RESPONSIBILITY AND CONTROL

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In two recent cases, *Kansas v. Hendricks*[1] and *Kansas v. Crane*,[2] the Supreme Court upheld sex predator legislation. The Kansas statute,[3] which is similar to legislation adopted in other states,[4] provides for the indefinite detention of those classified as sex predators. The detention is to begin *after* the offender has served a prison term and will continue for as long as he remains dangerous.[5] One objection to the legislation had been that it permitted the detention of individuals who were considered legally sane and who were not being punished for any past crime (having paid the penalty for the crime that brought them to the law's attention). Some thought that approving preventive detention in such cases was an abuse of traditionally recognized rights under the Constitution.[6]

The Court carved a limitation out of the language of the statute: it found that the legislation permitted indefinite detention only of those sex offenders who could not control their sexually violent behavior.[7] Hendricks had freely admitted that he could not control his behavior, and

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1. 521 U.S. 346 (1997).

2. 534 U.S. 407 (2002).

3. KAN. STAT. ANN. §§ 59-29a01 to 29a15 (1994).

4. See, for example, the Washington state statute, WASH. REV. CODE ANN. § 71.09.010 to 71.09.902 (West 2002).

5. *See* KAN. STAT. ANN. § 59-29a07.

6. In its amicus brief, the ACLU, for example, argued that the Act violated substantive due process because "in reality [though labeled civil commitment, the Act] is intended to extend indefinitely the confinement of sex offenders considered dangerous, but who are not mentally ill, even though they have completed their judicially imposed incarceration and are legally entitled to be released." Brief of the ACLU et al. as Amici Curiae Supporting Respondents at 9, Kansas v. Hendricks, 521 U.S. 346 (1997) (No. 95-1649), 1996 WL 471020. There was an earlier period during which the states adopted sexual-psychopath legislation:

> Starting in the 1950s, sexual psychopaths, however defined, were targeted for indefinite detention. Many of these offenders were not dangerous, but were considered socially deviant, and upon conviction were either sentenced or committed civilly. During the early to mid-1990s, a number of states reinvigorated their civil commitment statutes for sex offenders, despite the criticism levied against earlier legislation . . . and its abolition during the 1970s.

Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and* Sicherungverwahrung, 30 FORDHAM URB. L.J. 1621, 1629-30 (2003) (footnotes omitted).

7. *Crane*, 534 U.S. at 412 (rejecting the argument that "the Constitution permits commitment of the type of dangerous sexual offender considered in *Hendricks* without *any* lack-of-control determination"); *cf*. *Hendricks*, 521 U.S. at 358 ("The precommitment requirement of a 'mental abnormality' or 'personal disorder' is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.").

so his detention was affirmed.[8] But Crane had not confessed to any lack of control, nor had the state made any showing of a lack of control in his case, and so the *Crane* case was sent back for a determination of that issue.[9] This was not merely intended to be an interpretation of the statute. It was clear that if the Court had not been able to read the limitation into the legislation, the legislation would not have withstood constitutional scrutiny.[10]

The Court's reliance on lack of control as an essential characteristic of the detainable sex predator has bothered some commentators. In the second half of the twentieth century there had been an intense campaign to rid the law of what was described as an incoherent notion, namely the idea that someone who was fully rational might lack control over his intentional actions. Unless the actor suffered from a defect of rationality or cognition,[11] it was argued, he was responsible for what he did.[12] The campaign was remarkably successful, affecting most notably the laws governing insanity and addiction.[13]

The trend in insanity law had been to excuse both those who suffered from an absence of rationality—a cognitive defect—and those who suffered from a lack of control—a volitional defect. Starting in the 1980s, roughly at the time of the assassination attempt on the life of Ronald Reagan, the momentum began to go in the other direction. For example, where federal courts generally had adopted the Model Penal Code's ("M.P.C.") approach recognizing both cognitive and volitional defects,[14] in 1984 Congress imposed a new insanity defense by statute,

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8. *Hendricks*, 521 U.S. at 354-55.

9. *Crane*, 534 U.S. at 411-12, 415.

10. Thus there was a disagreement between Justice Thomas, the author of the earlier *Hendricks* opinion, and the majority in the later *Crane* case. Although Thomas had spoken of a lack of control as a condition of detention, he joined the Scalia dissent in the *Crane* case which denied that that was what was intended. *See Crane*, 534 U.S. at 422-25 (Scalia, J., dissenting). Nevertheless, the *Crane* majority insisted upon it, and it seems unlikely that Thomas would have gotten a majority to uphold the statute in *Hendricks* if he had not been understood to have intended to limit the statute's application to those who could not control their behavior.

11. Throughout this Article, I will treat the phrases "defect of rationality" and "cognitive defect" as more or less interchangeable. Rationality and cognition are, of course, not the same thing; one has to do with the processing of information and the other with the acquisition of information. But the defects that are intended when there is talk in criminal law of either defects of rationality or cognitive defects include both defects in processing—for example, a persistent tendency to find threatening situations in the most harmless circumstances—and defects in acquisition—for example, the tendency to hear voices when no one is speaking.

12. *See, e.g.*, Insanity Def. Work Group, Am. Psychiatric Ass'n, *APA Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 681-82 (1983) [hereinafter *APA Statement on the Insanity Defense*].

13. For the changes in the insanity defense, see RICHARD J. BONNIE ET AL., A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY, JR. 121-37 (2d ed. 2000).

14. Section 4.01 of the M.P.C. states: "A person is not responsible for criminal conduct if at

one recognizing only cognitive or rationality defects.[15] Many states made similar changes; jurisdictions that still had something like the old *M'Naghten* cognitive test simply kept the law they had. By my survey, thirty states, in 1980, had two-prong insanity rules, with both cognitive and volitional prongs: only eighteen still had the older one-prong test.[16] By 2004, only fifteen states still had the two-prong test, and thirty had the one-prong, purely cognitive test.[17]

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the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01 (1962) (alteration in original). The first part, involving the capacity to appreciate, is the cognitive branch; the second part, involving the capacity to control, is the volitional branch.

15. The statute states:

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.

18 U.S.C. § 17(a) (1992). This statute differs from the M.P.C. defense primarily in dropping the volitional branch of that defense. But it also introduces the word "severe" before "mental disease or defect." *Compare id. with* MODEL PENAL CODE § 4.01 (1962).

16. States with a two-prong test in 1980 include: Alabama, Parsons v. State, 2 So. 854 (Ala. 1887); Alaska, ALASKA STAT. § 12.45.083(a) (1972); Arkansas, ARK. CODE ANN. § 41-601 (1977); California, People v. Drew, 583 P.2d 1318 (Cal. 1978); Colorado, COLO. REV. STAT. § 16-8-101 (1973); Connecticut, CONN. GEN. STAT. ANN. § 53a-13 (1971); Delaware, DEL. CODE ANN. tit. 11, § 401 (1979); Hawii, HAW. REV. STAT. § 704-400 (1976); Idaho, State v White, 456 P.2d 797 (Idaho 1969); Illinois, People v. Meeker, 407 N.E.2d 1058 (Ill. 1980); Indiana, IND. CODE ANN. § 35-41-3-6 (1979); Kentucky, Henderson v. Commonwealth, 507 S.W.2d 454 (Ky. 1974); Maine, ME. REV. STAT. ANN. tit. 17-A, § 58(1) (1976); Maryland, MD. CODE ANN., CRIM. PROC. § 59-25 (1979 repl. vol.); Massachusetts, Commonwealth v. McHoul, 226 N.E.2d 556 (Mass. 1967); Michigan, People v Crawford, 279 N.W.2d 560 (Mich. 1979); MICH. COMP. LAWS ANN. § 768.21a(1) (Supp. 1980); MICH. STAT. ANN. 28.1044(1) (Callaghan 1978); Missouri, MO. REV. STAT. § 552.030 (1969); Montana (up to 1979); New Mexico, State v. Dorsey, 603 P.2d 717 (N.M. 1979) (discussing a a third prong to the two-prong test); North Dakota, N.D. CENT. CODE, § 12.1-04-03 (Supp. 1976); Ohio, State v Staten, 267 N.E.2d 122 (Ohio 1971), *vacated* 408 U.S. 938 (1972); Oregon, OR. REV. STAT. § 161.295(1) (1971); Rhode Island, State v Johnson, 399 A.2d 469 (R.I. 1979); Tennessee, Graham v. State, 547 S.W.2d 531 (Tenn. 1977); Texas, TEX. PENAL CODE ANN. § 8.01 (Vernon 1974); Utah, UTAH CODE ANN. § 76-2-305 (Supp. 1975); Vermont, State v. Goyet, 132 A.2d 623, (Vt. 1957); Virginia, Davis v. Commonwealth, 204 S.E.2d 272 (Va. 1974); West Virginia, State v. Grimm, 195 S.E.2d 637 (W. Va. 1973); Wisconsin, WIS. STAT. ANN. § 971.15 (1971); Wyoming, WYO. STAT. ANN. § 7-242.4 (1975). One state, Montana, had no insanity defense at all, having gotten rid of it entirely in 1979; New Hampshire had its own test which did not involve particular volitional or cognitive disabilities. *See* State v Plummer, 374 A.2d 431 (N.H. 1977).

17. Of the thirty states (excluding Montana) which had a two-prong test in 1980, the following reverted to a one prong test by 2005: Alabama, ALA. CODE § 13A-3-1 (2005); Alaska, ALASKA STAT. § 12.47.010 (2005); California, CAL. PEN. CODE § 25 (2005); Delaware, DEL. CODE ANN., tit. 11, § 401 (2005); Illinois, 720 ILL. COMP. STAT. 5/6-2 (2005); Indiana, IND. CODE ANN. § 35-41-3-6 (Burns 2005); Maine, ME. REV. STAT. ANN. tit. 17-A, § 39 (2005); Missouri, MO. REV. STAT. § 552.030 (2005); North Dakota, N.D. CENT. CODE, § 12.1-04.1-01 (2005); Ohio, OHIO REV. CODE ANN. § 2901.01(A)(14) (2005); Tennessee, TENN. CODE ANN. § 39-11-501 (2005); Texas, TEX. PENAL CODE ANN. § 8.01 (2005). Some states went from a two-prong test to no insanity

Similarly, although the Supreme Court had begun a line of reasoning in *Robinson v. California*[18] that might have led to a constitutional excuse for the addict who was unable to control his behavior,[19] that line came to an abrupt halt in *Powell v. Texas*,[20] at least as far as the constitutional issue goes. And the idea that the addict suffered from control difficulties that might warrant a *common law excuse* in spite of *Powell* received a typical reception in *United States v. Moore*.[21] One argument most of the judges found persuasive in *Moore* was that an addiction excuse could not be restricted to possession and other addictive behavior, but would have to be extended to armed robbery, if that was required to support an addict's habit.[22] But the more interesting argument, from our point of view, was the one disparaging control difficulties, which found expression, for example in the concurring opinion of Judge MacKinnon:

> In my view the most impractical aspect of the "lack of substantial capacity to conform their conduct" test is that in applying such test it would be practically impossible to separate those who *lacked* substantial capacity to conform their conduct to the law from those who possessed such capacity but who merely *refused* to conform their conduct. . . . It would thus be the cause of great mischief besides favoring gross users of narcotics over those less addicted.[23]

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defense at all: Montana (in 1979), MONT. CODE ANN. § 95-501(a) (Smith 1947 & Supp. 1977) (repealed 1979); Utah, UTAH CODE ANN. § 76-2-305 (2005) (stating that mental illnes is a defense to the mental-state element of the offense charged only); and Idaho, IDAHO CODE ANN. § 18-207 (2005). New Hampshire still had its own unique version of the defense, N.H. REV. STAT. ANN. 628:2 (2005). Kansas, which had a one prong test in 1980, has no separate insanity defense at all, KAN. STAT. ANN. § 22-3220 (2005).

18. 370 U.S. 660 (1962).

19. *See* Easter v. Dist. of Columbia, 361 F.2d 50, 51, 53, 55 (D.C. Cir. 1966); Driver v. Hinnant, 356 F.2d 761, 764-65 (4th Cir. 1966). Justice Stewart, speaking for the majority in *Robinson*, used the unfortunate term "disease" in describing addiction, suggesting that the addict was utterly without control over his behavior. *Robinson*, 370 U.S. at 666-67. But there was also talk about compulsion and the severe difficulty some addicts had in avoiding addictive behavior. According to Justice Douglas, "the addict is under compulsions not capable of management without outside help." *Id.* at 671 (Douglas, J., concurring). The "disease" label is a red herring that has drawn a lot of abuse and that has deflected rational discussion of addiction. What is important is not whether addiction is a disease or not, but whether the addict has unusual difficulty in conforming his behavior to the law. Difficulty in conforming to the law is always a factor in assessing blame, and, after a certain point, the severity of the difficulty should relieve the actor of responsibility. The only controversial issue is where to draw the line.

20. 392 U.S. 514 (1968).

21. 486 F.2d 1139 (D.C. Cir. 1973).

22. *Id.* at 1146; *see also id.* at 1260 (Bazelon, C.J., concurring in part and dissenting in part).

23. *Id.* at 1208 (MacKinnon, J., concurring); *accord APA Statement on the Insanity Defense*, *supra* note 12, at 685 (distinguishing between inability to conform and simple failure to conform to the law, and stating "[t]he line between an irresistible impulse and an impulse not resisted is

But no sooner had the idea of control difficulties begun to leave by the front door than it began to creep in again by the back door, in such things as sex-predator legislation and the guilty-but-mentally-ill plea. The Kansas statute, like many such statutes, applied to those with a "congenital or acquired condition affecting the emotional or *volitional* capacity which predisposes the person to commit sexually violent offenses."[24] That statutory language is the language the *Crane* majority interpreted to require a control defect. In some states, the new guilty-but-mentally-ill statute similarly provides for imprisonment followed by indefinite detention for those who suffer from volitional but not cognitive defects.[25]

Commentators who opposed the idea of control defects when the insanity defense was in issue ought to oppose the idea in the context of sex-predator and guilty-but-mentally-ill legislation. Although there is not the same *political* opposition—after all, both sorts of legislation *extend* the criminal penalty rather than provide an excuse—serious commentators do in fact raise the same objections: they argue that the notion of control difficulties is incoherent; that there is no more difference between being unable to conform and being unwilling to conform than there is between "dusk and twilight"; and that anyone rational who has willed an action *eo ipso* is in control of it.[26]

If these commentators are right, what should happen to such things as the sex predator legislation? One of two things: Either it should be withdrawn, and sex offenders who were not incapable of rational thought—and thus not legally insane—should be treated as fully sane and punished but not detained; or the identification of sex predators should depend upon some other characteristic that justifies preventive detention. Stephen Morse has proposed the first alternative, which has

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probably no sharper than that between twilight and dusk").

24. KAN. STAT. ANN. § 59-29a02(b) (1994) (emphasis added).

25. For such an example, see Delaware's statute:

> Where the trier of fact determines that, at the time of the conduct charged, a defendant suffered from a psychiatric disorder which substantially disturbed such person's thinking, feeling or behavior and/or that such psychiatric disorder left such person with insufficient willpower to choose whether the person would do the act or refrain from doing it, although physically capable, the trier of fact shall return a verdict of "guilty, but mentally ill."

DEL. CODE ANN. tit. 11, § 401(b) (2004). Another example can be seen in South Carolina:

> A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong . . . but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

S.C. CODE ANN. § 17-24-20(A) (2003).

26. *See infra* text accompanying notes 90-95.

the advantage of preserving the classical distinction between those who are responsible for what they do, and thus may be punished but not detained, and those who are not responsible for what they do, and thus may be detained but not punished.[27] Christopher Slobogin has proposed the second, taking undeterrability as the relevant characteristic.[28] While Slobogin's proposal would save sex predator legislation, it would also justify the extension of indefinite detention to others not easily deterred—hardened criminals, accused terrorists, and so on. It is worth noting that the question of extending indefinite detention to citizens accused of terrorist activities has already been raised and that *Hendricks* was among the cases cited in support of that extension.[29]

I think both positions are mistaken. Regardless of the merits or demerits of the two proposals, they both rest on the same mistaken premise—that we cannot make sense of a lack of control. Slobogin follows Morse in this, but Morse's arguments are rather thin and don't support the premise. Indeed, as I will try to show, a consistent definition of a control difficulty is possible. But even if that is so, and even if the Supreme Court is right and the idea of an individual lacking control over his behavior does make sense, that doesn't mean that the sex-predator legislation should stand. For if it is possible for those who understand what they are doing to nevertheless lack control over it, then if we still believe that responsibility for a crime is a condition of punishment, we must take the question of the punishment of compulsive sex offenders seriously. We must reconsider the insanity defense and its rationale. We must determine whether those who cannot fully control their behavior, if there are any who cannot control their behavior,[30] should be held

27. *See infra* text accompanying notes 43-44.

28. *See infra* note 53.

29. Padilla *ex rel*. Newman v. Bush, 233 F. Supp. 2d 564, 591 (S.D.N.Y. 2002), *aff'd on reh'g sub nom*., Padilla *ex rel*. Newman v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *aff'd in part, rev'd in part sub nom*., Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd*, Rumsfeld v. Padilla, 542 U.S. 426 (2004). In a related case, the United States District Court for the Eastern District of Virginia observed that "[t]his case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer." Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002).

30. The fact that an idea is coherent does not mean that it has any application to the actual world. But if the idea is coherent, then we can no longer dismiss evidence of the thing's existence out of hand. We must take seriously those clinicians who tell us that addicts—some addicts—may not have sufficient control over their behavior to be held responsible; we must take seriously those clinicians who tell us that those suffering from certain compulsions, including perhaps sexual compulsions, may not be in full control of their behavior. It may be that legal insanity is not the neatest category for those suffering from such compulsive behavior, but the cash value—nonresponsibility and possible detention—should be the same when serious violent crimes are in question.

responsible for what they do. And only the answer to that question will determine the proper fate of sex predator legislation.

I. A STRAIN ON TRADITIONAL CATEGORIES

Under what I will call the traditional view of punishment, the state was limited by two presuppositions:

> 1. Only those who are responsible for what they do may be punished.
> 2. Only those who have a reasonable awareness of the consequences of their actions and a fair opportunity to do otherwise may be held responsible for what they do.[31]

A fair opportunity to do otherwise includes the *ability* to do otherwise and control over what you do.[32] Under this view, those who broke the law but were not able to appreciate the consequences of their actions or were not in control of them might be detained or committed but not punished. If we set out the various possibilities on a matrix it would look something like this:

	Reasonably Able to Appreciate Consequences	*Not Reasonably Able to Appreciate Consequences*
Reasonably in Control	1. Punishable	2. Detainable but not punishable
Not Reasonably in Control	3. Detainable but not punishable	4. Detainable but not punishable

Under the traditional understanding, those in the first quadrant are responsible for what they do and may be punished. Those in the other quadrants are not responsible and may not be punished.

What has changed with the sex-predator legislation, and with the entire assault upon the requirement of control, is the third quadrant. The sex predator is not legally insane, and he may be punished. The matrix now looks like this, at least with respect to sex predators:

	Reasonably Able to Appreciate Consequences	*Not Reasonably Able to Appreciate Consequences*

31. H. L. A. Hart, *Negligence,* Mens Rea*, and Criminal Responsibility*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 136, 152 (1968); Michael Corrado, *Notes on the Structure of a Theory of Excuses*, 82 J. CRIM. L. & CRIMINOLOGY 465, 471 (1991).

32. *See* Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 478 (1968). On the element of control, see JOHN MARTIN FISCHER & MARK RAVIZZA, RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY 240-44 (1998). On the ability to do otherwise and on the Frankfurt counterexamples to that element, see Michael Corrado, *Automatism and the Theory of Action*, 39 EMORY L.J. 1191, 1222-27 (1990).

Reasonably in Control	1. Punishable	2. Detainable but not punishable
Not Reasonably in Control	3. Detainable *and punishable*	4. Detainable but not punishable

This change is true not only of sex predators, but (as I have pointed out above) also of some adjudged *guilty but mentally ill*. That is, in some jurisdictions offenders who understand what they are doing but are unable to control their behavior nevertheless will, under guilty-but-mentally-ill legislation, be found sane and sentenced to imprisonment, to be followed by indefinite detention.

To justify this new treatment of individuals in category three, we must reject one or the other of the premises set out above. Since those who cannot control their behavior are subject to punishment, it follows that either punishment does not require responsibility or responsibility does not require control. Whichever of the two premises we reject, however, other pressing questions arise. Suppose that we take the first option, that punishment does not require responsibility. Then, the fact that those who up to now have been considered legally insane are not responsible for what they do is irrelevant, and they may be punished. There is no problem, then, about punishing those in the third group. But if responsibility is irrelevant to punishment, neither would there be a problem about punishing those in the second and fourth groups. The implications for the matrix are seen here:

	Reasonably Able to Appreciate Consequences	*Not Reasonably Able to Appreciate Consequences*
Reasonably in Control	1. Punishable	2. Detainable *and punishable*
Not Reasonably in Control	3. Detainable and punishable	4. Detainable *and punishable*

The only difference among the quadrants is that those in the first quadrant are punished only and not detained.

On the other hand, suppose that we give up the presupposition that responsibility requires control. Then those in the third quadrant are responsible for what they do, and that explains why they may be punished. Since responsibility still requires awareness, however, those in the second and fourth quadrants are not punishable. But if the distinction between the first and third quadrants does not consist in the

responsibility of those in the first group, the question becomes why the two groups should be distinguished at all. If those who are responsible for what they do may be both punished and detained, then why not punish *and detain* those in the first group? That is, why not preventive detention for those who *are* able to control their behavior?

Precisely this question has arisen in the recent terrorism litigation. In *Padilla ex rel. Newman v. Bush*,[33] the District Court asked itself whether a citizen said to have plotted terrorist activity might be indefinitely detained. It answered the question in the affirmative, citing the *Hendricks* case and others: "[I]nsofar as the [petitioner's] argument assumes that indefinite confinement of one not convicted of a crime is *per se* unconstitutional, that assumption is simply wrong."[34] If indeed terrorists and others in control of their behavior are to be subject to indefinite detention on the basis of future dangerousness, that suggests the following simplification of our matrix.

	Reasonably Able to Appreciate Consequences	*Not Reasonably Able to Appreciate Consequences*
Reasonably in Control	1. *Detainable and punishable*	2. Detainable but not punishable
Not Reasonably in Control	3. Detainable and punishable	4. Detainable but not punishable

The attempt to rationalize the sex predator statutes by rejecting either presupposition would have significant implications for whatever reasons we might offer for refusing to indefinitely detain those who can understand and control their behavior and for refusing to punish those who cannot.

It may be that we are at a point at which we are prepared to accept, for example, the possible indefinite detention of any persistent offender, even one who could appreciate the consequences of his actions and control them. Certainly we would not be the only nation to have gone down that road. It is, however, out of kilter with our Anglo-Saxon traditions,[35] and we should be clear about where the road leads. The first

33. 233 F. Supp. 2d 564, 569, 590-91 (S.D.N.Y. 2002), *aff'd on reh'g sub nom.* Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *aff'd in part, rev'd in part sub nom.* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd*, Rumsfeld v. Padilla, 542 U.S. 426 (2004).

34. *Id.* at 591.

35. *See* Ann Woolner, *If Only More People Saw Justices Rein in the President*, L.A. BUS. J.,

and most important point is that none of the protections that the Constitution provides for those threatened with punishment apply to those threatened with preventive detention, for, under the Constitution, preventive detention (so long as it is properly administered) is not punishment but regulation.[36] That means that double jeopardy, the presumption of innocence, the right to confront an accuser,[37] and other constitutional protections do not apply, except indirectly.[38] It also means that our uneasiness about things like proportionality, not clearly found in the Constitution[39] but deeply rooted in our feelings about the fair limits of punishment, can be set aside. For proportionality of sentence is not an issue in preventive detention; detention is for as long as it takes to make sure the offender is no longer dangerous. On the other side, we should be clear about the implications for the law of insanity. Up to now, commitment of the insane has required a showing of both mental illness and dangerousness.[40] An insanity acquittee who either regains his sanity or who remains insane but is no longer dangerous must, under current law, be released.[41] But commitment is nothing other than preventive detention. If we permit the indefinite detention of those who are legally

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July 12, 2004, at 47 (quoting United States Supreme Court Justice Antonin Scalia, who stated that "[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite detention at the will of the executive").

36. *See* United States v. Salerno, 481 U.S. 739, 746-47 (1987); *cf.* Allen v. Illinois, 478 U.S. 364, 370 (1986); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167-68 (1963). The right to a writ of habeas corpus transcends the distinction between punishment and regulation. A citizen is entitled to know why he is being detained. 18 U.S.C. § 3142(i)(1) (2002) (stating that "[i]n a detention order . . . , the judicial officer shall . . . include . . . a written statement of the reasons for the detention"). Once that right is satisfied, however, the various rights surrounding punishment do not kick in unless he is being punished—that is, unless he has been convicted and sentenced. *Kennedy*, 372 U.S. at 167.

37. See, for example, the case of Abu Ahmed Ali, an American citizen detained as a possible terrorist, whose lawyers argued to the court that they did not even have the right to know *the legal theory* on which their client was being detained, let alone the evidence supporting his detention. *Injustice, in Secret*, WASH. POST, Feb. 21, 2005, at A26. The courts might decide that Ali is indeed entitled to know the charges against him, but, if so, it will be on the basis of the right to a writ of habeas corpus. Once he knows the charges, he will still not be entitled to the privileges surrounding punishment (like the right to confront one's accusers) unless his attorneys can make the case that he is being punished and not simply detained as a dangerous person. *Allen*, 478 U.S. at 372 ("[I]nvoluntary commitment does not trigger the entire range of criminal procedural protections."); *see also Kennedy*, 372 U.S. at 167.

38. *See Allen*, 478 U.S. at 368. Although particular statutes may provide particular protections for those facing detention, the fact that these protections are not constitutional means that they are subject to prevailing opinions. *Id.* at 372, 375.

39. Although the Court has found a proportionality requirement when it comes to the death penalty, whether there is such a requirement in noncapital cases is a subject of some uncertainty after the divided opinion in *Harmelin v. Michigan*, 501 U.S. 957, 957, 959 (1991).

40. *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (quoting Jones v. United States, 463 U.S. 354, 362 (1983)).

41. *See Jones*, 463 U.S. at 368.

sane, then there is no reason in principle to release insanity acquittees once they have regained their sanity, so long as they remain dangerous.[42]

II. TWO RESPONSES

Many commentators are unwilling to accept these consequences. Stephen Morse, for one, has argued that the combination of punishment and preventive detention cannot be justified. But Morse locates the problem in what once would have seemed an unusual place: in the supposition that it makes sense to talk about people lacking control over their intentional actions. Morse believes that the idea of control difficulties is incoherent, and that those whose only defense is a claim that, though they understood what they were doing and that it was wrong, they could not help themselves, are responsible for what they do and should be punished and not preventively detained.[43] According to Morse, the only excuses that derive from the actor's mental condition are excuses based on cognitive defects:

> [T]he lack of the capacity for rationality is the central and normatively proper non-responsibility criterion in both law and ordinary morality. It can be applied workably and fairly and leaves room for moral, political, and legal debate about the appropriate limits of responsibility. The "control" language used in *Hendricks*, *Crane*, and other cases and statutes is metaphorical and better understood in terms of rationality defects.[44]

According to Morse, the idea that some people "can't help themselves" is an idea that doesn't make any sense at all.[45] Let's call this proposition, that lack of control doesn't make any sense, the assumption of perfect liberty.[46] More precisely, the assumption is this: Those who

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42. At this point, the holding in *Crane*, as well as the probable result of a constitutional test of the GBMI laws, both come into conflict with the holding in *Foucha v. Louisiana*, in which the Court declared that an insanity acquittee who had regained his sanity had to be released. *Foucha*, 504 U.S. at 80.

43. *See* Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL'Y L. 250, 258-59 (1998) [hereinafter Morse, *Fear of Danger*]. *See generally* Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1619-34 (1994) [hereinafter Morse, *Culpability and Control*].

44. Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1064 (2002) [hereinafter Morse, *Uncontrollable Urges*].

45. For my argument against this position, see Corrado, *supra* note 32 *passim*; Michael Corrado, *Addiction and Causation*, 37 SAN DIEGO L. REV. 913 *passim* (2000). The difference between a willed action that is within the control of the actor and a willed action that is not depends upon whether the willing itself is within the control of the actor. Moreover, Slobogin argues that if lack of control is unhelpful, Morse's notion of irrationality is not helpful either. *See* Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 41 (2003).

46. For a defense of this assumption, see generally Rogers Albritton, *Freedom of Will and*

act intentionally, unless they suffer from a defect of rationality, act freely and are responsible for what they do. According to that assumption, our matrix ought to look like this:

Reasonably Able to Appreciate Consequences	*Not Reasonably Able to Appreciate Consequences*
1. Punishable	2. Detainable but not punishable

Categories three and four, comprising those who understand what they are doing but are unable to control their behavior and those who do not understand what they are doing and cannot control their behavior, simply drop out.

Christopher Slobogin follows Morse in this.[47] But Slobogin does not agree with Morse about what should be done with sex offenders who simply refuse to obey the law. More generally, he is concerned about the offender who, though he understands and appreciates the consequences of his actions and could do otherwise if he chose, simply refuses to obey the law.[48] For example, what about the terrorist so committed to a political or religious cause that he will not be deterred by any threat of punishment? The suicide bomber, whether he straps explosives to his waist and aims to blow up people in the street or commandeers an airplane and aims to fly it into a building, is the paradigm example. The suicide bomber cannot be deterred by the threat of death, the threat of imprisonment, or the threat of reprisals against his community. The danger that the suicide bomber creates cannot be reduced to an appropriate level by the threat of punishment.[49]

Under the assumption of perfect liberty, Slobogin would assimilate the case of the compulsive sex predator to the case of the suicide bomber: both are perfectly free to do otherwise, but neither *will* do otherwise. He has refined the notion of undeterrability and made it the keystone of his theory of detention.[50] Unlike Morse, Slobogin would permit the detention of sex predators and criminals like them, provided that they were genuinely undeterrable, and it follows from his theory that the terrorist, at least the terrorist who like the suicide bomber will not be

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Freedom of Action, 59 PROC. & ADDRESSES AM. PHIL. ASS'N 239 (1985), *reprinted in* FREE WILL 408 (Gary Watson ed., 2d ed. 2003).

47. Slobogin, *supra* note 45, at 36-38.

48. *Id.* at 40-42.

49. *Id.* at 4, 46.

50. *See id.* at 40-46.

deterred, may be detained as well.[51] Detention is justified whenever "the individual lacks the capacity or lacks the willingness to adhere to society's basic norms."[52] For Slobogin, the matrix would perhaps look something like this:[53]

Deterrable	*Not Deterrable*
1a. Punishable	2a. Detainable

Slobogin rejects the control standard adopted in *Crane*[54] on grounds identical to those that persuaded Morse,[55] though he finds the irrationality standard accepted by Morse to be troublesome as well,[56] and would apparently supplant both with a single undeterrability standard.[57] He would maintain such things as sex-predator legislation, though with such safeguards as increasingly heavy burdens for the state to meet as detention drags out.[58] He argues that it is the undeterrability of certain offenders that justifies the use of detention against them. Although the ordinary offender is protected by his humanity against such treatment, and is entitled to punishment instead,[59] the undeterrable offender *loses* his essential humanity and thus may be detained.[60] He in effect becomes a "harmful animal."[61] "[T]hrough punishment 'the criminal is honoured as a rational being,'" he says, quoting Hegel.[62] It is an insult to the autonomy of the ordinary criminal to try to prevent him from committing crimes in the future by detaining him; it presumes that he does not have the capacity to choose the right path or, having the capacity, that he will not choose it. It denies his "status as a self-governing, autonomous human being."[63] But "preventive detention

51. *See id.* at 42, 46.

52. *Id.* at 29.

53. I use the qualifier "perhaps," in presenting the matrix for the following reason: It is clear from Slobogin's article that the person who is not undeterrable is entitled to be punished and should not be preventively detained. *See id.* at 29-30. It is also clear that the person who *is* undeterrable may be preventively detained (subject to appropriate restrictions). *See id.* What is not clear from Slobogin's article is whether the person who is undeterrable may also be subjected to punishment.

54. *See supra* notes 6-8 and accompanying text.

55. *See* Slobogin, *supra* note 45, at 36-37.

56. *Id.* at 41.

57. *See id.* at 42.

58. *See id.* at 62.

59. *Id.* at 29.

60. *Id.* at 29-30.

61. *Id.* at 30.

62. *Id.* at 29 (quoting G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 126 (Allen W. Wood ed., H. B. Nisbet trans., Cambridge U. Press 1991) (1821)).

63. *Id.* at 27.

eludes the dehumanization objection if the government . . . can show he will exercise his autonomy in the anti-social direction regardless of circumstance."[64] That is, it is not degrading to preventively detain someone who cannot understand what he is doing, and it is not degrading to preventively detain someone who though he does understand and though he can obey will not, because both are undeterrable and consequently neither one is entitled to the dignity accorded to an autonomous human being.

But what exactly does it mean to say that someone is undeterrable? Slobogin attempts to define undeterrability in psychological terms familiar in the criminal law:

> This notion is most meaningfully expressed not in terms of lack of control, irrationality, or the "likeliness" of being deterred, but rather in terms of two other psychological tendencies: either (1) *unawareness that one is engaging in criminal conduct*; or (2) *extreme recklessness with respect to the prospect of serious loss of liberty or death resulting from the criminal conduct*.[65]

According to Slobogin:

> [T]he formulation proposed here would encompass people who are lacking in autonomy due to mental disability and the like, as well as that small category of people who are not insane but who can nonetheless be denied the right to punishment because of their manifest obliviousness to society's most important criminal prohibitions.[66]

Preventive detention is appropriate for people in both those groups. Those who are deterrable, on the other hand, are entitled to punishment instead of detention.[67]

Slobogin says that "[t]he old policeman-at-the-elbow test puts the matter succinctly."[68] In other words, if the offender is willing to commit the crime in spite of the fact that there is a policeman looking over his shoulder and apprehension is certain, then he is undeterrable. I agree that such a person would qualify as undeterrable if anyone would, but it is not a *test* of undeterrability. Since all that is necessary, Slobogin admits, is that the offender be "extremely reckless" about apprehension and punishment, punishment doesn't have to be certain, as it would be with a policeman standing by. It is enough if the criminal is willing to act

64. *Id.* at 45-46.
65. *Id.* at 42.
66. *Id.* at 35.
67. *See id.* at 5.
68. *Id.* at 43.

despite a sizeable risk that he will be apprehended and punished.

III. SOME THOUGHTS ON VOLITIONAL DEFECTS AND UNDETERRABILITY

A. Undeterrability

Slobogin groups undeterrable sex predators with undeterrable terrorists because he accepts Morse's position on the lack-of-control standard. He believes that lack of control makes no sense, and so there is no difference in capability and responsibility between the sex predator and the terrorist. I believe there are a number of problems with his position.

1. "The Undeterrable Offender Loses Her Humanity"

The first problem is this: Why does the determined criminal, the one who risks even death to accomplish his goal, lose his humanity? Whatever the metaphor of losing one's humanity may mean, it would hardly seem to apply to those who act out of motives we admire, those who act out of a sense of honor and with great bravery. And yet Slobogin's theory would seem to mean that some such people are less than human, are not entitled to punishment, and may be preventively detained to keep them from causing harm in the future. Think of the civilly disobedient. Think, for example, of the young protestor who broke Israeli law by trying to obstruct a bulldozer and who was run over and killed for her trouble.[69] Perhaps she did not intend to suffer death; perhaps it was all an accident. But would we have thought less of her if we found out that in fact she had known that death was likely and confronted it willingly to make her point? I suggest that the opposite is true. Whatever our political beliefs, we would have been forced to admire her. Yet I believe that, on Slobogin's view, she has lost her humanity; indeed, would the act of the driver who killed her be a punishable act if what Slobogin says is true?

And how would you distinguish the terrorist, whom we now claim is not protected by the rules of war, from the extraordinary prisoner of war who is actually willing to fight and die for the sake of his country? I suggest that, far from losing their humanity, some of the people we most

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69. The victim was a 23-year-old American, Rachel Corrie. There are conflicting stories about whether the killing was deliberate or merely accidental, and about whether, at the last moment, she refused to move or simply slipped and fell. *Israeli Bulldozer Kills American Protester*, CNN.COM, Mar. 25, 2003, http://www.cnn.com/2003/WORLD/meast/03/16/rafah.death/index.html (last visited Oct. 31, 2005).

admire fall into these groups; they represent the highest sort of humanity. And if humanity means that indefinite preventive detention is inappropriate, as Slobogin suggests,[70] then it would be inappropriate at least in the most admirable of these cases.[71] But there is no morally neutral way, I would suggest, to distinguish between those resisters we admire and those terrorists we abhor. If one loses her humanity on the single ground that she is undeterrable, so does the other. I would argue that neither does, neither the good nor the evil. We might be willing to say in this metaphorical language that one who, like the sex predator, lacks the human capacity to control her behavior, lacks an essential ingredient of humanity. But one who, in the face of great danger, simply refuses to obey, is doing something human and perhaps more than human. If it honors humanity to punish their behavior, then they should be punished. On the terms of his own argument, then, Slobogin should reject preventive detention of the sane—that is, he should reject what I have called pure preventive detention.

2. "Extreme Recklessness is a Mark of Undeterrability"

The second problem has to do with the definition of undeterrability. The first category of undeterrability, remember, includes those who are unaware that they are engaging in criminal conduct. The second includes those who are extremely reckless with respect to a serious loss of liberty or death resulting from the criminal conduct. The problem is that the second category draws no clear line between the ordinary criminal and the sort of person that I believe Slobogin would like this category to include.

Every criminal takes a chance that he will be apprehended and punished. How great must the chance be before he moves from the

70. *See* Slobogin, *supra* note 45, at 29-30.

71. Kant discusses the interesting (though now unfashionable) case of the young military officer whose honor has been challenged and who kills another in a duel. IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 143-44 (John Ladd trans., 2d ed. Hackett Publ'g 1999) (1797). The officer was clearly willing to suffer death to avenge his honor and so cannot be deterred by the threat of punishment. *Id.* Far from supposing that he should be preventively detained to prevent a recurrence, Kant argues that the state does not even have the authority to justly punish him, because the state is responsible, in a way, for this outcome of an insult to honor (perhaps because the state does not adequately punish insults to honor). *Id.* at 144; *see also* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 73-74 (Henry Paolucci trans., Bobbs-Merrill 1963) (1764) ("[T]he best method of preventing this crime is to punish the aggressor, namely, the one who has given occasion for the duel, and to acquit him who, without personal fault, has been obliged to defend what the existing laws do not assure him, that is, opinion."). It is not that he is *beneath* punishment; he will have to be punished, but the punishment remains unjust. KANT, *supra*, at 143-44. The only case in which Kant seems willing to favor something like preventive detention for the sane is the case, oddly, of bestiality, for which, having chosen to leave the human race by his act, the offender is to be put outside society. *Id.* at 172 (supplementary remarks).

category of the punishable into the category of the detainable? Slobogin says that he must be willing to run a *significant* risk of a *substantial* punishment.[72] But how much is significant, and how much is substantial? The punishments that are risked by criminals are sometimes very substantial indeed. In those cases, how great must the risk be before it is significant? Do we determine the amount of risk based upon the criminal's calculations, or by using more objective measures? Using the standards of the criminal law, we would have to say that causing a twenty-percent chance of death or of life imprisonment would be more than reckless; it would be something close to depraved-heart indifference. Should every criminal who believes that the chance of death or of life in prison for his crime is twenty percent or more be subject to indefinite detention?[73]

The problem is not so much coming up with the right figures as it is in explaining why those a bit on one side of the line should be subject to punishment only, while those a bit on the other side should be subject to indefinite detention. The difference between punishment and detention is not a difference in degree; it is a difference in kind. If Slobogin is right, it depends upon the humanity of the offender. But whatever it is in us that "humanity" stands for, it can't be something that disappears as the actor's tolerance for risk edges up a bit. And beyond that, of course, is the enormous potential for abuse.

B. Volitional Defects

But the most serious problem with Slobogin's position is a problem that it shares with Morse's theory: the assumption of perfect liberty. The notion that some people cannot control their behavior, have great difficulty in controlling their behavior, or "can't help themselves," is a notion with a foundation in common sense—as Morse himself admits[74]—and it seems to me that we should be cautious about dismissing any such deeply rooted notions, particularly when the arguments for dismissal are based upon premises less secure and less well founded in evidence than the notion to be rejected. The idea of control difficulties, the idea that people who know full well what they

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72. *See* Slobogin, *supra* note 45, at 43-44.

73. And what should we say about the person who, when provoked severely enough, will disregard a high risk of punishment? The criminal justice system that we have *mitigates* his punishment. *See* Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstrution of Free Will*, 60 ALB. L. REV. 1127, 1154-56 (1997). *See generally id.* at 1154-63 (discussing the definition and history of provocation as mitigation of punishment for crimes). Should he be indefinitely detained instead? Detained only when he is provoked?

74. *See* Morse, *Uncontrollable Urges*, *supra* note 44, at 1034-35, 1059-60.

are doing sometimes cannot help themselves, shows a kind of stubbornness. It will not easily be put down, as its re-emergence in the new legislation shows. And even if we were able to do away with the notion of control difficulties or volitional disabilities it would require a more thorough-going revamping of our system of criminal justice than Morse and others may be willing to countenance.[75]

Still, it is worth taking the time to discover why the idea that control difficulties or volitional disabilities simply do not exist is popular among legal theorists. Morse is perhaps the most distinguished legal psychologist to have taken this position. Over the years he has refined a series of arguments to support his conclusion that the only excuses that make sense are those based on cognitive or rationality defects. His writing on the subject has been too extensive for me to try to consider all of his arguments here, so I will confine myself to some of the more important and influential ones.

1. "All Human Behavior Either is Voluntary or is Not Action at All"

All human behavior is either willed or not willed by the actor.[76] Behavior that is not willed is not action at all, according to Morse,[77] and of course the agent may not be responsible for such behavior. For example, our movements when we thrash about in our sleep are not willed. Spasms are not willed. Unless the actor performed an action earlier knowing that it might cause the thrashing or the spasm, she is not responsible for it.[78] But sleep movements and spasms are not the sort of behavior that is generally at issue when the claim is made that someone cannot control himself. The question is whether there may be *actions*—willed movements—that are not within the agent's control. The answer, according to Morse, is that all genuine action is willed, and, if it is willed, it is voluntary.[79] Just as the idea of unwilled *action* doesn't make

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75. *See* Michael L. Corrado, *The Abolition of Punishment*, 35 SUFFOLK U. L. REV. 257, 270 (2001).

76. If you are uncomfortable with the expression, "an act willed by the actor," substitute for it the expression, "an act initiated by the actor." I don't think anything of significance will be lost. *See* Corrado, *supra* note 32, at 1196-97.

77. Morse, *Uncontrollable Urges*, *supra* note 44, at 1055-56.

78. Of course, even if we did something earlier that caused the unwilled movements, we might still not be responsible for them. It would depend upon whether we were aware that the unwilled movements would follow or that they might follow. *Cf.* Stephen J. Morse, *Hooked on Hype: Addiction and Responsibility*, 19 L. & PHIL. 3, 42-43 (2000) [hereinafter Morse, *Hooked on Hype*] (discussing how drug addicts should be responsible for "diminishing their own rationality" at the time they committed a crime).

79. *See* Morse, *Uncontrollable Urges*, *supra* note 44, at 1055-60; Morse, *Culpability and Control*, *supra* note 43, at 1591-92.

sense, so the idea of action that is willed but involuntary doesn't make sense either. None of the behavior that we seek to excuse as not within the agent's control—the actions of the sex predator, for example—are unwilled, and therefore all such actions are voluntary. Unless they are the product of an irrational mind, according to Morse, the agent is responsible for them.[80] The compulsive sex offender is not acting blindly; what he does he does intentionally. He is in control of his behavior and is accountable for it.

There are two problems with this argument. The first is that the mere fact that an action is the result of an act of will does not entail that it is voluntary. For example, if an agent is hypnotized, and while under the influence, chooses to do something that he would not otherwise have done, then (if hypnotism operates as we commonly believe it does) the agent could not have chosen otherwise, and his act is not voluntary.[81] Yet it was willed by him. A type of thought experiment is also sometimes used to make this point. If a scientist is able, through a device wired into the brain of a subject, to make the subject choose one thing rather than another, then though there is choice—and willing—the resulting act may be against the actor's will.[82] But though it is against the actor's will, in the loose and popular sense, it is nevertheless true that the actor willed it; the scientist may have controlled the actor's will, but it was precisely the *actor's* willing that produced the action. This is a purely conceptual point: it is not the willing of an act that makes it voluntary; it is the willing of it while at the same time being able to will otherwise.[83] In the case of hypnosis, and in the case of our imaginary scientist, it is the "unwilling" actor who does the willing. Morse has a response to this argument, and I will return to this point in Section 2.

The more important objection to this first argument is that it is irrelevant to most cases in which lack of control is used as an excuse. It is perfectly true that the sex predator cannot claim that his actions are literally involuntary. Not only are the actions of the sex predator willed, the sex predator is able to will otherwise. His acts are voluntary. The real

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80. *See* Morse, *Culpability and Control*, *supra* note 43, at 1591-93, 1599, 1605.

81. The Model Penal Code recognizes hypnotism as a defense. MODEL PENAL CODE § 2.01(2)(c) (1962).

82. The issue here is not whether such a procedure is possible, but whether it is self-contradictory. There is nothing inconsistent with the idea of an intention being implanted and then the actor being caused to act upon that intention.

83. For those familiar with Frankfurt's work on alternate possibilities, a better way to put this might be: willing it without being caused to will it. *See* Corrado, *supra* note 32, at 1222-27 (discussing Harry G. Frankfurt, *Alternate Possibilities and Moral Responsibility*, 66 J. PHIL. 829 (1969)). *But see* John Martin Fischer, *Frankfurt-Style Compatibilism*, *in* CONTOURS OF AGENCY: ESSAYS ON THEMES FROM HARRY FRANKFURT 1 (Sarah Buss & Lee Overton eds., 2002).

question is whether acting otherwise is extremely difficult for him, difficult in a way that would incline us not to hold him responsible for avoiding it. It makes perfectly good sense to suppose that an agent might be free to choose otherwise and might at the same time find it extraordinarily difficult to make that other choice. For example, the severely addicted person may find it so difficult to do otherwise that we find it understandable that in spite of severe penalties he persists in his habit.

If there are such cases, as I think there are, then at least in the more extreme such cases two things relevant to the question of punishment become clear: (a) we are less inclined in such cases to blame the actor for what he does; and (b) the state cannot control the risk the person presents by threatening him with punishment. Morse has an answer to this as well, and I will deal with that in Section 3.

2. "The Mere Fact that a Willing is Caused by Some Prior Event Beyond the Actor's Control Does Not Entail that the Agent is Not Responsible for It"

I suggested above that a willed action might not be a voluntary action when the willing was caused by something beyond the actor's control. Morse, following Michael Moore in this, argues that the mere fact that a willing is caused does not entail that it is involuntary or that we are not responsible for it.[84] This is a perfectly respectable position in philosophy, called compatibilism,[85] but it is controversial and it requires an argument. It appears to contradict one of the assumptions upon which our notion of justice is founded—the idea that we are responsible for our behavior only when it is entirely within our control, and only when we could have done otherwise[86]—and so it cannot be simply asserted. It must be backed up with argument. Otherwise it would seem to be as plain as could be that if an actor is caused to act by something outside his control he is simply not responsible for what he does.

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84. *See* Morse, *Culpability and Control*, *supra* note 43, at 1592-94; *see also* Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1128-48 (1985).

85. Compatibilism is the view that causation is compatible with responsibility. It is rejected by the determinist (or hard determinist) who believes that all actions are caused and that, *therefore*, no one is responsible for what he does, and also rejected by the metaphysical libertarian, who believes that we are responsible for some of our actions, and *therefore*, not all actions are caused. *See* Corrado, *supra* note 31, at 472-75.

86. *See, e.g.*, Slobogin, *supra* note 45, at 27-28. For those who are aware of the work of Frankfurt and who believe for that reason that the ability to do otherwise cannot be a condition of responsibility, the gist of the traditional notion of justice includes the claim that the actor was not caused to do what he d*id*. Corrado, *supra* note 32, at 1222-27.

As far as I can make out, Morse has only one argument. If we believe that an act's being caused by something beyond the actor's control means that it should be excused, then we have this problem: Since all of our choices are (or may well be) caused by things beyond our control, that means that all actions would have to be excused. Since the aim of those who would excuse uncontrollable behavior would be defeated by a showing that *everything is excused*, something we may presume they don't want, the contention that causation provides an excuse must be rejected by them.[87]

This is a nice *ad hominem* argument.[88] If Morse is right, the proponent of a causal theory of excuse ends up having to excuse everyone, when all he set out to do was to excuse those whose actions are caused by something outside their control. If the proponent cannot accept the conclusion that everything is excused, he must reject the premise that causation excuses. There are a number of reasons why the argument doesn't work, however. In the first place, it depends upon the additional premise that everything, including human action, is caused by events outside the actor's control. This is a premise that is rejected by some non-compatibilist philosophers.[89] I do not mean to argue for its rejection, but only to point out one reason why the argument may not work against Morse's opponent. The opponent may reject the assumption that all action is caused by things outside our control—and he may be willing to concede that if he is wrong about that, then indeed all actions should be excused.

In the second place, though, the argument would seem to be irrelevant here, as I suggested above. It is difficult to figure out just who Morse's opponent is in this particular controversy about causation. When the defense attorney claims that her client cannot help himself (or now when the prosecutor claims that the defendant sex predator cannot help himself), and that only death will stop him from somehow committing his violent crimes, she is not claiming that the offender's action should be excused because it is caused. She is not claiming that he is an automaton. She is claiming instead that the offender is unlike other human beings in having to make choices that are simply very difficult for him to make, and that perhaps conforming his actions to the law is so

87. Morse, *Culpability and Control*, *supra* note 43, at 1592.

88. Not all *ad hominem* arguments are suspect. Where, as here, the opponent's own premises can be turned against him, the argument may be perfectly sound and relevant.

89. *See, e.g.*, RODERICK M. CHISHOLM, PERSON AND OBJECT: A METAPHYSICAL STUDY 61-62 (1976); PETER VAN INWAGEN, AN ESSAY ON FREE WILL 162-82 (1983); MICHAEL J. ZIMMERMAN, AN ESSAY ON HUMAN ACTION 221 (1984); Peter van Inwagen, *Logic and the Free Will Problem*, 16 SOC. THEORY & PRAC. 277, 289 n.3 (1990).

difficult for him that he ought to be excused and committed (or, now, preventively detained after his prison term). I will take up Morse's answer to this position in Section 3.

3. "The Fact that Someone has Strong Desires, Even Very Strong Desires, Does Not Relieve Him of Responsibility for What He Does"

Those who argue for a control or volitional excuse, and those who write the sex-predator laws, assume that some individuals are driven by strong impulses—cravings—and find it difficult to control their behavior. But, says Morse, we all have certain strong desires.[90] Those desires do not literally compel us to act one way or the other, and they do not relieve us of responsibility for our behavior.[91] Acting upon a desire may be irrational, and if it is irrational then it may be excused. That would be a cognitive excuse. But the fact that a desire is strong does not by itself make acting upon it irrational. We all have strong desires and when we act upon them we are usually responsible for what we do. So if Morse is right, the sex predator's strong desires—his cravings—do not excuse his actions nor put him beyond the reach of the threat of punishment.[92]

But what about the addict, the paradigm example of someone who, though he knows what he is doing, knows the consequences, and knows that it is illegal, continues to engage in his habit? Again, this is nothing but a case of someone with a strong desire, according to Morse.[93] His practice is rational; he compares the pain he will suffer if he does not take his substance of choice with the pleasure or lack of pain he will feel if he does take it, taking into account the consequences if caught and the chance of getting caught, and he makes his decision to take the substance. If the actor really could not control his behavior, then he would engage in it even with a policeman at his elbow; but no addict would do that, Morse speculates, and so addicts really are in control of their behavior. If the pain that he would suffer if the substance were withheld were truly great, we might be willing to grant him an excuse. But the pain is never that great, in fact. And in any case, the excuse would be based on a notion of fairness: it simply wouldn't be fair to force him to experience that sort of pain. Nevertheless, the addict is as

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90. *See* Morse, *Culpability and Control*, *supra* note 43, at 1600.

91. *See id.* at 1600-02; Morse, *Fear of Danger*, *supra* note 43, at 263-64.

92. Morse, *Fear of Danger*, *supra* note 43, at 263-64; Morse, *Culpability and Control*, *supra* note 43, at 1600-02.

93. Morse, *Hooked on Hype*, *supra* note 78 at 28. And for a similar view, see Alan Schwartz, *Views of Addiction and the Duty to Warn*, 75 VA. L. REV. 509, 531 (1989).

much in control of his behavior as the person who weighs the alternatives and chooses going to the movies over staying at home to work. And the same, according to Morse, is true of the sex predator.[94]

But having granted that the addict's behavior and the sex predator's behavior are voluntary, we need not be persuaded by the example of the policeman at the elbow that it is responsible behavior. We know that although it may be true that neither the addict nor the sex offender would engage in criminal conduct if apprehension and punishment were certain, the real question is how much of a risk each is willing to take. The person who is willing to take the risk when the probability is *all but* certain is either someone who simply values his object more than he fears punishment, or else someone who finds it extremely hard to resist pursuing his object. All action is motivated by desire, but there is a world of difference between the suicide bomber whose desires are more or less coherent and who will persist in spite of the near certainty of punishment, and the severely addicted person who fears punishment, despises her habit, and will regret giving in after it is done, but who acts upon the stronger immediate desire for the drug nevertheless. Although the addict gives in to her stronger desire, there is nothing *irrational* about her behavior. She understands the facts, and she can draw the proper conclusions. She may be fully aware that her desire for her drug of choice is overpowering the desire for a more satisfactory life overall and the desire to avoid punishment. She risks punishment to get what she wants, even though she knows that she will be sorry if she is in fact punished, much like the person who risks a great deal of money on a lottery may know that he will in fact be sorry for having done it if he loses. The more certain the punishment that she is willing to risk, the stronger her addiction, and the less she is in control of her behavior.

I conclude that the case against control or volitional difficulties, at least as Morse has made it, is not persuasive. Certainly these are difficult notions to apply, and they are as difficult to measure as are "recklessness" and "intent" and many other criminal law concepts. But they do have some clear applications, as in cases in which the actor persistently acts against what he perceives to be his own interest and regrets his actions, perhaps to the extent of contemplating suicide. These are the marks, for example, of the addict.[95]

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94. Morse, *Uncontrollable Urges*, *supra* note 44, at 1057-58.

95. Morse admits the existence of cases that in common parlance we would call "control cases," and he admits that they ought to be excused (and perhaps detained). But he misleadingly describes such cases thus:

> [S]uppose the predation has been frequent, it has previously led to conviction and imprisonment, and incarceration is a profoundly unpleasant experience for the predator.

To be clear, I am not arguing that sex offenders are not responsible for what they do. Whether they are or not, the point is that there is a category of behavior that takes an individual beyond the reach of punishment, and it has nothing to do with deficiencies of a cognitive or emotional sort. Whether any sex predators fit this description is another question. There are disabilities that affect our ability to pursue certain ends, not by making them impossible, but by making them very difficult to attain. In cases of that sort, I maintain what Morse denies, that the state may not be able to reduce an individual's dangerousness by threatening punishment, and thus preventive detention may be warranted.

IV. MAKING SENSE OF CONTROL DIFFICULTIES

If it is our purpose to defend the possibility of control difficulties, it is not enough to show that important arguments *against* the coherence of control difficulties fall through. It is necessary also to show that control difficulties can be given a plausible meaning. In this Part, I will offer a way to make sense of such difficulties, and try to show why those who lack control (as I define it) should be treated differently.[96] To show that control difficulties make sense is not the same, of course, as showing that there are individuals who suffer from such difficulties. It is not my intention to try to answer such questions, but only to move the discussion forward by showing that an important element in determining punishability, namely control, cannot be ruled out *a priori*.

Before starting on a definition of control difficulties, however, there is another equally important task that cannot be neglected. So often in these discussions all the difficulties that are commonly said to deprive an

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> Such a history is precisely the type that justifies a recognized psychiatric diagnosis. . . . The predator may have no reasonable explanation for why he did not tie himself to the mast, did not take the preventive measures necessary to avoid hated imprisonment.

Morse, *Uncontrollable Urges*, *supra* note 44, at 1073-74. Morse insists on calling such cases, "cases of irrationality," so that the fact that these cases call forth our willingness to excuse (and perhaps to detain) does not enlarge the list of excuses beyond the cognitive. But to call these cases "cases of irrationality" stretches the concept of irrationality beyond reasonable bounds. Someone who cannot connect premises with conclusions is irrational. Someone who cannot properly take in information is irrational in a derivative sense. But someone who knows what he is doing and what follows from it is not irrational in any strict sense. One who though he knows what he is doing and knows that something unpleasant follows from it, but cannot control his impulse to do it, has a control problem and not any clear sort of rationality problem. No doubt the behavior of predators in such cases is irrational from an objective standpoint, but that is because the actor's *behavior* does not follow from what he knows he ought to do.

96. I want to make clear that I am proposing the definitions in this section as a way to begin discussion, not as a way to conclude it.

actor of responsibility are crammed into the category of irrationality; yet rarely are we told precisely what rationality or irrationality is for the purposes of the law. Every condition that undermines responsibility is said to be a rationality defect; and then the category of rationality is so loosely defined that every troublesome case can be coerced into it. For example, a commentator might insist that addicts are fully in control of their behavior and then, when confronted with cases of addicts who are obviously not in control of their behavior, might insist that they suffer from a defect of rationality—"murky" thinking, perhaps.[97] We cannot make headway in separating out control difficulties on one side until we have pinned down just what we mean by a defect of rationality on the other. Precision is needed to prevent the slight of hand by which we are persuaded first that all exculpatory psychological conditions, including extreme addiction and the more extreme compulsions, are defects of rationality, and then that compulsives and addicts are not to be excused because they do not suffer either from a defect of perception or a defect of inference. If we are clear about what we mean by rationality, it will become evident that some psychological difficulties are not difficulties of reason.

Of course we could do it the other way around. If, for example, we accept the notion proposed by some philosophers that rationality includes not only perception and inference, but that desires themselves can also be called rational or irrational, then irrationality might include both cognitive and volitional disabilities. But for legal purposes, that would be to gloss over the problem at issue here and not to solve it. There is a cash value to this distinction in legal contexts; the law of insanity, for example, does not talk about "rationality" as such, but rather about the ability to understand or to appreciate. Either way, we arrive at the same conclusion. If we want to use rationality in the larger sense, that's perfectly fine, but then we should enlarge the so-called conditions of responsibility to include not only right perception and right inference, but also right desire. We should, that is, recognize defects of volition as one defect of rationality and consider whether addicts and those who suffer from compulsions are not entitled to mitigation or exculpation.

For the purposes of this Article, let's do it the first way and say that rationality, at least as far as responsibility in the criminal law is concerned, is the ability to take in and process information. Someone who suffers from a defect of rationality or a cognitive defect and who, because of that, should not be held responsible for his behavior is

97. *See* Morse, *Hooked on Hype*, *supra* note 78, at 42-43.

someone who does not correctly understand the world around him, or else does not draw correct conclusions from what he does understand. More than that, it is a *defect* only if he is *unable* to understand the world around him, or *unable* to draw correct conclusions from what he observes—that is, only if his beliefs are not responsive to evidence. To say that someone committed a crime only because he suffered a defect of reason is to say this, as a first approximation:

> 1. He committed the crime;
> 2. If he had correctly appreciated the facts, and if he had correctly drawn conclusions from the facts, he would not have had the *prima facie* desire to perform the action that constituted the crime;[98] and
> 3. No amount of evidence would have caused him to correct his appreciation of the facts or his inferences.

The first and second clauses are intended to capture the fact that his commission of the crime was due to a misapprehension of the facts and what followed from the facts. Such misapprehension may or may not excuse behavior, but it is not by itself tantamount to a defect of rationality. Someone who fires at a paper target unaware that someone is standing behind it would not have fired and killed the person behind it if he had been aware of the facts. Someone who draws a wrong inference from the facts he observes may likewise have an excuse, if the inference is not negligent or reckless. But someone may fail to be deterred because he underestimates the chance of apprehension and conviction, and in that case he will not be excused.

The third clause is meant to introduce the idea of a defect: the actor's beliefs cannot be changed by any evidence that it might have been possible to adduce in the world as it stood at the time of the crime. But the clause is obviously too strong. What the definition captures, as it stands, is the idea of someone *utterly* out of touch with reality. Rarely will someone be beyond the reach of *all* evidence. Nevertheless, we can preserve what is important in the definition by talking about *resistance* to evidence. A more appropriate definition, therefore, of someone who committed a crime because of a *substantial* defect of reason would include something like this as a third clause:

> 3(a). It would require unusual measures or an unreasonable amount of evidence to cause him to correct his beliefs and inference patterns.

For example, someone who only with medication, or with a lengthy

98. Every desire an actor has, whether he acts on it or not, is a *prima facie* desire. *Prima facie* desires will lose out to stronger desires. We might call a desire that trumps all competing *prima facie* desires a desire *all things considered*.

course of therapy, could be made to see the truth would satisfy this clause.

There is obviously a lot of play in the last clause, but that is as it should be. Where the line should be drawn remains a matter of community judgment. All that needs to be clear is that there comes a point when resistance to evidence constitutes a defect that makes punishment an unreasonable response to a crime.

It may be that not all beliefs are or should be responsive to evidence. Perhaps religious beliefs are of that sort; perhaps beliefs about morality are as well. If either religious or moral beliefs are outside the realm of evidence, how should we treat someone whose crimes stem from religious or moral beliefs which cannot be changed by evidence? Suppose a Catholic kills an abortion doctor, believing that he has done so to protect unborn children. Since there is no evidence that would have caused him to be deterred by the threat of punishment, should he be treated as suffering from a defect of rationality? In that case, the killer fails the test of the first two clauses, but it requires us to limit the range of *facts* that should be taken into consideration. It is not the case that, if he had apprehended the facts correctly—facts other than those that are the content of his motivating religious or moral beliefs—he would have been deterred. Or, if there had been a fact that he misapprehended which would have deterred him, it would have something to do with his chances of apprehension, and unless there is reason to think that he is genuinely irrational, he would no doubt have responded to evidence that his beliefs about that were mistaken.[99]

Can all the cases in which we say that someone was not responsible for what he did be made to satisfy this definition? Unless we are committed to maintaining the assumption of absolute liberty and will not consider evidence to the contrary, I think we must concede that there are cases that do not satisfy this definition, and yet in which we are inclined to hold actors less responsible for what they do, or in which we are inclined to deny legal responsibility altogether. The case of the severely addicted person is one example. The addict is typically hyper-rational, at least when it comes to the subject matter of his addiction. There is no reason to believe that he has false beliefs about the world, or that he is incapable of drawing correct conclusions from what he perceives and desires. It does not make sense, for example, that the addict desires the benefits of a drug-free life *more* than he desires the drug at the time

99. For example, if he was apprehended because of a witness that he was not aware was there, then either he would not have committed the crime on that occasion if he had been shown evidence of it—and so fails the third part of the test, or he would not have been deterred by the facts—and so fails the second part of the test.

when he takes it, but simply cannot make the inference from his greater desire to the proper action. That *would* be an example of irrationality. The better supposition seems to be that, at the time of taking the drug, the addict desires the drug more than anything else.

It appears to be very difficult for the addict to avoid doing what he does. Although the serious addict might not pursue his addiction with a policeman standing at his elbow, he would certainly take very great risks to that end, and indeed, it is conceivable that a person severely enough addicted would do what he had to do with the policeman standing there. There is no evidence that the compulsive criminal, such as the compulsive sex offender, might suffer from the same intensity of cravings—cravings that would cause him to risk almost certain punishment—and indeed, it may be that the rational sex offender, unlike the rational addict, never lacks ordinary control over his behavior. I stress again that it is not my purpose to answer the empirical question. But it is my purpose to argue that the picture of the compulsive addict and the compulsive sex offender is one that can be made sense of. If I am right, it is very much the province of the legislature, guided by medical and scientific evidence, to determine whether there is a class of offenders who are not in control of their behavior; it is the province of the jury, guided by clinicians, to determine whether any particular offender fits the picture. I have already argued that this picture is not self-contradictory. It remains for me to show what sort of sense it might make.

As a first approximation, I will begin with a definition of what it means to be utterly unable to control behavior—that is, what it means to be subject to an irresistible impulse. An irresistible impulse is a desire—a craving—that would dominate other desires no matter what circumstances the actor found himself in. Thus, to say that someone committed a crime only because he suffered from a defect of volition or control is to say this, again as a first approximation:

> 1. He committed the crime;
> 2. He did not suffer from a defect of rationality at the time; and
> 3. The desire that led him to perform the action that constituted the crime would have done so, at that time, under any set of external circumstances.

In other words, his desire to perform the action trumped all his other desires, including the desire to be free of punishment, and it would have done so no matter what he knew to be the case—even with a policeman

at his elbow, for example.[100]

The question is whether there is anyone who satisfies both clauses, whether there is anyone, that is, who can be said to be subject to irresistible impulse. Notice that the definition does not describe a person who is impervious to evidence. Granting that the person in question is capable of perceiving the world more or less as it is, and of drawing appropriate conclusions, this is a person who in every possible world—that is, a person who, no matter what he believed—would attempt to satisfy his desire. Such a person is beyond the reach not only of the threat of punishment, but beyond the reach of punishment itself. Where that is the case punishment cannot be justified, as I will argue below. There is nothing in the definition that makes it inconsistent, and I have argued above that such a person is conceivable. I reiterate that the question whether there is or is not such a person is a red herring for our enterprise. We are concerned not with the person who is utterly unable to conform to the law, but with the person who finds it so difficult to conform that he must be granted an excuse.

Let's try now to modify the definition to capture the idea of someone who is largely but not entirely unable to control his behavior. To say that someone commits a crime because he is *substantially* unable to control his behavior and conform to the law would require a clause of this sort:

> 3(a). The desire that led him to perform the action that constituted the crime would have done so, at that time, in any but the most exceptional circumstances.

Naturally, "most exceptional" would depend on the sense of the community, as do many of the terms we find in the criminal law. The question is not whether there is any consequence that might lead the offender to change his behavior; the question is how severe the consequence would have to be. The policeman at the elbow makes punishment certain, and we may grant that even the severely addicted will not ordinarily step out of line in those circumstances. I say "ordinarily": I would think that it would sometimes depend upon how long the addict believed that the policeman would remain at his elbow. But even if the addict, or the sex offender, is not willing to risk certain punishment, the real question ought to be how much of a risk the compulsion leads to.[101]

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100. For a philosophical analysis of responsibility that includes a similar condition, see FISCHER & RAVIZZA, *supra* note 32 *passim*.

101. For a similar qualification of the Fischer-Ravizza criterion, see Michael Smith, *Rational Capacities, or: How to Distinguish Recklessness, Weakness, and Compulsion*, *in* WEAKNESS OF

What should we say about the person whose compulsion leads him to extremely risky behavior? I think that even those who, like Morse, would prefer to think of this as a question about rationality will sometimes concede that responsibility is not present. But they then characterize the behavior as irrational, involving a cognitive defect, and not as involving a volitional or control defect. This is not merely a matter of labeling. The problem is that when we go looking for the cognitive defect we find none, and end up with Morse classifying most of these offenders as responsible for their behavior.[102] These are not cases of defective rationality, not if we make the least effort to say what exactly defective rationality is. When we attempt to do that, we see that compulsive behavior does not require misapprehension or misinference. The compulsive sex offender might know quite well what the chances are of his being caught, and the chances might be quite high, though somewhat short of certainty.

V. CONCLUSION: TYING THE ENDS TOGETHER

Much more is involved here than just trading one label for another. For if in fact we can make sense of volitional difficulties, and if beyond that, we have evidence (as in many cases we appear to) that some people suffer from these volitional difficulties, we are back at our original problem: If there are people who understand the consequences of their actions but lack sufficient control to conform their behavior to the law, what are we to say about a law that subjects them to both punishment and preventive detention?

This is not the place to draw out a complete theory of punishment, and I would not attempt it in any case. But there are some plausible conclusions we may draw about punishment, conclusions that dictate a particular outcome for the sex predator laws. The reasoning goes something like this: To the extent that punishment can be justified at all, it cannot be justified either as retribution or as example-making. Punishment *is* retribution, as a matter of definition; and it may serve to deter others, as a matter of fact. But justification requires something more. It is true that the *threat* of punishment can be justified by its generally deterrent effect: the state fulfills its obligation to protect us from each other largely by defining crimes and attaching the threat of punishment to each of them. But the threat is not enough in some cases; the threat has to be realized. Some will not be deterred unless they experience punishment. But punishment itself cannot be justified in

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WILL AND PRACTICAL IRRATIONALITY 17 *passim* (Sarah Stroud & Christine Tappolet eds., 2003).

102. *See supra* notes 90-92 and accompanying text.

terms of general deterrence without the undesirable consequence of justifying the punishment of innocent people. The only justification left for punishment must be its effect on the person being punished: it is a last resort to be used against the person who cannot be deterred by the mere threat of punishment, to impress upon him the seriousness of his act. Unlike general deterrence—example-making—this justification does not see the criminal as a tool to be used to affect the behavior of others, though of course that may be a consequence of punishing him; nor does it depend upon the retributive idea that the world is a better place for his punishment, regardless of the consequences of that punishment.

Once we have taken both retribution and example-making out of the picture, it becomes pointless to punish those who do not understand what they are doing, for their view of the world cannot benefit by being punished. And it would be equally pointless to punish those who suffer from extreme difficulty in controlling their behavior. It may seem awkward to call such people insane, and it is unfortunate that the only responsibility defense we have is the insanity defense. But we have in the past made room in the defense for those who could not control their behavior, and if we have legislatively recognized, in the sex-predator and other laws, the possibility that such people exist, it may be time to pull the older more comprehensive defense out of the storage room and re-examine it.

But what, finally, about offenders who fall into that category Slobogin brought to our attention, of those who can control their behavior, who *can* respond to the threat of punishment, but will not: the terrorist; the hardened criminal; the civilly disobedient? Are they beyond punishment? Should they immediately be shipped over for indefinite detention? I think the answer to that must be no, but I think it is not an easy question in any case.[103] The important point about detention in the case of those who are cognitively and volitionally sound is that we cannot be sure that punishment itself will not work on them. In the past we have trusted that it would, and have often been disappointed. But unless the offender suffers from a condition which makes it impossible for him to respond to punishment, we cannot know that he will not respond. And therefore, in those cases, detention should not be

103. Certainly there are other more or less enlightened legal systems in which detention is an alternative to punishment available for the persistent offender. It is not considered shocking in Germany, for example, or in many other Western countries, to learn that some offender, typically a repeat offender, has been committed to detention rather than punishment. *See* Demleitner, *supra* note 6 at 1642 *passim*. But indefinite detention of competent actors is outside the Anglo-American tradition, and you cannot normally change one aspect of a legal system—adopting a feature that works well abroad—without risking a more significant change in the system as a result.

considered until punishment has been tried. The person who murders or rapes the second time may be a candidate for detention. I am not saying that he is, but certainly no one who is sane and who has not been subjected to punishment should be a candidate for indefinite detention.