The Criminal-Civil Distinction and Dangerous Blameless Offenders

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Our legal system distinguishes criminal law from other, civil law and criminal commitment from civil commitment. We speak of a "crime" rather than a "violation" or a "breach," and "punishment" rather than "sanction" or "liability." Why is criminal law kept distinct? One can conceive of a system in which no such criminal-civil distinction exists. An actor who commits a violation of the legal rules of conduct not a "crime") would have jurisdiction taken over him (not "convicted") during which time he would be corrected or sanctioned (but not "punished"). What is now dealt with as criminal law could be treated as just another aspect of civil law, perhaps even using the same procedures now used in criminal law; different aspects of civil law commonly have different procedures, depending upon the interests at stake. Some academics have proposed just such a system, although I know of no society in which such a system currently operates. Why are societies persistent in maintaining a distinct "criminal" system?

Criminal law is not unique in the conduct it punishes; some conduct violates criminal and civil law. Nor is criminal law unique in the deprivations that it imposes; civil commitment, tort law, and a variety of other civil measures can deprive a person of his or her liberty, put restrictions on what a person can do, and compel the payment of money. If criminal law is not unique in either the conduct it prohibits or the deprivations it dispenses, why is it kept distinct? Its existence must have an explanation apart from its prohibitions, deprivations, or procedures.

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

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

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

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

4Model Penal Code § 2.12(2) (1962) (emphasis added). Where the damage is minor under civil law, in contrast, liability nonetheless is imposed but only nominal damages are awarded.

5Id. § 1.04(5). For a definition of what constitutes a "violation," see supra note 4.
motor vehicle, and other such prohibitions generally are not "crimes," although they are enforced by the same officers who enforce the criminal law.)

Also characteristic of criminal law is the fact that an actor generally must have a culpable state of mind. Bringing about a prohibited harm or evil, even wrongfully, is not itself sufficient for criminal liability. Generally, a minimum of recklessness is required as to every offense element;\(^6\) that is, an actor must have some degree of awareness of the facts that make his or her conduct criminal. Still higher culpability, consisting of knowledge or purpose, commonly is required as to one or more offense elements. Lower culpability than recklessness, criminal negligence, is used infrequently; strict liability generally is limited to "violations"\(^7\) (which, you recall, are distinguished from "crimes").

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

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

While the notion of criminal liability as moral condemnation may have public appeal, would such a criterion for criminal liability leave society dangerously unprotected? Consider the problem of the dangerous person who causes serious harm blamelessly, such as a person who is violent because of severe mental illness. A system of criminal law committed to personal blameworthiness would give an insanity defense to such a person. Yet, society is not left defenseless because civil commitment generally is available to incarcerate such a dangerously mentally ill person. But what if civil commitment did not reliably protect society from dangerous offenders who escape the criminal system because of their blamelessness? Consider, for example, a person who is acquitted of an offense because the offense was the product of then-present insanity, but the actor is no longer insane but is still dangerous. His dangerousness may arise from conditions independent of his former mental illness, from the potential for reoccurrence of the mental illness and its accompanying violence, or from a combination of the two. How ought the law, criminal or civil, handle the problem of such a dangerous blameless offender? The answer to this question reveals much about the nature of criminal law and its distinctiveness.

The problem of the blameless dangerous offender can be dealt with in either of two ways. First, one might keep the criminal law focused upon blameworthiness and expand civil commitment if necessary to take control of such persons. This approach maintains a clear criminal-civil distinction, as that distinction is popularly conceived: criminal law would remain committed exclusively to punishment upon moral blameworthiness and civil law would

\(^6\)Id. § 2.02(3).\(^@\)

\(^7\)Id. § 2.05(2). The most notorious exception to this is the common law's use of strict liability in statutory rape, a serious offense. Modern codes commonly recognize two forms of statutory rape. The first punishes intercourse with a person under 16 (or similar age). Here, criminal negligence is required. A second offense punishes intercourse with a person under 10 (or similar age). Here, strict liability is imposed, but typically in the belief that no one in good faith could mistake a person under 10 for a person over 16. Where someone does, they no doubt will be exculpated from criminal liability under an excuse defense, such as insanity. See, e.g., MODEL PENAL CODE §§ 213.1(1)(d), 213.3(1)(a), 213.6(1); id. § 213.6(1) comment ?? (1980).\(^@\)

\(^8\)E.g., MODEL PENAL CODE §§ 3.02, 3.07, 4.01, 4.10, 2.08(4), 2.09.\(^@\)

\(^9\)Id. § 1.02(1)(c).\(^@\)
provide protection as needed through non-condemnatory incarceration. A second approach would shift criminal law, rather than civil law, toward taking control of such dangerous blameless offenders. By convicting an admittedly blameless violator, this second approach rejects the exclusive focus of criminal law on blameworthiness and blurs the criminal-civil distinction.

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

A majority of the Court appears to have chosen the second course for dealing with the dangerous blameless offender: dropping the criminal law's focus on blameworthiness to allow the criminal system to fill the protective gap. Justice O'Connor, the swing vote, is explicit about the approach. In her concurrence, she reminds the states that they are not helpless to protect their residents from dangerous offenders who, because of the Court's decision, can no longer be civilly committed:

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

[The Court's holding] places no new restrictions on the States' freedom to determine whether and to what extent mental illness should excuse criminal behavior. The Court does not indicate that States must make the insanity defense available. See Idaho Code § 18-207(a) (1987) (mental condition not a defense to criminal charges); Mont. Code Ann. § 46-1-4-102 (1991) (evidence of mental illness admissible [only] to prove absence of state of mind that is an element of the offense). It likewise casts no doubt on laws providing for prison terms after verdicts of "guilty but mentally ill." See, e.g., Del. Code Ann., tit. 11, § 408(b) (1987); Ill. Rev. Stat., ch. 38, ¶ 1005-2-6 (1989); Ind. Code § 35-36-2-5 (Supp. 1991). If a State concludes that mental illness is best considered in the context of criminal sentencing, the holding of this case erects no bar to implementing that judgment.14

In other words, if the state is dissatisfied with the resulting lapse in protection through civil commitment, it ought to simply criminally convict persons whom it previously had civilly committed.15
No doubt Justice O'Connor is right in what Supreme Court cases currently allow states to do: states may use criminal commitment as an alternative to civil commitment. No doubt many states will follow her suggestion. Indeed, as I describe below, Justice O'Connor simply echoes a strategy that many states have already tried and found effective since courts have begun imposing constitutional limitations on civil commitment. I will argue, however, that such views of the interchangeability of criminal and civil commitment blur the criminal-civil distinction in a way that ultimately will make our society more dangerous and less just.

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

The Interdependence of Criminal and Civil Commitment as Protective Mechanisms

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

Let me illustrate the interdependence of criminal and civil commitment with a one paragraph history of the insanity defense as it has evolved over 150 years to keep pace with expanding community notions of the potential exculpating effects of mental illness. (The history of the insanity defense also includes instances in which it was reduced in scope because it exceeded the community's willingness to excuse.\footnote{See, e.g., United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc). Brawner's overruling of the Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), overruled by United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc) "product" test is the clearest example of this. This kind of reform is not criticized here but rather encouraged, because it promotes the community's respect for the criminal law as embodying their shared notions of justice.} In 1843, the House of Lords in McNaghten expanded the insanity defense and more carefully articulated its criteria. Previously limited to persons...
having no more understanding "than an infant, than a brute, or a wild beast,"17 it was defined to include anyone who due to mental illness at the time of the offense did not "know the nature and quality of the act he was doing, or, if he did know it, [he] did not know he was doing what was wrong."18 As early as 1887, the McNaghten test was criticized as failing to reflect the growing understanding of human behavior. Mental illness, it was observed, can as effectively take away the power to choose as it does the knowledge of what is right and what is wrong.19

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

In each instance of reform, criminal law doctrine changed with current thinking, to exclude from criminal liability persons who had come to be seen as insufficiently responsible for their conduct to be blamed for it. Each reform was possible, without jeopardizing the safety of the public, because protective jurisdiction was shifted to the civil commitment system. Dangerous offenders who escaped criminal liability under increasingly broader insanity tests did not go free to maul a defenseless public, but rather were civilly committed under a system that did not carry the condemnation of criminal conviction.22

The point is that the natural development of the criminal law, as a system that imposes the condemnation of criminal conviction only upon those that are seen to deserve it, requires a civil commitment system that will pick up the slack to protect the public from dangerous offenders. One can conceive of further advances in behavioral sciences and further changes in public views on what makes a person sufficiently blameworthy for criminal conviction. If the criminal law is to be free to evolve to reflect such changes, it must be free to exclude blameless offenders from criminal liability without fear that by doing so it leaves society unprotected.23

17Arnold's Case, 16 How. State Tr. 695, 765 (1724).@  
18McNaghten's Case, 8 Eng. Rep 718, 722 (1843).@  
19Parsons v. State, So. 854 (1887).@  
20Id. at 866. It also required that "at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect [to the duress of mental illness], as to have been the product of it solely." Id. at 866-67 (emphasis in original).@  
21Model Penal Code § 4.01(1).@  
22Most states have special statutes for the civil commitment of persons acquitted of criminal charges by reason of insanity. See, e.g., N.H. REV. STAT. ANN. § 651:8-b (1991); N.Y. CRIM. PROC. LAW § 330.20 et seq. (Consol. 1992); UTAH CODE ANN. § 77-16a-302 (1992); WASH. REV. CODE § 10.77.110(2) (1991) and statutes cited at infra note 36. Occasionally, separate arrangement is made for the commitment of mentally retarded or "developmentally disabled" acquitees. See, e.g., WASH. REV. CODE § 10.77.005 (1991). For examples of general civil commitment statutes not requiring a prior criminal acquittal, see infra note 43.@  
23Some people may suggest that eventually all human conduct will be shown to be sufficiently caused by factors beyond an actor's control, that notions of blame will be outmoded. See Stephen J. Morse, Psychology, Determinism & Legal Responsibility, The Law as a Behavioral Instrument, in NEBRASKA SYMPOSIUM ON MOTIVATION 35, 50 (1985) (??). I, for one, do not believe that this will occur but, if it did and was generally (continued...)
There is some indication that current restrictions on civil commitment will make it difficult for the civil commitment system to assure continuing protection from dangerous offenders who are excluded from criminal liability as not sufficiently blameworthy. Indeed, it appears that restrictions on civil commitment have already caused retreat from past criminal law advances, creating criminal liability for persons that current notions would hold insufficiently blameworthy to deserve criminal conviction. In other words, instead of the civil commitment system catching dangerous offenders dropped from the criminal justice system, the criminal justice system has been turned into society's safety net for dangerous persons excluded from civil commitment.

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

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

The fact is that the "guilty but mentally ill" verdict serves, and apparently is designed to serve, a different purpose than to provide a clinical screening judgment. The legislative history suggests that the verdict arose as a response to court-mandated limitations on the use of civil commitment. The Michigan statute, the first "guilty but mentally ill" verdict, was enacted in response to public outcry over the Michigan Supreme Court decision in People v. McQuillan, which required that insanity acquittes be released from civil commitment if they could not be shown to be presently insane. Responding to public concern that the ruling would require the release of dangerous offenders, the Michigan Legislature promptly enacted the guilty-but-mentally-ill provision. The Legislative Analysis of the bill describes the "Apparent Problem to Which the Bill Addresses Itself" by citing the Michigan Supreme Court decision and noting the concern that "the release of persons acquitted by reason of insanity creates a potential threat to the public safety." The operation of the "guilty but mentally ill" verdict is indirect in achieving its goal of avoiding the release of dangerous insanity acquittes. It works not by making continued civil commitment easier (the constitutional rules

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Idaho, for example, repealed its insanity defense, in part out of concern for protection of the community.\(^{30}\) The State enacted a new provision providing that "mental condition shall not be a defense to any charge of criminal conduct," and added a new code section directing that mentally ill prisoners be incarcerated "in an appropriate facility for treatment."\(^{31}\) Thus, persons previously civilly committed after acquittal may now be criminally committed in the same facility to which they previously would have been civilly committed.

Still other jurisdictions, like the federal system, have narrowed their insanity defenses to avoid release of dangerous offenders from civil commitment. Citing, inter alia, the absence of a federal provision for the civil commitment of persons acquitted by reason of insanity,\(^{33}\) Congress narrowed the federal insanity defense to exclude cases of control dysfunction (a ground of exculpation, recall, first recognized as appropriate for excuse by addition

\(^{29}\)If effective abolition is the objective, it would seem to further the interests of informed debate and reform if it were done openly.@


\(^{31}\)See Minutes of Idaho House Judiciary, Rules & Administration Committee ?? Cong., at ?? (March 15, 1982) and Minutes of Idaho House Judiciary, Rules & Administration Committee ?? Cong., at ?? (March 17, 1982).@

\(^{32}\)See 1982 Idaho Sess. Laws 368, codified as Idaho Code § 18-207(a)-(b) (19__). Before this reform, insanity acquittees were civilly committed, to the custody of the Director of the Department of Health and Welfare, if they met the requirements for such commitment. Idaho Code § 18-214 (19__) (also repealed by 1982 Sess. Laws 368).@

of the irresistible impulse test in the late 1800's). Many states have followed the lead of the federal system in dropping the volitional prong from their insanity defense.

The same dynamic -- altering the criminal justice system to compensate for weaknesses in the civil commitment system -- is seen in some states' attempts to abolish their "diminished capacity" defense, in which evidence of mental illness is used to negate a required offense culpability element. While most states have procedures for automatic civil commitment for examination of persons held not guilty by reason of insanity, few

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34See 18 U.S.C. § 17 (1993). As one witness before the Senate Committee on the Judiciary noted: "First, it is clear to us all, I believe, that present dissatisfaction with the insanity defense is largely rooted in public concern about the premature release of dangerous persons acquitted by reason of insanity," Insanity Defense Hearing on S.818, S.1106, S.1558, S.2669, S.2672, S.2678, S.2745, and S.2780 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 256 (1982)(Statement of Richard J. Bonnie, Professor of Law and Director, Institute of Law, Psychiatry and Public Policy, University of Virginia). A congressman testifying before the House committee on the bill described a case from his district in which the defendant, Russell Maguire, was charged with sexual abuse and transporting a minor across state lines for immoral purposes. The jury returned a verdict of not guilty by reason of insanity.

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

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

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


The narrowing of the federal insanity defense might be defended on the ground that, like Brawner's overruling of Durham, supra note 3, it cuts back on an insanity defense that exceeds the community's notions of exculpation. This possibility cannot be entirely discounted, but it seems more likely that the reform cuts back further than the community view would support. Available evidence suggests that the community does recognize an insanity defense for both cognitive and control dysfunction as a ground of exculpation. PAUL ROBINSON & JOHN DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (forthcoming 199__). Thus, to exclude the possibility of exculpation on either ground is to create the possibility for convicting blameless offenders. The federal reform, in my view, is an example of the kind of miscalculation that can occur in the confusion created by a society's fear of the release of dangerous mentally ill persons from civil commitment.@

35See, e.g., 1982 Alaska Sess. Laws § 42 ch. 143 (repealing the control prong of Alaska's insanity defense, ALASKA STAT. § 12.45.083(a) (19__); cognitive prong retained, ALASKA STAT. § 12.47.010 (19__)); Del. Laws Vol. ____ (19__) (repealing control prong, see Daniels v. State, 538 A.2d 1104, ?? (1988); cognitive prong retained, DEL. CODE ANN. tit. 11, § 401 (1992)).

36See, e.g., Bethea v. United States, 365 A.2d 64 (D.C. App. 1976), cert. denied, 433 U.S. 911 (1977) (evidence of mental disease or defect may not be introduced to show that defendant did not possess the culpable state of mind required by offense definition??); Johnson v. State, 439 A.2d 542 (Md. 1982) (??); Bates v. State, 386 A.2d 1139 (Del. 1978) (??); State v. Wilcox, 436 N.E.2d 523 (Ohio 1982). The United States Supreme Court has not yet decided the issue of whether rejection of mental illness negating an element is constitutional. (The Court did deny certiorari in Bethea).@

37Jones v. United States, 463 U.S. 354 (1983), authorizes automatic civil commitment after a verdict of "not (continued...
have analogous procedures for persons acquitted because their mental illness negates a required culpability element.\textsuperscript{38} Some jurisdictions have sought to close this hole not by expanding automatic civil commitment to include mentally ill persons acquitted under diminished capacity, but by abolishing their diminished capacity defense.\textsuperscript{39} Similarly, legal challenges and restrictions on systems for the civil commitment of offenders judged to be "sexual psychopaths," have brought repeal of such statutes in many states, leaving such offenders to be committed under criminal process.\textsuperscript{40}

\textsuperscript{37}(...continued)
guilty by reason of insanity" for a period long enough to perform an examination of the person committed. Most commitment schemes require that continuing commitment past the initial examination period be justified in periodic reviews. \textit{See, e.g., ____________________________}.\textsuperscript{41}

\textsuperscript{38}The jurisdictions abolishing the diminished capacity defense cited in \textit{supra} note 23 had automatic civil commitment only for defendants acquitted under the insanity defense verdict of "not guilty by reason of insanity." \textit{See Del. Code Ann. tit. 11, § 403(a) (1992); D.C. Code Ann. § 24-301(d) (1992); Md. Health-Gen. Code Ann. § 12-111(a) (1992); Ohio Rev. Code Ann. § 2945.40(A) (Baldwin 1992)}.\textsuperscript{42}

\textsuperscript{39}The Ohio Supreme Court explains its rejection of a diminished capacity defense in part in this way:

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


Similarly, the decision to waive civil juvenile jurisdiction in favor of criminal jurisdiction frequently rests in part upon the dangerousness of the juvenile, thus making routine the use of the criminal system to protect the community where the civil system cannot. \textit{See, e.g., Alaska Stat.} § 47.10.060(d) (1992). An analogous dynamic is seen in the rejection of "civil" in favor of "criminal" sentencing options. For example, Wisconsin repealed provisions that had sexual offenders (after criminal conviction) treated and confined by the Department of Public Welfare until they were no longer dangerous. "Legislative concern that the Sex Crimes Act allowed parole of persons who might still be dangerous was a major factor in the repeal decision." Marie Therese Ransley, \textit{Note, Repeal of the Wisconsin Sex Crimes Act}, 1980 Wis. L. Rev. 941, 953. The repeal means that sex offenders are now to be dealt with by the Department of Corrections, as are other criminal offenders. \textit{See generally id.}
In each instance, where civil commitment is made unavailable, difficult, or ineffective in committing
dangerous offenders, pressure to criminally convict such offenders is increased. The resulting criminal law reforms
increase the likelihood that offenders will be held criminally liable because of their apparent dangerousness, despite
the absence of the blameworthiness. Instead of the civil commitment system serving as society's protective safety net
where criminal liability is inappropriate, the increasing restrictions on civil commitment have reversed the roles. The
criminal system is modified as necessary to protect us from the dangerous offenders that the civil system does not,
without regard to the offender's blameworthiness. Under this arrangement, there is little hope for further refinements
of criminal law that will broaden defenses to keep up with changing notions of criminal responsibility.

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

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

Criminal Liability of the Blameless vs. Civil Commitment of the Sane

If one's justification for criminal liability and punishment is non-consequentialist desert, the need to limit
criminal conviction to instances of moral condemnation is self-evident. For utilitarians, however, my objection to
using the criminal law to commit blameless but dangerous offenders presumably cannot be sustained unless I can
support at least these two propositions: (1) the effectiveness of the criminal law in controlling crime is diminished
when the criminal law is modified to convict persons who do not have sufficient blameworthiness to deserve the
condemnation of criminal conviction, and (2) injury to societal interests would be less (than those I allege to the
criminal justice system) if the civil commitment system were expanded as I suggest, to allow the commitment of
dangerous offenders who are excluded from criminal liability as blameless for any reason.

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

41See text at note [13].

42Note that only one of the two kinds of inconsistencies between community views and criminal law has this
adverse effect on the moral crediblity of the criminal law: punishing a blameless offender. The reverse kind of
deviation--failing to punish a blameworthy offender--may give rise to claims that the system is too lenient or too
ineffective but does not tend to undercut the moral condemnation that would attach where persons are convicted.
An even greater compliance mechanism than the deterrent effect of shame and condemnation is suggested by recent empirical studies. The studies suggest that most persons are motivated to obey law not because they fear being caught and punished (or shamed) but because they believe in the moral weight of the law. That is, most people obey the law not because they fear the pain of criminal sanction but because they want to do what is right. They are driven in large part by their perceptions of themselves as honest law-abiding people. But the effectiveness of the law in gaining compliance in this way is again a function of the law's credibility for doing justice. If the law closely matches people's shared intuitive notions of justice, it grows in its power to act as a model for their conduct. If the law is seen as being unjust, its power as a moral force is diminished. A society that imposes criminal liability on persons that the community regards as not sufficiently blameworthy risks destroying this motive to adhere to the laws. It risks becoming a society in which the only motive not to commit criminal conduct is to avoid being caught and punished.

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

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

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

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42See Thomas Tyler, Why People Obey the Law chs. 3, 4 (1990). Tyler cites a number of other studies that suggest similar conclusions. Id. at 30-39. Other research supports the conclusion that a tension or contradiction between legal code and community standard does have some of the consequences suggested. Studies show that the degree to which people report that they have obeyed a law in the past and plan to obey it in the future correlates with the degree to which they judge that law to be morally valid. See also Harold G. Grasmick & Donald E. Green, Legal Punishment, Social Disapproval, and Internalization As Inhibitors of Illegal Behavior, 71 J. CRIM. L. AND CRIMINOLOGY 325 (1980); H______ Jacob, Debtors in Court: The Consumption of Government Services (1969); Robert F. Meier & Weldon T. Johnson, Deterrence as Social Control: The Legal and Extralegal Production of Conformity, 42 AM. SOC. REV. 292 (1977); Matthew Silberman, Toward a Theory of Criminal Deterrence, 41 AM. SOC. REV. 442 (1976); Charles R. Tittle, Sanctions and Social Deviance: The Question of Deterrence (1980). Tyler's recent Chicago panel study (1990) comes to similar conclusions. The degree to which his respondents saw the legal authorities as having legitimate power predicted their willingness to obey various laws promulgated by those authorities.@

Certainly there are dangers in creating such civil commitment authority but there is much that can be done to limit the danger. Civil commitment of non-mentally-ill offenders could be limited to threats of certain enumerated serious offenses, where the government shows\(^45\) that the likelihood of future criminality meets a given level of probability, where a given minimum level of confidence in the prediction is met, and where these determinations are made in conjunction with procedural safeguards analogous in many respects to those provided criminal defendants: assistance of counsel, an evidentiary hearing, an opportunity to respond to the state’s evidence, and appellate review. (The process necessarily would be different from a criminal trial, however, because a central issue here -- the likelihood of future criminality -- frequently would call for different kinds of evidence than would the issue in a criminal trial -- culpability and responsibility at the time of a past offense.) In some respects the procedural protections would exceed those given criminal defendants because the process would appropriately call for periodic reviews to confirm the offender’s continuing dangerousness, reviews not needed for criminal commitment if the latter is justified as desired punishment for a past offense.

Still, some might argue that such a system, while justifiable on its own terms, would set a dangerous precedent. But consider whether such a system would break new ground. Precedent already exists for commitment based on dangerousness alone for mentally ill persons. Most jurisdictions presently provide for such.\(^46\) In upholding the constitutionality of such commitment, courts have said: "There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts. . . ."\(^47\) Note that current systems for the civil commitment of the mentally ill have less demanding criteria than the expansion of civil commitment proposed here; they do not require proof of a prior criminal offense as this proposal does, but premise incarceration exclusively on a prediction of future dangerousness.

Nor does the proposed expansion of civil commitment break new ground in the commitment of dangerous persons who are not mentally ill. Dangerousness is the rationale and the criterion for special extended terms of incarceration for habitual offenders.\(^48\) Under such provisions, an offender may be sentenced to life imprisonment for obtaining $120.75 by false pretenses, for example, upon a showing that he committed two previous felonies related

\(^{45}\) One can appropriately argue for a clear-and-convincing-evidence standard (rather than the criminal law’s beyond-a-reasonable-doubt standard). This is typically required for current civil commitment. See [Addington]. The civil commitment determination here does not serve the same general-deterrence-through-moral-condemnation function that a criminal verdict must serve and therefore need not reflect the kind of strong consensus demanded by a beyond-a-reasonable-doubt standard. Also, prediction of future events, the dangerousness issue, can never be shown to the same degree of certainty that one can have as to a past event, the issue in a criminal case. A beyond-a-reasonable-doubt standard might well make the system ineffective as a protective device. (On the other hand, if the ultimate issue to be proven was not terribly demanding, even a beyond-a-reasonable-doubt standard could be satisfied. That is, instead of requiring proof that it was probable that the offender would commit another offense, the system could be effective even if it required proof beyond a reasonable doubt that there existed a significant possibility that the offender would commit another serious offense.)\(^@\)


\(^{47}\)O’Connor v. Donaldson, 422 U.S. 563, 582-583 (1975) (Burger, C.J., concurring), quoted in State v. James, 534 S.W.2d 41, 44 (Mo. 1976).\(^@\)

to credit card and check fraud. Some jurisdictions use dangerousness as the primary criterion for deciding whether consecutive sentences should be imposed for multiple offenses. "[A] consecutive sentence should be imposed only after a finding by the trial judge that confinement for such a term is necessary in order to protect the public from further criminal conduct by the defendant." Dangerousness similarly is the rationale and the criterion for extended terms for several classes of offenders, such as those determined to be a "sexually dangerous person." Under the Colorado statute, for example, a sex offender is committed to an indeterminate term, from one day to life imprisonment, upon a finding that he "constitutes a threat of bodily harm to members of the public." The release decision for such offenders similarly is keyed to the continuing dangerousness of the offender. Indeed, some jurisdictions allow extended terms for nearly any serious felony where the offender is found to be dangerous. And many jurisdictions have their parole commissions make release decisions for all offenses by assessing inter alia the dangerousness of the offender. Typically, an offender may be released only if such "will not increase the likelihood of harm to the public."

49Such sentencing was upheld as constitutional. See Rummel v. Estelle, 445 U.S. 263 (1980). As one court explains, [T]he sentence imposed for a subsequent offense [under a habitual violent offender statute] is enhanced on the theory that the defendant's prior conviction of a violent felony indicates the 'incorrigible and dangerous character of the accused and establishes the necessity for enhanced restraint.'

Tillman v. State, 609 So.2d 1295 (emphasis added). Another court explains, "Our habitual criminality statute exists to enable the criminal justice system to deal determinedly with career criminals who pose a serious threat to public safety." State v. Sessions, 789 P.2d 1242, 1245 (1990). See also Rummel, 445 U.S.: [T]he interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another's property; it is in addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.

50Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976) (citing Sentencing Alternatives and Procedures, § 3.4(b)(IV), American Bar Association Project on Standards for Criminal Justice (1968)).


53The Board is authorized to release a person, "if the board deems it in the best interests of that person and the public and that the person, if at large, would not constitute a threat of bodily harm to members of the public."


55TEX. CODE CRIM. PROC. art. 42.18, § 8(a) (West 1993). See also ALASKA STAT. § 33.16.100 (1986); ARK. CODE ANN. § 16-93-701 (Michie 1987) (release when there is a reasonable probability that the prisoner can be released without detriments to the community); COLO. REV. STAT. § 17-22.5-404 (1992) (the board shall first consider the risk of violence to the public in every release decision it makes); DEL. CODE ANN. tit. 11, § 4347 (1987) (a parole shall be ordered only in the best interest of society); FLA. STAT. ANN. § 947.18 (West 1985) (no person shall be placed on parole until and unless the commission finds that there is a reasonable probability that, if he is placed on parole, his release will be compatible with his own welfare and the welfare of society); K Y. REV. STAT. ANN. § 439.340 (Michie/Bobb's-Merrill 1985) (a parole shall be ordered only for the best interest of society); MO. ANN. STAT. § 217-690 (Vernon 1983) (when in the board's opinion there is a reasonable probability that an offender can be released without detriment of the community, the board may in its discretion release or parole such person);

(continued...)
Nor is commitment of dangerous non-mentally-ill persons limited to cases labelled as "criminal." Non-criminal detention of legally sane persons has been authorized in a variety of instances in which commitment is needed to protect the community. Statutes for the detention of persons with communicable diseases are common.56 In supporting the state's use of its police power to detain two women who were thought to have a venereal disease but who refused medical examination, the Illinois Supreme Court concluded:

Among all the objects sought to be secured by governmental laws none is more important than the preservation of public health. The duty to preserve the public health finds ample support in the police power, which is inherent in the state, and which the state cannot surrender. . . . The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deny to any person within its jurisdiction equal protection of the laws, were not intended to limit the subjects upon which the police power of a state may lawfully be asserted in this any more than in any other connection.57

In the same vein, many jurisdictions provide for the civil commitment of persons with a chemical dependence,58 "not only for the protection of the addict . . . against himself, but also for the prevention of contamination of others and the protection of the public."59 Every jurisdiction has a civil system for the commitment of juvenile delinquents. The justification for such commitment frequently is "for the safety and protection of the public."60 Commitment and release frequently are based in part upon the juvenile's dangerousness to others.61 Frequently, detention beyond the

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55(...continued)

normal statutory period is authorized if "discharge from control of the Youth Authority . . . would be physically dangerous to the public." Because behavioral scientists until recently did not consider repeated criminal conduct itself to be a mental illness,64 "sociopaths" or "psychopaths," as some habitual offenders are clinically diagnosed, are not subject to the provisions for civil commitment of the mentally ill. Many states, however, provide special provisions for the civil commitment of such persons.64 Persons suffering mental retardation, which is not considered a "mental illness" in some jurisdictions, are nonetheless civilly committed under special statutes.65 Commitment and release decisions typically depend upon the retarded person's dangerousness.66 Finally, pretrial detention of dangerous arrestees is permitted in the District of Columbia and the federal system if "no condition or conditions [of release] would reasonably assure the safety of the community."67

61(....continued)

release the child). The decision to waive civil juvenile jurisdiction in favor of criminal jurisdiction frequently rests in part upon the dangerousness of the juvenile, making routine the use of the criminal system to protect the community where the civil system cannot.62 CAL. WELF. & INST. CODE § 1800 (Deering 1993); MASS. ANN. LAWS chs. 119-58.63


63MINN. STAT. § 526.10(1) (1992) ("psychopathic personality" is defined in MINN. STAT. § 526.09 (1992) to mean a person who suffers emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any such conditions, as to render such person irresponsible for personal conduct with respect to sexual matters and thereby dangerous to other persons.")

=FT There is no doubt that preventing danger to the community is a legitimate regulatory goal. . . .

While the government's general interest in preventing crime is compelling, even this interest is heightened when the government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these circumstances, society's interest in crime prevention is at its greatest.

=FT United States v. Salerno, 481 U.S. 739, 747, 750 (1987). See also United States v. Edwards, 430 A.2d 1321 (D.C. (continued...
Note that the preconditions for civil commitment in all of these instances are less demanding than the requirements for civil commitment proposed here. None but the last -- preventive detention pending trial -- require even a claim that the actor has committed an offense; and preventive detention requires only an allegation of criminal conduct. The civil commitment authority proposed here would require proof of commission of an offense.

**Dangerousness in Criminal Grading and Sentencing**

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

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

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

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

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67(...continued)


68 See supra notes 45-52 and accompanying text.@

69[1990 Wash. Laws 3, § 1003.--get code cite ?? ]@

70 See supra note 48 and accompanying text.@

71 [Jones, supra.]@
commitment requirements, including periodic review, ought to be applied to that additional portion of the term imposed on dangerousness grounds.\(^2^2\)

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

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

Conclusion

I have argued here that it would be better to expand civil commitment to include seriously dangerous offenders who are excluded from criminal liability as blameless for any reason, than to divert the criminal justice system from its traditional requirement of moral blame. Admittedly, such an expansion of civil commitment is potentially problematic. Most notably, behavioral science still does a poor job in predicting future dangerousness.\(^2^3\) This fact counsels caution. Nonetheless, it seems unwise for courts, as the Michigan Supreme Court did in McQuillan and as the United States Supreme Court now does in Foucha, to constitutionally restrict the use of civil commitment to cases of mental illness and thereby compel use of the criminal justice system to pick up the protective slack. At the very least, by constitutioalizing limitations on civil commitment the courts prevent legislatures from experimenting with combinations of criminal and civil commitment that might better preserve both individual rights and society’s protection.

One can hope that Foucha is given a narrow reading, as invalidating Louisiana’s civil commitment scheme only because of inadequate procedural safeguards or because the nature or place of detention (a mental hospital) was

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\(^2^2\)As noted above, in some jurisdictions, some periodic review for continuing dangerousness does take place, in the form of parole release decisions. But because the punishment and dangerousness portions of a term are unspecified, that two kinds of errors are inevitable. Periodic review (in the form of parole review) might start too late, after a substantial part of the dangerousness portion of the term has begun. Or, conversely, a person might be released too soon, as no longer dangerous but before the punishment portion had been served.\(^@\)

inappropriate (for commitment of a person who is no longer mentally ill). Justice O'Connor's concurrence can be read to take this view, and her vote is needed for the bare majority supporting the judgment. Perhaps a subsequent case will give the Court the opportunity to reinvigorate the use of civil rather than criminal commitment for dangerous blameless offenders. Such a course seems the only means by which the moral credibility of the criminal law and the compliance that it generates is likely to be preserved.

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