

Punishment Without A Crime: Is Preventive Detention Reconcilable with Justice?

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Abstract

In this paper, I argue that civil preventive detention is tolerable because it is the lesser of two evils. I argue that the serious sex offender is partially to blame for his preventive detention, because he offends, re-offends and refuses treatment whilst in prison with a full awareness of the potential preventive detention consequences. However, I question the fairness of extending an offender's penal sentence beyond what his or her past wrongdoing warrants. I argue that laws allowing dangerous offenders to be imprisoned beyond the length of their original sentences cannot be reconciled with the cardinal requirements of justice and fairness and therefore should be abrogated. The proportional punishment constraint means that punishment has to be proportionate with the culpableness and harmfulness of the offenders' past wrongdoing. Because dangerous offenders do not deserve further penal sanction, civil confinement should be used instead of imprisonment in those exceptional circumstances where it is absolutely necessary to prevent further harm doing. Furthermore, if a detailed supervision order provides a reasonable solution, then it should be used instead of civil confinement. I argue that civil confinement and supervision orders can be reconciled with justice. In the final section of this paper, I argue that a person's right to justice and fairness can be overridden in exceptional circumstances to prevent aggregate harm of an extraordinary grave kind. However, the harm posed by serious sex offenders is not sufficient to override the proportional punishment justice constraint, because it is not sufficiently grave in aggregate terms and civil confinement is also available as a less draconian alternative.

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I. Introduction

The preventive detention problem involves two injustices—evils. On one side of the scales, the injustice is that preventive prison sentences imprison the offender for what he or someone else belonging to a putative dangerous class of offenders might do in the future. The dangerous sex offender is imprisoned disproportionately, because he is no longer blameworthy for any past wrongdoing. He has served a proportionate sentence for his past wrongdoing and should be free to move on and start a new life. Underserved sentences contravene the fundamental human right not to be unjustly punished.¹ On the other side of the scale, the injustice transpires when an untreated dangerous offender is released into the community and accesses new victims. The injustice is simply that it is unfair for the state to release a dangerous offender into the community when it knows that it is extremely likely that he will commit further harms. Is it possible to achieve proportionality in the sentencing of sex offenders while protecting the community? In this paper, I try to strike a balance between the two injustices. It is not possible to reach perfect harmony, but a reasonable compromise can be achieved. I argue below, that the lawmaker should be prevented from using penal detention to incapacitate serious sex offenders, but that it should not be hindered from using civil confinement in the right circumstances to protect the community. Using civil confinement, community treatment programs, supervision orders and notification orders could allow the lawmaker to strike a reasonable balance. It is submitted below, that it is just and fair to use these types of measures as a last resort to protect the public, even though the offender may be wrongly identified as posing a continuing threat to society. As far as civil confinement is concerned I have the United States model in mind, that is, a detention order made in civil proceedings for detaining an offender in a facility that has therapeutic and curative goals rather than penal aims.² Treatment is crucial for reducing recidivism and civil confinement is the preferred means by which those offenders should be incapacitated until they no longer pose a

¹ For an overview of this right and the more general right not to be criminalized, see Dennis J. Baker, 'Constitutionalizing the Harm Principle' (2008) 27(2) *Criminal Justice Ethics* 3, at 4-28; Dennis J. Baker, 'A Critical Evaluation of the Historical and Contemporary Justifications for Criminalising Begging,' (2009) 73(3) *Journal of Criminal Law* 212-240.

² McSherry, Keyzer and Freiberg sum up the difference in the following terms: 'In comparison to the criminal justice model, the "sexual predator" laws in the United States are based on a medical model which views sex offenders as mentally ill, with diagnosable sexual disorders'. See Bernadette McSherry, Patrick Keyzer and Arie Freiberg, 'Preventive Detention for Dangerous Offenders in Australia: A Critical Analysis and Proposals for Policy Development' (Melbourne: *Monash University Report to the Criminology Research Council*, 2006) 42.

risk to others.³ In this paper, I argue that civil confinement should only be used in exceptional circumstances where it is absolutely necessary to prevent further harm doing. If a detailed supervision order provides a reasonable solution, then it should be used instead of civil confinement.

I note below, that the core difference between penal detention and non-penal detention is that the former is about communicating blame. If a young man helps a little old lady onto the bus with her shopping he would be morally responsible for his good deed. Nonetheless, being responsible for helping the elderly means that he should receive moral praise not moral blame and condemnation, for he aimed to bring about a good consequence. The point here is that aiming for good or neutral consequences is not worthy of normative reproach or criminal condemnation, because there is nothing blameworthy about such conduct.⁴ If a person accidentally becomes a carrier of the bird flu whilst on vacation and is quarantined at the airport upon arriving back in Australia, she is not blameworthy or criminally condemnable. She has not made a culpable decision to subject others to the risk of grave harm, but has the misfortune of posing such a risk and is detained for purely harm prevention reasons. She is not detained with the dual aim of conveying blame and censure to her for making a culpable choice to harm others. Likewise, when civil confinement is used as a last resort for purely harm prevention reasons to incapacitate a dangerous sex offender, he is not blamed or condemned for a particular culpable choice to harm others. *Per contra*, if a person chooses to subject others to a risk of harm by driving her Bentley at 100 miles per hour through a school zone, then her culpable and deliberate choice to risk harming others is blameworthy—criminally condemnable and punishable.

Nevertheless, quarantine and civil confinement do have very unpleasant consequences⁵ (*i.e.*, a complete loss of physical liberty). In the case of quarantine, it is used as a matter of necessity. In the case of civil confinement for dangerous offenders, it ought to be used as a last resort as a matter of necessity. It does not convey blame, but it does involve a degree of injustice because the offender is locked up and there is no way to know for certain whether a particular offender belonging to the dangerous class will go on to re-offend. What is the lesser of the two injustices: further civil confinement for a

³ Ibid 9-23.

⁴ For a detailed philosophical analysis of the difference between private wrongs and criminal wrongs and the role of culpability and blameworthiness as an element of the justification for using penal punishment as opposed to compensation for dealing with criminal wrongs, see Baker, above n 1, 4-9.

⁵ McSherry, Keyzer and Freiberg drawing on the United States experience, rightly point out that even civil confinement involves civil rights issues. McSherry, Keyzer and Freiberg, above n 2, 50-56.

potentially dangerous offender or the risk of grave harm for his potential victims? In this paper, I argue that civil confinement is the lesser of the two injustices and that the dangerous offender has to bear the cost of any residual injustice because of his *wrongful* historical choices. The dangerous offender has to shoulder any injustice that flows from civil confinement and false predictions of dangerousness, because it is his past decisions to offend, re-offend, and to refuse treatment whilst in prison that has made it necessary to detain him as a last resort. If he had accepted treatment during his time in prison, then he might have been a suitable candidate for a community supervision order as opposed to further detention. Likewise, if he had not offended, re-offended and had accepted treatment, then he might not have been labelled as a member of a dangerous class. In choosing to behave in this way the offender willingly risked being falsely labelled as dangerous. I argue below, that this is a form of *prior fault*, which explains why it is fair to make the potential *aggressor* pay the price of any residual injustice as opposed to the potential *passive* victim. This kind of prior fault is not criminal fault as such, as it does not connect up with any *particular* past wrong that has not already been punished. But it does demonstrate that the weight of justice must favour the *passive* victim rather than the *past and potential* aggressor in this type of no-win situation. The aggressor is able to control whether or not he will eventually be subject to civil confinement. The victim has no control over whether or not s/he will be victimised.

McSherry, Keyzer and Freiberg note that some psychiatrists have claimed that it is inappropriate to use overburdened mental hospitals to treat paedophiles that require long-term treatment given that they do not suffer from mental illness as such.⁶ This clearly raises policy issues about what type of medical facility and treatment programs are required to deal with this problem. It also raises policy and empirical issues about whether separate treatment facilities should be built to detain dangerous sex offenders, *etc.* For a country the size of Australia, it might not be economically feasible to build a separate high secure medical facility for detaining a small number of high-risk sex offenders. However, there is evidence from other jurisdictions that treatment and civil confinement is somewhat less expensive than the prison alternative.⁷ I mention these issues in passing, as an empirical analysis of the available high secure medical treatment facilities in Australia and the living conditions in those institutions as opposed to prisons is beyond the scope of this paper. In this paper, I take it as a given that at least one facility could be constructed or that a wing of one of the existing high secure mental hospitals could be converted to provide an alternative to prison. Furthermore, regardless of the type of psychiatric/medical label that is used to describe serious sex offenders,

⁶ Ibid 50-56.

⁷ Ibid.

it is clear that they are not insane and have full capacity. It is also apparent that a large number of dangerous sex offenders are treatable.

II. Dangerous Offender Enactments

In this paper, I use the *Crimes (Serious Sex Offenders) Act 2006* (NSW) as a point of reference, because the rationale underpinning all the so-called *dangerous sex offender* enactments is harm prevention. There has been an international movement towards incapacitating dangerous *sex* offenders and the NSW enactment is merely another enactment *in pari material*.⁸ These enactments aim to use incapacitation and treatment to prevent potentially dangerous sex offenders from harming putative victims. The *raison d'être* for such enactments is to prevent a specific kind of harm—that is, the harm caused by serial sex offenders, especially the harm caused to child victims.⁹

⁸ Generally, preventive detention in Australia has a long history. *The Habitual Criminals Act 1957* (NSW), ss. 115 and 443 of the *Crimes Act 1900* (N.S.W.) and *The Indeterminate Sentencing Act 1908* (Vic.) mirror older English legislation. In England, preventive detention provisions have been in existence at least since the Anglo-Saxon period. See Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (1909), 27. In the twentieth century the enactment of the *Prevention of Crime Act 1908* (U.K.) allowed for the indeterminate incarceration of recidivists. See also s. 2(1)(b) of the *English Criminal Justice Act 1948* (U.K.). The preventive detention provisions are now collected together in ss. 227-228 of the *Criminal Justice Act 2003* (U.K.) and the *Criminal Justice and Immigration Act 2008* (U.K.). The more recent Australian enactments have included, *The Community Protection Act 1990* (Vic.); *Sentencing Act 1991* (Vic) and the *Community Protection Act 1994* (N.S.W.). However, the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld.) was a turning point, as it was specifically designed to deal with dangerous *sex* offenders. Since its enactment a number of other Australian states have enacted similar laws. See for example, section 65, *Dangerous Sexual Offenders Act 2006* (WA). See also *Community Protection (Offender Reporting) Amendment Bill 2007* (W.A.). South Australia also has dangerous offender legislation in the pipeline. Because of the constitutional protections in the United States, dangerous sex offenders have been incapacitated primarily through the use of civil confinement. Coupled with this, the U.S. allows the public to be notified of the location of released sex offenders. See generally, Eric S. Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (2006); Bruce J. Winick, and John Q. La Fond, *Protecting Society from Sexually Dangerous Offenders: Law, Justice, and Therapy* (2003).

⁹ See for example, *Tillman v Attorney General for the State of New South Wales* [2007] NSWCA 327 and *Attorney General for the State of New South Wales v Hadson* [2008] NSWSC 140; *Cornwall v Attorney General for New South Wales* [2007] NSWCA 374.

These enactments tend to punish the offender for crimes he has not yet committed, even though that is not their aim. The purpose of these laws is to incapacitate certain serious sex offenders¹⁰ to prevent them from engaging in future wrongdoing rather than to punish them for past wrongdoing. The New South Wales enactment follows the *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld.), which was one of the first attempts in Australia to detain dangerous sex offenders after the expiration of their prison sentence.¹¹ The Queensland laws were enacted because of growing community concerns about the dangers posed by convicted sex offenders and the lack of evidence that some offenders had been rehabilitated.¹² The NSW enactment is also aimed at serious sex offenders who are likely to re-offend (*i.e.*, sex offenders who have not made any attempt to seek *rehabilitative treatment*¹³ whilst in prison and have a *history of sex offending*). In the Second Reading Speech of the New South Wales Parliamentary Debates,¹⁴ the Minister for Justice stated:

One particular concern, that is dealt with by the scheme, relates to a handful of high-risk, hard-core offenders who have not made any attempt to rehabilitate whilst in prison. These offenders make up a very small percentage of the prison population, yet their behaviour poses a very real threat to the public. These concerns are compounded where the offender never qualifies for parole and is released at the end of their sentence totally unsupervised. The proposed legislation will address this problem by allowing this small group of high-risk offenders to be placed on extended supervision, or, in only the very worst cases, kept in custody.

¹⁰ Sections 4 defines serious sex offender as a 'person who has at any time been sentenced to imprisonment following his or her conviction of a serious sex offence'. See also section 5.

¹¹ McSherry, Keyzer and Freiberg, above n 2, 9-10. The authors rightly note that there is a difference between these types of preventive detention provisions and those that allow for an order for indefinite detention at the time of sentence. Those that take effect at the time of sentencing would not have a retroactive effect, but could still contravene justice to the extent that they are disproportional.

¹² Patrick Keyzer and Sam Blay, 'Double Punishment? Preventive Detention Schemes Under Australia Legislation and Their Consistency with International Law: The Fardon Communication' (2006) *Melbourne Journal of International Law* 407 at 412.

¹³ Hon. Mr. Scully, N.S.W. Legislative Assembly Hansard, *Crimes (Serious Sex Offenders) Bill*, Wednesday 29 Wednesday March 2006.

¹⁴ *Tillman v Attorney General for the State of New South Wales* [2007] NSWCA 327 at para. 57 per Giles and Ipp JJA citing the Hansard of the Legislative Council, 30 March 2006, 21801 - 21802.

In *Fardon v. Attorney-General*¹⁵ High Court held that these types of preventive detention laws are constitutionally valid. In that case the appellant had been sentenced to imprisonment for 13 years for rape. After serving eight years he was released on parole. Within twenty days of his release he committed further offences of rape, sodomy and assault occasioning actual bodily harm. Consequently, he was sentenced to 14 years imprisonment. However, by the time that sentence had expired in June 2003, the Queensland *Dangerous Prisoners (Sexual Offences) Act 2003* had come into force. The offender was made the subject of a number of short-term interim detention orders. The detention order that *Fardon* appealed against was justified in the following terms:¹⁶

What is of major concern is the failure by [the appellant] to participate in or to participate to completion in a course or courses of therapy ... For some ten years there have been efforts made to assist [the appellant] towards reintegration into the community ... He has, for the most part, chosen not to take some responsibility for his own rehabilitation and engage in appropriate treatment.

....

There is a great deal of guidance to be found in the most recent reports and evidence ... This could be further explored. The *goal must be one of rehabilitation* if [the appellant] is to remain detained and, with [the appellant's] co-operation, *appropriate treatment* together with staged reintegration as recommended by Dr. Moyle may lead to a positive outcome when this order is reviewed. But until that occurs, [the appellant] must be detained so that the *community may be adequately protected*.

The aims of the Queensland legislation as outlined in the above passage are to provide rehabilitation, treatment and community protection. The New South Wales legislation was enacted against this backdrop. The NSW legislation sets out proposals similar to those found in the Queensland legislation. For example, section 14 of the *Crimes (Serious Sex Offenders) Act 2006* (NSW) allows the Attorney-General to apply for a detention order to detain a sex offender who is still in custody beyond the term of his latest sentence. The sex offender must be serving a full-time prison sentence for a serious sex offence or an offence of a sexual nature. Section 14(2) of the NSW *Act* requires the application to be made within the last six months of the

¹⁵ *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575.

¹⁶ *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575.

offender's prison sentence. An application for an extended term of detention must be supported with relevant evidence including a psychiatric report about the offender's future dangerousness. Section 18(1) (b) of the *Act* allows the Supreme Court to extend an offender's gaol term for up to five years. The offender may be detained *ad infinitum* if the relevant evidence demonstrates that he continues to pose a real threat to society. Section 18(3) states: 'Nothing in this section prevents the Supreme Court from making a second or subsequent continuing detention order against the same offender'.

The factors that the court must consider when determining whether to extend the offender's latest sentence are set out in section 17. Generally, section 17 requires the Supreme Court to determine whether there is a high degree of probability that the offender will commit further offences. In making this determination the court must have regard to a number of factors including the extent of the threat to community safety; the relevant psychiatric reports and the level of the offender's participation¹⁷ in that process; the psychiatric prediction about the offender's dangerousness; statistical evidence 'as to the likelihood of persons with histories and characteristics similar to those of the offender committing a further serious sex offence'; the offender's willingness and level of participation in any treatment or rehabilitation programmes; the extent to which the offender has complied with any obligations to which he is or has been subject under the *Child Protection (Offenders Registration) Act 2000* (NSW)¹⁸ or the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW);¹⁹ the offender's criminal record, and any other relevant evidence that might be indicative of an offender's potential dangerousness.

The detention orders found in the *Crimes (Serious Sex Offenders) Act 2006* (NSW) have a preventive rather than punitive aim. The legitimate aims of this legislation are rehabilitation, appropriate treatment and community protection. Even though it might not be the aim of the legislature to subject dangerous offenders to further punishment, extra punishment and quasi-criminal labelling are the inseparable and automatic side-effects of using penal detention to achieve the goals of treatment, rehabilitation and incapacitation. Because the use of penal detention means that the legislature cannot achieve its legitimate aims without also imposing further underserved punishment on offenders, such an approach cannot be reconciled with justice. There is a

¹⁷ Kaden notes that participation and acknowledgement of wrongdoing is a major component in the treatment process used in the United States: Jonathan Kaden, 'Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination' (1999) 89(1) *Journal of Criminal Law and Criminology* 347 at 365 *et seq.*

¹⁸ This enactment creates a scheme of sex offender registration.

¹⁹ This enactment allows for court orders to restrain offenders (who pose a risk to lives or sexual safety of children) from engaging in specified conduct.

difference between civil confinement and penal detention in that civil confinement does not convey blame and condemnation. There are forms of dangerousness incapacitation that are not censuring such as the civil confinement measures that are used to incapacitate mentally disordered people who pose a threat to society, and the quarantine measures that are used to prevent the grave harm that might transpire from allowing the carrier of a deadly contagious disease to roam freely.

It is not fair to use penal detention to achieve the aims of incapacitation and harm prevention when an offender has already been punished. The detention orders found in the NSW legislation results in penal detention, because past sex offenders are physically confined with other offenders of all descriptions who are being punished for their present wrongdoing. The past offender is no longer deserving of penal censure and punishment, but is detained with those who are deserving of punishment. It has long been recognised that it is contrary to the fundamental notion of justice to use penal censure and imprisonment to punish those who have not committed a crime.²⁰ A criminal justice system that treats offenders unjustly lacks legitimacy.²¹ However, when penal populism and fear is involved the majority are likely to support such a system. The public would lose confidence in a criminal justice system that imposed 20-year gaol terms on shoplifters, but might not protest when vile offenders are given more hard treatment than they deserve.

III. Justifying Punishment and Incapacitation

The institution of punishment has a number of instrumental aims, which include deterrence, incapacitation, rehabilitation and so forth.²² Nevertheless, using punishment to achieve these utilitarian aims is only justifiable when the lawmaker can demonstrate that it is objectively just (*i.e.*, provide justifications to satisfy the normative constraints against undeserved punishment)²³ to punish a given offender in an individualised sense.²⁴ Individualised punishment is about penalising offenders in proportion with the gravity of the criminal harm they have culpability brought about. Once an offender has served a proportionate sentence, that is, a sentence that fairly reflects the culpableness and harmfulness of her past wrongdoing, she should be free to leave prison to start a new life. Imprisonment not only involves censure and hard treatment, but it also limits the offender's choices. When a person is gaoled she is restricted in a physical sense, which involves the greatest degree of hard treatment and stigma that a convicted person will normally experience. Merely being labelled a criminal can also result in hard treatment. Criminal

²⁰ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Everett v. Ribbands* (1952) 2 Q.B. 198, 206. See Jerome Hall, *General Principles of Criminal Law* (1961) 219.

²¹ David Beetham, *The Legitimation of Power* (1992) 22.

convictions stigmatise those who are convicted and may make it difficult for them to find work and to travel abroad and so on.²⁵

Legal moralistic²⁶ accounts of danger would not provide a sound justification for using civil confinement let alone underserved penal detention. The majority may be fearful about what dangerous offenders might do when they are released from prison, but community fears based on guesswork and opinion have to be substantiated with sound empirical evidence if justice is to be served. Merely arguing *ad hominem* that a particular class of offenders pose a continuing risk to society is not sufficient to reconcile undeserved punishment with justice. Rational debate often takes second place to non-objective dangerousness arguments. For instance: ‘Hetty Johnson, who, in a radio interview, said “What’s happening here is we’re just pussyfooting around. If what we’re trying to do is protect the community, protect innocent children, then let’s do it. And if that means turning the law on it head, then let’s do that too”’.²⁷ It is not so much that Hetty Johnson’s harm claim is not objective *per se*,²⁸ because if the offender accesses a child and harms him or

²² For a convenient and compendious overview of these instrumental aims, see generally, Sanford H. Kadish, Stephen J. Schulhofer and Carol S. Steiker, *Criminal Law and Its Processes: Cases and Materials* (2007) 70-105.

²³ See Baker, above n 1. See also Dennis J. Baker, ‘The Harm Principle vs. Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation’ (2008) 33 *Australian Journal of Legal Philosophy* 66; Dennis J. Baker, ‘The Moral Limits of Consent as a Defense in the Criminal Law’ [2009] 12(1) *New Criminal Law Review* 93; Dennis J. Baker, ‘The Sense and Nonsense of Criminalising Transfers of Obscene Materials’ [2008] 26 *Singapore Law Review* 126.

²⁴ Joel Feinberg, *Doing and Deserving* (1970). See also Tony M. Honoré, ‘Social Justice’ in Robert S. Summers, *Essays in Legal Philosophy* (1970).

²⁵ See generally Nigel Walker, *Punishment, Danger and Stigma* (1980) 142 *et seq*; Hilary Metcalf *et al.*, *Barriers to work for offenders and ex-offenders* (DWP Research Report No 155) Leeds: CDS, 2001); Kevin Brown *et al.*, ‘The Reintegration of Sex Offenders: Barriers and Opportunities for Employment’ (2007) 46(1) *The Howard Journal of Criminal Justice* 32.

²⁶ Here, I have in mind positive morality—sometimes called community or conventional morality. See Patrick Devlin, *The Enforcement of Morals* (1965); Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, Vol. IV (1988); Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2008) 196-206.

²⁷ See Keyzer and Blay, above n 12, 410.

²⁸ However, at face value such views are often no more objective than Devlin’s positive morality arguments, because there is no way of knowing whether a particular offender is going to re-offend, nor is penal sanction the appropriate means for preventing harm after a just sentence has been served. See also Julian V. Roberts, *et al.*, *Populism and Public Opinion: lessons from five countries* (2003). Likewise, claims by liberals, such as La Fond,

her, then objective harm takes place. Providing an objective justification here also means producing sound normative arguments backed up with empirical evidence to demonstrate that the offenders being targeted pose a real danger to society and that penal detention as opposed to civil confinement is the only way to prevent the potential harm from transpiring. Many offenders might be appropriately dealt with by means of community supervision, electronic tagging, medical treatment, *etc.*²⁹

It would not be just to subject a convicted offender to indefinite imprisonment merely because the majority believes that the offender poses a threat to society. Justice in the penal domain is about producing normative justifications to show that the wrongdoer *deserves*³⁰ to be punished. If a person commits an act that has been labelled as a crime she is ultimately labelled as a criminal—is censured and punished. Censure is about communicating blame to offenders—that is, using the criminal justice system to publicly condemn them for their past wrongs. It is about communicating³¹ to the wrongdoer that her past wrongs have hurt and harmed others and therefore she must expect unpleasant consequences by way of penal fines or penal detention, and the shame and stigma of being formally convicted and condemned as a criminal wrongdoer. Depending on the gravity of the past wrongdoing, the offender may be subject to minor or major forms of formal criminal condemnation and hard treatment. A petty wrong might involve the offender being subjected to a compulsory community service order or a pecuniary fine. Whereas grave harm doing might warrant a prison sentence, which has a stronger censorial meaning. If a person is imprisoned for treatment or to incapacitate her, the

who asserts that: ‘the fundamental nature of the liberal state, including its fierce protection of individual liberty and the rule of law, will be irreparably damaged’ by such laws, is an overstatement given that the laws are only likely to apply to a very small number of sex offenders who are a minority of prisoners to start with. La Fond’s claim lacks empirical validity and is as sensationalized as Hetty Johnson’s claims. See John Q. La Fond, ‘Sexually Violent Predator Laws and the Liberal State: An Ominous Treat to Individual Liberty’ (2008) 31 *International Journal of Psychiatry* 158, 169.

²⁹ McSherry, Keyzer and Freiberg, above n 2.

³⁰ Arguably the *Crimes (Serious Sex Offenders) Act 2006* (NSW) creates a new offence that holds certain members of a dangerous class criminally responsible for merely belonging to that class of persons. To argue that this type of status criminalisation is fair would be *eo ipso* to argue *ad hominem*.

³¹ Lucas notes: ‘[P]unishment is a message, primarily addressed to the person who did wrong, though also and importantly overheard by others, denouncing the wrongdoing in a way that will not be ignored. It is because you did wrong that we are punishing you, and were you fully of one mind with us, you would understand that what you had done was wrong, and acknowledge the *justice* of what we are doing to you’: John R. Lucas, *Responsibility* (1993) 101.

ensorial message is that she has wronged others and is being punished even if this is not the aim. Furthermore, she is in fact being punished, as prison is a form of hard treatment. The Cambridge penal theorist, Andrew von Hirsch, provides an insightful account of the censuring role found in desert-based punishment.³² He notes:³³

[R]eprobation accounts of the institution of the criminal sanction are those that focus on that institution's condemnatory features, that is, its role as conveying censure and blame. The penal sanction clearly does convey blame. Punishing someone consists of visiting a deprivation (hard treatment) on him, because he supposedly has committed a wrong, in a manner that expresses disapprobation of the person for his conduct. Treating the offender as a wrongdoer is central to the idea of punishment.

The normative constraint adopted by both von Hirsch and myself (just deserts for individual wrongdoing) *justifies* individualized punishment in normative terms: it provides an objective *justification* for criminalization and punishment at the individual level.³⁴ Inflicting individual just deserts on wrongdoers might indirectly achieve the prudential aim of convincing others not to engage in similar wrongdoing, but it is individual wrongdoing that justifies individualized punishment. Censure is backward looking and it is about holding a moral agent accountable for his or her wrongful choices. Preventive detention is forward looking—it is about detaining people for what they might do. Preventive penal detention is not reconcilable with justice, because the person being subjected to imprisonment is being detained (subjected to hard treatment) for what she might do in the future. The wrongdoer is not *blameworthy* for any *culpable harm doing* (*nulla poena sine culpa*—no punishment without fault or without a bad act), because she has not harmed any new parties. Likewise, if *x* is totally inebriated and runs in front of *y*'s car and is killed, *y* is not blameworthy unless she intentionally hit *x* or was otherwise culpable (grossly reckless or grossly negligent).³⁵

As far as further penal confinement is concerned, the fairness constraint (proportionate detention for past wrongdoing) can be overridden, but only

³² The utilitarian aims of punishment such as deterrence and incapacitation are only reconcilable with justice when the sentence is proportionate with the offender's culpability, and the harmfulness of her past wrongdoing. Andrew von Hirsch, *Censure and Sanctions* (1993) 6.

³³ Ibid 7.

³⁴ Ibid.

³⁵ See Baker, above n 1.

when there are exceptional reasons for doing so.³⁶ The temporary penal detention of a terrorist to prevent a major terrorist attack would be justified if there were compelling evidence to demonstrate an imminent and real threat of magnitude. As I point out below, this is a very high standard to satisfy and the aggregate harm caused by dangerous sex offenders does not bring them within the purview of this type of override argument. Likewise, most terrorist suspects would also fall outside of such an override argument. Punishment has to be for past wrongs, not for nonexistent future wrongdoing.³⁷ In Australia imprisonment is the harshest form of punishment available and it should only be used to punish actual wrongdoing. The foremost objection to the NSW enactment is that it uses penal detention to achieve its incapacitation and treatment aims. This in effect subjects sex offenders to further penal confinement, which violates the proportional punishment constraint.³⁸ When such a law is enacted after the offender has already been tried and convicted and has started his sentence, it has a retroactive effect and therefore also violates the right not to be subjected to retrospective punishment.³⁹

The aims of penal detention should not be conflated with those of preventive detention. Preventive detention is about detaining blameless offenders (blameless because they have already been punished for their past wrongdoing) to prevent them from re-offending. If it is absolutely necessary to detain offenders who are no longer deserving of criminal censure, then this should be achieved by using civil confinement and only after all other reasonable alternatives have been exhausted. Civil confinement would be more appropriate as it does not communicate censure and blame. It does not

³⁶ I discuss the override argument in full in the final section of this paper.

³⁷ *Tillman v Attorney General for the State of New South Wales* [2007] NSWCA 327 and *Attorney General for the State of New South Wales v Hadson* [2008] NSWSC 140 are not reconcilable with justice as the offenders were subjected to further penal detention even though they had not committed any new wrongs.

³⁸ Baker, above n 1.

³⁹ 'The imposition of punishment, or added punishment, by the operation of a new law having retroactive effect is not only contrary to our legal tradition and offensive to its basic principles. It is also incompatible with the fundamental rules of universal human rights forbidding retroactive criminal punishment'. *Baker v. The Queen* (2004) 223 CLR 513 per Kirby J. at 551-552 citing *International Covenant on Civil and Political Rights* done at New York on 19 December 1966, [1980] Australian Treaty Series No. 23, Art. 15.1; *European Convention for the Protection of Human Rights and Fundamental Freedoms* done at Rome on 4 November 1950, European Treaty Series No. 5, Art. 7.1; *R. (on the application of Utley) v. Secretary of State for the Home Department* [2003] 1 W.L.R. 2590; [2003] 4 All E.R. 891. See also *Welch v. United Kingdom* (1995) 20 E.H.R.R. 247; *Ibbotson v. United Kingdom* [1999] Crim. L.R. 153.

condemn the detainee for past wrongdoing, but aims to treat him as a dangerous patient who requires incapacitation because he poses a real threat to society and is untreatable or refuses to accept the type of treatment that might allow him to return to the community. If it is absolutely necessary to detain an offender for long or indefinite periods of time beyond what her latest crime warrants, then this should be achieved by using civil confinement. Robinson notes: 'The difficulty [in detaining offenders for what they might do] lies not in the laudable attempt to prevent future crime but rather in the use of the criminal justice system as the vehicle to achieve that goal. The approach perverts the justice process and undercuts the criminal justice system's long-term effectiveness in controlling crime'.⁴⁰

Civil confinement removes much of the penal censuring and stigmatising impact that is inherent in penal confinement. The terrorist and dangerous sex offender cases cause public fear and evoke emotional responses in ways that other cases do not, but we have to strike the right balance otherwise we risk allowing our cardinal rights to be violated in less emotive cases. Civil confinement is a middle ground, but it too must be explained in just terms to those who are detained. It too, is *prima facie* unjust, as it has harsh consequences in that it results in a complete loss of freedom. When a dangerous insane person is confined or a disease carrier quarantined, criminal stigma by way of fault and blameworthiness is absent. Civil confinement is symbolically reserved for those who lack blame for their past harm doing and those who lack the capacity (the blameless) to control their propensity towards engaging in future wrongdoing. Similarly, quarantine is about detaining a blameless person because she is in the unfortunate situation where she poses a major threat to others. In both cases, the detained person is subjected to the unpleasantness of detention, but she is not blamed or censured for the harm she has brought about or for her potential dangerousness. The core problem with the spate of preventive detention laws that have been enacted in Australia in recent years is that the proportionality and retrospective punishment constraints have been violated. This has occurred because penal detention has been used to achieve the preventive aims of the legislation. Arguably, civil

⁴⁰ Robinson goes on to assert: 'At the same time, the basic features of the criminal justice system make it a costly yet ineffective preventive detention system. ... Segregation of the punishment and prevention functions offers a superior alternative. Punishment and prevention are fundamentally different procedures. Punishment especially through imprisonment, happily produces a beneficial collateral effect of incapacitation. If preventive detention is needed beyond the prison term of the deserved punishment, it ought to be provided by a system that is open about its preventive purpose specifically designed to perform that function'. Paul H. Robinson, 'Punishing Dangerousness Cloaking Preventive Detention as Criminal Justice' [2001] 114(5) *Harvard Law Review* 1429 at 1432; 1443-1444.

confinement would provide a more comfortable facility⁴¹ for those detained, which might allow for unrestricted visits, televisions, wirelesses, internet, newspapers, private rooms, access to gardens, appropriate treatment and rehabilitation, *etc.*

IV. False Positives: Predicting Dangerousness

The lawmaker would also be required to produce sound normative reasons to justify using civil confinement to incapacitate those who have already received their just deserts. The *Crimes (Serious Sex Offenders) Act 2006* (NSW) allows sentences to be extended to incapacitate potentially dangerous offenders. The decision to extend a given sentence is made by considering the offender's potential dangerousness. But how reliable are predictions of dangerousness that are based on psychiatric reports, psychological profiling,⁴² and scientific and statistical profiling? It might be fair to use civil confinement to incapacitate certain dangerous offenders in exceptional circumstances, but only if there is a way of knowing that it is highly probable that the offender will re-offend. Mere guesswork will not do. The reliability of dangerousness predictions has been discussed in the debates concerning the use of civil confinement for blameless mentally disordered offenders (blameless because they lack sufficient mental capacity for the purposes of imputing fault) for decades.⁴³ Mercado and Ogloff recently concluded:⁴⁴ '[W]hile repeat sex offences are certainly troubling, available

⁴¹ See Paul H. Robinson, *Distributive Principles of Criminal Law: Who Should Be Punished How Much?* (2008) 109-133.

⁴² The *Crimes (Serious Sex Offenders) Act 2006* (NSW), like Queensland's *Dangerous Prisoners (Sexual Offenders) Act*, requires the offender to be assessed by psychiatrists. But as Mercado and Ogloff note: 'There is nothing inherent in the training of psychiatrists or psychologists that prepares them to properly assess violence and sexual offending risk'. Cynthia C. Mercado and James R. P. Ogloff, 'Risk and the preventive detention of sex offenders in Australia and the United States' (2007) 30(1) *International Journal of Law and Psychiatry* 49 at 57.

⁴³ Peter B. Ainsworth, *Psychology and Crime, Myths and Reality* (2000).

⁴⁴ '[W]hile known base rates of sexual re-offence appear low, it is clear, however, that some sexual offenders are more likely to recidivate than others. Follow-up studies allow investigators to compare characteristics of offenders known to have re-offended with offenders not known to have re-offended, yielding important group findings related to the identification of those at heightened risk of re-offence. Having male victims and having unrelated victims, for example, is associated with an elevated risk of re-offence. To date, however, the most robust predictors of sexual recidivism have been measures of sexual deviancy ($d = .30$) and indicators of antisocial orientation ($d = .23$). Indeed, under the broad category of sexual deviancy, identifiable deviant sexual interest ($d = .31$), sexual interest in children ($d =$

research does not support the contention that sex offenders inevitably re-offend or suggest that sex offenders are more recidivistic than other offending populations.’ The bulk of the literature suggests that the psychological and actuarial predictive tools (concerned with both static and dynamic risk factors such as age, gender *etc.*) cannot predict future dangerousness with any exactitude.

Mercado and Ogloff have observed that some studies have shown that pure actuarial risk assessment is ‘significantly more accurate than empirically guided clinical assessment.’⁴⁵ But even the most sophisticated actuarial tools do not allow researchers to conclude with certainty that a particular offender will re-offend.⁴⁶ The literature on predicting dangerousness demonstrates that it is impossible to make conclusive predictions. In some cases, up to three quarters of those who were diagnosed as dangerous never went on to commit further violence.⁴⁷ The better predictive factors are past violence and drug or alcohol abuse.⁴⁸ A number of actuarial methods have been developed, which have proven to be better than clinical methods for prognosticating dangerousness. Even the Macarthur project, which has been described as the best study available,⁴⁹ was unable to predict dangerousness with a high degree of success. Monahan *et al.* used a variety of statistical methods to develop five risk bands for predicting violence. The bands are as follows:

.33), sexual interest in children as measured by phallometry ($d = .32$), and paraphilic interests ($d = .21$) all show a significant relationship to sexual recidivism. Similarly, indicators of antisocial orientation, such as Psychopathy Checklist score (PCL-R, Hare, 2003) ($d = .29$), MMPI Psychopathic deviate scale ($d = .43$), and problems with general self-regulation ($d = .37$) show an important relationship to sexual recidivism’. Mercado and Ogloff, above n 42, 52-53.

⁴⁵ Ibid 54.

⁴⁶ It has been noted that ‘although we may be able to identify individuals as members of a “high risk” group, we have no way of accurately distinguishing the true risk level of any one member of that group’. Ibid 56.

⁴⁷ John Monahan *et al. Rethinking Risk Assessment: The Macarthur Study of Mental Disorder and Violence* (2001); Nigel Walker, *Dangerous People* (1996).

⁴⁸ Grant T. Harris *et al. ‘Violent Recidivism of Mentally Disordered Offenders: the Development of a Statistical Prediction Instrument’* (1993) 20 *Criminal Justice and Behaviour* 315.

⁴⁹ Peter Bartlett and Ralph Sandland, *Mental Health Law: Practice and Policy* (2003) 179.

TABULATOIN: 1.1.⁵⁰

Risk class	Number of cases in class	Percent of class Violent	Number of people violent	Percentage of total people contained in this class	Number of people not in violent class
1	343	1.2	4	2	341
2	248	7.7	19	11	237
3	183	26.2	48	27	135
4	102	55.9	57	32	45
5	63	76.2	48	27	15

Out of the 63 in the most dangerous risk class (class 5) 15 did not turn out to be violent. If they had been detained for what they might have done—they would have been wrongfully detained. Bartlett and Sandland note that if the criteria were to be confined so that only those in class 5 (the high risk group) would be detained, then just over a quarter of those who would have been violent during the following year would have been excluded.⁵¹ Furthermore, the criteria would have to be extended to class 4 and 5 if we were to catch 50 per cent of the violent people.⁵² The authors also note that it ‘would in fact catch 59 per cent of the people who would be violent in the following year, but an additional 37 per cent of those within the criteria’ would

⁵⁰ Ibid 178. This is an adaptation from Macarthur Project (table 6.7); Monahan, above n 47.

⁵¹ Ibid.

⁵² Ibid 179.

not end up becoming violent.⁵³ The Macarthur approach is regarded as one of the best available, but it shows that actuarial predictions would result in many people being detained regardless of their actual dangerousness—while other potentially violent people would slip through the net.

More specifically, the techniques for determining the dangerousness of sexual offenders does not provide any better results than the general methods adopted in the Macarthur project. The best mechanisms would only allow a judge to conclude that it is highly probable that someone fitting the offender's profile (belonging to the particular class of dangerous offenders: sex offenders) may go on to commit further crimes. Professor Duff⁵⁴ notes:

The proportion of 'false' positives would be much larger than the proposition of mistaken convictions: the most that seems currently achievable is a rate of two false positives for every true positive (two people wrongly identified as 'dangerous' for every one who is accurately identified); and even optimistic advocates of [selective preventive detention] do not aspire to a 'false positive' rate much lower than 50 per cent. The fact that those subjected to [selective preventive detention] are anyway guilty of serious offences might justify tolerating a higher rate of errors than we accept for mistaken convictions: but, critics argue, we cannot justify a system as grossly inaccurate as this.

The bulk of the prediction research has focused on predicting the dangerousness of violent and mentally disordered offenders. But there is plenty of literature on dangerous sex recidivists as well.⁵⁵ In a recent report commissioned by the Home Office in England, Hood *et al*, found that: 'just over a quarter of those imprisoned for a sexual crime against a child victim not in their family were reconvicted of another sexual offence, and nearly a third were imprisoned for a sexual violent crime'. The authors noted that the recidivism rates were lower for sexual crimes against adults (only ten percent re-offended against adult victims), but concluded that those who were reconvicted committed very serious sexual offences.⁵⁶ Given that it is not

⁵³ Ibid.

⁵⁴ Anthony R. Duff, 'Dangerousness and Citizenship' in Andrew Ashworth and Martin Wasik, *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (1998), 145.

⁵⁵ See generally the reports surveyed in McSherry, Keyzer and Freiberg, above n 2, 12-14.

⁵⁶ Roger Hood *et al.*, 'Reconviction Rates of Serious Sex Offenders and Assessments of Their Risk', *Findings 164*, Home Office, London, accessed online <<http://www.homeoffice.gov.uk/rds/pdfs2/r164.pdf>>. Some commentators have argued that in the case of sex offenders, the best

possible to predict with certainty that a particular offender will re-offend, and the loss of liberty involved, can preventive civil confinement be reconciled with fairness and justice?

V. Reconciling Preventive Detention With Justice

Notwithstanding that some past sex offenders might be detained because they have been falsely identified as dangerous, civil confinement does provide a just alternative to penal detention. It is fair to use civil confinement in exceptional cases as a last resort, because the statistical evidence shows that a reasonably high share of those who are labeled as having the potential to re-offend will in fact re-offend. The dangerous offender might argue that it is not fair to detain all those who fall within the dangerous class. However, the dangerous offender chose to put himself in a situation where it is impossible to know for certain whether he continues to pose a danger to the community and it is he, rather than his potential victim, who should bear the cost of civil confinement and wrong predictions. Fairness would also be achieved by considering an application for civil confinement just prior to the offender's release, because such an assessment would include a consideration of whether the offender has been rehabilitated during his years in gaol and whether he has accepted treatment and thus made a genuine effort to avoid being falsely predicted as a continuing source of dangerousness.

Dangerousness claims will only satisfy the requirements of justice if compelling empirical evidence is produced to demonstrate that a given offender belongs to a class of offenders who are highly likely to re-offend, that there are no other incapacitation means that are just as effective to prevent him from re-offending, and that on balance the wrongdoer's past conduct is sufficiently reprehensible and repetitive to establish a form of prior *quasi-fault*.⁵⁷ Prior fault in the case of dangerous sex offenders would be established by pointing to the offender's *prior intentional choices* to offend and re-offend, his prior deliberate and informed choice to *refuse medical treatment* while in prison, his deliberate and informed choice to refuse to acknowledge that he is a

estimation that a particular offender might re-offend 'could reasonably be estimated at 70% to 80%.' But even at this level there would be a false positive rate of between 20 to 50%. See La Fond, above n 28, 167.

⁵⁷ For example, if a person is in a *voluntary* state of intoxication and recklessly causes the death of another, her voluntary intoxication cannot be taken into account in relation to manslaughter. See *R v Grant* [2002] NSWCCA 243. In Victoria, *R v O'Connor* (1980) 146 CLR 64 is still followed. Cf. *Regina v. Majewski*, [1977] AC 443, which also applies to murder. Similarly, if a dangerous offender voluntarily commits a number of dangerous offences, he must expect that he may eventually be detained for preventive reasons as he has voluntarily labeled himself as a dangerous offender.

paedophile who requires treatment and monitoring if released and so forth. We cannot be certain about whether an offender will re-offend, but we can determine with certainty whether he has *offended before, has refused treatment while in prison and continues to deny that he needs treatment*. I use the term quasi-fault as it is not a case of fault being imputed to the offender for an unpunished wrong that occurred because of his prior recklessness (i.e., killing another whilst intoxicated), but rather it is a case of fault being imputed to the offender for his civil confinement. He is at fault to the extent that he has created the situation where the state is forced to choose between wrongly incapacitating him on the basis of a false prediction, and between wrongly releasing him on the basis of a false prediction thereby allowing him to access more victims. This type of fault would not be sufficient to justify penal punishment, criminalization or conviction, but it would be sufficient to justify using civil confinement as a last resort to protect potential victims. It is a case of telling the sex offender that he chose not to take some responsibility for his own rehabilitation and engage in appropriate treatment while in prison, and in making these choices he also deliberately signalled that he is not safe or ready to return to the community—and therefore is to blame for civil confinement being used as a matter of necessity.

The sex offender chooses to risk preventive detention when he offends, re-offends and refuses treatment in prison. The sex offender is fully aware of the wrongness and harmfulness of sexually abusing children and is aware that refusing treatment in gaol could result in preventive detention. As far as penal detention is concerned, antecedent offending (a poor criminal record) should be considered at the sentencing stage only. The fact that the defendant makes a blameworthy choice to re-offend provides part of the justification for using civil confinement to prevent him from accessing more victims, because sex attacks are very damaging criminal activities. These types of crimes are of an extremely serious and damaging nature and destroy the lives of the vulnerable victims. The recidivist makes a deliberate choice to re-offend and this means that he must take responsibility for putting himself in a situation where the lawmaker might wrongly conclude that he poses a future risk to society. Unlike those who are quarantined or are confined because they are mentally disordered and dangerous, the sex offender's *prior remote-fault* makes him partially to blame for his preventive detention. Even if the sex offender does not have fair warning when he commits his first crime or even his second crime, he does when he is asked to participate in a treatment program whilst he is serving his prison sentence. His decision to refuse treatment manifests an intention to take the risk of being detained (civilly) beyond the term of his current sentence. Coupled with this, even though it is not possible to predict a particular offender's future dangerousness with exactitude, it is possible to ascertain whether he belongs to a particular class of

dangerous offenders. Mercado and Ogloff⁵⁸ that it is possible to identify individuals as members of a high risk group and that it '[i]s virtually undisputed that actuarial measures and structured professional judgment measures increase the reliability and validity of decisions, they bring a transparency to the process. ... Such evidence allows the courts to evaluate strengths and weaknesses of the risk assessment process.'⁵⁹ Hence, this type of evidence is sufficiently transparent and reliable for a court to conclude with some certainty whether a particular offender belongs to a dangerous class of sexual offenders. As Duff puts it:⁶⁰

Given a suitably reliable prediction that he would probably commit further such crimes, if released after a normal term of imprisonment, we can therefore justifiably redistribute the costs of crime, or its prevention, onto him; we can impose on him the cost of being detained beyond the term of imprisonment he would otherwise serve for his current offence, rather than leaving other citizens to bear the costs of his probable future crimes.

However, if it can be shown that there are other alternatives that are suitable for preventing a particular offender from re-offending, then those methods should be used. There are a number of alternatives that might be used instead of civil detention including supervision orders, medical treatment programs, licenses, extended parole and so forth.⁶¹ A comprehensive supervision order could be more appropriate in some cases. For instance, in *Cornwall v. Attorney General for New South Wales* [2007] NSWCA 374, the Court held that there was insufficient evidence to justify continued detention pursuant to 17(3) *Crimes (Serious Sex Offenders) Act 2006* (NSW), but in the alternative handed down a supervision order. Pursuant to section 17(1) (a) of the *Crimes (Serious Sex Offenders) Act 2006* the Court set out extensive conditions with the aim of preventing the offender from re-offending. The conditions included that the offender accept the supervision and guidance of the Probation and Parole Service, report personally once a week to the responsible probation and parole officer and otherwise as directed by that officer, comply with any reasonable direction given by a probation and parole

⁵⁸ Mercado and Ogloff, above n 42, 57.

⁵⁹ Ibid 56.

⁶⁰ Duff goes on to note that: 'The first argument can be buttressed by another, which seeks to show that the difference between 'true' and 'false' positives is not as important as critics of [preventive detention] have thought; and that someone who is appropriately judged to be dangerous is not detained purely on the basis of a possibly mistaken prediction of what he might do'. Duff, above n 54 at 152.

⁶¹ For a detailed discussion of how these types of alternatives might work in practice see McSherry, Keyzer and Freiberg, above n 2, 42-50.

officer, wear electronic monitoring device(s), inform the officer of his proposed daily movements on a weekly basis, accept home visits, including unannounced visits, not leave the State of New South Wales without written permission, accept psychiatric treatment from CFMHS, including anti-libidinal and antidepressant or other psychiatric medication as indicated, attend regular medical consultations, physical examinations, pathology testing, and medical imaging as directed by the CFMHS, attend consultations with the CFMHS, at such a frequency as specified by the CFMHS, undertake at his own expense psychological treatment, waive his right to the confidentiality of all information disclosed by him during treatment to his treating doctors and psychologist, attend a six-monthly meeting with all agencies/parties, not associate or be in contact with children less than 18 years old unless that contact is approved and supervised by the Probation and Parole Service, not attend public places regularly frequented by children, not consume any alcohol or illicit drugs or abuse prescription medication, and submit to drug and alcohol testing as directed by the Probation and Parole Service.⁶²

Critics might argue that this type of extensive monitoring is a form of punishment.⁶³ Furthermore, others might argue that civil confinement⁶⁴ is also a form of punishment even though it does not censure the wrongdoer. Certainly the type of strict conditions set out in the supervision order above violate the offender's basic civil liberties (for example, being barred from going to pubs, the horse races, drinking alcohol, being monitored 24/7 etc.),⁶⁵ and could be described as a form of hard treatment, but such an *order* is offered as an alternative to detention, it is offered as a form of rehabilitation, as an attempt to help the offender help himself. Thus, even though this type of order is hard treatment it is not censuring and such measures are reconcilable

⁶² *Cornwall v. Attorney General for New South Wales* [2007] NSWCA 374.

⁶³ See Sir Anthony Bottoms, 'Five Puzzles in von Hirsch's Theory of Punishment' in Andrew Ashworth and Martin Wasik, above n 54, 70-77.

⁶⁴ Civil confinement is used extensively in the United States. See the works cited above n 8.

⁶⁵ In *Cornwall v. Attorney General for New South Wales* [2007] NSWCA 374 the offender was also prohibited from going to the races and to pubs. Likewise, these types of offenders are registered so that everyone will know about their past wrongdoing. There is no doubt some of these requirements violate the offender's basic freedoms. Freedom of movement, privacy and association are protected in a number of international human rights conventions. For example, see *International Covenant on Civil and Political Rights* done at New York on 19 December 1966 (entry into force 23 March 1976, in accordance with Article 49), [1980] Australian Treaty Series No. 23, Arts. 7, 8, 10, 15, 17, 18, 19, 21, and 22. In principle, a person should be free to do whatever she likes so long as she does not wrong others. Her freedom to swing her fist ends at the next person's nose. See generally, Baker, above note 1.

with fairness⁶⁶ as they strike a balance between the offender's interests and harm prevention. It is not censoring and it would be used as a last resort. The lawmaker could also explain to the dangerous offender that such measures are just and fair because the use of such measures does not convey censure; and such measures are a reasonable alternative to imprisonment given that the offender has put him or herself in a situation where it is not possible to know whether he or she will re-offend. By focusing on the offender's past dangerousness (the types of crimes and the frequency in which she has committed them) the lawmaker is able to say to the offender in dialectical terms he and everyone else can understand that those who chose to represent themselves as dangerous cannot complain that they might never re-offend. Someone has to bear the cost that flows from false predictions about dangerousness, and that someone has to be the offender because he chooses to take the risk of being falsely labelled as dangerous each time he commits a serious sex offence and by forcing the lawmaker to use civil confinement as a last resort because he *refused treatment in prison*.

The alternative is to subject children, women and others to the unfairness that would flow from releasing offenders that clearly continue to pose a real risk. Given that the *passive* victims are not in a position to alter or control the situation, it seems fair to subject the potential *aggressor/controller* to the unpleasantness of civil confinement and extensive supervision rather than subject children and others to the injustice of becoming the victim of a serious sex crime. If a person makes a choice to be labelled as dangerous and refuses to participate in a treatment program, then what is wrong with making the price of those choices a willingness to risk civil confinement?⁶⁷ Extensions

⁶⁶ This is fair, in part, because the research on recidivism has found: 'antisocial indicators shown to be predictive of sexual recidivism include employment instability ($d = .22$), substance abuse ($d = .12$), intoxication during offence ($d = .11$), and hostility ($d = .17$). Though based on a smaller number of studies, indices of rule violation, such as non-compliance with supervision ($d = .62$) and violation of conditional release ($d = .50$) also appear to show a very strong relationship to sexual recidivism'. Mercado and Ogloff, above n 42, 52-53. For a discussion of some of the other alternatives on offer, see Karen Harrison, 'The High-Risk Sex Offender Strategy in England and Wales: Is Chemical Castration an Option?' (2007) 46(1) *The Howard Journal of Criminal Justice* 16; Robin J. Wilson *et al*, 'Circles of Support and Accountability: Engaging Community Volunteers in the Management of High-Risk Sexual Offenders' (2007) 46(1) *The Howard Journal of Criminal Justice* 1.

⁶⁷ Murphy and Coleman note, in the context of justifying some forms of strict liability, that: 'Widespread strict liability would destroy meaningful lives because it would force us to be overly cautious in areas (e.g., travel, pursuing ordinary activities, *etc.*) where we should not be overly cautious. But this is not true for all areas of social activity. Thus, in order to prevent

of sentences under the *Crimes (Serious Sex Offenders) Act 2006* (NSW) cannot be reconciled with justice, but civil confinement as a last resort can be. It is the lesser of the two evils. The NSW enactment along with all the other enactments imposing detention without blame, should be abrogated and replaced with narrowly tailored legislation that subjects dangerous offenders to supervision orders and civil confinement, so that justice and fairness is not compromised in the name of penal populism.

VI. The Von Hirsch and Ashworth Override Argument

Von Hirsch and Ashworth⁶⁸ try to ascertain whether the fairness constraint (here, the requirement that the offender's sentence is proportionate to her past wrongdoing) could be overridden in the dangerous offender situation as a matter of necessity. It would be unjust to subject dangerous sex offenders to disproportionate sentences, but in some cases the lawmaker may be forced to ignore the requirements of justice to prevent a grave harm. Von Hirsch and Ashworth discuss Dworkin's⁶⁹ override argument and apply it in the sentencing context. They examine whether it might be fair to override the proportional punishment constraint in order to use penal detention to incapacitate and treat dangerous offenders. Professor Dworkin's override argument holds, *inter alia*, that it might be fair to override fundamental rights when 'the cost to society would not be simply incremental, but would be of a degree beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved.'⁷⁰ Dworkin argues that '[i]f the nation is at war, a policy of censorship may be justified even though it invades the right to say what one thinks on matters of

great harm, what is ultimately the matter with society saying this: 'Certain areas of activity (food processing, banking, and sexual experimentation with children) have great potential for harm. Since individuals do not have fundamental rights to do these things and since there is no social value in having people casually experimenting in these areas (indeed much potential social harm), then what is wrong with making the price of entry into these selected areas a willingness to risk strict liability prosecution'. Jeffrie Murphy and Jules L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence* (1990) 128.

⁶⁸ A further example 'of a fairness constraint is the requirement of proof beyond reasonable doubt in criminal trials. This is designed to avoid the injustice of convicting innocent people—and hence should apply even if a lower standard-of-proof were to provide greater aggregate crime-preventive yields, by making it easier to convict actually guilty (and still possibly criminally-inclined) persons'. Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (2005) 50-61.

⁶⁹ Ronald Dworkin, *Taking Rights Seriously* (1977) 200.

⁷⁰ *Ibid.*

political controversy. The emergency must be genuine. There must be what Oliver Wendell Holmes described as a clear and present danger, and the danger must be one of magnitude.⁷¹

Public emergencies often require urgent action to prevent harm of serious magnitude. The urgency and necessity of the situation could mean that it is necessary to override the fairness constraint for some greater public good. The threat posed by a person roaming the streets carrying the bird/swine flu virus would permit the fairness constraint to be overridden to allow the carrier to be quarantined for as long as reasonably necessary. Quarantine detention is unjust, because it detains a blameless person—someone who has done nothing wrong. Nevertheless, quarantine is necessary in certain situations to prevent grave and widespread harm that poses present danger of magnitude.⁷² The types of scenarios that might satisfy the Dworkin override test are rare. The fairness constrain could be overridden when a person's actions contribute to serious harm doing, even though she is not culpable for the actual resulting harm. For example, where a person is a 'but for' cause of a serious remote harm.⁷³ What is a remote harm? A remote harm is a harm that occurs when *x*'s innocuous conduct contributes to *y*'s ability or decision to commit a harmful crime. *X* is only indirectly (remotely) connected to the direct (primary) harm, because the harm is contingent on *y* making the independent criminal choice to commit the harm. For instance, when *x* gives *y* a flyer and *y* harms the environment by making an independent choice to throw the flyer into the street, the harm is remote because it is contingent on *y* making an independent choice to litter.⁷⁴

Firearm possession was outlawed in Australia by the Howard Government to prevent serious and widespread harm from transpiring. Firearm possession is a remote harm in the sense of guns being used in domestic altercations. The harm that transpires from widespread firearm possession is indirect or remote, because it is contingent on a gun possessor or someone else (who may access a gun) making an independent choice to misuse a firearm. Likewise, the dangerous sex offender's dangerousness is

⁷¹ Ibid.

⁷² This is based on Dworkin's second ground for overriding the fairness requirement. The second ground allows the fairness constraint to be overridden to prevent harm of and extraordinary grave kind. 'Such an approach, based on Dworkin's [override argument] for derogation, seems plausible in the case of quarantine, because of several features. The potential harm is of an extraordinary magnitude, not only in the seriousness of the possible consequences in the individual case, but also in the pervasiveness of the harm . . . ' von Hirsch and Ashworth, above n 68 at pp. 53-54.

⁷³ Dennis J. Baker, 'The Moral Limits of Criminalizing Remote Harms' [2007] 10(3) *New Criminal Law Review* 370 at 388-391.

⁷⁴ Ibid 370.

contingent on what he or someone else in the dangerous class might do. There are a number of ways in which gun possession could be a remote harm, but its most obvious remote dangerousness transpires from the owner of a gun (or someone else who is able to access it easily, a friend, family member *etc.*) going on to misuse it at some future time. Merely possessing a firearm in itself does not harm anyone, as harm only transpires when a possessor or someone else makes an independent decision to misuse the gun in a domestic or some other dispute.⁷⁵ The claim is simply that easy access to guns (either because they are possessed in a home or can easily be obtained from the corner store) leads to increased gun deaths and therefore indirectly facilitates the direct harm that is caused by those who choose to misuse firearms. A person in an emotional domestic situation could resort to using a gun in the heat of the moment and regret it later.

Many young mentally disordered offenders have been able to commit mass murder in the United States in universities and other public places because of the ready availability of guns in that country. Certainly, in the domestic situation it is arguable that if easy access to guns were not possible, then those in domestic disputes would have a chance to calm down. The individual who misuses the gun causes direct harm to her victim, whilst those who merely possess or sell guns in their corner store are a *but for* cause of the general increase in gun deaths that result when guns are readily available. The original actor in this type of intervening choice situation is not blamed for directly causing a gun death or injury; instead she is blamed for possessing a gun when she knows that possession contravenes a law that has been put in place to prevent the widespread harm that results from gun possession. The possession prohibition is justified 'on probabilistic grounds, because [gun possession] contributes to the harm's eventual likelihood'.⁷⁶ Preventive detention is justified on similar grounds.

Von Hirsch postulates that the great loss of social utility flowing from firearm deaths is potentially sufficient to override the fairness constraint.⁷⁷ This would allow the gun possessor to be held partly to blame, that is, criminalised and punished for possessing a firearm not for the direct harm caused when someone else uses a gun to commit murder. Von Hirsch

⁷⁵ Andrew von Hirsch, 'Extending the Harm Principle: "Remote" Harms and Fair Imputation' in Andrew P. Simester, and A. T. H. Smith, *Harm and Culpability* (1996) 271.

⁷⁶ Ibid 267.

⁷⁷ 'This argument depends, however, on demonstrating a high likelihood of extraordinarily grave and pervasive harm—sufficient to overcome the normally applicable fairness constraints. Possibly, gun control legislation could meet this special burden, given the widespread carnage that appears to result from the easy availability of guns. But few other measures could do so...'. Ibid 271.

postulates that gun laws could be justified on the statistical expectation that more guns lead to grave harm by increasing gun fatalities and injuries.⁷⁸ The threshold proposed by von Hirsch is very high. It has to be shown that overriding the fairness requirement is a matter of urgency to prevent harm of an extraordinary grave kind, which will almost certainly transpire. Those who merely possess guns are punished to prevent the aggregate harm that is caused by increased gun deaths. Firearm possession does seem to meet the requirements of Dworkin's override threshold.⁷⁹ The empirical evidence does suggest that it is desirable to limit access to firearms.⁸⁰ Gun deaths occur all year round, year after year. The literature on gun control debate is vast.⁸¹ A full analysis of the pros and cons of criminalising gun ownership would be a major project. I do not intend to present a full argument here, as I have addressed the issue elsewhere.⁸² I merely draw an analogy between this situation and the harm posed by dangerous offenders to demonstrate that the *Crimes (Serious Sex Offenders) Act 2006* does not prevent harm of a kind that would justify overriding the proportional punishment fairness constraint.

I cite the United States statistics as it arguably has the most liberal gun ownership laws in the Western world (Australia has outlawed most forms of gun ownership), to demonstrate the type of aggregate harm that would be required to justify overriding the fairness constraint. In the United States gun violence causes a large number of injuries each year, many of them fatal. Cook and Ludwig⁸³ note that: 'The magnitudes, trends, and distribution of these injuries form the statistical backdrop to the public debate over gun policy'. The sheer extent of the long-term carnage is shocking. In 1997 that statistics showed that 32,000 Americans died of gunshot wounds, while a further

⁷⁸ See also, von Hirsch and Ashworth, above n 68, 51.

⁷⁹ I have argued elsewhere that trumping justice for the greater public good, even to prevent aggregative and remote harms of an extraordinary grave kind, will hardly ever be justified. See Dennis J. Baker, 'Collective Criminalization and the Constitutional Right to Endanger Others,' (2009) 28(2) *Criminal Justice Ethics* (forthcoming).

⁸⁰ Ibid.

⁸¹ See for example the works cited in Earl R. Kruschke, *Gun Control: A Reference Book* (1995); Robert J. Spitzer, *The Politics of Gun Control* (2007) and Kristin A. Goss, *Disarmed: The Missing Movement for Gun Control in America* (2006) 41.

⁸² Baker, above n 79.

⁸³ Philip J. Cook and Jens Ludwig, *Gun Violence: The Real Costs* (2002) 15. It is noted in the British Medical Journal that after the massive gun buy back in Australia firearm fatalities were halved. Coupled with this, in the 18 years before the buyback there were 13 mass shootings, but in the 10 years following the gun buyback there has not be a single mass shooting. See 'Success in Gun Law Reform in Australia' 334 *British Medical Journal* 284 (2007).

81,000 people were seriously wounded.⁸⁴ This is more than double the amount that died from AIDS or liver disease in that year.⁸⁵ The statistics show that more than one million Americans have been killed from gun violence since 1965.⁸⁶ More Americans have been killed from domestic gun use than have been killed in all foreign wars in which America participated during the twentieth century (619,000).⁸⁷ Arguably, the harm caused by high rates of gun ownership in the United States is of an extraordinary grave kind.⁸⁸

In the United States context, it is arguable that the gravity of the harm is of an extraordinary nature, pervasive and is certain to occur if left unchecked. The empirical evidence does appear to be compelling. While a deeper analysis of the empirical evidence is required, it seems sufficiently convincing to support a weak override argument.⁸⁹ Dworkin makes it clear that such rights can only be trumped in exceptional circumstances. '[E]ven though utilitarianism's deterrent force cannot be denied, the objection remains that it involves treating people as things rather than as ends in themselves.'⁹⁰ People can only fairly be asked to keep the law themselves. It is not fair to expect them to ensure that others who they have no normative relationship with also obey the law.⁹¹ Thus, while the gun possessor who never misuses his or her gun is not responsible for others who do misuse their guns, a convincing Dworkin-style override argument could be produced to deny the gun possessor

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ 'Gunshot fatalities impose a disproportionate public-health impact because so many of the victims are young. Homicide and suicide each rank among the top four causes of death for youths aged 10-34. Ibid 15-17.

⁸⁸ 'Killing by all means other than guns occur in the United States at a rate per million population that is 3.7 times the non-gun homicide rate in England and Wales. But homicides by handguns occur in the United States at a rate per million population that is 175 times as great ... While the magnitude of the difference that can be attributed solely to gun use cannot be determined with precision, as much as half of the difference between America and European homicide rates may be explained by differential resort in the United States to the most lethal of the commonly used instruments of violence'. Franklin E. Zimring and Gordon Hawkins, *Crime Is Not the Problem: Lethal Violence in America* (1997) 109-110. See also Peter Squires, *Gun Culture or Gun Control* (2000) 51-55; 174-201; Ian Taylor, *Crime in Context, A Critical Criminology of Market Societies* (1999) chap. 6.

⁸⁹ Cf. Douglas Husak, 'Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction' (2004) 23 *Law and Philosophy* 437.

⁹⁰ P. J. Fitzgerald, *Criminal Law and Punishment* (1962) 112. See also Margaret Falls, 'Retribution, Reciprocity, and Respect for Persons' (1987) 6 *Law and Philosophy* 25.

⁹¹ Baker, above n 73.

the right to possess certain types of military guns in her inner city apartment and criminalise her if she violates such a prohibition.

The *Crimes (Serious Sex Offenders) Act 2006* cannot be justified by referring to Dworkin's override standard. Dworkin's override approach might provide a case for extended penal confinement in exceptional circumstances. But it can only be invoked when the empirical, statistical and psychological evidence is sufficient to demonstrate that the denial of fairness would prevent pervasive harm of an extraordinary grave kind. It seems that the empirical evidence would not only have to focus on the gravity of the offender's particular crime, but also on the offender's potential dangerousness, and on the general rates of offending for that crime. Dworkin's override threshold cannot be met simply by showing that it would prevent one violent sexual assault per year in Victoria or in New South Wales or five violent sexual assaults or paedophilic attacks per year across Australia. While the serious harmfulness of these crimes in an individualised sense is unquestionable, the frequency and widespreadness of such crimes would have to be significant to demonstrate that it is necessary to use penal detention as opposed to civil confinement to detain potential sex offenders for periods of time beyond what they deserve. The empirical evidence would have to demonstrate that penal detention would not only prevent hundreds of dangerous sex crimes, but also that civil confinement is not as an effective means for preventing this type of harm. After all, overriding the fairness constraint involves extended sentences for people who no longer deserve punishment.

The Dworkin-style override argument could not be used to justify the dangerous offender enactments found in Australia, because sexual offending is not sufficiently widespread and civil confinement offers an equally effective form of incapacitation. This type of crime does not involve tens of thousands of people being victimized let alone hundreds of thousands.⁹² There is no doubt that such crimes are grave in an individualized sense, but civil confinement and supervision orders would provide equally effective mechanisms for preventing the potential harm involved. For the same reason, terrorism laws⁹³ that are aimed at harm prevention could not be used to detain

⁹² For an overview of the offending rates see McSherry, Keyzer and Freiberg, above n 2 and the works cited therein.

⁹³ *Terrorism (Preventative Detention) Act 2005* (Cth.); *Terrorism (Police Powers) Act 2002* (NSW). For further examples of the fairness constraint being overridden in the terrorism context see Christopher Michaelsen, 'International Human Rights on Trial—The United Kingdom's and Australia's Legal Response to 9/11' [2003] *Sydney Law Review* 13; Patrick Emerton, 'Paving the way for Conviction Without Evidence—A Disturbing Trend in Australia's Anti-Terrorism Laws' (2004) *QUT Law & Justice Journal* 12; Simon Bronitt and James Stellios, 'Sedition, Security and

suspects for lengthy periods⁹⁴ without a trial. In *A v. Secretary of State for the Home Department*⁹⁵ the Law Lords held that the detention of a terrorist suspect without a trial was incompatible with certain provisions of the *European Convention for the Protection of Human Rights*.⁹⁶ The Law Lords had to address the question of whether there was a ‘war or other public emergency threatening the life of the nation’. The majority held that terrorism did create a public emergency, but that the evidence was not sufficiently compelling to show that the defendants’ were sufficiently connected to such an emergency. Therefore, the majority held that it was not necessary to circumvent the fairness constraint. The majority was persuaded by a number of factors including the fact that one of the suspects was allowed to go to France, which suggested that detention was not a matter of urgency. Furthermore, it was held that the Government had not considered other options, such as electronic tagging, limiting access to the Internet and so forth—which would have been less restrictive.⁹⁷

VII. Conclusion

The provisions found in the *Crimes (Serious Sex Offenders) Act 2006* allowing dangerous offenders to be detained in gaol beyond the terms of their original sentences cannot be reconciled with justice. It is not fair or just to detain a person in prison for what she or someone else belonging to the dangerous class of offenders might do. The offenders targeted by the *Crimes (Serious Sex Offenders) Act 2006* are neither culpable nor responsible for any harm doing because they have been in gaol and have already received their just deserts for their past wrongdoing. The *Act* allows the Supreme Court to make a second or subsequent continuing detention order against the same offender *ad infinitum*, this is grossly unjust and contrary to our constitutional

Human Rights: “Unbalanced” Law Reform in the “War on Terror” [2006] *Melbourne University Law Review* 29.

⁹⁴ Of course, when intelligence agencies have compelling evidence that a terrorist group is about to blow up a train, detention without trial would be justified for a limited period of time to prevent imminent harm of magnitude from transpiring, but the evidence would have to be compelling and demonstrate a real urgency. *Per contra*, there is no justification for long periods of detention without a trial. If after a month, the intelligence agencies and prosecution have been unable to gain sufficient evidence for a trial, then it seems fairly clear that there is no evidence to support the claim that the suspect poses an *imminent* threat of magnitude and thus no grounds for detention without a trial.

⁹⁵ [2005] 2 A.C. 68.

⁹⁶ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222, (entered into force generally on 3 September 1953).

⁹⁷ *A v. Secretary of State for the Home Department* [2005] 2 A.C. 68.

sense of personal liberty. The laws allowing dangerous offenders to be imprisoned beyond the length of their original sentences are unjust and therefore should be abrogated. The appropriate way to prevent the kind of harm posed by dangerous offenders is to use civil confinement and supervision orders, because such measures can be reconciled with justice. It is just and fair to use these types of measures as a last resort to protect the public, even though the offender may be wrongly identified as posing a continuing threat to society. It is the offender's historical choices that have caused him or her to be labelled as a dangerous offender. Civil confinement should only be used in those exceptional circumstances where it is absolutely necessary to prevent further harm doing. If a detailed supervision order provides a reasonable solution, then it should be used instead of civil confinement. Finally, like von Hirsch and Ashworth, I have taken the position that the cardinal right to be punished proportionately can only be overridden in exceptional circumstances. As we have seen such rights can only be overridden in very rare situations to prevent aggregate harm of an extraordinary grave kind or to prevent a disaster in an emergency situation. The dangerous offender laws clearly do not meet this requirement, because the harm is not extraordinarily grave in an aggregate sense and civil confinement and supervision orders are sufficient to prevent the potential harm that is involved.