The Law of Dangerousness: Some Fictions about Predictions

The Harvard community has made this article openly available. Please share how this access benefits you. Your story matters

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Citable link</td>
<td><a href="http://nrs.harvard.edu/urn-3:HUL.InstRepos:17190388">http://nrs.harvard.edu/urn-3:HUL.InstRepos:17190388</a></td>
</tr>
<tr>
<td>Terms of Use</td>
<td>This article was downloaded from Harvard University’s DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at <a href="http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA">http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA</a></td>
</tr>
</tbody>
</table>
tematically include what a Pennsylvania practitioner calls the "hard headed, ultra-conservative people." And who is there in the jury room to argue the defendant's cause and counter-balance the defenders of law and order?

And so I return to where I began: I find it lamentable that this study has to be done but since it is being done I wish it well because I am confident of the results but also greatly concerned about whether the Court will be receptive.

CHAPTER 2. PREVENTIVE DETENTION AND THE PREDICTION OF DANGEROUSNESS

THE LAW OF DANGEROUSNESS: SOME FICTIONS ABOUT PREDICTIONS

ALAN M. DERSHOWITZ *

INTRODUCTION

There is today a silent but growing trend in this country toward confining people who have not committed crimes but who are thought to be dangerous—that is, likely to engage in harmful conduct at some future time. The issues raised by such preventive confinement of allegedly dangerous persons were perceptively captured in a dialogue between Lewis Carroll's Alice and the Queen. The Queen said:

"There's the King's Messenger. He's in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all."

"Suppose he never commits the crime?" asked Alice.

"That would be all the better, wouldn't it?" the Queen responded.

Alice felt there was no denying that. "Of course it would be all the better," she said; "but it wouldn't be all the better his being punished."

"You're wrong..." said the Queen. "Were you ever punished?"

"Only for faults," said Alice.

"And you were all the better for it, I know!" the Queen said triumphantly.

"Yes, but then I had done the things I was punished for," said Alice. "That makes all the difference."

"But if you hadn't done them," the Queen said, "that would have been better still; better, and better, and better!" Her voice went higher with each "better," till it got quite to a squeak.

† The papers appearing in this chapter were presented at the Criminal Law Round Table at the annual meeting of the Association of American Law Schools on December 28, 1969. Professor Norval Morris of the University of Chicago Law School served as Chairman and Moderator.

* Professor of Law, Harvard University.
It is the aim of this paper to propose a framework for analyzing the range of problems posed by our increasing reliance on the strategy of prediction and prevention of harmful conduct. My remarks are not intended as a brief in favor of this trend toward this intervention. Indeed, they will provide opponents of this development with much ammunition with which to attack. They may also provide proponents with some defensive ammunition. My thesis is that the strategy of preventive confinement, though widespread in this country, has not been accompanied by a systematic probing of its underlying empirical and normative assumptions; and that without this sort of careful analysis, no system of confinement, based on prediction, can be either accurate or just.

**History**

Although the punishment-deterrent strategy is the one most often associated with the Anglo-American criminal process, the prediction-prevention strategy has roots deep in our legal heritage. It was a source of great pride to Blackstone that preventive justice was part of the English tradition: "And really it is an honor," he said, "and almost a singular one, to our English laws, that they furnish a title of this sort, since preventive justice is upon every principle of reason, of humanity and of sound policy, preferable in all respects to punishing justice, the execution of which . . . is always attended with many harsh and disagreeable circumstances." The "preventive justice" to which Blackstone was specifically referring consisted of requiring certain persons who had committed no crime, but about whom there was "a probable suspicion that some crime is intended or likely to happen," to find "pledges or securities for keeping peace, or for their good behavior." Those unable to comply were incarcerated.

Now one could, of course, argue that this sort of preventive justice fits as well into the punishment-deterrent strategy as into the prediction-prevention one, since a predicted law-breaker was not automatically confined, but instead was threatened with an additional punishment—forfeiture of money—in the event he broke the law. This merely serves to point up the difficulty of dichotomizing complicated human processes into distinct categories. Blackstone himself saw the conceptual difficulty of separating the punishment-deterrent strategy (which he called "punishing justice") from the prediction-prevention one (which he called "preventive justice"). "If we consider all human punishments in a large and extended view," he observed, "we shall find them all Rather calculated to prevent future crimes than to expiate the past. . . ." And Blackstone's view is well taken. A convicted murderer is imprisoned or executed as much to prevent him, as to deter others, from committing further murders. All that my dichotomy is intended to suggest is that different assumptions and values are implicit in the decision to authorize state intervention at one point, rather than another, along the continuum of predicted danger to consummated harm.

---

3 *Id.*
4 *Id.*
Alice thought, "There's a mistake here somewhere. . . ."  

It is this mistake that I wish to explore today.

The twin questions posed by any system of criminal justice are: "Did he do it?" and "Will he do it?" These questions reflect different strategies toward a common goal: to reduce the frequency and severity of certain feared events. I will refer to the strategy reflected in the question "Did he do it" as the punishment-deterrent strategy. Under this approach, the feared event is formally defined and proscribed. When someone brings it about he is punished, with the expectation that anyone contemplating similar conduct will be dissuaded by the unpleasurable response they now know awaits them. Thus, killing another under most circumstances is thought to be a harmful event whose frequency should be reduced. It is therefore defined as murder or manslaughter and formally proscribed. When such an event occurs, the perpetrator is imprisoned or executed, with the expectation that potential killers will have it brought home to them that if they kill they too may be imprisoned or executed.

The strategy embodied in the question "will he do it" may be called the prediction-prevention strategy. Under this approach the feared event may or may not be formally proscribed. Those persons who are thought likely to cause harm are sought out before they have had an opportunity to do so. They are then prevented from bringing it about by some method of incapacitation. Thus, potential killers may be spotted by some predictive device or by the presence of some mental condition and incarcerated until the assumed danger no longer exists.

Throughout the ages, some societies have focused more directly on the punishment-deterrent strategy; others on prediction-prevention. No society has ever ignored either. A systematic, though imperfect, jurisprudence has emerged in response to the first strategy. Every schoolboy knows, for example, that our methods of determining whether he "did it" are limited by the maxim "Better 10 guilty men go free than one innocent may be wrongly imprisoned." Although more people are today confined under the prediction-prevention rationale than under the punitive deterrent one, the former operates, for the most part, outside the confines of any jurisprudential framework. Even the most sophisticated jurists have given little thought to how many false positives—people who would not commit a predicted act—ought to be confined to prevent a true positive from bringing about a predicted harm. Indeed, when we look closely at what we are actually doing under the banner of prediction-prevention, we discover that our practices reflect a value judgment diametrically opposed to that which limits the punitive-deterrent strategy. The maxim seems to be: "Better to confine 10 people who would not commit predicted harms, than to release one who would." I do not mean by this to deny that an ounce of prevention may be worth a pound of cure. I do, however, question the assumption underlying that venerable adage, at least in the context of crime prevention. In law, it will often require a pound of prevention to replace an ounce of cure. And when these pounds and ounces measure human confinement, the issues raised are far more complex than the adage suggests.

1 C. Dodgson, Through the Looking-Glass 88 (1902 ed.).
Are both of these strategies employed in the United States today? If one looked only to the pronouncements of our high courts for the answer, he would come away believing that the prediction-prevention approach has no place in our constitutional constellation. As Justice Jackson said in holding that bail must be set for defendants charged with violating the Smith Act:

If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but uncommitted offenses is so unprecedented in this country and so fraught with danger of excess and injustice that I am loath to resort to it. . . . 5

But if one looks carefully at our statute books, court decisions and, most important, our practices, there begins to emerge a much fuller picture of widespread, though sometimes unarticulated, use of the prediction-prevention strategy in the United States. A Justice of the Burma Supreme Court came closer than Justice Jackson when he observed:

Preventive justice which consists in restraining a man from committing a crime which he may commit but has not yet committed is common to all systems of jurisprudence . . . . 6

The prediction-prevention strategy is used widely throughout the world during times of war and emergency. During both world wars, Great Britain promulgated regulations explicitly authorizing the preventive detention of certain persons suspected of "hostile origin or association." During the Second World War the United States employed one of the grossest forms of preventive detention known to history: the mass transfer and internment of Americans of Japanese descent, allegedly on the basis of a prediction that otherwise they would sabotage our war effort on the West Coast and become victims of racial violence. The Supreme Court's approval of that device 7 laid the foundation for a statute now on the books which authorizes the detention during a declared internal security emergency of any person "as to whom there is reasonable ground to believe that he probably will engage in or probably will conspire with others to engage in acts of espionage or of sabotage." 8

During the recent summer riots, in several areas of this nation, thousands of persons were detained without bail, or with very high bail, on the pretense of awaiting trial for trivial offenses, but actually in order to prevent them from committing future crimes. As the Kerner Commission reported, "such high-money bail has been indiscriminately set, often resulting in detention of everyone arrested during a riot without distinction as to the nature of the alleged crime or the likelihood of repeated offenses." 9

5 Williamson v. United States, 184 F.2d 280, 292 (2d Cir. 1950).
Nor is our use of the prediction-prevention strategy limited to times of war or emergency. In this paper I will simply catalogue some of the preventive devices presently employed in this country during peacetime, and then focus on two of them in some detail.

Peace bonds—the Blackstonian technique of "preventive justice"—are still authorized in some parts of the United States. In a recent Pennsylvania case, a defendant was charged with assault and battery. He stood trial and was acquitted by a jury. Despite this, the judge required him to post a bond of $1000 "to keep the peace for a period of two years." In its opinion vacating the bond as inconsistent with the right to trial by jury, the Superior Court of Pennsylvania cited data indicating that during ten previous years "478 men, after acquittal of criminal charges, were compelled to serve an aggregate of over 600 years in prison in default of bonds aggregating $613,200."

Juvenile statutes authorize confinement of young persons who have not yet committed criminal acts, but who are thought likely to become criminals. Indeed, Mr. Justice Harlan cited figures in his separate opinion in the Gault case indicating that between 26 and 48 percent of the 600,000 children brought before juvenile courts "are not in any sense guilty of criminal misconduct." Some sex psychopath laws also authorize detention of persons who have never been convicted of sex (or other) crimes, but who are thought likely to engage in such acts. Many states permit the incarceration of so-called "material witnesses"—that is, persons not charged with crimes themselves who may be important witnesses at the trial of someone charged with a crime. Such witnesses may be required to post bond, and if unable to do so, may be confined in prison until the trial on the basis of a prediction that otherwise they might disregard the subpoena. Another widespread American practice is the so-called "preventive arrest," recently described in a government report as follows:

. . . A person trying front doors of stores, or peering into parked cars, in the early hours of the morning; a person 'known' to the police as a pickpocket loitering at a crowded bus stop; a 'known' Murphy game operator talking to a soldier or a sailor—such persons may be arrested . . . largely in order to eliminate at least temporarily the occasion for any possible criminal activity. The principle upon which arrests are made appears to be: if the individual is detained until 10 or 11 a.m. the following day, at least he will have committed no crime that night. . . .

The courts are beginning to place limits on police discretion in some such situations. For example, the arrest of a person found wandering around toilets on the ground that there is probable cause to suspect that he is about to perform an act of homosexuality might not be sustained as a valid exercise

11 Id., at 274.
12 In re Gault, 387 U.S. 1, 76 (1967).
14 District of Columbia, Commissioners' Committee on Police Arrests for Investigation 18 (1962).
of police discretion. But many legislatures have made it unnecessary for the police to justify such arrests by reference to as yet uncommitted crimes. They make the "suspicious" act itself a crime justifying arrest. Thus a number of states now make it a crime "to loiter in or about public toilets" or "to wander about the streets at late or unusual hours without any visible or lawful business." The preventive aspect of such vagrancy statutes was recently recognized in a judicial decision condemning the District of Columbia statute. Judge Greene suggested that the real objection to the vagrancy law is that "its basic design is one of preventive conviction imposed upon those who, because of their background and behavior, are more likely than the general public to commit crimes, and that the statute contemplates such convictions even though no overt criminal act has been committed or can be proved." Accordingly, he defined the real issue in the enforcement of vagrancy type statutes as "whether our system tolerates the concept of preventive conviction on suspicion.

In addition to these and other purely preventive devices, there are several statutes which, though triggered by commission of a criminal act, rest primarily on a prediction-prevention rationale. Included in this mixed category are defective delinquency, habitual criminal, and addict or alcoholic commitment laws.

The two prediction-prevention devices employed most widely in the United States today are: 1) denial of pre-trial release to persons charged with, but not yet convicted of, crimes; and 2) involuntary hospitalization of the mentally ill. Though different in rationale, focus, and duration, these devices raise sufficiently similar questions so that a comparative analysis may shed some light on the general issue of preventive confinement.

PREVENTIVE DETENTION OF PERSONS AWAITING TRIAL

When a person is charged with having committed a serious crime, he is generally arrested. Since his trial will not be held for a number of months, a decision must be made as to whether he will be detained or released during this hiatus. But this decision is not made by the judge, at least not directly. For the judge is required, in all but a small number of capital cases, to "set bail"—that is, to condition pre-trial release on the posting of a certain amount of money as security for the defendant's appearance at trial. In setting the amount of the bail, the judge is supposed to consider the likelihood that the accused will not appear for trial. Even if that likelihood is high—that is, even if the judge predicts that the accused will probably flee—he must still set bail. But he will set it at a high amount, in the expectation that the accused either will not be able to post it, or, if he can, that the threat of forfeiting so much money will dissuade him from fleeing. Although in setting the amount of bail, judges are supposed to consider only the likelihood that the accused will flee, it is clear that they also consider the likeli-

1970] ADMINISTRATION OF JUSTICE 29
hood that he will commit crimes, threaten witnesses, or bribe jurors, while awaiting trial.

Thus, the present system of pre-trial preventive detention seems to function in the following way: if the judge predicts that any of the feared occurrences is likely, he sets high bail; if he predicts that they are unlikely, he sets low bail. The imprecision of this indirect system of preventive detention is apparent. The access of the accused to money is a crucial variable which bears little relevance to the system's goal—detention of predicted wrongdoers. For if an accused can post high bail, he will be released even if thought to be dangerous. But if an accused cannot post bail, he will be detained even if not thought to be dangerous. Thus the apparent goal of the system—the detention of all dangerous people and the release of all non-dangerous people—is distorted by the critical role played by an irrelevant variable: money.

This system has recently come under heavy attack, both because it effects the release of too many wealthy dangerous people and because it effects the detention of too many poor non-dangerous people. In its place, a plan has been proposed which would explicitly authorize the preventive detention pending trial of certain predicted law breakers. In other words, instead of pre-trial release depending on the defendant's financial ability, it would turn explicitly on his predicted dangerousness. In cautiously suggesting this change, one thoughtful commentator has said:

Our hostility towards the notion of preventive detention ought not lead us to continuing the game of making believe that the practice does not exist. It ought not blind us to the fact that the practice is indulged in by criminal courts every day through the often unfair and ineffective medium of excessive bail, without the candor that is needed to make it visible, controllable and susceptible to appellate review and constitutional testing.

It, of course, does not follow from the fact that preventive detention is surreptitiously "indulged in by criminal courts every day" that its continuation should be authorized. Its social benefits and costs should be articulated and balanced. If the former are thought to outweigh the latter, then perhaps some form of preventive detention should be authorized in appropriate situations. If not, then procedures should be devised to purge it from the system. If preventive detention is to be authorized, then surely it should be candid, visible, controllable and subject to review. Moreover, it should not employ distorting variables—like money—which result in the detention of some people who are less dangerous than others who are released.

The conditions giving rise to the call for preventive detention are not difficult to understand. A person suspected of committing a crime cannot stand trial on the day of his arrest; he must be given time to consult with his lawyer and prepare a defense. Although this should rarely take more than a few days, the delay between arrest and trial has been growing, until it is now almost as long as two years in some cities and a year in most other cities, including the District of Columbia. This is the consequence primarily of our unwillingness to pay for needed increases in judicial machinery.

At the same time there has been a growing sensitivity to the plight of the indigent accused who are unable to raise even modest bail. This is reflected
in a 1966 bail reform law which authorizes federal judges to release most defendants without requiring money bail. The net result of bail reform and increased delays in court has been that more criminal defendants spend more time out on the street awaiting their trials than ever before. This has led to an increase—or at least the appearance of an increase—in the number of crimes between arrest and trial. And so, in an effort to stem this tide of increasing crime, many political leaders, including Senators as diverse in their political views as Roman Hruska and Joseph Tydings, have focused their attention on the defendant awaiting trial. The slogan "crime in the streets" has found its first political victim.

The resulting proposals for preventive detention vary: some are limited to the District of Columbia, while others apply to all federal courts; some would seem to authorize the confinement of a very large number of defendants, while others are narrower in their scope; some include methods of shortening the time interval between arrest and trial, while others seem satisfied to leave things pretty much as they are now.

But they all have one point in common: they permit the imprisonment of a defendant who has not been convicted (and who is presumed innocent) of the crime with which he stands charged, on the basis of a prediction that he may commit a crime at some future time. These predictions would be made by judges on the basis of their appraisal of the suspect's dangerousness, after study of his prior record and the crime for which he is being tried. The proponents of preventive detention hope thereby to identify and isolate those defendants awaiting trial who account for the apparently high incidence of serious crime.

The opponents of preventive detention, a heterogeneous group which includes Senator Ervin of North Carolina and the American Civil Liberties Union, maintain that, under our system of criminal justice, which is characterized by "the presumption of innocence," conviction for a past crime is the only legitimate basis for confinement. They are fearful that acceptance of this "novel" approach to crime prevention might be an opening wedge leading to widespread confinement of persons suspected, on the basis of untested predictions of dangerous propensities. And they reject the idea of confining anyone on the basis of statistical likelihood that he "may" be dangerous.

As I have shown, however, this preventive approach is not nearly as novel as the opponents of preventive detention suggest. Nor can I reject—as necessarily unjust—a system which relies on statistical likelihood. Statistical likelihood—gross and impersonal as that sounds—is all we ever have, whether we are predicting the future or reconstructing the past. When we establish rules for convicting the guilty, we do not require certainty; we only require that guilt be proved "beyond a reasonable doubt." And that means that we are willing to tolerate the conviction of some innocent suspects in order to assure the confinement of a vastly larger number of guilty criminals. We insist that the statistical likelihood of guilt be very high: "better ten guilty men go free than one innocent man be wrongly condemned." But we do not—nor could we—insist on certainty; to do so would result in immobility.

What difference is there between imprisoning a man for past crimes on the basis of "statistical likelihood" and detaining him to prevent future

---


23 Journal of Legal Ed. No. 1—3
crimes on the same kind of less-than-certain information? The important difference may not be so much one of principle; it may be more, as Justice Holmes said all legal issues are, one of degree. The available evidence suggests that our system of determining past guilt results in the erroneous conviction of relatively few innocent people. We really do seem to practice what we preach about preferring the acquittal of guilty men over the conviction of innocent men.

But the indications are that any system of predicting future crimes would result in a vastly larger number of erroneous confinements—that is, confinements of persons predicted to engage in violent crime who would not, in fact, do so. Indeed, all the experience with predicting violent conduct suggests that in order to spot a significant proportion of future violent criminals, we would have to reverse the traditional maxim of the criminal law and adopt a philosophy that it is “better to confine ten people who would not commit predicted crimes, than to release one who would.”

The reason why this is so can perhaps best be illustrated by turning to the preventive detention device most widely employed in this country: the involuntary hospitalization of the mentally ill.

Preventive Detention of the Mentally Ill

Tens of thousands of persons who have committed no criminal act are confined indefinitely without their consent on the basis of a diagnosis—that they are “mentally ill”—and a prediction—that unless confined they might cause harm to themselves or others. It is often alleged that involuntary confinement of the mentally ill serves functions other than preventive detention, such as the treatment and cure of sick people. Yet, although some courts have articulated a general “right to treatment,” no court, so far as I am aware, has ever actually ordered the release of a dangerous mentally ill person who is receiving no treatment or who is incurable or untreatable. Indeed, if courts were to order the release of inmates not receiving meaningful treatment, the population of many state mental hospitals would be reduced dramatically. This is not to suggest the courts should issue such an order or that preventive detention of some mentally ill persons may not be justified. It is only to suggest that, as with preventive detention of persons awaiting trial, we should not continue “the game of making believe that the practice does not exist.” Only if we recognize involuntary hospitalization for what it is can we begin to ask whether the criteria for such confinement promote or retard the legitimate goals of preventive detention.

The one universal criterion for involuntary hospitalization is the presence of mental illness. In some jurisdictions this is enough; in others, something else—such as danger to self or others—must also be established. In all jurisdictions, as a matter of practice, once mental illness is established, there is a presumption in favor of confinement. Thus, the critical criterion is “mental
But if the function of involuntary hospitalization is the preventive detention of dangerous people, then why should it matter whether such people are, or are not, "mentally ill"? Particularly so, since mental illness is not an accurate predictor of dangerous conduct. Recent studies suggest that the mentally ill do not, as a class, engage in more acts of violence than those not so diagnosed. If a "mentally healthy" person is sufficiently dangerous, why should he not be confined? If a "mentally ill" person is not sufficiently dangerous, why should he be confined? Consider a hypothetical case of two persons: one named Ira Ill and the other named Mike Mafia. Assume that the predictive device establishes a seventy percent likelihood that Ira Ill, who is diagnosed by a psychiatrist as "mentally ill," will commit homicide in the reasonable future, and an eighty percent likelihood that Mike Mafia, a mentally healthy gangster, will commit homicide in the reasonable future. Ira Ill's detention would be no more justified than Mike Mafia's unless it was designed to promote unarticulated values other than preventive detention. Just as in the bail area, where the preventive goal is distorted by the irrelevant variable of money, in the involuntary hospitalization area the preventive goal is distorted by the irrelevant criterion of mental illness.

It may be instructive to explore briefly the history of the mental illness criterion and its relationship to preventive confinement. Not in every society and not in every age were the insane locked up by the state.

The earliest English laws relating to "persons non compos mentis" seem to have grown out of jurisdictional disputes between the barons and the king (as did so many important English laws). The leading 19th century treatise on "The Law Concerning Idiots, Lunatics, and other Persons Non Compos Mentis" maintained that the first legislation relating to mentally incapacitated persons was intended to prevent "lawless and violent practices of the ancient barons" who had been seizing upon the rents and profits of their incapacitated vassals. The alleged justification for these seizures was to enable the baron "to procure a fulfillment of the condition upon which the estate had been granted," namely, military service, which the incapacitated vassal was incapable of performing. But the barons apparently abused their prerogatives, and "in consequence of the destruction, that frequently took place, of the property of persons labouring under mental imbecility and incapacity, the legislature was induced to place them under the protection of the crown. . . ."

Collinson was not certain "at what particular period this great change was effected"; nor "by what particular statute the king first acquired jurisdiction." Although "the subject is involved in great obscurity," it seems clear that the first legislative regulation occurred sometime after the reign of Henry the Third and before the reign of Edward the Second. In any event, this initial legislation was apparently not preserved "in print," and the earliest existing statute on this matter is the ninth chapter of the act de Praerogativa Regis, enacted in 1324 during the reign of Edward the Second. That chapter provided as follows:

The king shall have the custody of the lands of natural fools, taking the profits of them without waste or destruction; and shall find them necessaries, of whose fee soever the lands be holden. And after the death of such idiots, he shall render it to the right heirs, so that such idiots shall not alien, nor their heirs be disinherited.
Also the king shall provide (habet providere), when any that before
time hath had his wit and memory, happen to fail of this wit, as there
are many per lucida intervalla, that their lands and tenements shall be
safely kept without waste and destruction, and that they and their house-
hold shall live and be maintained competently with the profits of the
same; and the residue, besides their sustentation, shall be kept to their
use, to be delivered unto them when they come to right mind; so that
such lands and tenements shall in no wise be aliened within the time
foresaid; and the king shall take nothing to his own use. And if the
party die in such estate, then the residue shall be distributed for his
soul, by the advice of the ordinary.\textsuperscript{22}

Although the words of the quoted provision refer only to “custody of the
lands,” Collinson—like other writers—interprets the statute as granting to
the king “the custody of the \textit{person} of an idiot during life, and of any other
non compos mentis, during the continuance of his mental infirmity . . . .” (emphasis added).

Whether this construction was correct or not apparently made little differ-
ence during the centuries immediately following the passage of the statute of
1324. Even if the legislature intended to grant the king custody over the
persons of the disabled, the king was hardly in a position to accept such cus-
tody in any realistic sense. There were but a few custodial institutions ca-
pable of confining mentally disabled persons. St. Mary of Bethlehem—later
shortened to Bethlem or Bedlam—\textsuperscript{23} was the only place of confinement which
“from the end of the fourteenth century devoted itself entirely to such pa-
tients.” And its inmate population—even as late as the early seventeenth
century—rarely exceeded 30 persons. There were also, during this period,
some almshouses and monastic foundations that admitted the insane. But
for the most part the family was thought to be responsible for the care of
their incapacitated relatives. Accordingly, there was little legislative or ju-
dicial involvement in this area until confinement became a more generally
available social mechanism.

But what of those insane persons who could not be cared for by family?
What was done with the violently insane who had no family, or whose fami-
ly was too poor to provide the necessary care?

There have always been some, among those labelled insane, who have been
regarded as dangerous. Throughout history, the dangerous insane—sometimes called “furious”—have been handled differently from the “helpless”
insane. This should come as no surprise, since these two groups pose essen-
tially different problems.

John Brydall, the author of many legal treatises including one published in
1700 under the title “Non-Compos Mentis: or the law relating to Natural
Fools, Mad-Folk and Lunatick persons,” suggested that the right to confine a
“mad-man” finds its source in a common law doctrine analogous to self-de-
fense:

A \textit{Mad-man}, or a \textit{Lunatick}, may be imprisoned by another, to prevent
killing of his, or burning his House, and justifiable. The \textit{Lord Hobart

\textsuperscript{22} De Prerogativa Regis, 17 Edw. 2, Stat. 1, C. 9, 10 (1324).

says, That the necessity of avoiding greater inconvenience, is a good Plea in Law; as where one kills a Thief, or a Burglar, in defense of his Person, or House; so also is the binding and beating of a Person Mad or Lunatick.

Brydall traces the roots of this approach to "the old Roman Law" which provided that "Guards or Keepers, are appointed for Mad-men, not only to look that they do not mischief to themselves; but also that they be not destructive to others. . . ."

It seems likely that over time this common law right of self-defense (or necessity) against the dangerous insane was merged with the king's statutory custody over the property of persons non compos mentis to provide a firm basis upon which the courts could order confinement in appropriate cases. This merger is suggested in one of the earliest documentary records of a court-ordered restraint, the case of Edmund Francklin, a lunatic, circa 1630. This document is important enough in the history of confinement to warrant its reproduction in substantial part:

The said Francklin of Bolnhurst hath ever since the said Commitment been violent and outrageous in his Carriage divers several times more sometimes less and within the space of two yeares last past hath divers several times behaved himself in the manner following:

Disturbed the Minister in the Church when he was preaching several times within the space aforesaid. And in the Church in Divine Service In July last, at Sermon time, used these words, That his Brother George was God the Father, his Son, God the Sonne, and the Lady Dyer God the Holy Ghost. He hath divers times . . . said that he was God, that he suffered more than Christ, that the wine at his own Table was better than the Communion, not suffer Grace to be said at his Table, nor prayers in his house as was customably and duly used heretofore. He hath . . . spoke unfittingly of diverse Noblemen and Gentlemen in the Country, and of his Father and two of his Sisters and would kill the rest meaning his Brothers before he had done. He hath . . . often broke Glass Windowes and divers bays of walls, threw divers things of value secretly into the Fire; and some into the ponds, and as he sat at Meat would mangle and cut the Meat unfittingly and throw it to the Doggs. About a month before Christmass last he fell upon Mr. Roper, a Gentleman whom Mr. Fitzgeoffry brought to his house threw him down and stabbed at him with a knife because he seemed to contradict him when he said he was God . . . Since Easter last he hath fallen with violence upon his Brother . . . Threw a great Iron Jack winch, and a great Stone at him, threatened to shoot him, to cut his throat and to kill him . . . he continually lay in wait for him . . .

During the time of this Commitment he never medled with his Estate received no rents, nor disposed of his Lands either by Letting or other managing . . . And by the opinion of all the Country that are understanding and have heard of or seen his Carriage, thought unfit to manage his Estate. The said Edmund Francklin so demeaning himself
and being in such estate and there being divers plots upon him to marry him unworthily, and to draw him into greater expences than his Estate would bear, for preventing these mischiefs and restraining his dangerous violence the said George Francklin one of the Committees in the presence of Mr. Richard Taylor and Nicholas Francklin another of the Committees made complaint about the latter end of Trinity terme last to the Attorney of the Court of Wards, of the danger his person was in, in respect to the said plots, and his Estate by such expenses, and of his Carriage & Demeanor in general, and of his particular Carriage to him, and made Affidavit thereof and thereupon had an order for his restraint.

The said George Francklin by the advice and Consent of Mr. Richard Taylor, and of Nicholas Francklin another of the Committee did agree with Dr. Crooke, Censor of the College of Physicians, Sworn Servant to King James and intrusted by the King with the government of the great Hospital of Bethlehem in London for to pay him after the rate of two hundred pounds a year for the Physick, Diet, Clothes, Lodging, washing and all things necessary for the said Edmund, and two Men Servantes to attend upon him, so long as the said Edmund Francklin should be with him. And thereupon the said Doctor Crooke came down from London in his Coach and four Horses, attended with three men and came to the said Edmunds house about Seven of the Clock in the morning, the Committees being then in the house, and all the Servants stirring up and down the House, and did see what & in what manner it was done, and finding him in bed intreated him fairly, caused him to make him ready, and to break his fast and carried him to London to the Doctors own House where he was fairly intreated and well used & carefully provided of a good Lodging and wholsome and good dyet, according to the Quality of his person and nature of his Infirmity.

The Francklin case illustrates the operation of the law on men of means who apparently became more “violent and outragious” over time. First there was an “inquisition.” Although the Crown (through the Attorney General) might seek a “commission,” they were “usually directed upon petitions preferred by private individuals [generally relatives] accompanied with affidavits, setting forth so many instances of weak or incoherent conduct or language, as raise a strong presumption that the party is incapable, through mental infirmity or derangement, of managing his own affairs.” A precept was then issued to the sheriff “requiring him to cause a jury of good and lawful men . . . to inquire upon their oaths . . .” The concurrence of “twelve jurymen” was required to declare a person “non compos mentis.” The person charged with being non compos had a “right to be present at the execution of the commission. It is his privilege.”

During the sixteenth and seventeenth centuries a number of “private madhouses” had begun to spring up “especially in and around London.” These houses were operated for a profit and accepted only those inmates whose families could afford their relatively high prices. Before long, evidence of abuses came to light. Wealthy husbands apparently viewed con-

---

24 R. Hunter, Three Hundred Years of Psychiatry 1535–1860, 451 (1903).
finement in these unregulated madhouses as a comparatively inexpensive way of ridding themselves of bothersome wives. Daniel Defoe began to call public attention to this as early as 1687. He exclaimed against the vile Practice now so much in vogue among the better sort, as they are called, but the worst sort in fact, namely the sending their Wives to Mad-Houses at every Whim or Dislike, that they may be more secure and undisturb'd in their Debaucheries: Which wicked Custom is got to such a Head, that the number of private Mad-Houses in and about London, are considerably increased within these few Years. This is the height of Barbarity and Injustice in a Christian Country, it is a clandestine Inquisition, nay worse. How many Ladies and Gentlewomen are hurried away to these Houses, which ought to be suppressed, or at least subject to daily Examination, as hereafter shall be proposed? How many, I say, of Beauty, Vertue, and Fortune, are suddenly torn from their dear innocent Babes, from the Arms of an unworthy Man, who they love (perhaps too well) and who in Return for that Love, may probably an ample Fortune, and a lovely Off-spring besides; grows weary of the pure Streams of chaste Love, and thirsting after the Puddles of Lawless Lust, buries his vertuous Wife alive, that he may have the greater Freedom with his Mistresses?

If they are not mad when they go into these cursed Houses, they are soon made so by the barbarous Usage they there suffer, and any Woman of Spirit who has the least Love for her Husband, or Concern for her Family, cannot sit down tamely under a Confinement and Separation the most unaccountable and unreasonable. Is it not enough to make one mad to be suddenly clap'd up, stripp'd, whipp'd, ill fed, and worse us'd? To have no Reason assign'd for such Treatment, no Crime alleged, or Accusers to confront? And what is worse, no Soul to appeal to but merciless Creatures, who answer but in Laughter, Surliness, Contradiction, and too often Stripes? All conveniences for Writing are denied, no Messenger to be had to carry a letter to any Relation or Friend; and if this tyrannical Inquisition, join'd with the reasonable Reflections, a Woman of any common Understanding must necessarily make, be not sufficient to drive any Soul stark staring mad, though before they were never so much in their right Senses, I have no more to say . . .

How many are yet to be sacrificed, unless a speedy Stop be put to this most accursed Practice I tremble to think; our Legislature cannot take this Cause too soon in hand: This surely cannot be below their Notice, and 'twill be an easy matter at once to suppress all these pretended Mad-Houses. Indulge, gentle Reader, for once the doting of an old Man, and give him leave to lay down his little System without arraigning him of Arrogance or Ambition to be a Law-giver. In my humble Opinion all private Mad-Houses should be suppress'd at once, and it should be no less than Felony to confine any Person under pretence of Madness without due Authority. For the cure of those who are really Lunatick, licens'd Mad-Houses should be subject to proper Visitation and Inspection, nor should any Person be sent to a Mad-House without due Reason, Inquiry, and Authority.
Defoe proposed an ingenious plan to raise money for the erection of a public "fool-house." He proposed that a special tax be levied upon "Those who have a Portion of Understanding extraordinary" to support those "as suffer for want of the same Bounty." What could be more equitable than a special tax on those who were exceptionally brilliant to support those who lacked even a mediocum of intelligence or insight? Accordingly, he suggested that the fool-house be built "by a Tax upon Learning, to be paid by the Authors of Books."

Similar criticisms of the private mad-houses were voiced by others as well. In 1748, a "mad-doctor" was convicted of illegally detaining and maltreating a sane person. In 1738 a former inmate of a private mad-house published a pamphlet entitled "The London-Citizen Exceedingly Injured, or a British Inquisition Displayed." The pamphlet purported to describe how its author, Alexander Cruden, was lured into the mad-house and chained there for ten weeks, until he "most Providentially made his Escape." It ends with a plea to the legislature "to regulate Private Madhouses in a more effectual manner than at present." In 1754, the College of Physicians was asked to recommend a bill for the regulation of such houses, but the proposal was rejected on the ground that it would be attended with too many difficulties. Then, in 1763, Parliament appointed a committee to "inquire into the State of private Madhouses." The Committee heard testimony of a number of former inmates and doctors. They were told that "the Admission of Persons brought as Lunatics is too loose and too much at large, depending upon Persons not competent Judges; and that frequent Visitation is necessary . . . ." They were told by a distinguished doctor of lunacy that he "frequently" saw "persons of sane Mind in Confinement for Lunacy." The Committee recommended legislation, which was finally enacted in 1774.

This Statute—entitled the Act for Regulating Madhouses—began with the following recitation:

Whereas many great and dangerous Abuses frequently arise from the present State of Houses kept for the Reception of Lunaticks, for want of Regulations with Respect to the Persons keeping such Houses, the Admission of Patients to them, and the Visitation by proper Persons of the said Houses and Patients: And whereas the Law, as it now stands, is insufficient for preventing or discovering such Abuses . . . .

It then proceeded to provide for licensing all houses which keep "more than one lunatic at any one time"; for notification of all admissions; for requiring an order of some "Physician, Surgeon, or Apothecary" before admission; and for inspection once a year. The Act "was limited to safeguarding the liberty and welfare of private patients and excluded from its provisions all insane paupers . . . ."

The foregoing brief historical account conveys some impression of what was happening to the wealthy insane through the Eighteenth Century in England. As Blackstone summarized it:

On the first attack of lunacy, or other occasional insanity, while there may be hopes of a speedy restitution of reason, it is usual to confine the

---

25 See generally, Report from the Committee appointed to inquire into the State of private Madhouses in this Kingdom, H. C. Jour. for 1763, 486 et seq.

26 14 Geo 3, c. 49 (1774).
unhappy objects in private custody, under the direction of the nearest friends and relations: and the legislature, to prevent all abuses incident to such private custody, hath thought proper to interpose its authority by 14 Geo. III. c. 49. But, when the disorder is grown permanent, and the circumstances of the party will bear such additional expense, it is proper to apply to the royal authority to warrant a lasting confinement.\textsuperscript{27}

But what of the indigent insane whose family could neither provide their own confinement nor afford the cost of a private regulated madhouse? It seems likely that the indigent insane—like other poor persons without ties to the land—roamed the countryside, begged for sustenance, and eventually drifted to the cities (when they began to emerge). The violent and furious among them eventually ran afoul of the criminal law and, depending on their crime and the extent of their insanity, were hanged, whipped, banished, or detained in the few institutions designed for confinement, according to the first statute Parliament enacted explicitly regulating pauper lunatics.\textsuperscript{28} The other insane were not distinguished from “disorderly persons, idle rogues, vagabonds, and sturdy beggars.” This 1713 act was early construed to apply “to vagrant lunatics only, who are strolling up and down the country, and does not extend to persons who are of rank and condition in the world, and whose relations can take care of them properly, by applying to this court [High Court of Chancery] as is usual in cases of lunacy.”\textsuperscript{29}

How unsatisfactory this law proved to be may be guessed from the passage thirty years later of “an act to amend and make more effectual the laws relating to rogues, vagabonds, and other idle and disorderly persons, and to houses of correction.”\textsuperscript{30} Prefacing one section with “whereas there are sometimes persons, who by lunacy, or otherwise, are furiously mad, or are so far disordered in their senses that they may be dangerous to be permitted to go abroad,” the act then went on to authorize “any Two or more Justices of the Peace . . . to cause such Persons to be Apprehended, and kept safely Locked up . . . and (if such Justices find it necessary) to be there chained. . . .”\textsuperscript{31} There were at least two important differences under this act between the confinement of the “furiously Mad” and the confinement of vagrants. Madmen could not be whipped, as vagrants could, and madmen were to be confined “during such time only as such Lunacy or Madness shall continue,” whereas vagrants could be confined by the order of a single justice only “until the next Quarter Sessions.”\textsuperscript{32}

There is substantial authority in support of a common law authority to restrain “absolute madmen.” As Blackstone argued:

in the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting unless under proper control; and, in particular, they ought not to be suffered to go loose, to the terror of the king’s subjects. It was the doctrine of our ancient law that persons deprived of their reason might be confined till

\textsuperscript{27} Blackstone, supra note 2, at 440.
\textsuperscript{28} 12 Anne, stat. 2, c. 23 (1713).
\textsuperscript{29} 17 Geo 2, c. 5 (1744).
\textsuperscript{30} Id., § 20.
\textsuperscript{31} Id., §§ 7, 20.
they recovered their senses, without waiting for the forms of a commis-
sion or other special authority from the crown: and now, by the vagrant
acts, a method is chalked out for imprisoning, chaining, and sending
them to their proper homes.32

Thus, by the middle of the eighteenth century, there had emerged a num-
ber of different legal procedures for the confinement of persons regarded as in-
sane. There were, roughly speaking, four distinct classes of insane persons:
1) the non-dangerous wealthy insane were confined at home until they be-
came incurable or unduly bothersome, whereupon they were formally admit-
ted to private madhouses; 2) the dangerous wealthy insane were committed
to the few private madhouses that were willing to accept them; 3) the non-
dangerous indigent insane were treated much like the non-dangerous indi-
gent vagrant, left to roam the countryside, sometimes whipped, imprisoned
and banished; and 4) the dangerous indigent insane were confined indefi-
nitely in public jails or other places of confinement until they were safe to
be released.

Thus, the original legislative purpose underlying commitment laws seems
clear: to isolate those persons who—for whatever reason—were regarded as
intolerably obnoxious to the community. Medical testimony had little to of-
er in making this judgment: the people knew whom they regarded as ob-
noxious. By the middle of the nineteenth century, however, madness was
becoming widely regarded as a disease which should be treated by physicians
with little or no interference by courts.

The present situation comes close to reflecting that view: the criteria for
confinement are so vague that courts sit—when they sit at all—merely to re-
view decisions made by doctors. Indeed, the typical criteria are so meaning-
less as even to preclude effective review. In Connecticut, for example, the
court is supposed to commit any person whom a doctor reasonab’y finds is
"mentally ill and a fit subject for treatment in a hospital for mental illness,
or that he ought to be confined.” 33 This circularity is typical of the criteria
—or lack thereof—in about half of our states. Even in those jurisdictions
with legal sounding criteria—such as the District of Columbia, where the
committed person must be mentally ill and likely to injure himself or
others 34—the operative phrases are so vague that courts rarely upset psychi-
atriic determinations.

The distorting effect of this medical model of confinement may be illus-
trated by comparing two recent cases from the District of Columbia. One
involved Bong Yol Yang, an American of Korean origin who appeared at
the White House gate asking to see the President about people who were fol-
lowing him and “revealing his subconscious thoughts.” He also wondered
whether his talents as an artist could be put to use by the government. The
gate officer had him committed to a mental hospital. Yang demanded a jury
trial, at which a psychiatrist testified that he was mentally ill—a paranoid
schizophrenic—and that although there was no “evidence of his ever attack-
ing anyone so far,” there is always a possibility that “if his frustrations

32 Blackstone, supra note 2, at 2185.
. . . became great enough, he may potentially attack someone.
. . ." On the basis of this diagnosis and prediction, the judge permitted a jury to commit Yang to a mental hospital until he was no longer mentally ill and likely to injure himself or others.

The other case involved a man named Dallas Williams, who at age 39 had spent half his life in jail for seven convictions of assault with a deadly weapon and one conviction of manslaughter. Just before his scheduled release from jail, the government petitioned for his civil commitment. Two psychiatrists testified that although "at the present time [he] shows no evidence of active mental illness . . . he is potentially dangerous to others and if released is likely to repeat his patterns of criminal behavior, and might commit homicide." The judge, in denying the government's petition and ordering Williams' release, observed that: "The courts have no legal basis for ordering confinement on mere apprehension of future unlawful acts. They must wait until another crime is committed or the person is found insane." Within months of his release, Williams lived up to the prediction of the psychiatrists and shot two men to death in an unprovoked attack.

Are there any distinctions between the Williams and Yang cases which justify the release of the former and the incarceration of the latter? There was no evidence that Yang was more dangerous, more amenable to treatment, or less competent than Williams. But Yang was diagnosed mentally ill and thus within the medical model; whereas Williams was not so diagnosed. Although there was nothing about Yang's mental illness which made him a more appropriate subject for involuntary confinement than Williams, the law attributed conclusive significance to the presence of mental illness. The outcomes in these cases—which make little sense when evaluated against any rational criteria for confinement—are typical under the present civil commitment process. And this will continue, so long as the law continues to ask the dispositive questions in medical rather than legally functional terms, because a medical model does not ask the proper questions, or asks them in meaninglessly vague terms: Is the person mentally ill? Is he dangerous to himself or others? Is he in need of care or treatment?

Nor is this the only way to ask the questions to which the civil commitment process is responsive. It will be instructive to restate the problem of civil commitment without employing medical terms and to see whether the answers suggested differ from those now given.

There are, in every society, people who cause trouble if not confined. The trouble may be serious (such as homicide); trivial (making of offensive remarks); or somewhere in between (forging checks). The trouble may be directed at others, at the person himself, or at both. It may be very likely that he will cause trouble, or fairly likely, or fairly unlikely. In some instances this likelihood may be considerably reduced by a relatively short period of involuntary confinement; in others, a longer period may be required with no assurances of reduced risk; in still others, the likelihood can never be significantly reduced. Some people will have fairly good insight

36 Id., at 876.
into the risks they pose and the costs entailed by an effort to reduce those risks; others will have poor insight into these factors.

When the issues are put this way, there begins to emerge a series of meaningful questions capable of traditional legal analyses:

What sorts of anticipated harm warrant involuntary confinement?

How likely must it be that the harm will occur? Must there be a significant component of harm to others, or may the harm be to self alone?

If harm to self is sufficient, must the person also be incapable, because he lacks insight, of weighing the risks to himself against the costs of confinement?

Must the likelihood of the harm increase as its severity decreases? Or as the component of harm to others decreases? How long a period of involuntary confinement is justified to prevent which sorts of harms?

These questions are complex, but this is as it should be, for the business of balancing the liberty of the individual against the risks a free society must tolerate is very complex. That is the business of the law, and these are the questions which need asking and answering before liberty is denied. But they are obscured when the issue is phrased in medical terms which frighten—or bore—lawyers away. Nor have I simply manufactured these questions. They are the very questions which are being implicitly answered every day by psychiatrists; but they are not being openly asked, and many psychiatrists do not realize that they are, in fact, answering them.

Let us consider two of these questions and compare how they are being dealt with—or not dealt with—under the present system, with how they might be handled under functional, non-medical, criteria.

The initial and fundamental question which must be asked by any system authorizing incarceration is: which harms are sufficiently serious to justify resort to this rather severe sanction? This question is asked and answered in the criminal law by the substantive definitions of crime. Thus, homicide is a harm which justifies the sanction of imprisonment; miscegenation does not; and adultery is a close case about which reasonable people may, and do, disagree. It is difficult to conceive of a criminal process which did not make some effort at articulating these distinctions. Imagine, for example, a penal code which simply made it an imprisonable crime to cause injury to self or others, without defining injury. It is also difficult to conceive of a criminal process—at least in jurisdictions with an Anglo-American tradition—in which these distinctions were not drawn by the legislature or courts. It would seem beyond dispute that the question of which harms do, and which do not, justify incarceration is a legal—indeed, a political—decision, to be made not by experts, but by the constitutionally authorized agents of the people. Again, imagine a penal code which authorized incarceration for anyone who performed an act regarded as injurious by a designated expert, say a psychiatrist or penologist.

It is argued, however, that there are differences between the criminal and the civil commitment processes: the criminal law is supposed to punish people for having committed harmful acts in the past, whereas civil commitment is supposed to prevent people from committing harmful acts in the future. While this difference may have important implications in some contexts, it
would seem entirely irrelevant in deciding which acts are sufficiently harmful to justify incarceration, either as an after-the-fact punitive sanction or as a before-the-fact preventive sanction. The considerations which require clear definition of such harms in the criminal process would seem to be fully applicable to civil commitment.

Yet the situation which I said would be hard to imagine in the criminal law is precisely the one which prevails with civil commitment. The statutes authorize preventive incarceration of mentally ill persons who are likely to injure themselves or others. "Injure" is generally not defined in the statutes or in the case law, and the critical decision—whether a predicted pattern of behavior is sufficiently injurious to warrant incarceration—is relegated to the unarticulated judgments of the psychiatrist. And some psychiatrists are perfectly willing to provide their own personal opinions—often falsely disguised as expert opinions—about which harms are sufficiently serious. One psychiatrist recently told a meeting of the American Psychiatric Association that "you"—the psychiatrist—"have to define for yourself the word danger, and then having decided that in your mind . . . look for it with every conceivable means . . . ."

My own conversations with psychiatrists reveal wide differences in opinion over what sorts of harms justify incarceration. As one would expect, some psychiatrists are political conservatives while others are liberals; some place a greater premium on safety, others on liberty. Their opinions about which harms do, and which do not, justify confinement probably cover the range of opinions one would expect to encounter in any educated segment of the public. But they are judgments that each of us is as qualified to make as they are. Thus, this most fundamental decision—which harms justify confinement—is almost never made by the legislature or the courts; often it is never explicitly made by anyone; and when it is explicitly made, it is by an unelected and unappointed expert operating outside the area of his expertise.

Consider, for example, the age-old philosophical dispute about the government's authority to incarcerate someone for his own good. The classic statement denying such authority was made by John Stuart Mill in his treatise *On Liberty*. He deemed it fundamental:

That the only purpose for which power can be rightfully exercised against his will, is to prevent harm to others. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because . . . to do so would be wise or even right . . . .

The most eloquent presentation of the other view was made by the poet John Donne in a famous stanza from his Devotions:

No man is an island, entire of itself;
Every man is a piece of the continent,
A part of the main;
If a clod be washed away from the sea,
Europe is the less . . . .
Any man's death diminishes me, because I am involved in mankind;
And therefore never send to know for whom the bell tolls;
It tolls for thee.  

These statements—eloquent as they are—are far too polarized for useful discourse. In our complex and interdependent society, there is hardly a harm to one man which does not have radiations beyond the island of his person. But this observation does not, in itself, destroy the thrust of Mill's argument. Society may still have less justification for incarcerating a person to prevent a harm to himself which contains only a slight component of harm to others, than if it contained a large component of such harm.

Compare, for example, a recent case which arose under the civil commitment process with a similar fact situation which produced no case at all. Mrs. Lake, a 62 year old widow, suffers from arteriosclerosis which causes periods of confusion interspersed with periods of relative rationality. One day she was found wandering around downtown Washington looking confused but bothering no one, whereupon she was committed to a mental hospital. She petitioned for release and at her trial testified, during a period of apparently rationality, that she was aware of her problem, that she knew that her periods of confusion endangered her health and even her life, but that she had experienced the mental hospital and preferred to assume the risk of living—and perhaps dying—outside its walls. Her petition was denied, and despite continued litigation, she is still involuntarily confined in the closed ward of the mental hospital where she will probably spend her remaining days.

Compare Mrs. Lake's decision to one made by Supreme Court Justice Jackson who, at the same age of 62, suffered a severe heart attack while serving on the Supreme Court. As Solicitor General Sobeloff recalled in his memorial tribute, Jackson's "doctors gave him the choice between years of comparative inactivity or a continuation of his normal activity at the risk of death at any time." Characteristically, he chose the second alternative, and suffered a fatal heart attack shortly thereafter. No court interfered with his risky decision. A similar decision, though in a lighter vein, is described in a limerick entitled "The Lament of a Coronary Patient":

My doctor has made a prognosis
That intercourse fosters thrombosis
But I'd rather expire
Fulfilling desire
Than abstain, and develop neurosis.

Few courts, I suspect, would interfere with that decision. Indeed, a number of courts, and at least one State Attorney General, have recently gone so far as to apply Mill's restriction to the inconvenience of wearing an unwanted item of apparel. The Attorney General of New Mexico offered the following argument in support of his conclusion that the state lacks constitutional power to compel an adult motorcyclist to wear a protective helmet:

It cannot be questioned that requiring a motorcycle rider to wear a helmet will render him less likely to be injured. However, if a motorcycle

37 J. Donne, Devotions 108 (1959 ed.).
rider chooses to pursue his personal happiness by riding without a helmet it cannot be said that his choice will injure his fellow man. Therefore, the adoption of the proposed ordinance would be an unconstitutional restriction upon a person's civil liberty, for the ordinance seeks to restrict his liberty when such restriction will not result in a benefit to the public at large or tend to preserve the safety of the community.

Why then do courts respond so differently to what appear to be essentially similar decisions by Mrs. Lake, Justice Jackson, the coronary patient, and the motorcyclist? Because these similarities are obscured by the medical model imposed upon Mrs. Lake's case, but not upon the others. Most courts would distinguish the cases by simply stating that Mrs. Lake is mentally ill, while Jackson, the coronary patient, and the cyclist are not, without pausing to ask whether there is anything about her "mental illness" which makes her case functionally different from the others. To be sure, there are some mentally ill people whose decisions are different from those made by Justice Jackson and the coronary patient. Some mentally ill people have little insight into their condition, the risks it poses, and the possibility of change. Their capacity for choosing between the risks of liberty and the security of incarceration may be substantially impaired. And in some cases perhaps the state ought to act in parens patriae and make the decision for them. But not all persons so diagnosed are incapable of weighing risks and making important decisions. This has been recognized by some of the very psychiatrists who advocate the medical model most forcefully. Dr. Jack Ewalt, Chairman of the Department of Psychiatry at Harvard, recently offered the following observation to a Senate Subcommittee:

The mentally sick patient may be disoriented, but he is not a fool. He has read the newspapers about overcrowded and understaffed hospitals. He is alert to the tough time he will have getting a job when he gets out, if he does get out. He knows that there lurks in the minds of his former friends the suspicion that he is a dangerous fellow. He is sensitive that a mother may recoil in fright if he stops to give her child a pat on the head.

But Dr. Ewalt uses this sensitive observation, not as an argument in favor of increased self-determination by the mentally ill, but rather as showing the need for medical commitment without judicial interference.

The appropriateness and limitations of such benevolent compulsion are in the forefront of our concerns in the criminal law. (Witness the wide attention received by the Hart-Devlin debate.) Although there is as much reason for concern about these issues in the civil commitment context, they are being ignored, because the law has inadvertently relegated them to the unarticulated value judgments of the expert psychiatrist.

This is equally true of another important question which rarely gets asked in the civil commitment process: how likely should the predicted event have to be to justify preventive incarceration? Even if it is agreed, for example, that preventing a serious physical assault would justify incarceration, it still must be decided whether the occurrence of the predicted assault is sufficiently likely to justify this sanction. If the likelihood is very high—say 90%—then a strong argument can be made for some incarceration. If the likelihood is very small—say 5%—then it would be hard to justify confinement. Here, unlike the process of defining harm, little guidance can be ob-
tained from the criminal law, for there are only a few occasions where the criminal law is explicitly predictive, and no judicial or legislative guidelines have been developed for determining the degree of likelihood required.

But someone is deciding what degree of likelihood should be required in every case. Today the psychiatrist makes that important decision: he is asked whether a given harm is likely, and he generally answers yes or no. He may—in his own mind—be defining likely to mean anything from virtual certainty to slightly above chance. And his definition will not be a reflection of any expertise, but again of his own personal preference for safety or liberty.

Not only do psychiatrists determine the degree of likelihood which should be required for incarceration. They are also the ones who decide whether that degree of likelihood exists in any particular case.

Now this, you may be thinking, is surely an appropriate role for the expert psychiatrist. But just how expert are psychiatrists in making the sorts of predictions upon which incarceration is presently based? Considering the heavy—indeed exclusive—reliance the law places on psychiatric predictions, one would expect there to be numerous follow-up studies establishing their accuracy. Over this past few years I have conducted a thorough survey of all the published literature on the prediction of anti-social conduct. I have read and summarized many hundreds of articles, monographs, and books. Surprisingly enough, I was able to discover fewer than a dozen studies which followed up psychiatric predictions of anti-social conduct. And even more surprisingly, these few studies strongly suggest that psychiatrists are rather inaccurate predictors; inaccurate in an absolute sense, and even less accurate when compared with other professionals, such as psychologists, social workers and correctional officials, and when compared to actuarial devices, such as prediction or experience tables. Even more significant for legal purposes: it seems that psychiatrists are particularly prone to one type of error—overprediction. In other words, they tend to predict anti-social conduct in many instances where it would not, in fact, occur. Indeed, our research suggests that for every correct psychiatric prediction of violence, there are numerous erroneous predictions. That is, among every group of inmates presently confined on the basis of psychiatric predictions of violence, there are only a few who would, and many more who would not, actually engage in such conduct if released.

One reason for this over-prediction is inherent in the mathematics of the situation: violent conduct is extremely rare, even among the mentally ill, and any attempt to predict a rare event necessarily results in an undue number of false positives.

Another reason is that the psychiatrist almost never learns about his erroneous predictions of violence—for predicted assailants are generally incarcerated and have little opportunity to prove or disprove the prediction. But he always learns about his erroneous predictions of non violence—often from newspaper headlines announcing the crime. This higher visibility of erroneous predictions of non violence inclines him, whether consciously or unconsciously, to overpredict rather than underpredict violent behavior.

Moreover, the cardinal rule of medical and psychiatric diagnosis—that "judging a sick person well is more to be avoided than judging a well person
"suggests that overprediction as a modus operandi is built into the medical model under which the psychiatrist works.

What then, have been the effects of virtually turning over to the psychiatrists the civil commitment process? We have accepted a legal policy—never approved by any authorized decision maker— which permits significant overprediction. In effect this is a rule that it is better to confine ten men who would not assault than to let free one man who would, or, in terms of the adage, that a pound of prevention is worth an ounce of cure.

Now it may well be that if we substitute functional legal criteria for the medical model, we would still accept many of the answers we accept today. Perhaps our society is willing to tolerate significant overprediction. Some of the proposals for pretrial preventive detention suggest that. Perhaps we do want incarceration to prevent minor social harms. Perhaps we do want to protect people from themselves as much as from others. But we will never learn the answers to these questions unless they are exposed and openly debated. And such open debate is discouraged—indeed made impossible—when the questions are disguised in medical jargon against which the lawyer—and the citizen—feels helpless.

The lesson of this experience is that no legal rule should ever be phrased in medical terms; that no legal decision should ever be turned over to the psychiatrist; that there is no such thing as a legal issue which can not—and should not—be phrased in terms familiar to lawyers. And civil commitment of the mentally ill, like other mechanisms of preventive detention, is a legal issue. Whenever compulsion is used or freedom denied—whether by the state, the church, the union, the university, or the psychiatrist—the issue becomes a legal one, and lawyers must be quick to immerse themselves in it.

If courts, legislatures, and psychiatrists continue to phrase the critical questions of preventive detention in the scientific sounding jargon of psychiatry or any other discipline, then lawyers must become cryptographers; they must learn to break these codes. They must know exactly what it is the psychiatrist is saying: what is fact and what is fiction; what is theory and what is opinion; what is value judgment and what is bias. The testimony of the expert must be exposed to the glaring light of public understanding, so that the people, and not the pundits, may decide how much deprivation of individual liberty should be permitted to achieve a tolerable level of safety. So long as hundreds of thousands of our citizens remain confined by psychiatric prescription, lawyers and law students have an obligation to acquire an understanding of the tenets of this discipline, because, in the words of Holmes, "When you get the dragon out of his cave on to the plain and into the daylight, you can count his teeth and claws, and see just what is his strength." Nor should we be diverted from this task by the seductive labels attached to confinement; labels such as therapy, treatment, help, and prevention. The words of Brandeis ring as true today as they did in 1927, and are even more applicable to the psychiatrist and the juvenile court judge than they were to the wiretapper:

. . . Experience should teach us to be most on our guard when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.40

40 Olmstead v. United States, 277 U.S. 438, 479 (1928).