, however, the preventive model will encounter a formidable theoretical impediment to prediction: the false positive problem.

1. *The Significance of False Positives.* Starting in the early 1920's with S. B. Warner's statistical study of recidivism among prisoners paroled from the Massachusetts State Reformatory and with the Gluecks' widely publicized prediction studies, an extensive literature has developed concerning the statistical prediction of parole recidivism and of delinquency.[42]

As Wilkins points out in his perceptive *Evaluation of Penal Measures,*[43] there has been a tendency in this predictive literature to adopt a rather one-sided criterion for success. A prediction table for delinquency or recidivism is thought effective if it can correctly forecast a relatively high proportion of those individuals who actually become delinquent or recidivist. The other side of the coin is less often considered: the so-called *false positives*—those mistakenly predicted to engage in such deviant conduct.

41. *See* S. BRAKEL & R. ROCK, *supra* note 13, ch. 10, and Note, *Indiana's Sexual Psychopath Law, supra* note 11, arguing that the privilege against self-incrimination should apply in sexual psychopath proceedings; People v. Potter, 85 Ill. App. 2d 151, 228 N.E.2d 238 (1967), holding that, on the basis of the Supreme Court's reasoning in Specht v. Patterson, 386 U.S. 605 (1967), the privilege against self-incrimination should be applicable to proceedings under the Illinois Sexual Offender Act. *Contra, Rutgers Note, supra* note 5; Haskett v. Marion Criminal Court, 250 Ind. 229, 234 N.E.2d 636 (1968).

42. The Warner, Glueck and other studies are summarized in H. MANNHEIM & L. WILKINS, *supra* note 17, ch. 1.

43. L. WILKINS, EVALUATION OF PENAL MEASURES ch. 5 (1969).

There has been an inclination to overlook how many non-delinquents or non-recidivists a prediction table incorrectly classifies as potentially deviant.

In certain types of prediction, the criteria for success need not be too seriously concerned with false positives. If, for example, we develop a prediction table for recruitment into the army,[44] the table may well be useful if it successfully identifies a high percentage of individuals actually unsuitable for the service, who can then be screened out. If the manpower pool is ample, it does not really matter that the predictive index also yields a substantial number of false positives—individuals actually suitable for the service who are rejected as a result of a mistaken prediction of unsuitability. For the Army does not need to recruit all suitable persons; and the impact upon affected individuals of a mistaken prediction of unsuitability generally is not damaging.

In predicting criminal conduct, however, the consequences of ignoring the false positives are much more serious. As Wilkins points out:

> Taking a sample of offenders and showing that a large proportion would have scored in the delinquent category does not validate the prediction. Yet claims of this kind are frequently found. If decisions are made upon the basis of prediction statements, it is to be expected that the consequences of errors in each class will be different. It may be more damaging to regard (predict) a person as delinquent or recidivist when this is incorrect, than to incorrectly regard a person as nondelinquent or nonrecidivist. Some recent writers have claimed that the first kind of error can lead to a self-fulfilling prophecy—the labeling process of classification as "likely delinquent" may change the perception of the person by others, and through this, his own self-image.[45]

In the context of our model system of preventive incarceration, we can afford little tolerance, indeed, of prediction methods that show a high yield of false positives. Here, mistakenly predicting nondangerous individuals to be dangerous is gravely damaging—for it can lead to their prolonged incarceration.

Because of the historical lack of concern with the question,

44. For an example of such a prediction study designed for Army recruitment purposes, see Danielson & Clark, *A Personality Inventory for Induction Screening*, 10 J. CLIN. PSYCHOL. 137 (1954). The design of that study, however, was criticized in Meehl & Rosen, *Antecedent Probability and the Efficiency of Psychometric Signs, Patterns and Cutting Scores*, 52 PSYCHOL. BULL. 194 (1955).

45. L. WILKINS, *supra* note 43, at 69-70.

the existing prediction indices for juvenile delinquency and parole recidivism seldom tabulate the actual rate of false positives. Yet where the false positive rate has been calculated for existing prediction tables, it turns out to be disturbingly high.[46]

It has sometimes been suggested that statistical predictive indices should be used only to identify the *risk category* in which offenders are located; and that selection of individuals within a given risk category for release or continued confinement should then be made by the parole board on the basis of clinical observation.[47] However, this suggestion does not solve the problem of false positives in the model. Given what we know of the fallibility of psychiatrists' and correctional officials' clinical forecasts,[48] there is no reason to expect that *their* predictive choices—even within statistically defined risk categories—will be dramatically free of false positives, where the prediction tables themselves are not. As Wilkins states:

> It is sometimes claimed that subjective judgment can help in regard to these kinds of error. Where the tables may fail to find the ten who will succeed in the 90 percent failure group, the human intelligence will be able to identify them. This is sometimes claimed by those who recognize that the human subjective intelligence is not adequate in any other part of the range of assessment. They want to cooperate with the tables, helping them when they fail. These kinds of claims for clinical supplementation of statistical tables have not been supported by any evidence. Their belief that

46. For example: Gottfredson developed a prediction table for parole recidivism, based upon California Base Expectancy scores, and applied it to a validation sample of 2,132 California male parolees. The lowest score category (Base Expectancy scores 0-4)—which indicated the highest expectancy of recidivism—correctly identified slightly under 10% of all violators in the sample; but 26% of those in this category were false positives. Those scoring in the lowest third of the sample (in percentile terms) constituted 46% of the actual violators; but 33% of those in this low scoring group were false positives. Gottfredson, *The Base Expectancy Approach,* in THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 807-13 (N. JOHNSTON, L. SAVITZ & M. WOLFGANG eds. 1970). Wenk and Robison applied more elaborate prediction tables for parole recidivism, developed by Gough, Wenk and Rozynko and based upon the California Psychological Inventory and Minnesota Multiphasic Personality Inventory scores, to a large group of paroled California Youth Authority wards (the sample used in this study is described in the text accompanying note 57, *infra*). Again, the results were disappointing, with over 50% of those predicted to be violators being false positives, and with the incidence of correct predictions being lower than it would be by random selection. E. Wenk & J. Robison, Assaultive Experience and Assaultive Potential, May 1971 (unpublished paper, National Council on Crime and Delinquency Research Center, Davis, Cal.). *See also* Gough, Wenk & Rozynko *Parole Outcome as Predicted from the CPI, the MMPI, and a Base Expectancy Table,* 70 J. ABNORMAL PSYCHOL. 432 (1965).

47. Glaser, *supra* note 17, at 247-48.

48. *See* text accompanying *supra* notes 30 and 31.

> something of this kind of supplementation *should* be possible seems again to originate in an inability to come to terms with uncertainty. For them, probability must be supplemented so that a deterministic model is provided—then a decision can be made! [49]

The false positive issue, therefore, must squarely be faced.

2. *The Rare Event and False Positives: The Rosen Suicide Model.* It might be hoped that with increased attention to the false positive problem and sufficient expenditure of time, money and effort, superior predictive indices could be developed which would be relatively free of false positives. That hope, however, may be misplaced—for there exist theoretical impediments to prediction of criminal conduct notwithstanding such efforts at improvement.

Generally speaking, criminal conduct tends to have two characteristics which make it resistant to accurate prediction:

(1) It is comparatively rare. The more dangerous the conduct is, the rarer it is. Violent crime—perhaps the most dangerous of all—is the rarest of all.

(2) It has no known, clearly identifiable symptoms. Prediction therefore becomes a matter of developing statistical correlations between observed characteristics of offenders and subsequent criminal conduct.

Where those two conditions obtain, false positives show a high degree of persistence, even in a theoretical predictive model.

In a valuable 1954 article, Albert Rosen [50] of the University of Minnesota developed a theoretical model for predicting suicide among mental patients, that illustrates this problem. Rosen constructed a hypothetical suicide detection index for an assumed population of 12,000 mental patients. On the basis of existing suicide statistics, he assumed that the rate of suicides was very low—one third of one percent of the total patient population. With this low rate, only 40 patients out of the initial population of 12,000 would actually commit suicide. Thus, without any test, *all* patients in this population could be predicted to be non-suicidal, and the prediction would be right in 99⅔% of all cases.

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49. L. WILKINS, *supra* note 43, at 128-29.

50. Rosen, *Detection of Suicidal Patients: An Example of Some Limitations in the Prediction of Infrequent Events*, 18 J. CONSULTING PSYCH. 397 (1954).

A hypothetical suicide detection index would have to perform better than this in identifying the potential suicides.

Rosen assumes such a hypothetical index is developed as follows: (1) the patient population is divided into two groups—patients who actually committed suicide during confinement (suicide population), and patients who did not (non-suicide population); (2) a random sample is selected and analyzed from each population; (3) a predictive index is developed, based upon the test data which significantly differentiate the two criterion samples; (4) a cutting line is established—that is, a differentiating score on the index, so that patients testing above that score would be classified as suicidal and patients testing below that score would be classified as non-suicidal; and (5) the cutting line is cross-validated—*i.e.*, it is validated with new suicide and non-suicide samples, every psychiatric patient over a period of years being scored on the index.[51]

Such an index, Rosen finds, can identify a significant number of true positives only by mis-identifying a very much larger number of false positives. If an effort is made to reduce the false positives to a manageable number, only a tiny fraction of the true positives can be spotted—and even then, there are many more false positives than true positives.[52]

Suppose the cutting line is established at a point where, after cross-validation, the index will correctly identify 75% of the patients in both the suicide and the non-suicide populations, respectively. Using this cutting line, the index *will correctly identify 30 of the 40 actual suicides.* However, Rosen indicates, *it will also incorrectly identify 2,990 non-suicidal patients as potentially suicidal.*[53] The false positive rate here is so high as to make the prediction, in his words "[of] no appreciable value, for it would be impractical to treat as suicidal the prodigious number of misclassified cases." [54]

Suppose, then, a much higher cutting line is established—one which, when cross-validated, will correctly identify 90% of the non-suicide cases. It is assumed that the new cutting line reduces to 60% (regarded by Rosen as a liberal estimate) the pro-

51. *Id.* at 398.
52. *Id.* at 399-400.
53. *Id.* at 399.
54. *Id.*

portion of correctly classified suicidal patients. Using this new cutting line, the index *will correctly identify 24 out of 40 actual suicides,* but still *will mis-identify as suicidal 1,196 false positives.* This is still "an impractical instrument because of the large number of false positives." [55]

With every elevation of the cutting line, Rosen shows, there would be some reduction in the number of false positives. However, there would be a corresponding shrinkage in the number of true positives. And the false positives will continue to greatly outnumber the true.

If the cutting line is raised to the point where it screens out 99.5% of the non-suicide cases, then, Rosen estimates, the predictive index will be able to spot only 2.5% of the actual suicides. Thus the problem remains unsolved. *Only 1 out of 40 actual suicides are correctly identified; and to achieve this meagre result, 60 false positives will still have to be predicted.*

To achieve a better result, the experimenter might try to seek to develop a predictive index for a special diagnostic subgroup that has a substantially higher suicide rate than the general mental patient population. But, as Rosen points out,[56] there are inherent limitations in this approach. Any such diagnostic subgroup would be unlikely to have a suicide rate much higher than two percent, and that still would yield an excessive number of false positives. Moreover, a considerable proportion of the actual suicidal patients in the entire sample population would then be *excluded* from the diagnostic subgroup.

3. *Violent Crimes and False Positives.* Like suicide, crimes of violence are infrequent events. They are rare not only among the general population, but also (as will be discussed below) among previous offenders who have been released. The Rosen model thus has applicability to violent crimes, as well as to suicide. Predictions of violence tend to yield large numbers of false positives.

What makes violence so particularly difficult to predict is not merely its rarity, but its situational quality. Deterministic models to the contrary notwithstanding, violence generally is not a quality which inheres in certain "dangerous" individuals: it is

55. *Id.* at 400.
56. *Id.*

an occurrence which may erupt—or may not—in certain crisis situations. Whether it does erupt, whether it is reported, whether the perpetrator is apprehended and punished, depend upon a wide variety of fortuitous circumstances, largely beyond the actor's control. Not only the actor's proclivities, but the decisions of other individuals—the victim, the bystanders, the police, the magistrate—may determine whether an act of violence occurs and whether it comes to be included in the criminal statistics. Trying to predict violence on the basis of information concerning only the supposedly violence-prone individual—without taking these numerous external contingencies into account—is trying to solve a multi-variable problem by keeping track of only one variable. It is a hazardous undertaking, indeed.

The difficulty of predicting violent criminal behavior is strikingly illustrated by a recent study by Wenk and Robison of violent recidivism among California Youth Authority wards.[57] Wenk and Robison examined the records of all juvenile offenders who were processed during 1964–66 through the Deuel Reception-Guidance Center, a diagnostic unit that examines older juvenile offenders at the time they are committed to the Youth Authority. A follow-up study was made of their behavior on parole for a period of 15 months after release from confinement—with a view to determining how many were recommitted for a violent offense. As nearly one quarter of the sample had originally been committed for a violent offense or had a history of known violent behavior, the violence potential of the group might have been expected to be relatively high. Nevertheless, the investigators found that of this entire group, the incidence of violent recidivism during the 15-month follow-up period was only 2.4%.[58] As Rosen's analysis of his suicide model indicates, constructing a hypothetical predictive index upon a base rate as low as that—only 2.4%—would yield an unmanageable number of false positives.

Wenk and Robison's own tentative analysis supports this conclusion. They requested a psychologist and a statistician to project hypothetical predictive indices for violent recidivism, based upon the data in their sample. The *less* pessimistic projec-

57. E. Wenk & J. Robison, Assaultive Experience and Assaultive Potential, May 1971 (unpublished paper, National Council on Crime and Delinquency Research Center, Davis, Cal.).

58. *Id.* at 27.

tion—that of the psychologist—was that a multi-variable multiple regression equation could be developed from the data, which could identify about one-half of the true positives, *but in which the false positives would outnumber the true positives by a discouraging eight to one.*[59]

4. *Selection of High-Risk Subgroups.* One strategy mentioned by Rosen [60] for avoiding the false positive problem was to develop a predictive index only for narrowly defined subgroups of the original sample population, which manifest a considerably higher rate of the behavior to be tested. Applying this strategy to predictions of violent crime, we might try to construct a predictive instrument only for special subgroups of the convicted offender population, which manifest a substantially higher rate of violence.

The Wenk and Robison study suggests, however, that there may be serious obstacles to such a strategy. Their investigation identified five subgroups which manifested higher rates of violent recidivism than the general sample population.[61] The subgroups were: (1) offenders with known histories of violence; (2) offenders originally committed on a violent offense charge; (3) offenders committed to the Youth Authority for the fourth time or more (*i.e.,* multiple recidivists); (4) offenders with histories of "moderate to serious" opiate involvement; and (5) offenders referred to a psychiatrist for violence potential upon commitment to the Youth Authority.[62] The investigators' results indicated that *none* of these subgroups manifested a high enough incidence of violent recidivism to avoid the false positive problem. The highest rate (for category 5) was 6.2%; the other categories showed rates of about 5% or less.[63] These rates are well below the frequency needed for constructing an instrument relatively free of false positives—which, as Meehl and Rosen [64] estimate, should be closer to 50%.

Moreover, Wenk and Robison found that all these subgroups, except the first, account for a rather small fraction of the total

59. *Id.* at 47.
60. *See* text accompanying *supra* note 56.
61. Wenk & Robison, *supra* note 57, at 27-38.
62. *Id.*
63. *Id.*
64. Meehl & Rosen, *supra* note 44.

incidence of violent recidivism in the sample population. For example, offenders in category (5), which manifests the highest rate of violence, account for only 15% of the total incidence of violence on parole in the entire group. This creates another difficulty. If to construct an accurate predictive index, we are forced to limit its application to defined, high-risk subgroups that account for only a small fraction of the total occurrence of violence, then the public obtains little additional protection from preventive confinement so limited in scope.

5. *Inclusion of Lesser Offenses.* Another avoidance strategy might be to include nonviolent offenses—since they are much more frequent. In the Wenk and Robison study, for example, if all parole violations are considered—which include not only violent crimes but also property crimes and other lesser offenses—then the recidivism rate climbs to a more statistically manageable 39.9%. Another serious objection is encountered here, however. To obtain the needed higher offense rates, we find ourselves fast descending the scale of seriousness toward the minor offenses. Then, it becomes increasingly difficult to demonstrate a need for societal protection of the degree of urgency that could conceivably warrant the kind of deprivation of liberty contemplated in the model. It should be recalled that the model involves incarceration for an indeterminate period that may be quite prolonged, perhaps lifelong.[65]

6. *Concealing Overprediction.* Even were we to extricate ourselves from this last difficulty we face another formidable theoretical problem: any system of preventive incarceration *conceals erroneous confinements, while revealing erroneous releases.*[66] The individual who is wrongly identified as dangerous is confined, and thus has little or no opportunity to demonstrate that he would not have committed the crime had he been released. The individual who is wrongly identified as non-dangerous remains at large, so it comes to public attention if he later commits a crime. Thus, once a preventive system is established, it creates the illu-

65. As will be recalled, indeterminate terms of confinement are utilized in the model in order to assure that an individual predicted to be dangerous remains confined—and thus unable to harm the community—until he is found no longer dangerous.

66. Dershowitz, *On Preventive Detention,* in CRIME, LAW AND SOCIETY 307-19 (A.S. GOLDSTEIN & J. GOLDSTEIN eds. 1971); Tribe, *supra* note 1, at 372-73.

sion of generating only one kind of evidence: *evidence of erroneous release, that prompts decision-makers to expand the categories of persons who are preventively confined.* In short, a system of preventive confinement creates a self-fulfilling prophecy for the need of *more* preventive incarceration.[67]

Preventive confinement will also make it difficult to determine with any degree of confidence when a person ceases to be dangerous, and may be released. For the predictive criteria, in all likelihood, will largely rely upon the individual's behavior patterns in the relatively recent past. Incarceration itself will temporarily distort or suppress those behavior patterns, thus leaving few accurate clues concerning his probable behavior upon release.

Moreover, the problem of distortion of evidence would greatly be compounded by political-bureaucratic pressures. Under a system of preventive confinement, the public undoubtedly would hold officials responsible if they fail to incarcerate (or if they release) persons who subsequently do commit violent criminal acts. This would create overwhelming pressures upon officials to overpredict—since it would entail much less risk to the institution and to their own careers for them to confine (or fail to release) persons who actually are or have become harmless, than to release persons who are actually dangerous and do subsequently perpetrate crimes.

C. *Evaluation of the Model—With False Positives*

We are now ready to evaluate our model of preventive confinement. Let us begin by assuming that the technique of prediction used in the model manifests a relatively high incidence of false positives. More specifically, let us suppose that the prediction method *generates false positives at a rate which substantially exceeds the rate of erroneous convictions under the existing system*

67. To avoid this distortion of the evidence, it has been suggested that a random sample of the population of those preventively confined be released from time to time, and the accuracy of the prediction be tested upon that sample. That may get us involved, however, in the problem of infrequent events. If we are trying to predict violent crimes, where the offense rate is very low, a substantial number of persons would have to be released at random in order to be able to measure the effectiveness of the criteria. This would pose serious problems of fairness for those who remain subject to confinement. Also, any large-scale random release could reduce the effectiveness of the system as a measure of public protection—and rekindle much of the public anxiety that the preventive system is designed to alleviate. *But see* Dershowitz, *On Preventive Detention, supra* note 66.

of criminal justice for those categories of offenses. (Since there is little available evidence concerning the rate of mistaken convictions, it is difficult to confirm that any given rate of false positives would, or would not, substantially exceed it. But if the rate of false positives is of the high order of magnitude discussed in the preceding analysis—say, the eight false positives to every one true positive suggested by the Wenk and Robison study—it is fairly safe to conjecture that, in Dershowitz' words, "any system of predicting future crimes would result in a vastly larger number of erroneous confinements" [68] than could be expected to occur under the present criminal justice system.) Later, we will go on to make an evaluation of the model in the context of a hypothetical "ideal" predictive technique that is relatively "free" of false positives.

1. *Inappropriateness of Cost-Benefit Rationale.* To sustain the model where false positives are present, a cost-benefit rationale must be assumed. Proponents of preventive confinement must argue in terms of "balancing" the individual's interest in not being mistakenly confined against society's need for protection from the actually dangerous person. It has to be contended that the "benefit" of preventing the really dangerous individual from committing future crimes exceeds, in the aggregate, the "cost" of mistakenly identifying and confining the nondangerous one.

Even if this kind of cost-benefit thinking were appropriate, it is highly questionable whether the preventive confinement model could be justified in its terms—once the magnitude of the "cost" of confining large numbers of false positives is fully taken into account. That is especially true because—for reasons just noted—strategies designed to minimize the number of false positives also sharply reduce the number of true positives that can be identified—and hence, minimize the social benefits of the system as a crime prevention device.

The more basic point, however, is that *cost-benefit thinking is wholly inappropriate here.* If a system of preventive incarceration is known systematically to generate mistaken confinements, then it is unacceptable in absolute terms because it violates the obligation of society to do *individual* justice. Such a system cannot be justified by arguing that its aggregate social benefits exceed

68. Dershowitz, *supra* note 66, at 313.

the aggregate amount of injustice done to mistakenly confined individuals.

2. *The Parallel of Conviction of the Innocent.* In our criminal law, a whole variety of safeguards exist—most notably, the requirement of proof of guilt beyond a reasonable doubt—designed to assure that an innocent person is not convicted or punished. There, aggregate cost-benefit theories would definitely be inappropriate. Would reducing the standard of proof in criminal cases to a "preponderance of the evidence" yield favorable cost-benefit results—in terms of yielding a greater increase in numbers of convictions of the guilty than in numbers of additional convictions of the innocent? Perhaps so, perhaps not; but it does not really matter. A reduction in the standard of proof is absolutely unacceptable if it would materially increase convictions of the innocent. As Tribe states:

> Indeed, the very enterprise of formulating a tolerable ratio of false convictions to false acquittals puts an explicit price on an innocent man's liberty and defeats the concept of a human person as an entity with claims that cannot be extinguished, however great the payoff to society.
>
> This argument does not imply that we do or should insist on absolute certainty; we properly instruct juries to convict if they believe that guilt has been established "beyond a reasonable doubt" rather than "beyond all doubt." We do so, however, only because total certainty is incompatible with the human condition, and we do not wish to immobilize the system by demanding the impossible. Thus, guilt beyond a reasonable doubt represents not a lawyer's fumbling substitute for a specific percentage, but a standard that seeks to come as close to certainty as human knowledge allows—one that refuses to take a deliberate risk of punishing any innocent man.[69]

The Supreme Court has recently held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[70] The Court cited three reasons for its decision. Its first reason was that of simple fairness

69. Tribe, *supra* note 1, at 387-88.

70. *In re* Winship, 397 U.S. 358, 364 (1970). The Court held that the requirement of proof beyond a reasonable doubt applied both to criminal and juvenile delinquency proceedings.

(an individual should not be subjected to the deprivations of punishment if there is any reasonable doubt he deserved it):

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt . . . ;[71]

its second, the need to uphold the moral force of the law:

> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned . . . ;[72]

and its third, the need to preserve citizens' sense of security from wrongful state interference:

> It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.[73]

Assuming for the sake of argument that the state is entitled to confine *actually* dangerous individuals (an assumption to be examined below), the *mistaken* preventive confinement of actually nondangerous persons can no more be tolerated than the conviction of the innocent. We are speaking here, of course, of persons who have already been convicted of crimes. But by hypothesis in our model, they have already served the full punishment for their past offense, and are being preventively confined for an additional time designed expressly and solely to incapacitate them from committing future crimes. Hence, the past conviction would not cure the unfairness inherent in preventively incarcerating nondangerous persons. After all, if a man is convicted of robbery and serves the maximum term in prison, we *still* would object to further imprisoning him for an alleged past murder of which he was wholly innocent. Why should we be more

71. *Id.* at 363-64.
72. *Id.* at 364.
73. *Id.*

tolerant of taking a man who has been convicted and has served the full time for the robbery and confining him for more years to prevent a future murder which in fact he would never commit if given his freedom?

Even if preventive confinement is not officially labelled "punishment," the deprivations of prolonged preventive confinement would be much like those of prolonged imprisonment. The loss of liberty would be the same. So would many of the other unpleasant aspects of confinement, such as forced association with other persons, some of whom may well be actually dangerous. The social obloquy of confinement would be similar—since labeling someone a potential criminal would have much the same stigmatizing effect as labeling him a past offender.[74]

3. *Reduced Trial Safeguards.* If accused of a crime, an individual has recourse to various traditional trial safeguards that enable him to defend himself against a false charge. The prosecution has to meet a standard of proof beyond a reasonable doubt. It cannot show that the defendant had a propensity to commit criminal acts,[75] but must establish that he had the opportunity to commit, and did actually commit a specific crime. Thus the defendant, if he has effective counsel, can escape conviction by casting doubt upon the evidence connecting him with the offense.

These safeguards would not be available in a preventive proceeding. A standard of proof beyond a reasonable doubt would be virtually meaningless, and could not be applied. Given all the contingencies affecting future occurrences, how can any future

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74. The force of this argument—that preventive confinement of the false positives is essentially unjust—does not, in fact, depend upon whether such confinement is classified as punishment. Even if it is regarded as a precautionary, rather than a punitive measure, the justification of preventively confining an individual would depend upon his *actually* being dangerous. The individual is being deprived of his liberty because, if he were to remain at large, he would interfere with the liberty of others by committing crimes. If he is *not* in fact dangerous, this justification simply collapses; and what we have left is gratuitous suffering imposed upon a harmless individual.

See also In re Winship, 397 U.S. 358 (1970), where the Supreme Court ruled that the mere fact that juvenile delinquency proceedings were legislatively designated as civil, instead of criminal, did not obviate the need for criminal due process safeguards, including proof beyond reasonable doubt.

For comment on reasons for the different treatment of the insane, see note 79 *infra.*

75. Generally, evidence of a defendant's propensity for criminal conduct is not even admissible in a criminal trial. *See* Comment, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crimes,* 78 HARV. L. REV. 426, 435-43 (1964).

event be predicted beyond a reasonable doubt? We can at least imagine what it would be like to be sure beyond reasonable question that X has committed a murder; but how could we imagine being so sure he *will* do so, since he could always change his mind, be arrested beforehand, be killed in an accident, etc.? How, particularly, could we be so sure if we know our predictive method yields false positives and there is no way of ascertaining whether *he* is one of the false or one of the true positives? Moreover, evidence of a mere propensity to commit criminal acts would, necessarily, have to be sufficient to incarcerate. The defendant would have no way of challenging his actual connection with the crime —for the crime would be in the future. (How, for example, could he establish an alibi for an offense which has not yet occurred?) [76]

D. *Evaluation of the Model—Minus the False Positives*

Thus far, the objection to preventive confinement has centered upon the false positive issue—the injustice inflicted upon those wrongly confined on the basis of an erroneous prediction of dangerousness. Is this, however, the only objection? If it is, then it might be worthwhile to labor to overcome the obstacles to prediction, formidable as they are, with a view ultimately to establishing a system of preventive confinement when and if the accurate prediction of criminal conduct can be achieved.

Or do more fundamental evils inhere in the preventive concept—even if the false positive problem is assumed not to be present? If so, the entire concept deserves to be scrapped.

To answer these questions, we should inquire: how would we judge the preventive model described earlier, were we to as-

76. Dershowitz has also pointed out that in a criminal trial, imperfect as it is, the judge and jurors have "some sense of what it means to decide whether a specifically charged act probably was or was not committed . . . some basis for sorting out the relevant from the irrelevant, the believable from the incredible, the significant from the trivial." Dershowitz, *supra* note 66, at 315. In a preventive proceeding, the regular participants in the judicial process would be ill-equipped to judge the validity of the prediction. In a traditional courtroom, one might imagine what predictive trials would become when they were contested: baffling arguments between prosecution and defense expert witnesses, each claiming superior expertise and offering contrasting clinical or statistical judgements. A lay judge and jury (if there is a jury) will find such evidence much harder to evaluate intelligently than evidence of past crimes.

To provide greater expertise to the decision-makers, preventive confinement might be decided upon by specialists. That, however, would remove the traditional safeguard of lay control over the judicial process. If the experts decide, who chooses the experts and judges their performance?

sume that a predictive technique had been developed which is reasonably free of false positives? More specifically, let us hypothesize that the predictive technique mis-identifies false positives at a rate which is *no greater* than the rate of convictions of innocent persons for past crimes which are assumed to occur under the existing system of criminal justice.[77]

1. *Universal Preventive Confinement.* To evaluate the model assuming such a "foolproof" predictive technique, we might start by inquiring: "If our predictions are so accurate, why limit the model to previously convicted persons; why not preventively confine *anybody* found to be potentially dangerous?" If, as we shall find, there are serious objections to such a universal scheme of preventive confinement, then we should ask: "What, if anything, is there about a prior conviction that renders our preventive model any more acceptable?"

What are the objections, then, to a universal system of preventive confinement, assuming we can predict criminal conduct with a high degree of accuracy? Suppose a preventive system is established which is similar to our model in all major respects but one—it is not limited to persons who have already been convicted of crimes. If any individual meets specified standards of probable cause for being dangerous, the state could initiate commitment proceedings against him. After a full hearing, with maximum feasible procedural safeguards, he would be preventively confined for an indeterminate term if the predictive criteria indicate that he can be expected to commit a serious crime if permitted to remain at large.

Even with an accurate predictive technique, such an Orwellian scheme would be unacceptable, for two major reasons.

(1) Universal preventive confinement would run counter to basic concepts of individual liberty: it would deny individuals the fair opportunity to make their own decisions and order their own lives. A system of criminal justice which imposes specified punishments for specified crimes gives us some degree of assurance that we can, in Hart's words,

> predict and plan the future course of our lives within the coercive framework of the law. For the system which makes liability to the law's sanctions dependent upon a voluntary act not only maximizes

77. *But see* Tribe, *supra* note 1, at 385-88.

> the power of the individual to determine by his choice his future fate; it also maximizes his power to identify in advance the space which will be left open to him free from the law's interference.[78]

In a system of preventive confinement, this safeguard would be lost; an individual would have little choice as to whether he is confined or remains at large. His liberty would depend not upon his voluntary acts, but upon his *propensities* for future conduct as they are seen by the state. Far from being able "to identify in advance the space which would be left free to him from the law's interference," his liberty would depend upon predictive determinations which he would have little ability to foretell, let alone alter by his own choices.

Our constitutional scheme assigns a high value to the right of individual choice; this is reflected, for example, in the guarantees of free speech, free assembly and free association. It is likewise reflected in the basic rule of our criminal jurisprudence, that a sane adult may not be deprived of his liberty except as punishment for a crime of which he has been convicted.[79] The law thus warns that specified modes of anti-social conduct will be met by unpleasant consequences, including incarceration for a specified time. But the choice—whether to engage in such conduct and chance the punishment—is left up to the individual; the state will not intervene unless he has been found to have violated the law. By giving him that choice, society risks that the individual will make the wrong selection, to the community's detriment. Sim-

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78. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 181-82 (1968).

79. An exception has historically been made of the insane—who have been subjected to preventive confinement without the requirement of a prior conviction, if deemed to be "dangerous to themselves or others." Little concern has been shown with safeguarding mental patients' rights of individual choice—because, in part, they have been regarded as persons incapable of choosing: that is, so cognitively and emotionally deranged that, for them, choice has little or no meaning. As one commentary put it:

> Another explanation might be found in the assumption that society's rules cannot deter the mentally ill from acting dangerously. Whether persons who are not mentally ill commit dangerous acts or avoid them is thought to depend on a process of choice. This process is respected and valued; only by not confining even those who can be accurately predicted to be dangerous can all persons be permitted to make the choice. On the other hand, whether mentally ill persons act dangerously is thought to depend not on their own choice but on the chance effects of their disease. Confining them hinders no respected process.

Note, *Civil Commitment of the Mentally Ill, supra* note 2, at 1291. This view of mental illness has been questioned, *see* Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment, supra* note 2. Whatever its merits, this justification points up the high value assigned to individual choice, in the case of persons not deemed insane.

ilar hazards are entailed by other constitutional guarantees. Free speech risks incitement to violence; free assembly risks riot; free association risks criminal conspiracy. Nevertheless, we choose to withhold the coercive power of the law until *after* the event. In so doing, we may incur the costs of certain anti-social conduct that might have been precluded by state preventive action. But that is felt to be well worth the assurance given to individual freedom.

Universal preventive confinement is inconsistent with this concept of individual choice. Because a prescient and paternalistic state is assumed to know that certain individuals will make the wrong choice, it confines them precisely for the purpose of depriving them of the opportunity of choosing at all. Even if the state's predictions are imagined to be highly accurate, such a scheme would entail undue sacrifice of individual freedom and dignity.

The force of this argument, it should be noted, does not depend upon any particular psychological or philosophical view of individual choice. Do individuals consciously weigh the risks when they decide whether or not to comply with the law—or do they act upon impulse, habit and social pressure? Are individuals really free to choose between legal and illegal conduct, or is their choice determined by their backgrounds and experiences? Interesting as these questions may be in themselves, they are of no relevance here. As Herbert Packer points out, we are not describing the process of individual choice, but expressing a value preference for limiting *state* intrusion into citizens' lives:

> Neither philosophic concepts nor psychological realities are actually at issue in the criminal law. The idea of free will in relation to conduct is not, in the legal system, a statement of fact, but rather a value preference having very little to do with the metaphysics of determinism and free will. The fallacy that legal values describe physical reality is a very common one. . . . But we need to dispose of it here, because it is such a major impediment to rational thought about the criminal law. Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were. It is desirable because the capacity of the individual human being to live his life in reasonable freedom from socially imposed external constraints (the only kind with which the law is concerned) would be fatally impaired unless the law provided a *locus poenitentiae,* a point of no return beyond which external constraints may be imposed but before which the

> individual is free—not free of whatever compulsions determinists tell us he labors under but free of the very specific social compulsions of the law.[80]

(2) Preventive confinement also would entail unjustified risks of abuse. If the government had the power to designate any individual as dangerous and to confine him preventively regardless of any prior determination of guilt, it could misuse that power to incarcerate for racial, social or political ends. Granted, we are assuming here that a highly accurate predictive technique has been developed. However, the mere fact that such a technique is known to exist provides no guarantee that government—once it has the power of universal preventive confinement—will opt for that technique alone and will not resort to biased prediction devices. Prediction being such a highly technical matter, the difference between an accurate and a distorting predictive instrument could depend upon subtle shifts in the data base, the sampling and validation methods, and the prediction variables and equations employed. It would be difficult, indeed, to develop workable constitutional or legal safeguards, that could effectively be administered by the courts, to assure that such distortions not be made. Nor could there be an effective popular check on abuses, given the arcane nature of the entire subject.

Of course, any human institution is susceptible to abuse. However, our tolerance for abuse diminishes as the institution's potential intrusiveness into citizens' lives increases. Universal preventive confinement has great potential intrusiveness. By abandoning the requirement of a prior criminal act, it reduces the protections and immunities available to individuals against state interference, and permits the state to confine a larger number of individuals, at an earlier time, and for a longer period than the criminal law would allow. Where the degree of intrusion can be so great, the risks of abuse implicit in a scheme of preventive confinement seem truly unacceptable.

2. *Preventive Confinement for Those Convicted.* If a scheme of universal preventive confinement is unacceptable, why is our model any better? It differs from the universal scheme in only one significant respect: it is applicable solely to persons who

80. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 74-75 (1968).

have been convicted of a crime. The fact of a prior conviction, however, gives no additional sustenance to the scheme.

It cannot be argued that the fact of the prior conviction justifies the preventive confinement in the model *as punishment.* For we are assuming in the model that the individual has already served the maximum statutory term of punishment for the past offense, and is now serving extra time that is expressly intended to be preventive, not punitive.

Nor can it be asserted that the supposed greater dangerousness of convicted persons justifies their preventive incarceration. A universal system of preventive confinement would not be rendered acceptable if its application were limited to the most dangerous individuals. With an accurate method of prediction—which we assume to be available—a finding of dangerousness would not have to depend upon the presence or absence of a prior conviction. Some persons who had never been convicted might well be found to be *more* dangerous than their convicted brethren.

The two major policy objections to universal preventive confinement, just described, would seem equally applicable to our model.

Objection (1)—the individual's loss of the fair opportunity "to identify in advance the space which will be left open to him free of the state's interference"—applies as well to the model. An individual who commits an offense will have no way of determining whether, in addition to being liable to punishment if he is apprehended, he will be subject to indeterminate and possibly lifelong confinement on the basis of a prediction of dangerousness. The possible result—the indeterminate confinement—is well beyond the reasonably foreseeable risk involved in committing an offense. True, he may be on notice that if he commits the offense, there is *some* possibility of his being subjected to indeterminate preventive confinement, whereas none exists if he complies with the law. However, the degree of likelihood of his being so confined if he commits an offense depends not upon the nature and quality of his chosen acts, but upon the state's determination of his proclivities.

A violation of law may warrant punishment and punishment involves the temporary suspension of certain rights, including in some instances the right to liberty. In the model, however, we are speaking of the offender at a point in time where he has fully

served his punishment; where he once again should be able to regain most, if not all of the ordinary rights of a citizen—including at least the right to remain free from seizure of his person by the state unless and until he has committed another offense.

Objection (2)—risk of abuse—applies *a fortiori* to the class of convicted offenders. Widely feared because of their past conduct [81] and drawn predominantly from the most under-privileged segments of society, convicted persons would have the most to fear from a deliberate "slanting" of the predictive criteria.

E. *Preventive Confinement as "Punishment"*

It is worth exploring more thoroughly whether a scheme of preventive confinement could be supported by resort to the concept of punishment. To do so, let us vary our original model slightly as follows:

> *Variation 1 of the Model. The legislature provides general maximum terms of imprisonment for various offenses. However, it provides that where any convicted offender meets specified predictive criteria for future dangerousness, he will be subject to an indeterminate term of confinement, possibly exceeding the normal maximum penalty, until he is adjudged no longer dangerous. The additional confinement would be classified by law as punishment and as an addition to the sentence for the crime of which he has been convicted; it would be served in a regular prison, rather than a special, less rigorous preventive facility.*

Thus in the revised model—unlike the original model—preventive confinement is officially labelled as *punishment* for the prior offense and is served under conventional punitive conditions, *i.e.*, in a regular prison. This change in the model is designed to enable us to focus squarely on the issue: can preventive confinement be *justified* as punishment for the prior offense? [82]

It is a basic principle of justice that the severity of punishment should not unduly exceed the gravity of the offense. While

81. *See* Harris poll on public attitudes toward convicted offenders in JOINT COMMISSION ON CORRECTIONAL MANPOWER AND TRAINING, THE PUBLIC LOOKS AT CRIME AND CORRECTIONS (1968).

82. *See* H.L.A. HART, *supra* note 78, ch. 1, at 4-6.

the legislature has wide discretion in defining the seriousness of offenses and determining the severity of punishments, it is subject to some moral and constitutional limits. The old English practice of hanging pick-pockets would now be regarded as repugnant. On at least one occasion, the Supreme Court has invalidated a criminal statute that imposed excessive fines and an extended prison term for a relatively minor crime. The Court in *Weems v. United States*[83] ruled the eighth amendment ban on cruel and unusual punishments extended not only to barbaric punishments, but also to prolonged punishments that were in no way proportional to the offense committed.

It is likewise a basic principle of justice—although one widely ignored in practice in our criminal justice system—that persons guilty of equally serious offenses should not be subjected to grossly unequal punishments.[84]

These are what Hart[85] calls principles of distribution—that is, principles limiting the way punishment may properly be distributed among individuals. As Hart points out, they should apply whether or not one adopts a retributive theory of the general aim of punishment.[86]

Suppose, for example, we reject the view that retribution for moral guilt is the main purpose of punishment, and hold instead that punishment serves the object of deterring the general public from engaging in criminal activity. Even with this deterrence philosophy, we should still—in fairness to the individuals affected—insist that punishment not be disproportionately severe in relation to the gravity of the offense. That being so, we should oppose the infliction of severe exemplary punishments upon certain individuals convicted of minor offenses, however useful that might be in deterring that type of offense.[87]

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83. 217 U.S. 349 (1910), invalidating a statute imposing a penalty of from 12 to 20 years imprisonment at hard and painful labor for the crime of falsifying official records. For a comment on this case, see *Rutgers Note, supra* note 5; Katkin, *Habitual Offender Laws: A Reconsideration,* 21 BUFFALO L. REV. 99 (1971).

84. *See* H.L.A. HART, *supra* note 78, ch. 1; AFSC REPORT, *supra* note 33, ch. 3, 9. *See also* United States v. Wiley, 278 F.2d 500 (7th Cir. 1960); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE, TASK FORCE REPORT: THE COURTS 23-24 (1967); S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 1284-87 (1969).

85. H.L.A. HART, *supra* note 78, ch. 1.

86. *Id.* at 11-13.

87. Hart explains this point as follows:

> The further principle that different kinds of offence of different gravity

If we consider prevention to be the main purpose of punishment, the same principles of justice still limit the manner in which we distribute punishment among individuals. Punishments of grossly disproportionate severity, and grossly unequal punishments for similar offenses, would still be objectionable.

Obviously, the application of these principles depends upon how we judge the seriousness of the offense. (Their application may also depend upon the extent to which we take into consideration the personal culpability of the offender. Should there, for example, be uniform penalties for each category of offense, disregarding the actor's state of mind except insofar as necessary to ascertain whether his conduct was intentional, negligent, accidental etc., as some reformers have recently recommended? [88] Or should we continue to permit judges and parole boards to vary the punishment for an offense in order to reflect the actor's personal culpability, as indicated by his apparent motives, character or personal history? [89]) Without needing to resolve these difficult questions, it is fairly evident that the revised model violates the two principles of justice of which we are speaking. This is so because the revised model authorizes the imposition of indeterminate, even lifelong imprisonment, *without regard to the serious-*

(however that is assessed) should not be punished with equal severity is one which like other principles of Distribution may qualify the pursuit of our General Aim and is not deducible from it. Long sentences of imprisonment might effectually stamp out car parking offences, yet we think it wrong to employ them; *not* because there is for each crime a penalty "naturally" fitted to its degree of iniquity (as some Retributionists in General Aim might think); not because we are convinced that the misery caused by such sentences (which might indeed be slight because they would rarely need to be applied) would be greater than that caused by the offences unchecked (as a Utilitarian might argue). The guiding principle is that of a proportion within a system of penalties between those imposed for different offences where these have a distinct place in a commonsense scale of gravity. This scale itself no doubt consists of very broad judgements both of relative moral iniquity and harmfulness of different types of offence: it draws rough distinctions like that between parking offences and homicide, or between 'mercy killing' and murder for gain, but cannot cope with any precise assessment of an individual's wickedness in committing a crime (Who can?). Yet maintenance of proportion of this kind may be important: for where the legal gradation of crimes expressed in the relative severity of penalties diverges sharply from this rough scale, there is a risk of either confusing common morality or flouting it and bringing the law into contempt.

H.L.A. HART, *supra* note 78, ch. 1, at 25. *See also* AMERICAN BAR ASSOCIATION, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 56-61 (1968).

88. *See* AFSC REPORT, *supra* note 33, ch. 9.

89. *See, e.g.*, R. DAWSON, *supra* note 19, at 79-93.

ness of the offender's past offense—however such seriousness may be defined.

Consider the example of robbery. Under the revised model, the ordinary robber could be confined for no more than a specified number of years. But the robber who has the misfortune of being predicted to be dangerous would be subject to imprisonment for as much as his entire life. This would be objectionable for the two reasons just stated: 1) confinement for as much as a lifetime for the crime of robbery would, by any humane standards, be disproportionately severe in relation to the character of the offense, and 2) such prolonged confinement would be discriminatory against the robbers classified as dangerous, because their punishment would far exceed the penalty suffered by equally culpable robbers who happen not to be predicted to be dangerous.

Here, assuming the prediction of dangerousness to be accurate would not cure these objections. For the individual is, by hypothesis, serving the additional time as *punishment,* under punitive conditions. The punishment can be imposed only for the past offense—the robbery. If the extra time cannot be justified as punishment for the past robbery, then it cannot be justified with reference to the predicted crime, regardless of its prospective heinousness. For it likewise offends basic concepts of justice to *punish* someone—if confinement is seriously intended as punishment—except for a past offense.[90] Hence the revised version of the model would be unacceptable, whether one assumes false positives are involved or not.[91]

F. *Addition of Rehabilitative Treatment*

It has been suggested that the imposition of compulsory rehabilitative treatment gives justification to a scheme of preventive confinement.[92] This suggestion is worth critical examination.

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90. *See* H.L.A. HART, *supra* note 78, ch. 7. *See also* H. PACKER, *supra* note 80, at 73-79.

91. The concept of punishment might justify imposing longer sentences upon multiple offenders than upon first offenders—on the ground that a persistent course of criminal conduct evidences a greater degree of culpability. However, the model cannot be rescued by limiting its application to recidivists. Even for second robbery offenders, for example, an indeterminate and possible lifelong sentence would seem excessive; and selecting *some* second robbery offenders (namely, those predicted to be dangerous) and not others (namely, those not so predicted) for such harsh treatment would, again, be discriminatory. For a useful analysis of habitual offender laws, see Katkin, *supra* note 83.

92. *See, e.g.,* Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964), upholding the Maryland Defective Delinquent Law.

To do so, let us again vary our original model, this time to provide the additional element of compulsory individualized treatment.

> *Variation 2 of the Model. The legislature provides maximum terms of imprisonment for various criminal offenses. It prescribes, however, that where any convicted offender meets the predictive criteria for dangerousness, he will be subject to preventive confinement for an indeterminate period that may exceed the maximum statutory term of imprisonment for his offense. Preventive confinement would be served in a special facility under conditions of minimum rigorousness; there, he would be required to undergo psychological, educational and vocational rehabilitative treatment. Either the offender would first serve a prison term for his past offense and then be transferred to this special facility; or else he could be sent immediately to the special facility. In either case, he would not be released from the special facility until he no longer met the criteria for dangerousness.*[93]

Here, the individual's alleged need for treatment, alone, could not justify his being preventively confined—even were it supposed that he is suffering from an emotional or personality disturbance and could be genuinely helped by the treatment. For he is assumed to be an adult and—despite his psychological troubles—legally sane. Without the added elements of the prior conviction and the prediction of dangerousness, it could hardly be contended that the state had the right to confine *any* sane adult (even if he is somewhat disturbed) solely for therapeutic treatment, against his will.

Nor would the prior conviction alone justify his confinement. For we are assuming, again, that the period during which the individual is being confined for treatment exceeds the maximum statutory term of punishment for the offense of which he was convicted.

The justification of the mandatory treatment must depend,

93. This revised model closely resembles Maryland's Defective Delinquent Law—described in the text accompanying *supra* notes 5-9—except that the procedures and predictive criteria would be improved to meet the threshold requirements described in part II-A of this article.

therefore, upon the prediction of dangerousness itself. The individual is being committed for treatment *because* he is thought to be dangerous, *precisely for the purpose of "curing" him of his dangerousness.* Were he not found dangerous he would not have to be treated.

The only functional difference between the original model of preventive confinement and this revised model of treatment-oriented confinement, is the manner by which they are designed to protect the community from individuals who are deemed dangerous. Pure preventive confinement operates only by incapacitating the individual; whatever his propensities for injuring the community, he is rendered incapable of exercising them because he is isolated. Treatment-oriented confinement operates by trying to eliminate these propensities in the individual, through a program of rehabilitative therapy; the individual is confined in order to assure his availability for the treatment program, and also in order to incapacitate him from doing harm during the interim period while the treatment is being administered and is supposedly taking effect.

Treatment could permit earlier release, assuming—and this assumption itself has been questioned [94]—that it can be effective. Under the preventive model, the individual simply remains in confinement until such time as he changes sufficiently of his own accord so that he ceases to meet the criteria of dangerousness. Under the revised, treatment-oriented model, an effort would be made to hasten the process of change—and hence the prospects of his release—by application of the appropriate rehabilitative therapy. Despite these differences, however, both models have essentially the same purpose: to safeguard society against persons who have been identified by specified predictive criteria as individually dangerous if permitted to remain at large.

Thus the treatment-oriented model ultimately rests upon the same assumption as the purely preventive model: that society

94. Several studies have shown that existing rehabilitative treatment programs have had little or no measurable success in reducing recidivism rates. *See* G. KASSEBAUM, D. WARD & D. WILNER, PRISON TREATMENT AND PAROLE SURVIVAL (1971); Robison & Smith, *The Effectiveness of Correctional Programs,* 17 CRIME & DELIN. 67 (1971). The concept of mandatory rehabilitative treatment has also been attacked as having functioned almost exclusively as a pretext for widening the discretion of law enforcement and correctional officials, and having aggravated the repressive and discriminatory features of the correctional system. AFSC REPORT *supra* note 33, chs. 3, 6.

has the right to deprive persons of their freedom on the basis of individual predictions of future dangerousness. If for the reasons earlier explained, that assumption is unacceptable as applied to the original preventive model, it cannot sustain the treatment-oriented model either. (The false positive problem, for example, does not disappear merely because we choose to impose treatment upon the individuals who are mistakenly identified as dangerous.)

G. *Implications for Current Practice*

It is wise to be cautious in translating conclusions developed from a theoretical model to the real world; for the question can always be asked: "How do you know the real world is similar to the model in all the relevant respects?" In the field of preventive confinement, sufficient data concerning current practices is not available to enable us to answer this question with any certainty. However, some tentative conclusions might be ventured.

First, the foregoing analysis calls into serious doubt the rationality and fairness of overt schemes of preventive confinement in existing law—such as the Canadian Preventive Detention statute, the Maryland Defective Delinquent Law and the Colorado sexual offender statute, described at the beginning of this paper. Any such system—which takes legally sane individuals who have been convicted of crimes, makes predictions of their individual future dangerousness, and subjects them on the basis of such predictions to prolonged confinement, in excess of what could legally be imposed as punishment for their prior offenses—shares the essential defects of the models we have been analyzing. This conclusion holds also for the recommendations of the Model Sentencing Act and the Model Penal Code which would impose extended terms of confinement upon certain "dangerous" offenders.

Second, the analysis raises questions concerning the use of predictions of dangerousness in sentencing and parole decisions. Are sentencing judges and parole boards attempting to make individual assessments of the supposed dangerousness of convicted persons coming before them? To what extent do these assessments affect decisions concerning imposition and duration of confinement or grant or denial of parole? Is there evidence that individuals predicted to be dangerous receive materially *longer* sentences

or serve materially *longer* terms of confinement than other offenders with similar offense histories not so predicted? Do individuals predicted to be dangerous receive terms of confinement of a duration that substantially exceeds what would ordinarily be regarded as appropriate as punishment for the past offense, if its seriousness alone is considered? A definitive answer to these questions would require a much more detailed investigation of existing law and practice than the scope of this theoretical analysis permits. However, if the answers to these questions are affirmative (as one might well suspect to be often the case) then the law is being used to create *de facto* preventive confinement—that would be subject to essentially the same objections as apply to the theoretical models discussed in this paper.

III. Conclusion

In this article, the following question was considered: "Is it appropriate to decide whether and how long to confine a person convicted of a crime on the basis of a prediction of his supposed individual dangerousness?"

To examine this question, we constructed a hypothetical model where a person convicted of a criminal offense is subjected to preventive confinement for an indeterminate term—possibly well in excess of the maximum statutory term of punishment for the crime of which he was convicted—if specified predictive criteria indicated a high probability of his committing a serious offense in the future. It was assumed that the model met certain threshold criteria, namely: that there would be a reasonably precise legal definition of "dangerousness"; that the predictive criteria would be adequately validated in advance; and that certain minimum procedural safeguards would be adopted.

Our analysis indicated that predictions of dangerousness would, because of the infrequency of the events to be predicted, generally yield a high incidence of false positives—that is, persons *mistakenly* predicted to be dangerous. Where numerous false positives are confined, the model was found to offend fundamental conceptions of individual justice.

Even if the predictive methods were assumed to be highly accurate, preventive confinement in the model was found not sustainable, because it infringed the right of individual choice and

entailed significant risks of abuse. The preventive confinement could not, moreover, be justified by reference to concepts of punishment for the prior offense.

The addition of mandatory rehabilitative treatment, likewise, did not sustain the model, for the function of treatment itself was dependent upon the prior finding of individual dangerousness.

Thus, under our analysis, the model scheme of preventive confinement failed. The consequence of that failure for current practice has been examined.

Preventive confinement requires the assumption that conviction of a crime relegates the offender, even after he has completed the punishment for his prior offense, to *permanent* second-class status. The erroneous incarceration of false positives; the risk of abuse of prediction methods; and the abdication of concepts of personal choice which are inherent in such a scheme can be excused only if it is assumed that their infliction upon convicted persons does not matter—because, as a class, these persons are expendable. As Caleb Foote stated:

> It is a prerequisite for any system of preventive detention that you assume that those detained are going to be second-class citizens. The false positives are viewed as more expendable in the debates on preventive detention. Judges and psychiatrists who support preventive detention assume that a mistaken identification of one actually safe person who is predicted to be dangerous is much less serious than the release of one actually dangerous person. The operating rationale, therefore, is much like that of a search-and-destroy mission. Some dangerous Viet Cong may be eliminated, and the civilians and children are expendable.[95]

95. Foote, *Comments on Preventive Detention*, 23 J. LEGAL ED. 48, 52-53 (1970).