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Limits of Preventive Detention, The

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The Limits of Preventive Detention

Rinat Kitai-Sangero*

TABLE OF CONTENTS

I. INTRODUCTION	904
II. ARGUMENTS AGAINST THE GROUND OF DANGEROUSNESS	908
A. <i>The Ability to Predict Dangerousness and the Elusive Concept of Dangerousness</i>	908
B. <i>Detention as Punishment</i>	915
C. <i>A Presumption of Guilt</i>	920
III. BALANCING THE PRESUMPTION OF INNOCENCE AGAINST THE PUBLIC INTEREST IN PREVENTING HARM	923
IV. SETTING LIMITS ON PREVENTIVE DETENTION	925
A. <i>Clear Evidence of Dangerousness</i>	925
B. <i>Limits on Duration</i>	927
C. <i>Proportionality</i>	928
D. <i>Conditions of Confinement</i>	929
E. <i>Payment of Compensation</i>	930
F. <i>Seeking Less Restrictive Alternatives</i>	931
V. CONCLUSION	932

ABSTRACT

The purpose of this Article is to propose a framework for preventive detention and to call for strict limits on its use. The Article examines preventive detention mainly from the perspective of the presumption of innocence. It claims that the presumption of innocence has an important bearing on preventive detention and should set heavy limits on its use, including: solid evidence, due process, periodic review, requirement of proportionality, compensation, pleasant conditions of confinement, and a strict duty to explore all other alternatives for preventing harm before imposing detention. These limits are designed to make the use of preventive detention very difficult under normal circumstances.

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I. INTRODUCTION

Preventive detention entails the incarceration of a person who has not been convicted of a criminal offense, based on his dangerousness, in order to prevent him from causing public harm. Its primary manifestations are pretrial detention, the administrative detention of persons suspected of being terrorists or enemy combatants, and the involuntary civil commitment of sex offenders following the completion of their prison terms. Despite the various contexts of these cases, dangerousness constitutes the sole basis for depriving sane persons of their liberty in the absence of convictions. For the sake of convenience, I shall hereinafter refer to all such deprivations of liberty as “detention.”

Not long ago, one commentator, in discussing the *Salerno* ruling¹—which upheld the constitutionality of pretrial detention on the ground of dangerousness under the Bail Reform Act of 1984—referred to this judgment as “the world turned upside down.”² Some scholars, however, believe that pure preventive detention is not unthinkable.³

Normally, society uses the criminal trial to cope with the dangerousness of sane persons.⁴ However, the criminal trial, conducted according to traditional rules of evidence and procedure, is not always adequate for punishing an offender. Evidence may be inadmissible or insufficient to prove guilt beyond a reasonable doubt. Additionally, the prosecution may not be able to bring evidence at trial for reasons having nothing to do with the reliability of the evidence itself, such as concern for a witness’s life and safety or to avoid exposing sources.⁵ Moreover, the trial process is inadequate for dealing with future offenses. Since the state is forbidden from inflicting punishment for a future act, the question arises as to what society can do regarding someone perceived to be dangerous. What is it supposed to do, for example, with respect to the member of a terrorist organization who conducts a normative and peaceful lifestyle, but is ready to carry out a terror attack the moment he is assigned his mission? Should society remain idle until a crime is committed? Assuming that deterrence may be ineffective in some situations, is there anything that can be done to cope with the high risk that a potential offender poses to society? Is

1. *United States v. Salerno*, 481 U.S. 739 (1987).

2. Sidney Bernstein, *Supreme Court Review*, 23 TRIAL 89, 90 (1987).

3. Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778, 779 (1996).

4. Therefore, as Slobogin rightly emphasizes, preventive detention is inappropriate if a person is amenable to criminal prosecution. Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 28-29 (2003).

5. See Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT’L & COMP. L. 721, 762 (2001); Mark D. Villaverde, Note, *Structuring the Prosecutor’s Duty to Search the Intelligence Community for Brady Material*, 88 CORNELL L. REV. 1471, 1527 (2003).

society unable to act just because the potential offender has not yet committed an offense?

The United States Supreme Court has not recognized a regime of pure preventive detention. Although, in principle, the Court has upheld the constitutionality of the involuntary confinement of sex offenders not suffering from insanity after the completion of their prison terms,⁶ it has nevertheless stressed the need to identify something special in sex offenders who are civilly committed against their will in order to distinguish between them and other dangerous persons.⁷ In *Kansas v. Hendricks*, a mental abnormality or a personality disorder that makes it difficult for someone to control his dangerous behavior was deemed a condition for civil commitment,⁸ whereas, in *Kansas v. Crane*, the Court required that the state prove "serious difficulty in controlling behavior" for such commitment to be considered constitutional.⁹ In another case, the Court held that a sane person with an incurable antisocial personality disorder should be released from a state psychiatric hospital since dangerousness alone (even when accompanied by a diagnosis of antisocial personality disorder) is not a proper basis for the deprivation of liberty within a regime of civil commitment.¹⁰

Additionally, a general power to arrest dangerous persons is recognized within a framework of administrative detention aimed at terror suspects.¹¹ Such detention is outside, and operates parallel to, the normal criminal process.¹² Its classic objective is to prevent harm to national security during a state of emergency.¹³ Regardless of whether the fight against terrorism should be defined as war and subject to the rules of war,¹⁴ the assumption of such detention is that the state may more easily trample upon civil rights during a state of emergency.¹⁵

6. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

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

8. *Hendricks*, 521 U.S. at 356, 358, 360.

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

10. *Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992).

11. See George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L.J. 1 (1984); Andrew Harding & John Hatchard, *Introduction*, in PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY 1, 3 (Andrew Harding & John Hatchard eds., 1993).

12. See Gross, *supra* note 5, at 753-54.

13. Harding & Hatchard, *supra* note 11, at 4; Steven Greer, *Preventive Detention and Public Security—Towards a General Model*, in PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY 23, 36 (Andrew Harding & John Hatchard eds., 1993); see also *The King v. Superintendent of Vine Street Police Station, ex parte Liebmann*, (1916) 1 K.B. 268, 275-76 ("I think it right, therefore, to add that, deeply impressed as I am with the sanctity of the liberty of the subject, I cannot forget that above the liberty of the subject is the safety of the realm . . .").

14. Regarding the equivalence between war and the fight against terrorism, see, for example, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 773, 809-10 (2007).

15. See Gross, *supra* note 5, at 768-69; *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25, 95 (1978); *Lawless v. Ireland*, App. No. 332/57, 1 Eur. H.R. Rep. 15, 33 (1961).

In periods of emergency, the normal tools of the criminal process are inadequate to maintain public safety. There is not always enough time to distinguish between those persons who pose a danger to national security and those who do not.¹⁶ Thus, administrative detention is employed in cases where it is not possible to sentence a person to imprisonment for various reasons, such as insufficient time, difficulties in gathering evidence, or fears of disclosing classified evidence.¹⁷

Moreover, preventive detention is concerned with the future and not the past. For example, while the punishment for membership in a terrorist organization is relatively mild, the dangers of terrorism are severe. Preventive detention may be used in this circumstance to eliminate the threat of more dangerous offenses occurring in the future.

Some scholars, however, advocate the expansion of pure preventive detention to include dangerous persons in general. Robinson proposes to expand the civil commitment scheme to encompass individuals who pose a danger to society upon the completion of their prison terms.¹⁸ Slobogin develops what he terms “a jurisprudence of dangerousness,” claiming that preventive detention should target dangerous people who are undeterrable.¹⁹ Thus, urges driven by factors such as ideology, sex, drugs, money, or power could be stronger than a cold calculation of the risk of conviction and punishment.²⁰ Such dangerous individuals, although sane, exhibit a disdain for society’s most significant norms.²¹ Morse, while opposing preventive detention, puts forward the idea of extending the offense of reckless endangerment to include the following elements: a past conviction for a serious, violent offense or involuntary civil commitment for such behavior; an awareness on the part of the individual that he is highly likely to cause substantial harm in the future; and a failure by the individual to take effective steps to prevent this future harm.²² This offense should be accompanied by a short prison sentence. However, upon its completion, a person can expect to be charged again if he takes no further steps to avoid future wrongdoing.²³

16. *Korematsu v. United States*, 323 U.S. 214, 218-19 (1944).

17. Harding & Hatchard, *supra* note 11, at 6; *Liversidge v. Anderson*, [1942] A.C. 206, 221 (H.L.) (appeal taken from Eng.). See also the arguments of the British government in *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25, 37 (1978), regarding the difficulty of putting members of the Irish Republican Army on trial in Northern Ireland due to the fears of witnesses unwilling to testify against them and their ability to evade capture by crossing the border into the Republic of Ireland or by finding shelter in areas populated by supportive residents, where the British Army found it hard to move around freely.

18. Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1431-32, 1444 (2001).

19. Slobogin, *supra* note 4, at 4.

20. *Id.* at 37.

21. *Id.* at 40.

22. Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 152 (1996).

23. *Id.*

Indeed, there appears to be no need to expand on arguments supporting detention on the ground of dangerousness. The existence of a social interest in maintaining public safety is self-evident.²⁴ The desire of the public to live in peace and safety from the threat of criminals is understandable and legitimate. Security serves our ability to enjoy life, freedom, and property. Seemingly, the lack of a power to detain someone for a future offense could lead to impossible situations. For example, psychopathic serial murderers, who have been apprehended and have confessed their crimes, may remain free on the streets until the conclusion of their trials if it has not been proven that they intend to obstruct justice. Such persons could commit heinous crimes that are liable to cause victims, along with their families and friends, irreparable physical and emotional harm, or even endanger national security.

We worry about sex offenders who complete their prison terms but continue to pose a danger to society following their release. We are also troubled by Morse's example of the armed robber who, upon his release from prison, defiantly tells the warden that he will continue his life of crime but that, this time, he will not make the mistake of leaving any potential witnesses alive.²⁵ As normative persons and, perhaps even as potential victims, we want to prevent this from happening.

Nevertheless, the constitutionality of detention on grounds of dangerousness is questionable. Many scholars and judges have strenuously objected to this ground for detention.²⁶ In his dissent in *Salerno*, Justice Marshall opined that detention to prevent the perpetration of future offenses is only suited to a "police state."²⁷ Scholars have even viewed the ground of dangerousness as a reflection of thinking characteristic of the Nazi regime.²⁸

Surprisingly, some scholars who support preventive detention completely overlook or underestimate the role of the presumption of innocence in ruling out

24. See Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 556 (1986) ("[S]ensible people usually do not allow murderers and highwaymen to roam among them.").

25. Morse, *supra* note 22, at 113.

26. See, e.g., Craig Ethan Allen, *Pretrial Detention and the Loss of Innocence*, United States v. Salerno, 11 HAMLINE L. REV. 331 (1988); Bernstein, *supra* note 2, at 90; Sam J. Ervin, Jr., *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 289, 293 (1971); Sam J. Ervin, Jr., *Preventive Detention, A Species of Lydford Law*, 52 GEO. WASH. L. REV. 113, 121 (1983); Daniel Kiselbach, *Pre-Trial Criminal Procedure: Preventive Detention and the Presumption of Innocence*, 31 CRIM. L.Q. 168, 194 (1989); LeRoy Pemell, *The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence*, 37 CLEV. ST. L. REV. 393, 402-03 (1989); Jeff Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 44 WIS. L. REV. 441 (1978); Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970); David Jett, Note, *The Loss of Innocence: Preventive Detention Under the Bail Reform Act of 1984*, 22 AM. CRIM. L. REV. 805, 805 (1985); M. Gray Styers, Jr., Note, *United States v. Salerno: Pretrial Detention Seen Through the Looking Glass*, 66 N.C. L. REV. 616 (1988).

27. United States v. Salerno, 481 U.S. 739, 755 (1987) (Marshall, J., dissenting).

28. See Ervin, *A Species of Lydford Law*, *supra* note 26, at 115 (stating that preventive detention is a "Gestapo-like proceeding").

or, at least, strictly limiting the dimensions of preventive detention. Although this approach is understandable in light of the narrow meaning that the Supreme Court has granted to the presumption of innocence in *Bell v. Wolfish*, as “a doctrine that allocates the burden of proof in criminal trials,”²⁹ this approach is highly unjustified. The presumption of innocence should be accorded a broad meaning as a symbol of the proper attitude of the state towards the individual. The presumption of innocence contributes to alleviating the sense of humiliation, rejection, and alienation that the individual may suffer when the state treats him as if he or she were guilty. Since accusing a person of committing an offense involves ipso facto antagonism between the state and the individual, the presumption of innocence contributes to the individual’s positive identification with the community. It is instrumental in reducing the alienation felt by the individual during criminal proceedings.³⁰

This Article examines preventive detention mainly from the perspective of the presumption of innocence. It claims that the presumption of innocence has an important bearing on preventive detention and should set heavy limits on its use.

In a world of perfect knowledge, it would be hard to oppose preventive detention. It is proper and even preferable that a person who is going to commit serious crimes will be deprived of his liberty to prevent an innocent person from being seriously harmed.³¹ However, humans are not omniscient. In a world of uncertainty, the default rule is and should be the presumption of innocence, which assumes that a person will not commit an offense in the future.

Part II of this Article considers objections to the concept of preventive detention. Part III explains why preventive detention may nevertheless be justified based on the principle of self-defense, but only under very extraordinary circumstances. Part IV tries to propitiate the presumption of innocence by setting strict limits on the use of preventive detention, including: solid evidence, due process, periodic review, the requirement of proportionality, compensation, pleasant conditions of confinement, and a strict duty to explore all other alternatives for preventing harm before imposing detention. These limits are designed to make the use of preventive detention very difficult under normal circumstances.

II. ARGUMENTS AGAINST THE GROUND OF DANGEROUSNESS

A. *The Ability to Predict Dangerousness and the Elusive Concept of Dangerousness*

To detain someone on the ground of dangerousness, it must be proven that he is likely to commit a crime in the future. However, it is impossible to prove

29. 441 U.S. 520, 533 (1979).

30. Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 280-83 (2002).

31. See Morse, *supra* note 22, at 150.

beyond a reasonable doubt that someone will commit a future act.³² Most persons do not declare their intent to engage in criminal conduct. In effect, the future commission of an offense cannot be proven but only assessed. This is an assessment related to an intention, or perhaps a propensity, which attempts to ascertain someone's innermost thoughts in order to anticipate his or her behavior.³³

The power to detain someone to prevent future offenses is based on an assumption regarding the decision-maker's ability to reasonably assess a person's future dangerousness. However, according to many scholars, it is highly doubtful that such an assessment is possible to an acceptable degree of certainty.³⁴ Moreover, scholars have criticized the absence of reliable data regarding the link between preventive detention and the dimensions of crime—apart from isolated, marginal cases—arguing that there is no clear empirical evidence of a danger to public safety resulting from a waiver of this ground of detention.³⁵ Some scholars claim, therefore, that given the fallibility of predictions of dangerousness, the denial of a person's freedom on this shaky foundation is unconstitutional.³⁶

There is no way to assess the extent to which non-dangerous persons are detained, because the supposed danger for which they are incarcerated never materializes due to their confinement. Consequently, no data exists to prove that

32. See Andrew von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFF. L. REV. 717, 743-44 (1972). Regarding the inadequacy of the reasonable doubt standard for assessing the future dangerousness of a mentally-ill person, given the lack of certainty and fallibility of psychiatric diagnosis, see *Addington v. Texas*, 441 U.S. 418, 429-30 (1979).

33. See von Hirsch, *supra* note 32, at 746.

34. See, e.g., GARY T. TROTTER, *THE LAW OF BAIL IN CANADA* 31-32 (1992); Allen, *supra* note 26, at 344-45; Bernstein, *supra* note 2, at 91; Joseph J. Cocozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976); Michael J. Eason, *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent?*, 78 J. CRIM. L. & CRIMINOLOGY 1048, 1063-67 (1988); Ervin, *A Species of Lydford Law*, *supra* note 26, at 126; Ervin, *An Empirical Analysis*, *supra* note 26, at 357-58; Charles Patrick Ewing, *Preventive Detention and Execution: The Constitutionality of Punishing Future Crimes*, 15 LAW & HUM. BEHAV. 139, 139 (1991); Charles Patrick Ewing, Schall v. Martin: *Preventive Detention and Dangerousness Through the Looking Glass*, 34 BUFF. L. REV. 173 (1985); Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 200-02 (1996); Joelle Anne Moreno, "Whoever Fights Monsters Should See to It That in the Process He Does Not Become a Monster": *Hunting the Sexual Predator with Silver Bullets—Federal Rules of Evidence 413-415—and a Stake Through the Heart—Kansas v. Hendricks*, 49 FLA. L. REV. 505, 550-51 (1997); Tribe, *supra* note 26, at 378, 382; Billie Farthing, Comment, *An Analysis of the Bail Reform Act of 1984*, 53 TENN. L. REV. 145, 168 (1985); Margaret S. Gain, Note, *The Bail Reform Act of 1984 and United States v. Salerno: Too Easy to Believe*, 39 CASE W. RES. L. REV. 1371, 1384-86 (1989); Susan M. Marcella, Note, *When Preventive Detention Is (Still) Unconstitutional: The Invalidity of the Presumption in the 1984 Federal Bail Statute*, 61 S. CAL. L. REV. 1091, 1100-17 (1988); David J. Rabinowitz, Comment, *Preventive Detention and United States v. Edwards: Burdening the Innocent*, 32 AM. U. L. REV. 191, 207 (1982).

35. See Allen, *supra* note 26, at 345-46; Eason, *supra* note 34, at 1068; Ervin, *A Species of Lydford Law*, *supra* note 26, at 126; Kiselbach, *supra* note 26, at 182; Tribe, *supra* note 26, at 371-73; Rabinowitz, *supra* note 34, at 207; Shelley Zavlek, Note, *Martin v. Strasburg, Justice for Juveniles? The Second Circuit Declares Juvenile Preventive Detention Statute Unconstitutional*, 50 BROOK. L. REV. 517, 556-57 (1984).

36. See Ewing, *Preventive Detention and Execution*, *supra* note 34, at 159; Rabinowitz, *supra* note 34, at 207; von Hirsch, *supra* note 32, at 740.

it was possible to allow them to remain free.³⁷ Therefore, any decision to detain a person is, in some sense, a self-fulfilling prophecy, since the error of such detention will never be discovered.³⁸ The only verification of the correctness of a decision to impose preventive detention comes when the state's request to detain someone is denied and that individual subsequently commits an offense.³⁹ Thus, there is also a danger that decision-makers wishing to avoid visible errors will be overly cautious and, in cases of uncertainty, be more inclined to choose the option of detention.⁴⁰

An assessment of dangerousness is prone, in any case, to erroneous prediction and abuse in that it relates to factors that have yet to be proven.⁴¹ This potential abuse could lead to arbitrariness and injustice⁴² primarily directed at certain groups, such as ethnic minorities⁴³ or political opponents of the regime.⁴⁴ Thus, a tense political climate or general increase in the rate of crime could lead to a change in the assessment of a person's dangerousness.⁴⁵ In any event, assessing the probability of a future act is much more difficult than ascertaining the commission of a past offense. Moreover, an assessment of future dangerousness entails a normative component that is beyond the capacity of prediction.⁴⁶ A person cannot alter his past, but he does have the potential to act differently in the future.

37. See Tribe, *supra* note 26, at 375; von Hirsch, *supra* note 32, at 738-39; Marian E. Lupo, Comment, *United States v. Salerno: "A Loaded Weapon Ready for the Hand,"* 54 BROOK. L. REV. 171, 204 (1988).

38. See Eason, *supra* note 34, at 1068; Gain, *supra* note 34, at 1380-81; Kiselbach, *supra* note 26, at 183; Stuart S. Nagel, *Discretion in the Criminal Justice System: Analyzing, Channeling, Reducing, and Controlling It*, 31 EMORY L.J. 603, 609-10 (1982); Tribe, *supra* note 26, at 375; von Hirsch, *supra* note 32, at 739.

39. See Eason, *supra* note 34, at 1068; Marcella, *supra* note 34, at 1106; Stephen J. Morse, *Preventive Confinement of Dangerous Offenders*, 32 J.L. MED. & ETHICS 56, 59 (2004); Nagel, *supra* note 38, at 609-10; Tribe, *supra* note 26, at 375; von Hirsch, *supra* note 32, at 738-39.

40. See Allen, *supra* note 26, at 344-45; Eason, *supra* note 34, at 1068; John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375, 385-86, 406 (1999); Morse, *supra* note 39, at 59; Thaler, *supra* note 26, at 458; Tribe, *supra* note 26, at 382; von Hirsch, *supra* note 32, at 739.

41. See John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 28 (1985); von Hirsch, *supra* note 32, at 748.

42. See *United States v. Salerno*, 481 U.S. 739, 766 (1987) (Marshall, J., dissenting).

43. See Stanislaw Frankowski & Henry Luepke, *Pre-Trial Detention in the United States, in PREVENTIVE DETENTION: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE* 75 (Stanislaw J. Frankowski & Dinah Shelton eds., 1992) [hereinafter PREVENTIVE DETENTION]; Allen, *supra* note 26, at 345; Ervin, *An Empirical Analysis*, *supra* note 26, at 358-59; Styers, *supra* note 26, at 630; Tribe, *supra* note 26, at 374; Jack F. Williams, *Classifying Pre-Trial Detention Decisions Under the Bail Reform Act of 1984: A Statistical Approach*, 30 AM. CRIM. L. REV. 255, 293 (1993).

44. Styers, *supra* note 26, at 630.

45. See Frieder Dünkler, *Deutschland/Germany, in UNTERSUCHUNGSHAFT UND UNTERSUCHUNGSHAFTVOLLZUG / WAITING FOR TRIAL* 143 (Frieder Dünkler & Jon Vagg eds., 1994) (relating to rising social tension against foreigners). It would seem that a good example of this was the practice, during the McCarthy period in the United States, of imposing a higher bail on Communists than they could afford, based on an assessment of their dangerousness. See Donald B. Verrilli Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 360 (1982).

46. Adam J. Falk, Note, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional*

This point is illustrated by the personal story of a former addict. He made his living by robbing homes and was, as a result, a constant “guest” of the prison system. All his efforts to rehabilitate himself failed. One day, he looked up at the window of the fourth floor apartment he was about to rob and felt too weak to climb up and break in. As a result, he forced himself to once again enter a rehabilitation center—and this time he succeeded. As this story illustrates, deterministic attitudes regarding human nature and conduct are very dangerous; history is replete with examples of abuse resulting from such attitudes.

Furthermore, the concept of dangerousness is elusive and vague.⁴⁷ National security is often an “emotive and politically charged” matter.⁴⁸ Thus, there is a fear that administrative detention will serve as a guise for repressing legitimate political dissent.⁴⁹ We no longer believe that the more than 100,000 Americans of Japanese ancestry confined during the Second World War posed a danger to the national security of the United States that justified their internment; the *Korematsu* decision⁵⁰ is viewed today as one of the darkest stains in the history of American law.⁵¹ In Britain, as well, it is now estimated that most persons detained during World War II were not truly dangerous.⁵² Thus, when we read the landmark English judgment, *Liversidge v. Anderson*,⁵³ today, it is hard to believe that Liversidge, a Jew who clearly immigrated to England from Russia to escape anti-Semitism and had every reason to despise the Nazi regime, was considered a threat to the security of Great Britain.⁵⁴

Detention based on public fear and a desire for revenge risks that the scope of offenses given special attention would be expanded according to swings in public opinion.⁵⁵ After all, the motivations of sex offenders are similar to those that induce criminals to commit other kinds of violent offenses.⁵⁶ Some persons

Boundaries of Civil Commitment After Kansas v. Hendricks, 25 AM. J.L. & MED. 117, 141-42 (1999).

47. András Sajó, *From Militant Democracy to the Preventive State?*, 27 CARDOZO L. REV. 2255, 2266-67 (2006).

48. Elizabeth A. Faulkner, *The Right to Habeas Corpus: Only in the Other Americas*, 9 AM. U. J. INT'L L. & POL'Y 653, 656 (1994).

49. Helena M. Cook, *Preventive Detention—International Standards and the Protection of the Individual*, in PREVENTIVE DETENTION, *supra* note 43, at 1, 10-11; Harding & Hatchard, *supra* note 11, at 1, 4-5 (noting, however, that no indication of this has been found in the countries examined).

50. *Korematsu v. United States*, 323 U.S. 214 (1944).

51. See Developments, *Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens*, 115 HARV. L. REV. 1915, 1930-31 (2002); Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 J. CONTEMP. LEGAL ISSUES 61, 62-63 (1999); A. W. Brian Simpson, *Detention Without Trial in the Second World War: Comparing the British and American Experiences*, 16 FLA. ST. U. L. REV. 225, 238, 252, 265-66 (1988).

52. Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1936 (2004).

53. *Liversidge v. Anderson*, [1942] A.C. 206, 221-25 (H.L.) (appeal taken from Eng.).

54. Simpson, *supra* note 51, at 260-61.

55. See Moreno, *supra* note 34, at 513.

56. See *id.* at 553.

commit crime for profit.⁵⁷ Sexual impulses are not necessarily less controllable than other urges, such as the greed for profit, that lead to the commission of a property offense, or even a desire for personal revenge that results in a violent assault.⁵⁸ Scholars have indeed opined that there is no justification for classifying sex offenders as a separate category for the purpose of civil commitment.⁵⁹

The United States Supreme Court, however, has repeatedly held that it is possible to rely on the discretion of decision-makers and their abilities to reasonably predict potential criminality based on existing criteria for assessing dangerousness.⁶⁰ Many scholars support this position.⁶¹ Surely, there are good indicators for assessing dangerousness, including, *inter alia*, a criminal history.⁶² As Alschuler puts it, “[a]lthough predicting the weather is a difficult task, almost anyone can do it when a funnel cloud is headed in his direction.”⁶³

Moreover, at certain junctures, such as parole hearings, a decision based on an assessment of future dangerousness is unavoidable. Due to the risk of erroneous prediction, the decision-maker should exercise great caution.⁶⁴ However, it is impossible to completely rule out the existence of cases where a person’s dangerousness is significant and may be assessed to an acceptable degree.

Still, one should remember that erroneous decisions in favor of detention would necessarily be greater in number than wrongful convictions. The reasonable doubt standard of proof in a criminal trial reflects the unwillingness of

57. See Falk, *supra* note 46, at 142 (quoting Robert F. Schopp & Barbara Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437, 449-53 (1995)).

58. See Morse, *supra* note 22, at 138.

59. *Id.* at 138-39.

60. *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997); *United States v. Salerno*, 481 U.S. 739, 751 (1987); *Schall v. Martin*, 467 U.S. 253, 278 (1984).

61. See Alschuler, *supra* note 24, at 540; Thomas Grisso & Paul S. Appelbaum, *Is It Unethical to Offer Predictions of Future Violence?*, 16 LAW & HUM. BEHAV. 621 (1992); John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1240-42 (1969); John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 395 (2006) (regarding actuarial methods of risk assessment); Katherine P. Blakey, Note, *The Indefinite Civil Commitment of Dangerous Sex Offenders Is an Appropriate Legal Compromise Between “Mad” and “Bad”—A Study of Minnesota’s Sexual Psychopathic Personality Statute*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 227, 265-71 (1996); John B. Howard, Jr., Note, *The Trial of Pretrial Dangerousness: Preventive Detention After United States v. Salerno*, 75 VA. L. REV. 639, 676-77 (1989); Dawn J. Post, Note, *Preventive Victimization: Assessing Future Dangerousness in Sexual Predators for Purposes of Indeterminate Civil Commitment*, 21 HAMLINE J. PUB. L. & POL’Y 177, 184 (1999); see also Corrado, *supra* note 3, at 792-93 (arguing that the deciding factor is the assessment of present dangerousness, and not the prediction that a future harm will be caused, similar to the duty to remove an automobile without brakes from the road, regardless of the question as to whether the automobile has caused any actual injury). This distinction is misleading, since it is impossible to assess current dangerousness in isolation from future dangerousness. All we can know is that a person was dangerous in the past due to the harm he caused or attempted to cause.

62. See *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997); Corrado, *supra* note 3, at 804.

63. Alschuler, *supra* note 24, at 544.

64. Paul H. Robinson, *Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 716-17 (1993); Slobogin, *supra* note 4, at 10-11.

society to take a conscious risk that an innocent person will be convicted, despite the heavy social price entailed by this principle. It thus reflects the preference for a Kantian approach that views the individual as an end in and of himself and not just a means to an end.⁶⁵ Nevertheless, in other types of proceedings, society is willing to take a calculated and conscious risk that an innocent, or a non-dangerous, person will be detained.⁶⁶ von Hirsch asks, rhetorically, “[w]hy should we be more 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?”⁶⁷

With regard to substantive rules of criminal responsibility—i.e., the *actus reus* and *mens rea* requirements—the “primacy and ubiquity of the criminal justice system” should be maintained; in other words, a civil (non-criminal) commitment scheme should only be allowed to reach where substantive criminal law cannot.⁶⁸ However, with respect to the procedural safeguards of criminal law, this “principled boundary” must not be crossed, since it “ensures that preventive detention will not swallow the criminal justice system.”⁶⁹

Moreover, detention on the ground of obstruction of justice is designed to prevent a danger limited in time and directly related to the criminal process pending against an accused person for a specific criminal offense. However, in contrast to the ground of obstruction, an assessment of dangerousness is not necessarily related to someone’s status as an accused person or a formerly convicted sex offender.⁷⁰

Take, for example, the case of a person released from prison after having served a sentence for drug trafficking or burglary. During his incarceration, he continued to use drugs and was not employed in any permanent prison occupation. Despite the limitations in assessing future dangerousness, one may reasonably conclude that there is a high probability that this person will return to a life of crime following his release from prison. Despite his continuing

65. See Rinat Kitai, *Protecting the Guilty*, 6 BUFF. CRIM. L. REV. 1163, 1179 (2003); von Hirsch, *supra* note 32, at 741; ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 175 (2005).

66. See Gain, *supra* note 34, at 1386-87; Ann M. Overbeck, *Detention for the Dangerous: The Bail Reform Act of 1984*, 55 U. CIN. L. REV. 153, 182 (1986); Pernell, *supra* note 26, at 402; Tribe, *supra* note 26, at 385-90. For a different view, see Corrado, *supra* note 3, at 793-94, arguing that the anecdote whereby the acquittal of ten criminals is preferable to the conviction of one innocent is inapplicable to detention on the ground of dangerousness and that, in order to deny a person his freedom on this ground, the same standard of proof as that required for a conviction is unnecessary. When a past offense has been committed, the public has already been harmed, and the more serious damage is now posed by the conviction of an innocent person. Corrado, *supra* note 3, at 793. Regarding a future offense, it is preferable to prevent a severe harm, such as murder, even at the cost of unjustly denying a person their freedom. *Id.* at 794. However, in response to Corrado, one can say that if the defendant is not just guilty, but also dangerous, then an acquittal due to the high burden of proof clearly undermines public safety.

67. von Hirsch, *supra* note 32, at 742-43.

68. See Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use*, 8 STAN. L. & POL’Y REV. 71, 75 (1997).

69. *Id.*

70. See Tribe, *supra* note 26, at 405.

dangerousness, no one would seriously consider delaying his release by means of detention to prevent him from committing further offenses.⁷¹

Similarly, there may be significant, reliable evidence attesting to a person's involvement in dangerous criminal activity that cannot be submitted in court due to a fear of revealing sources. Under normal circumstances, this person also cannot be placed in preventive detention, despite the assessment that he is dangerous to the public. Consequently, in the absence of a general power to detain persons with criminal tendencies before they act, exposing only certain persons (such as pretrial detainees and sex offenders) to the risk of preventive detention represents a violation of the principle of equality.⁷² Once we accept the concept of preventive detention in principle, what theory would prevent its extension to all persons deemed dangerous?⁷³

Morse's proposal, regarding an expansion of the offense of reckless endangerment as an alternative to preventive detention,⁷⁴ is virtually inapplicable except under the most extreme circumstances. Such an expansion might be relevant in the case of a person who requires medication to avoid being dangerous. However, assuming that this is not the case with most potentially dangerous persons, how can one prove that someone is aware that he might commit an offense in the future? How can one really ensure that a dangerous person takes the appropriate steps to reduce his dangerousness? It is not enough that he undergoes treatment—he must be truly motivated for such treatment to actually succeed. How can a factor like motivation be adequately assessed? As Corrado concludes, a logical consequence of Morse's suggestion is that "[t]he merely dangerous person . . . is not doing anything that causes others to be in danger, unless it is his failing to detain himself."⁷⁵ But while Morse correctly assumes that "it is not a crime to have a criminal predisposition or criminogenic character and people do not deserve punishment for their characters,"⁷⁶ his proposal might lead to this result. Furthermore, it does not solve the problem of a dangerous person who is unaware of his dangerousness. Of course, from the perspective of public protection, the distinction between persons who are aware of their dangerousness and those who are not is irrelevant.

71. See Una Ni Raifeartaigh, *Reconciling Bail Law with the Presumption of Innocence*, 17 OXFORD J. LEGAL STUD. 1, 5 (1997) (discussing preventive detention in the pretrial context); Tribe, *supra* note 26, at 406; Kevin F. Arthur, Note, *Preventive Detention: Liberty in the Balance*, 46 MD. L. REV. 378, 403 (1987).

72. See Allen, *supra* note 26, at 349; Kiselbach, *supra* note 26, at 178; Tribe, *supra* note 26, at 395, 405.

73. See, e.g., Mara Lynn Krongard, Comment, *A Population at Risk: Civil Commitment of Substance Abusers After Kansas v. Hendricks*, 90 CAL. L. REV. 111, 116 (2002) (regarding the fear of expanding civil commitment statutes to include substance abusers).

74. See *supra* text accompanying note 22.

75. Corrado, *supra* note 3, at 810.

76. Morse, *supra* note 39, at 66.

B. Detention as Punishment

Some scholars view detention on the ground of dangerousness as punishment based on a suspicion.⁷⁷ According to this view, it bypasses the protections accorded under the criminal law and is therefore unconstitutional.

Punishment should, of course, be based on a conviction. A person deserves punishment for a past offense, but should not be punished for dangerousness or for a future offense.⁷⁸ It is virtually undisputed that retribution is not and should not be the rationale for, or a legitimate goal of, preventive detention.⁷⁹ Punishment without conviction also runs counter to the presumption of innocence.⁸⁰ However, some may argue—as the United States Supreme Court has essentially held by applying, *inter alia*, the *Mendoza-Martinez* factors⁸¹—that the detention of accused persons is not imposed as punishment.⁸² The clear legislative aim of detention is regulatory and preventive, not punitive. It is designed for the maintenance of public safety and not for purposes of punishment.

Similarly, in *Hendricks*, the Court held that the Kansas Sexually Violent Predator Act does not constitute punishment, stating that: “Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm.”⁸³ According to the Court, the commitment of sexually violent offenders following the completion of their prison sentences is remedial, civil, and non-punitive in nature⁸⁴ and, therefore, does not violate the Double Jeopardy Clause⁸⁵ or the Ex Post Facto Clause of the Constitution.⁸⁶

The Court has stressed that the aim of detention or commitment is not retribution or deterrence.⁸⁷ A criminal history serves only to prove mental abnormality or future dangerousness.⁸⁸ As for deterrence, since it is assumed that

77. See Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 47-48 (2005); Overbeck, *supra* note 66, at 157, 178, 186-87; Tribe, *supra* note 26, at 379-80; Lee A. Weiss, *Fourteenth Amendment—Due Process and the Preventive Detention of Juveniles*, 75 J. CRIM. L. & CRIMINOLOGY 855, 871-72 (1984).

78. See Robinson, *supra* note 18, at 1432.

79. See Justin Engel, Comment, *Constitutional Limitations on the Expansion of Involuntary Civil Commitment for Violent and Dangerous Offenders*, 8 U. PA. J. CONST. L. 841, 858 (2006).

80. See Kitai, *supra* note 30, at 287.

81. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

82. In this context, see, primarily, *United States v. Salerno*, 481 U.S. 739, 746-748 (1987), where the Court held that the characteristics of detention, such as the establishment of a maximum period of detention and provisions regarding the separate confinement of detainees and convicted prisoners, attest to its regulatory nature. See also *Schall v. Martin*, 467 U.S. 253, 269-74 (1984); *Bell v. Wolfish*, 441 U.S. 520, 537 (1979).

83. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). The Court reaffirmed this holding in *Kansas v. Crane*, 534 U.S. 407, 409 (2002).

84. *Hendricks*, 521 U.S. at 369; see also *Allen v. Illinois*, 478 U.S. 364, 368-69 (1986).

85. *Hendricks*, 521 U.S. at 369-70.

86. *Id.* at 370-71.

87. *Id.* at 361-63; *Allen*, 478 U.S. at 370.

88. *Hendricks*, 521 U.S. at 362.

the abnormality of sex offenders “prevents them from exercising adequate control over their behavior,”⁸⁹ they are “unlikely to be deterred by the threat of confinement.”⁹⁰

Indeed, incarceration in the absence of a criminal conviction for various, non-punitive objectives is not limited to dangerous criminals likely to commit offenses.⁹¹ One common manifestation is the involuntary civil commitment of the mentally ill, due to the danger they pose to the public or themselves, even if they have not committed any criminal offense in the past.⁹² It is also imposed on drug addicts and alcoholics.⁹³ The state confines illegal aliens for deportation.⁹⁴ Accused persons are also incarcerated to ensure their appearance at trial.⁹⁵ A person may be quarantined to prevent the spread of a contagious disease that endangers public health.⁹⁶

Scholars insist that there is a substantive difference between punishment and preventive detention. As Corrado argues, “punishment and detention on grounds of dangerousness are two different things.”⁹⁷ And, according to Slobogin: “By definition, we *cannot* punish someone unless he has committed a crime, or at least we say he has committed one. That does not mean that we are unwilling to authorize coercive government intervention against an innocent person.”⁹⁸

Scathing criticism has been leveled at the distinction between “regulatory” and “punitive” incarceration. In *Salerno*, Justice Marshall viewed it as an “absurdity” and an “exercise in obfuscation,” because one may “merely redefine any measure which is claimed to be punishment as ‘regulation,’ and, magically, the Constitution no longer prohibits its imposition.”⁹⁹ Other commentators have termed this distinction an “exercise in semantics,”¹⁰⁰ a “legal fiction,”¹⁰¹ and a “transparent sophistry.”¹⁰²

89. *Id.*

90. *Id.* at 362-63.

91. See *United States v. Salerno*, 481 U.S. 739, 748-49 (1987); Mitchell, *supra* note 61, at 1233-34 (noting statutes that authorize “indeterminate civil commitment for sexual psychopaths, narcotics addicts, chronic alcoholics, [and] the mentally ill”).

92. *Hendricks*, 521 U.S. at 363; *Salerno*, 481 U.S. at 748-49; *Addington v. Texas*, 441 U.S. 418 (1979).

93. Krongard, *supra* note 73, at 145; Robinson, *supra* note 64, at 712. Regarding the power to forcibly send alcoholics to rehabilitation centers in many U.S. states, see Herman Goldstein, *Confronting the Complexity of the Policing Function*, in *DISCRETION IN CRIMINAL JUSTICE* 23, 48-49 (Lloyd E. Ohlin & Frank J. Remington eds., 1993).

94. *Salerno*, 481 U.S. at 748; *Carlson v. Landon*, 342 U.S. 524 (1952).

95. *Salerno*, 481 U.S. at 749.

96. *Hendricks*, 521 U.S. at 366; *Jacobson v. Massachusetts*, 197 U.S. 11, 34-35 (1905); Corrado, *supra* note 3, at 791; Robinson, *supra* note 64, at 711-12.

97. Corrado, *supra* note 3, at 779.

98. Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 131 (2005).

99. *Salerno*, 481 U.S. at 760.

100. See Lupo, *supra* note 37, at 205 (asserting that “[t]he distinction between preventive detention as a regulation instead of a punishment is more than a facile exercise in semantics” in that Justice Rehnquist essentially rewrote precedent in the *Salerno* opinion).

101. See Lord Windlesham, *Punishment and Prevention: The Inappropriate Prisoners*, CRIM. L. REV.,

Indeed, many scholars have opined that to define preventive detention as “regulatory” does not alter the nature of incarceration. They reject the deference granted to the legislature’s intent in lieu of examining the consequences and punitive nature of detention.¹⁰³ It does not make much of a difference if we define detention as preventive rather than punitive. After all, the distinction between detention and imprisonment is almost insignificant. Detainees and convicted prisoners are harmed to the same extent by a denial of their freedom.¹⁰⁴ Even if detainees are kept apart from convicted inmates, they are still incarcerated under similar physical conditions and treated like prisoners.¹⁰⁵ It is impossible to ignore the punitive effect of detention.¹⁰⁶ Labeling a prison a “hospital” or “detention” center does not make it one.¹⁰⁷ Detainees—like the outside world—perceive detention as punishment.¹⁰⁸ A detainee confined to a cell would find it difficult to derive any comfort from the legislative purpose of detention.¹⁰⁹ Even if it were possible to neutralize the punitive aspects of detention by significantly improving conditions of confinement—which is, indeed, something that should be done—it can be argued that the denial of freedom itself is the decisive factor in determining its punitive nature.¹¹⁰ As such, in terms of suffering, detention is the equivalent of punishment.¹¹¹

Moreover, retribution, a backward-looking goal, is not the only goal of incarceration.¹¹² Given that prevention is a punitive objective on its own, some scholars have viewed the preventive goal of detention as evidence of its punitive nature.¹¹³ Moreover, there are scholars who advocate a shift in the goals of punishment towards prevention and protection of the public from dangerous

Mar. 1988, at 140, 146 (“What began as a distinction upheld by legal formalism rather than by measurable differences has drifted perilously close to a legal fiction.”).

102. Bernstein, *supra* note 2, at 91.

103. See Allen, *supra* note 26, at 332, 340; Arthur, *supra* note 71, at 391-404; Eason, *supra* note 34, at 1061-64; Ervin, *An Empirical Analysis*, *supra* note 26, at 336, 357; Gain, *supra* note 34, at 1382; Lupo, *supra* note 37, at 206-14; Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1959 (2005); Pernell, *supra* note 26, at 403; Rabinowitz, *supra* note 34, at 204; Styers, *supra* note 26, at 627.

104. See von Hirsch, *supra* note 32, at 743; Lord Windlesham, *supra* note 101, at 146.

105. La Fond, *supra* note 40, at 386-87. Regarding the transfer of sex offenders to “high-security mental health treatment center[s] located within the state penal system,” see Moreno, *supra* note 34, at 531.

106. See Gain, *supra* note 34, at 1382.

107. Michael L. Perlin, “There’s No Success Like Failure/And Failure’s No Success At All”: Exposing the Pretextuality of *Kansas v. Hendricks*, 92 NW. U. L. REV. 1247, 1272 (1998).

108. Thaler, *supra* note 26, at 451.

109. See Bernstein, *supra* note 2, at 91; Lord Windlesham, *supra* note 101, at 145.

110. Regarding the emphasis placed on this element, see Arthur, *supra* note 71, at 391-92; Bernstein, *supra* note 2, at 91; Weiss, *supra* note 77, at 871; Lord Windlesham, *supra* note 101, at 146.

111. See Toyoji Saito, *Pre-Trial Detention in Japan*, in PREVENTIVE DETENTION, *supra* note 43, at 201; Lord Windlesham, *supra* note 101, at 146.

112. Robinson, *supra* note 18, at 1441.

113. *Kansas v. Hendricks*, 521 U.S. 346, 379 (1997) (Breyer, J., dissenting); Allen, *supra* note 26, at 344; Arthur, *supra* note 71, at 392; Gain, *supra* note 34, at 1383-84.

criminals.¹¹⁴ Robinson claims that such a shift has already occurred through statutes such as “three strikes” laws,¹¹⁵ although the criminal justice system does not admit this.¹¹⁶ Indeed, dangerousness is a factor, sometimes the most important factor, when it comes to sentencing.¹¹⁷ Since both detention and a prison sentence aim to protect the public from harm, the disparity between different types of incarceration is blurred.¹¹⁸ In this manner, the objectives of detention and imprisonment are very similar and sometimes identical. Detention on the ground of dangerousness, therefore, realizes the goals of substantive law before a person has been convicted. Yet, the presumption of innocence precludes the realization of punitive goals prior to a final verdict.¹¹⁹

However, scholars who believe that the nature of detention based on dangerousness justifies that it be considered punishment—and, thus, improper—do not offer a convincing explanation for the difference between pretrial detention on grounds of obstruction, which they accept, and detention on the ground of dangerousness. Since the consequences and implications of detention are identical for all detainees, the view of detention as punishment should require the abolition of this institution in its entirety. But it is very hard to find proponents for such a result. The dearth of arguments regarding the punitive nature of detention on the ground of obstruction supports the conclusion that a distinction between “punitive” and “regulatory” incarceration should not be rejected and that significance should also be accorded to the intent underlying the deprivation of liberty to assess its justifiability. The fact that detention entails consequences similar to those of imprisonment should not, in and of itself, prevent an examination of its objectives.

The similarity between the consequences of detention and those of imprisonment following a conviction must be taken into account, however, when the conflicting interests are examined and weighed. Under certain circumstances, such as inhumane conditions of detention or conditions identical to those of convicted prisoners, an examination of these consequences might take precedence over an investigation of the legislature’s intent. In such circumstances, the institution of detention may be characterized as punitive. However, if we conclude that detention is punishment, then it is proper to abolish the institution of detention in its entirety, regardless of the grounds for its imposition.

Although, as stated, the bifurcation between punishment and preventive detention is plausible, it is an important element in blurring the boundaries

114. See Corrado, *supra* note 3, at 791; Slobogin, *supra* note 98, at 122.

115. Robinson, *supra* note 18, at 1429-31.

116. *Id.* at 1432.

117. Robinson, *supra* note 64, at 710-11; von Hirsch, *supra* note 32, at 718.

118. Roy E. Pardee, III, *Fear and Loathing in Louisiana: Confining the Sane Dangerous Insanity Acquittee*, 36 ARIZ. L. REV. 223, 230 (1994).

119. Kitai, *supra* note 30, at 287.

between civil law and criminal law. Detention, even if we do not call it punishment, inflicts pain and suffering on the individual. Many scholars advocate the elimination of the criminal-civil distinction, finding that “[i]ncapacitation should be entirely divorced from the criminal justice system.”¹²⁰ Robinson argues that the insistence on moral condemnation as a condition for criminal liability, although justified, leaves society unprotected against persons who are dangerous yet blameless.¹²¹ He suggests, therefore, that civil commitment be expanded to encompass dangerous, blameless persons “who are predicted to commit serious offenses if released.”¹²² This expansion is necessary, in his opinion, both to protect society and to avoid pressures to impose criminal liability on such persons.¹²³ Indeed, some scholars see no constitutional hindrance to replacing the trial process with preventive detention.¹²⁴

The safety of the public, however, should not be defended at all costs. Suppose a prosecutor conceals evidence proving that a dangerous recidivist is innocent of the offense with which he has been charged. Although the defendant’s conviction could benefit society, we would obviously consider this concealment immoral.¹²⁵

In response, some scholars argue that the outcome of wrongful conviction is more severe than that of erroneous commitment.¹²⁶ *Addington v. Texas* reflects the view that the penal nature of the criminal sanction increases the pain of a deprivation of liberty.¹²⁷

Corrado argues that “[t]he similarity between preventive detention and quarantine is that in both cases we confine people on the basis of dangerousness in the absence of fault.”¹²⁸ This equivalence seems preposterous. We ascribe fault to a person who intends to harm society. We do not only speak of fault in terms of a guilty verdict. Although society cannot impose punishment on a person without a conviction and cannot hold him responsible for something that he has not done, guilt and liability are not identical. We may speak of fault or guilt in diverse contexts.

Moral condemnation does exist when a sane person is deprived of his liberty because he might commit a serious criminal offense in the future. We feel indignation towards a sane, dangerous person. Reproach and condemnation are a

120. Engel, *supra* note 79, at 875; see also Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 81 (2008) (regarding procedural safeguards).

121. Robinson, *supra* note 64, at 700.

122. *Id.* at 698, 708.

123. *Id.* at 705-06.

124. Engel, *supra* note 79, at 858-60.

125. EDWARD H. MADDEN, *CIVIL DISOBEDIENCE AND MORAL LAW IN NINETEENTH-CENTURY AMERICAN PHILOSOPHY* 143 (1968); see also MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 238-39 (1984).

126. Engel, *supra* note 79, at 864.

127. *Addington v. Texas*, 441 U.S. 418, 427-28 (1979).

128. Corrado, *supra* note 3, at 812.

concomitant result of such a detention. As von Hirsch puts it, “[t]he 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.”¹²⁹ If we assume that a sane person who is aware of his conduct is going to inflict harm by committing serious offenses, we also assume that he is morally flawed, because a moral person would not commit dangerous crimes. We impute a kind of “free-floating” guilt, ready to be activated at some future time, to a dangerous person. Though he bears no legal guilt, he is morally guilty for not wanting to avoid doing harm.

In contrast, when we quarantine a person with a contagious disease we usually do not impute any moral guilt to him.¹³⁰ Detention on the ground of dangerousness is therefore a legal, as well as a moral, sanction. Under these circumstances, the distinction between detention and punishment seems artificial. Given the damage caused by detention, and its associated stigma, it would seem that the affront and sense of injustice felt by a person who is detained without a conviction is not much less than that felt by a person who is convicted despite the existence of a reasonable doubt as to his guilt.

C. *A Presumption of Guilt*

Denial of freedom on the ground of dangerousness is based on a crime that may be committed in the future. A person is being detained for a crime that he may perpetrate, even though he has not yet taken any steps toward its commission and even if it has not yet ripened in his mind.¹³¹ In effect, he is being detained for the criminal potential that he embodies.¹³² The role of the penal system is to respond to a crime that has been committed.¹³³ In general, a person cannot be convicted for mere preparation,¹³⁴ let alone for thoughts about committing a crime.¹³⁵ He is responsible for his deeds and not for his bad character. Incarceration should be reserved as punishment for an offense that has actually been committed and not for dangerous tendencies.¹³⁶ The criminal sanction derives its moral strength from its adherence to strict procedural

129. von Hirsch, *supra* note 32, at 743.

130. JEAN FLOUD & WARREN YOUNG, *DAGEROUSNESS AND CRIMINAL JUSTICE* 43-44 (Barnes & Noble Books 1982).

131. *People v. O'Callaghan*, [1966] I.R. 501, 508 (Ir.).

132. Tribe, *supra* note 26, at 394-95.

133. See P. J. FITZGERALD, *CRIMINAL LAW AND PUNISHMENT* 199-201 (1962); see also Arthur, *supra* note 71, at 402.

134. See Daniel Ohana, *Desert and Punishment for Acts Preparatory to the Commission of a Crime*, 20 CAN. J. L. & JURISPRUDENCE 113, 113 (2007).

135. Shlomit Wallerstein, *Criminalising Remote Harm and the Case of Anti-Democratic Activity*, 28 CARDOZO L. REV. 2697, 2700 (2007).

136. Elizabeth A. Weeks, Note, *The Newly Found "Compassion" for Sexually Violent Predators: Civil Commitment and the Right to Treatment in the Wake of Kansas v. Hendricks*, 32 GA. L. REV. 1261, 1285 (1998).

safeguards and from its application to a person who is being held responsible for his actual deeds.¹³⁷ A person is supposedly entitled to freedom as long as he does not commit a punishable offense. This principle grants individuals the choice to refrain from committing crimes.¹³⁸ However, as Slobogin puts it, "[p]erhaps . . . preventive detention can be characterized as an assertion that the detained individual has free will but is predicted to exercise it in the wrong direction."¹³⁹

We may respond to Slobogin by saying that, from a normative perspective, society is unwilling to interfere with someone's freedom prior to any prohibited conduct based merely on the risk that he might exercise his free will in the wrong direction; society should provide a person with the opportunity to not choose the wrong direction.¹⁴⁰ The presumption of innocence assumes that a person will refrain from choosing the wrong course of action.

Detention for the purpose of preventing the commission of further offenses inherently undermines the presumption of innocence. Detention to prevent an obstruction of justice may be justifiable despite the assumption that the accused is innocent. Undeniably, even an innocent person might be tempted to evade a trial, try to influence false witnesses, or conceal evidence that, in his opinion, could harm him despite his innocence. An innocent person might simply be unwilling to take the risk of a wrongful conviction.¹⁴¹ However, it is hard to argue that an innocent person constitutes a threat to society that is more serious than that posed by any other person.¹⁴² The argument that a danger exists that the detainee will commit further offenses reflects a presumption of guilt and a negative appraisal of his character.¹⁴³

An assessment of future dangerousness rejects the assumption regarding a person's general obedience to the law. The presumption of innocence does not just mean that a person is innocent of the specific offense with which he is charged. It also reflects a general assumption that a person is law-abiding and will not commit any future offenses.¹⁴⁴ Some may argue that dangerousness does not constitute a finding of guilt, but rather, only allows security measures to be implemented. However, there is no need to take special preventive measures

137. See Janus, *supra* note 68, at 75.

138. See Arthur, *supra* note 71, at 403; Tribe, *supra* note 26, at 396; von Hirsch, *supra* note 32, at 746.

139. Slobogin, *supra* note 4, at 28.

140. See Arthur, *supra* note 71, at 403; Tribe, *supra* note 26, at 396; von Hirsch, *supra* note 32, at 746-47.

141. See THOMAS HOBBES, LEVIATHAN 206-07 (Michael Oakeshott ed., Touchstone 1997) (1651). According to Hobbes, even an innocent person could flee "seeing the power and malice of some enemy, and the frequent corruption and partiality of judges." *Id.* at 207.

142. See JAMES C. MORTON & SCOTT C. HUTCHISON, THE PRESUMPTION OF INNOCENCE 121 (1987).

143. See *id.* at 120-21; Kiselbach, *supra* note 26, at 187.

144. See Lester, *supra* note 77, at 36. But see Raifeartaigh, *supra* note 71, at 5 (arguing that, since a person's inclination to commit further offenses serves as a basis for detention more than the view that he will be convicted of having committed further offenses, it is more accurate to say that the inclination to commit further offenses is not an acceptable basis for denying freedom than to speak of a violation of the presumption of innocence).

against a person who acts in accordance with the law. The presumption of innocence, in its normative sense, precludes us from placing restrictions on a person that reflect his treatment as an offender due to the existence of incriminating evidence against him or because of the fear that he will commit further offenses.¹⁴⁵ When preventive detention is imposed, the presumption of innocence is not respected in its fullest sense.¹⁴⁶ Indeed, the very acknowledgement of prevention as a legitimate objective of criminal punishment violates the presumption of innocence, since its underlying assumption is that a person will return to the commission of further offenses. However, normatively, preventive measures should not exceed the punishment dictated by the retributive principle.¹⁴⁷ When we speak of a future offense, an individual obviously does not deserve any retribution.

Even a requirement that conditions a use of the power of detention on harm caused to others in the past or on “conduct that evidences obvious risk”¹⁴⁸ does not mitigate the violation of the presumption of innocence. The rule that a person is considered innocent until proven guilty is framed in terms of a conclusive presumption. The presumption of innocence is a general presumption, applying equally to all persons whose guilt has not yet been determined at trial and creating a sort of “bias” in their favor, regardless of other factors, such as incriminating evidence or a criminal history.¹⁴⁹

Corrado believes that “[t]his right to be presumed harmless does not extend to those who have been convicted of a crime because convicted offenders, through their culpability, have lost that right.”¹⁵⁰ In his view, prior crime attests to culpability.¹⁵¹ There is no difference, however, between a presumption of harmlessness and a presumption of innocence. As we have said, people may alter their conduct. An assumption that what has happened in the past will happen again in the future clearly violates human dignity as well as the presumption of innocence.¹⁵²

145. Kitai, *supra* note 30, at 288.

146. See *United States v. Salerno*, 481 U.S. 739, 762-67, 769 (1987) (Marshall, J., dissenting); Eason, *supra* note 34, at 1071-72; Sam J. Ervin, Jr., *The Legislative Role in Bail Reform*, 35 GEO. WASH. L. REV. 429, 445 (1966); Ervin, *An Empirical Analysis*, *supra* note 26, at 298, 350; Ervin, *A Species of Lydford Law*, *supra* note 26, at 122; Gain, *supra* note 34, at 1391; Kiselbach, *supra* note 26, at 187; Pernell, *supra* note 26, at 402; Verrilli, *supra* note 45, at 359-60.

147. von Hirsch, *supra* note 32, at 750-51.

148. Slobogin, *supra* note 4, at 28-29.

149. Kitai, *supra* note 30, at 263, 272-73.

150. Corrado, *supra* note 3, at 804.

151. *Id.*

152. See Josephine Ross, “*He Looks Guilty*”: *Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 272 (2004).

III. BALANCING THE PRESUMPTION OF INNOCENCE AGAINST THE PUBLIC INTEREST IN PREVENTING HARM

Undeniably, society may defend itself against dangerous persons.¹⁵³ In his dissent in *Salerno*, Justice Stevens opined, with regard to accused persons, that there is no logical reason to expose only the members of a particular group to the risk of preventive detention.¹⁵⁴ In his own words, “[i]f the evidence of imminent danger is strong enough to warrant emergency detention, it should support that preventive measure regardless of whether the person has been charged, convicted, or acquitted of some other offense.”¹⁵⁵ Essentially, as Justice Stevens states, the power to detain someone on the ground of dangerousness is based on the principle of self-defense. The ground of dangerousness is based on society’s right to defend itself against a tangible, serious, and imminent harm.¹⁵⁶ Hence, detention on the ground of a general danger to public safety is unconstitutional, but in a concrete situation of self-defense, which is narrower than a case of public danger, it is possible to detain a person until he no longer poses a threat to society.

The harm to the presumption of innocence that is caused by detaining a person on the ground of dangerousness does not necessarily render preventive detention unconstitutional. It is doubtful that an ethical theory can be formulated that would absolutely forbid detention on this ground regardless of the extent and immediacy of the danger posed. The presumption of innocence is not unlimited in scope, and it may be trumped by other concerns.

If a person is running towards someone with a knife drawn, intending harm, then it is justifiable to use force in order to stop him. Nobody expects a victim to sit by idly until the perpetrator carries out his intent just because the attacker is presumed innocent. Every person has the natural right to use force in order to preserve his very existence.¹⁵⁷ The state, which assumes the role of maintaining the safety of its citizens, places itself in the shoes of the individual, and it must prevent such a person from causing harm in a timely fashion.¹⁵⁸ There is no dispute regarding the right and the duty of the state to maintain public safety.¹⁵⁹ Even a minimal restriction of the state’s role in accordance with a liberal view of the state as a “night-watchman” would include the duty to protect society from violent offenses.¹⁶⁰ Moreover, it is the desire for personal security that induces

153. Robinson, *supra* note 18, at 1432.

154. United States v. Salerno, 481 U.S. 739, 768 (1987).

155. *Id.*

156. See Alschuler, *supra* note 24, at 557.

157. BOAZ SANGERO, SELF-DEFENCE IN CRIMINAL LAW 6 (2006).

158. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT ¶¶ 19 to 21, at 12-14 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690).

159. Engel, *supra* note 79, at 847; Slobogin, *supra* note 4, at 5.

160. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, at ix, 26 (1974).

people to unite in a nation-state.¹⁶¹ Public faith in the state's ability to maintain public order is an essential condition for a willingness to accept the authority of the state. An abandonment of public safety might cause law-abiding citizens to lose faith in law enforcement officials and even in the state establishment as a whole. Some scholars argue, therefore, that the protection of the public from crime is the most important role of the state.¹⁶² There is also a fear that repeated violation of the social contract, through disobedience to the law and the threat that criminals pose to public order, would lead to general anarchy and to the ruin of the body politic.¹⁶³

The concept of "defensive democracy" requires that a state protect itself and its citizens from harm. Thus, the state should use its police power to prevent the harm of law-breaking from materializing and not just take retroactive steps to apprehend offenders so that they can be put on trial following the commission of an offense.¹⁶⁴ If a professed member of a terrorist organization is caught in possession of explosives and confesses that he was on his way to commit mass murder and will continue this activity, should he be allowed to go free, even for the shortest period of time, until a verdict is rendered in his case?¹⁶⁵ Would this not be a form of suicide by the state and an abandonment of its duty not only to the security of its citizens but also to its very existence? The state has a self-evident right and duty to defend itself and the fundamental rights of actual and potential victims. The right and duty of the state to prevent crime justifies the implementation of preventive measures for this purpose. Under certain circumstances, detention is an unavoidable measure for protecting the public from offenders.¹⁶⁶

However, basing preventive detention on self-defense is slightly flawed, since we cannot know for certain that the person whom we deem to be dangerous will actually commit a crime. The underlying rationale of self-defense requires that it only be applied in cases of true danger. In a democratic regime, which places the rights of the individual at its center, a person should not be stigmatized as a criminal for a future act. A denial of freedom is the harshest sanction that the state can impose on its citizens. Violation of an individual's freedom by the

161. Engel, *supra* note 79, at 848.

162. MORTON & HUTCHISON, *supra* note 142, at 121.

163. HOBBS, *supra* note 141, at 98-102. The state of nature—i.e., the absence of a state—is a situation of "dog-eat-dog" or "a war of all against all." *Id.* at 98-99. According to Hobbes, without security, neither the individual nor society can develop, "and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short." *Id.* at 100. See also JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 55 (Roger D. Masters ed., Judith R. Masters trans., St. Martin's Press 1978) (1762) ("[E]ach individual . . . might wish to enjoy the rights of the citizen without wanting to fulfill the duties of a subject, an injustice whose spread would cause the ruin of the body politic.").

164. See Corrado, *supra* note 3, at 790.

165. See the example provided by the dissenting judge in *United States v. Salerno*, 794 F.2d 64, 77 (2nd Cir. 1986) (Feinberg, C.J., dissenting) (regarding a member of a terrorist organization, accused of blowing up an airplane, when there is clear evidence that he will return to this activity if released).

166. Engel, *supra* note 79, at 848.

authorities may undermine a personal sense of security.¹⁶⁷ Some scholars posit that human dignity and freedom is a higher value than individual or national security.¹⁶⁸ There are scholars who even believe that society must completely relinquish the tool of detention in the absence of a conviction as the necessary cost—the lesser of two evils—of a legal system that recognizes liberty, the presumption of innocence, and fundamental principles of fairness towards the individual.¹⁶⁹ At any rate, the inability to prove with certainty that a danger to public safety exists should control the entire approach regarding preventive detention and, at the very least, lead to the adoption of restrictions on its use, as we shall describe below.

IV. SETTING LIMITS ON PREVENTIVE DETENTION

A. *Clear Evidence of Dangerousness*

According to Corrado, preventive detention may be justified under a utilitarian approach by comparing the physical harm caused to detainees with the physical harm from which potential victims were saved.¹⁷⁰ Nevertheless, the number of non-dangerous detainees may be greater than the number of dangerous detainees.¹⁷¹ Some may say that to confine a person behind bars due to an appraisal of his dangerousness, with the knowledge that this appraisal is prone to grave errors of prediction, represents the conscious sacrifice of an individual for the benefit of the public interest.¹⁷² To combat this argument, even only to a partial degree, extreme caution must be taken to ensure that such a person is only detained following a careful and thorough examination regarding the question of his dangerousness to the public. Society must do its utmost in order to reliably assess a person's dangerousness and avoid errors of prediction.

Regarding sex offenders committed following the completion of their prison terms, the state usually establishes its case based on the offender's past criminal

167. See David Libai, *Interrogations of a Suspect and the Privilege Against Self-Incrimination*, 2 ISR. Y.B. HUM. RTS. 247, 252 (1972) (discussing the fact that injury to the individual by the state or the police could be no less dangerous than the harm caused by criminals); Mordechai Kremnitzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?*, 23 ISR. L. REV. 216, 263-64 (1989) (arguing that a state that employs torture threatens its citizens instead of protecting them).

168. Alexander Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CAL. L. REV. 4, 14 (1961).

169. See Ervin, *supra* note 146, at 446; Ervin, *A Species of Lydford Law*, *supra* note 26, at 122; Tribe, *supra* note 26, at 376; Heidi Joy Herman, Note, *United States v. Salerno: The Bail Reform Act Is Here to Stay*, 38 DEPAUL L. REV. 165, 192 (1989).

170. See Corrado, *supra* note 3, at 803 (arguing that, in a utilitarian view, preventive detention may increase the amount of overall freedom in the world by preventing criminals from harming the freedom of others).

171. Morris, *supra* note 51, at 79.

172. See Tribe, *supra* note 26, at 387.

conviction.¹⁷³ Scholars demand a prior crime as a prerequisite to detention.¹⁷⁴ Slobogin suggests that “preventive detention may not take place unless the individual has either caused harm to another or has engaged in conduct that evidences obvious risk.”¹⁷⁵ Corrado views things differently, stating that there is “no good explanation of why the presumption of harmlessness may not be defeated by evidence of dangerousness without evidence of a prior crime.”¹⁷⁶

Slobogin says that a potential offender should be clearly told: “[i]f you do not comply with [the commands of the criminal law], you will be subject to intervention designed to prevent you from violating them again, which may consist of restrictions on liberty as well as treatment designed to ensure protection of the public.”¹⁷⁷ I do not reject this possibility as long as preventive measures are imposed as part of a sentence. But punishment should be defined clearly in accordance with the rule of legality. If such measures are imposed outside of the context of punishment for a past offense then they demand strong evidence in order to be justified.

Regarding the civil commitment of mentally disturbed persons, Grant Morris suggests (and this applies with equal force to sane persons) that “preventive detention . . . should require a ninety percent probability that, in the absence of confinement, the violent crime . . . will occur within six months.”¹⁷⁸ Morris does admit that these standards “will be difficult to achieve.”¹⁷⁹ However, as he justifiably adds, “that is exactly as it should be when society seeks to deprive an individual of liberty without first accusing him or her of criminal conduct, without providing a criminal trial with all criminal process safeguards, and without obtaining a criminal conviction.”¹⁸⁰

In this author’s opinion, dangerousness is not a consequence of, and should not be dependent on, a past criminal conviction, since preventive detention is forward-looking. As already stated, a member of a terrorist organization has not necessarily been convicted in the past. However, dangerousness must be indicated to a very high degree of certainty in a proceeding that guarantees the individual a panoply of procedural safeguards for his defense. As Robinson suggests, potential detainees should be granted procedural safeguards that are similar, *mutatis mutandis*, to those given to criminal defendants.¹⁸¹ Thus, a candidate for detention should be provided with counsel. He should have the right to cross-examine witnesses and to call witnesses on his behalf.

173. La Fond, *supra* note 40, at 385.

174. See Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. REV. 157, 167 (1996); Robinson, *supra* note 64, at 714.

175. Slobogin, *supra* note 4, at 28-29.

176. Corrado, *supra* note 3, at 805.

177. Slobogin, *supra* note 98, at 139-40.

178. Morris, *supra* note 51, at 77.

179. *Id.* at 83.

180. *Id.* at 83-84.

181. Robinson, *supra* note 64, at 709.

Additionally, subject to protective orders, he should have access to the evidence regarding his dangerousness.

B. Limits on Duration

Pretrial detention is limited in duration. It has a clear end—the delivery of a verdict. In contrast, the civil commitment of sex offenders may be indefinite. Thus, the *Hendricks* Court recognized that “[n]otwithstanding its civil attributes, the practical effect of the Kansas law may be to impose confinement for life.”¹⁸² Administrative detainees could be held in detention for years.¹⁸³ Administrative detention could be imposed for an indefinite period of time, from the outset or as a result of extensions without fixed time limits.¹⁸⁴ Needless to say, in terms of a deprivation of liberty, civil commitment following the completion of a prison sentence is a quantum leap when compared to pretrial detention.¹⁸⁵ In *Hendricks*, the Court held that there is a link between the duration of confinement and the threat that the detainee poses to the public; he will be released only when he gains control over his dangerousness and no longer poses a threat.¹⁸⁶ Prior to *Hendricks*, the Court had held that the civil commitment of insane persons who had committed criminal offenses could be prolonged, until they were no longer dangerous, for periods of time far exceeding the length of punishment that they might have received in the event of a conviction.¹⁸⁷

Detention in lieu of a criminal trial deprives the individual of the opportunity to prove his innocence, which a trial would provide. Of course, one might argue that an acquittal does not necessarily refute an assessment of dangerousness. If an acquittal is based on reasonable doubt, or the inadmissibility of evidence, does this really mean that someone who has been acquitted should be considered less dangerous to the public following his acquittal than he was during the course of his trial?¹⁸⁸ After all, the evidentiary basis for an assessment of dangerousness, according to the standard applied at the detention hearing, has not significantly changed due to an acquittal based on reasonable doubt. Despite the acquittal, there is still a real possibility that the defendant actually committed the offenses for which he was put on trial, and it is likely that the evidence of dangerousness

182. *Kansas v. Hendricks*, 521 U.S. 346, 372 (1997) (Kennedy, J., concurring).

183. *See* Gross, *supra* note 5, at 753; Ip, *supra* note 14, at 870; Schulhofer, *supra* note 52, at 1908-09, 1911.

184. *See* Greer, *supra* note 13, at 25; *Liversidge v. Anderson*, [1942] A.C. 206, 226 (H.L.) (appeal taken from Eng.).

185. *Foucha v. Louisiana*, 504 U.S. 71, 80-82 (1992).

186. *Hendricks*, 521 U.S. at 363-64.

187. *Jones v. United States*, 463 U.S. 354, 368-69 (1983).

188. *See* *United States v. Salerno*, 481 U.S. 739, 764 (1987) (Marshall, J., dissenting) (“[A] defendant is as innocent on the day before his trial as he is on the morning after his acquittal.”); Jett, *supra* note 26, at 819; Tribe, *supra* note 26, at 395, 405.

submitted at the detention hearing is still valid following an acquittal.¹⁸⁹ However, the verdict establishes an irrefutable “legal truth,” whereby the defendant did not commit the offense attributed to him, and this has a bearing on the question of dangerousness, which prevents the state from holding him in preventive detention following his acquittal, despite the apparent danger that he continues to pose.

It is undisputed that an assessment of dangerousness must undergo periodic review in order to evaluate its continued validity.¹⁹⁰ Thus, for example, criminality might be age-dependent.¹⁹¹ Such a review must be conducted on a regular basis to determine if dangerousness has been outgrown. Slobogin insists that a preventive detention regime should also be made conditional on efforts at treatment, if the detainee is amenable to treatment.¹⁹² Some scholars also advocate the imposition of a fixed time limit to prevent officials from overreaching.¹⁹³ Furthermore, a detainee should have a right to petition for a release hearing at any time.

As La Fond puts it, in the absence of a release date, “[i]t may be difficult to remain a human being in such circumstances.”¹⁹⁴ However, once someone has been found to be sexually dangerous, most professionals would be reluctant to declare that the danger has ceased and that it is safe to release them into the community.¹⁹⁵ The passage of time might alter an assessment of dangerousness, but not necessarily.

Slobogin recognizes that “[a]t some point, however, release should be required simply because the requisite certainty level demanded by the proportionality principle has become so high it cannot be met by any type of evidence.”¹⁹⁶ But, since this might only be wishful thinking, the duration of detention should be limited in advance. When a person sees no end to his detention, it is tantamount to a life sentence. Detention that is unlimited in time because a person is unable to refute an assessment of dangerousness represents an absolute assumption of guilt.

C. Proportionality

Given the grave harm that it causes, detention on the ground of dangerousness should be limited to exceptional cases in which there is a proper

189. Tribe, *supra* note 26, at 395, 405-06.

190. Hendricks, 521 U.S. at 364; La Fond, *supra* note 40, at 396-97; Robinson, *supra* note 18, at 1452-53; Slobogin, *supra* note 4, at 16.

191. Monahan, *supra* note 61, at 415-16; Morse, *supra* note 39, at 59; Robinson, *supra* note 18, at 1451.

192. Slobogin, *supra* note 4, at 16.

193. Peter Margulies, *Judging Terror in the “Zone of Twilight”: Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U.L. REV. 383, 427-30 (2004).

194. La Fond, *supra* note 40, at 414.

195. *Id.* at 398-99.

196. Slobogin, *supra* note 4, at 52.

balance between the nature of the risk posed to the public and the degree of harm to the individual.¹⁹⁷

In order to meet the requirement of proportionality, detention should only be permitted in order to prevent an imminent danger of death or serious bodily harm, or threat to national security, which cannot be dealt with through other means. Society must reconcile itself to the possibility that people will commit other crimes. There may be circumstances in which a person's liberty could be interfered with for purposes of punishment and following a conviction, but those same circumstances would not justify a denial of freedom and a violation of the presumption of innocence for purposes of preventive detention.¹⁹⁸ Some scholars demand a prediction of seriously violent behavior.¹⁹⁹ Thus, detention to prevent a mere danger to property would not be justified,²⁰⁰ even assuming that a kleptomaniac or a simple thief may not be deterred by the fear of punishment.

D. Conditions of Confinement

Detainees should be held in pleasant conditions that would clearly indicate that they are being treated differently than convicted prisoners.²⁰¹

In contrast to imprisonment, conditions of detention should in no way constitute punishment.²⁰² Thus, in Kansas, sex offenders who are involuntarily committed following the completion of their prison sentence are held apart from convicted prisoners; they are not compelled to work and are paid if they do choose to work; they have a "right to wear their own clothes"; and they have a right to receive visitors every day.²⁰³

Moreover, there is a duty to compare, to the greatest extent possible given the situation of incarceration, the conditions of detainees to those of persons who are not confined.²⁰⁴ The central guideline should be whether conditions of confinement reflect the innocent status of detainees and avoid the creation of an

197. See *id.* at 20.

198. See Morris, *supra* note 51, at 72-73.

199. *Id.* at 72; Morse, *supra* note 22, at 128.

200. See Barnett, *supra* note 174, at 167-68 (suggesting that "the means taken to prevent future criminal conduct should be *proportionate to the threat communicated* by prior conduct" and using car theft as an example).

201. See Rinat Kitai-Sangero, *Conditions of Confinement—The Duty to Grant the Greatest Possible Liberty for Pretrial Detainees*, 43 CRIM. L. BULL. 250, 266-72 (2007).

202. Robinson, *supra* note 18, at 1446-47.

203. Stephen R. McAllister, *Kansas v. Hendricks Package: "Punishing" Sex Offenders*, 46 U. KAN. L. REV. 27, 44 (1997). However, in *Hendricks* it was noted that "confinement takes place in the psychiatric wing of a prison hospital where those whom the Act confines and ordinary prisoners are treated alike." *Kansas v. Hendricks*, 521 U.S. 346, 379 (1997) (Breyer, J., dissenting) (citing Testimony of Terry Davis, SRS Director of Quality Assurance, App. 52-54, 78-81).

204. Rinat Kitai-Sangero, *supra* note 201, at 272.

impression of guilt.²⁰⁵ Budget allocations for detention facilities should take into account the innocent status of detainees.

E. Payment of Compensation

A deprivation of liberty in the public interest normally requires the payment of compensation.²⁰⁶ Corrado equates this to the defense of necessity. Although someone who acts out of necessity does not bear any guilt, “[i]t is fair and efficient to make me pay for what I use to save myself.”²⁰⁷ Compensation would deter society from curtailing freedom without strong justification.

However, most existing compensation statutes do not even allow a wrongfully convicted person who is later freed to receive compensation for his period of incarceration.²⁰⁸ In those states that have established statutory compensation schemes, the sum of compensation is symbolic rather than a reflection of the actual harm caused.²⁰⁹

According to Bruce Ackerman, compensation for unjustified detention should be obvious: “I am puzzled by the failure of American scholars to mount a sustained constitutional critique. Not only is this callous treatment scandalously unjust, but it cannot be justified by any of the theories of just compensation law that are taken seriously by the courts or commentators.”²¹⁰ Other commentators have also argued that wrongfully convicted persons are entitled to receive compensation for their incarceration.²¹¹

The arguments in favor of compensating detainees are quite a bit more complicated than those for compensating the wrongfully convicted. While the legal system should do its best to protect the innocent from an erroneous conviction, the detention hearing, by its very nature, entails a risk of error. Moreover, in contrast to pretrial detainees, who may be acquitted of the offenses ascribed to them, any mistake in the civil commitment of a sexual predator or the detention of an enemy combatant is not likely to be revealed.

Nevertheless, the state should be responsible for any deprivation of liberty outside the framework of punishment that is designed to promote public safety. The underlying assumption of such detention should be that the detainee is being

205. *Id.*

206. See Corrado, *supra* note 3, at 814.

207. *Id.*

208. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1063 (2004); Howard S. Master, Note, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97, 98, 102 (2004); Greta Proctor, Comment, *Reevaluating Capital Punishment: The Fallacy of a Foolproof System, the Focus on Reform, and the International Factor*, 42 GONZ. L. REV. 211, 235 n.132 (2007).

209. Master, *supra* note 208, at 104.

210. Ackerman, *supra* note 208, at 1064-65.

211. Master, *supra* note 208, at 97; Jessica R. Lonergan, Note, *Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 405, 407 (2008).

asked to sacrifice himself for the public good. Unless the detainee is convicted at the conclusion of a trial, he is entitled to compensation for the damages caused by his detention.

The right to compensation may be anchored in the Fifth Amendment Takings Clause.²¹² The Takings Clause forbids the state to take property without compensation.²¹³ Commentators argue that property includes the loss of productive labor caused during a period of confinement.²¹⁴ This "loss of human capital" should at least be recognized as the equivalent of a taking of property.²¹⁵

F. Seeking Less Restrictive Alternatives

Detention should be an option of last resort. The state must explore less restrictive and less burdensome alternatives.²¹⁶ The state's duty to maintain public safety is not an absolute value, and it must be fulfilled with a minimal violation of individual rights. An attempt must be made to find ways in which the least harm is caused. Moreover, some have argued that, compared to other alternatives, it is difficult to assess the effectiveness of detention in decreasing the rate of crime.²¹⁷ There are alternatives that do not entail a violation of the presumption of innocence, such as the following: an improvement in the functioning of the police by investing further resources; accelerating the criminal process for pretrial detainees;²¹⁸ setting harsher, or cumulative, penalties for crimes that are committed during a pending proceeding; and the enactment of enhanced sentencing statutes for repeat offenders.²¹⁹ It is possible to consider keeping track of persons who are considered dangerous.²²⁰

The dissent in *Hendricks* emphasized the need "to consider the possibility of using less restrictive alternatives, such as postrelease supervision [and] halfway houses"²²¹ In response, it may be said that: "If the government could confine or otherwise infringe the liberty of detainees only to the extent necessary to ensure their presence at trial, house arrest would in the end be the only constitutionally justified form of detention."²²² Morse indeed doubts "that many

212. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

213. *Id.*

214. Master, *supra* note 208, at 118, 120.

215. See Ackerman, *supra* note 208, at 1063.

216. See Engel, *supra* note 79, at 851 ("For offenders who are dangerous but not highly dangerous, supervised release or house arrest may be sufficient to ensure community safety.").

217. See Raifeartaigh, *supra* note 71, at 19-20.

218. Ervin, *An Empirical Analysis*, *supra* note 26, at 299, 359-62.

219. See Ryan v. Dir. of Pub. Prosecutions, [1989] I.R. 399, 407-08 (Ir.); Raifeartaigh, *supra* note 71, at 20; Tribe, *supra* note 26, at 371-72.

220. See Tribe, *supra* note 26, at 372.

221. *Kansas v. Hendricks*, 521 U.S. 346, 387 (1997) (Breyer, J., dissenting).

222. *Bell v. Wolfish*, 441 U.S. 520, 540 (1979) (quoting *Campbell v. McGruder*, 580 F.2d 521, 529 (D.C. Cir. 1978)).

courts would be likely to find that means less intrusive than confinement would be sufficient to protect the public from criminals with a history of sexual violence.”²²³ Regarding sexually violent predators, alternative programs are not always available.²²⁴

Of course, there is a range of possibilities in choosing the appropriate means. However, in light of the state’s duty towards an individual whose liberty it wishes to deprive on a basis of a dangerous deed he is likely to commit in the future, the state should strictly respect the idea of detention as a last resort.

The presumption of innocence forbids the imposition of any type of preventive measure, since the notion that a specific individual will commit a crime contradicts its underlying assumption. However, alternatives to detention are not identical or similar to imprisonment following conviction, and they are not accompanied by the same stigma associated with confinement behind bars.²²⁵ Such alternatives do not entail a harm similar to incarceration.²²⁶ Even when under house arrest, a person is not exposed to the disciplinary regime of prison and enjoys significant liberties in comparison to a person who is incarcerated. He is not humiliated and is not in constant fear of physical violence. He is not isolated from family and friends and enjoys the comforts of home, like sleeping in his own bed and eating the food that he likes.

Resources should be allocated in order to find creative solutions that would enable the oversight of persons deemed to be dangerous, without placing them behind bars.

V. CONCLUSION

There is an insoluble tension between the state’s obligation to protect the public from crime and its duty not to interfere with the freedom of the individual and his status as an innocent person.

The possibility to detain persons on the ground of dangerousness is inevitably based on a presumption of “free-floating” guilt. The presumption of innocence assumes that a person, including someone with a criminal history, will not break the law. When someone is detained on the ground of dangerousness, the assumption that a person is considered innocent until proven guilty becomes a myth and turns “in reality [into] a harsh presumption of guilt.”²²⁷ When this happens, the presumption of innocence, in its normative sense, does not serve its role to protect persons who have not been convicted at trial.

223. Morse, *supra* note 39, at 68.

224. See La Fond, *supra* note 40, at 389.

225. See Robinson, *supra* note 18, at 1444-47.

226. See Manns, *supra* note 103, at 1994 (noting that home detention or electronic monitoring inflict costs that “appear objectively far less than those imposed by pretrial detention”).

227. Thaler, *supra* note 26, at 441.

The power to detain a person on the ground of dangerousness is based on the right of self-defense, which is designed to preserve public safety.

Recognition of detention restricted to preventing an imminent, concrete danger of death or serious bodily harm, or a threat to national security, grants proper weight to the presumption of innocence within the context of a balance of interests. Given the considerable importance of the presumption of innocence, it seems obvious that detention should only be imposed in those rare cases where the clouds appear ready to pour rain²²⁸ and there is clear evidence, although not conclusive by the nature of a future offense, regarding an individual's dangerousness. Under these circumstances, the deprivation of liberty would only be limited to marginal cases in which it does not endanger the concept of the presumption of innocence or only puts it in minimal danger.

It must be taken into account that, in contrast to the certain violation of the presumption of innocence, the deprivation of freedom, and the moral stigma caused by detention, the danger posed by the detained individual is only hypothetical.²²⁹ Preventive detention based on a clear, imminent, and grave danger to public safety, however, does not reflect a conscious sacrifice of the individual if the decision regarding detention was reached after a consideration of all relevant data. In the exceptional cases entailing a clear and imminent danger to public order, to relinquish the ground of dangerousness out of a desire to view the presumption of innocence as an absolute right could even undermine the social contract between the individual and the state, since the state would be in breach of its duty to protect the safety of the individual.

The criminal process, however, should not be replaced by a regime of preventive detention on the ground of dangerousness. A broad renunciation of the presumption of innocence in favor of a desire to prevent future crimes would actually lead to a situation whereby, in the most sensitive circumstances to which a person is exposed, the presumption of innocence would be revealed to be ineffective and without force.

The very notion of preventive detention represents a significant waiver of the presumption of innocence. Therefore, it is necessary to make a clear distinction between prisoners and preventive detainees to not render the protection afforded by the presumption of innocence meaningless. Whereas, under very limited circumstances, preventive detention may be unavoidable, it is incumbent that the public, and not just the detainee and his family, should pay the price by allocating resources for exploring alternatives and, in their absence, by ensuring that detainees are held in pleasant conditions and are compensated if it turns out that their detention was unjustified.

In order to reflect the temporary nature of the institution of detention and its non-punitive intent and to make the imposition of detention difficult, certain

228. See Alschuler, *supra* note 24, at 544-45.

229. See Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 301-02 (1989).

provisions must be adopted. I propose that the following restrictions be placed on preventive detention: strong evidence of dangerousness; a limited duration; requirement of proportionality; compensation for the deprivation of liberty; and pleasant conditions of confinement. In addition, all alternative means for avoiding the potential danger posed by a person, short of detention, should be explored. Such restrictions are an unavoidable trade-off for sacrificing such persons for the benefit of society. These restrictions, I hope, would make preventive detention not worthwhile for the state in the ordinary case. Detention should be an exception used only in an emergency, in the face of a clear and present danger, and only under strict limits. Even under such circumstances, the state should be ready to pay the price for a deprivation of liberty that is designed solely for the public good.