We walk the streets of an American city in fear. This emotion is absent, however, on the streets of almost any other city in the world. Americans who travel abroad characteristically find the difference to be striking. Safety in public places, particularly after dark, is not granted to an American citizen at home. This situation is degrading. Not only does our criminal justice system fail to be the best in the world in this regard, it is far closer to being the worst. We allow persons who are known to be dangerous to walk the streets with relative impunity. As a result, we live in a state of chronic fear.

Crime as a general category is multifaceted. There are many kinds of offenses, but acts of violent predation are the most sinister of all. As a society we may or may not wish at this time to address ourselves to the issue of predation. We may prefer to muddle along in the usual manner. To do so would be to maintain our current attitude of leniency with respect, for example, to street crime. If this is our choice, we ought at least to modify the rhetoric we use in expressing our sentiments about crime and punishment. We should not, for instance, say that we desire that our neighborhoods be safe and
our public places free from fear.

It has been shown that predators tend to recidivate. They are permitted to strike again and again, because we release them although their dangerousness has been established. The police, who are the most efficient link in the criminal justice chain, do succeed in catching them, as evidenced by the long rap sheets commonly associated with such offenders. But the task of the police is to catch people, not keep them, and the felon is granted his freedom much too soon. It is a travesty that the police are required to catch the same man again and again and again.

The person who will be attacked by one of these violent repeat offenders is presently a statistical person who will become the next victim in the series. This essay is concerned with the welfare of that person whose name we do not yet possess, but whom we as a society will sacrifice to someone whose name is presently known, since it is a name associated with a history of documented acts of violence. We must interrupt the pattern of the violent predator, regardless of his age. He must be preventively detained because of the nature of his acts. Such intervention must come much earlier and more forcefully than is now the case. At present we do intrude, but only after needless tragedy has been allowed to invade the lives of innocent persons. In the meantime, many offenders are out of custody when they should be in, and in custody for a long period later in life,
when conceivably they could be out.

The time has come to acknowledge the existence of the statistical person. With respect to predatory crime, all of us as citizens, taken together, are members of a large set of statistical lives. As such, we are potential victims, each equally vulnerable to an assailant. A subset becomes actualized, consisting of those members whom the predator does assault. The defensive measures we take in daily living, such as possessing a handgun, or avoiding unlighted streets after dark, are attempts on our part to prevent our vulnerability from becoming actualized by that assailant. We wish to continue to exist as nonevents.

It may initially seem curious to think in terms of negative events, which is to say, facts that do not occur. But an eventuality which is not allowed to happen can be statistically interesting. It has been established, for example, that when lower speed limits are enforced, fewer accidents take place and not so many fatalities are recorded. This means that out of, say, every one hundred thousand in the population, there exists a measurable number of people now alive who would otherwise be deceased. We do not know their names. They are merely statistical lives. But while they constitute negative facts, events which have not transpired, they are nevertheless quantifiable, since they comprise a determinate subset of the population at large. These persons are not metaphysical
abstractions. Nor are they disembodied. Statements and verifiable predictions can be made in reference to them. They constitute an underworld of negatively discrete entities, real but unsensed.

Examples may also be found in public health medicine, where officials are able to calculate with a degree of precision the effect a given intervention will have in the way of preventing unwanted maladies from occurring and spreading. The diseases by which we are not afflicted, thanks to such practices as inoculation and the proper disposal of waste, can be empirically described. Examples also may be drawn from the realm of weight control. We know what we would weigh if certain dietary restrictions were relaxed; though we prevent it from happening, it remains a stubborn fact.

The notion of allowing negative entities to count as discrete objects of thought originally occurred to the Austrian philosopher Alexius Meinong, whose pioneering work deserves a wider audience. A meinongian entity of this sort, while absent in actuality, is nonetheless present in potentiality, and an ontological commitment must be made to its hidden subsistence. Any group of such entities forms a set. Such sets are negatively discernible, which is to say deficiently perceivable, but populated nonetheless, and the set of statistical victims forms just such a class.

Sadly, in the past, it has been easier for us to
sympathize with the palpable, identifiable life of the offender than with the merely statistical existence of his future victim. The offender can be seen, felt, and heard; he shares with us his hopes and fears, and his dreams for the future; his aching family worries about him; we see his tearful mother; he evinces human qualities with which we can feel kinship; in custody he is frequently a docile and engaging individual. We concede that he enjoys certain rights. But the statistical victims also exist, and likewise have names, addresses, and families. We do not yet know their names, but, as subscribers to the local tabloid, we will one day find out. Because these persons remain unseen, we lack a comparable degree of sympathy for them. A more just morality would be willing to sacrifice the identifiable life of a predator in order to save a greater number of statistical lives. In this regard the principle of utility finds an application. To prize the identifiable lives of the few who are predators more highly than the statistical lives of their many victims is morally and rationally indefensible.

No sophisticated theory is required in order to see that justice is a casualty. Even a timeworn formula as simplistic as the principle of utility can recognize the injustice immediately. Whenever the innocent security of the many is sacrificed to the perverse pleasure of the few, the social fabric is rent. The question of social utility, originally raised by
Bentham, has been criticized at length, and rightly so. But it embraces a principle which does have merit in the case of the many whose rights are currently being neglected. The preventive detention of repeat violent offenders is in the best interests of society at large. In Rule 9 of the Principles Bentham observed that, "Where the act is conclusively indicative of a habit, such an increase must be given to the punishment as may enable it to outweigh the profit not only of the individual offence, but of such other like offences as are likely to have been committed with impunity by the same offender."\(^2\) The crucial term is habit. When a person with a criminal mindset acts upon that inclination, and goes so far as to embark upon a criminal career, he may justly be said to have a habit—an intolerable one, as it happens. Allow that person's habit to include violence as a defining characteristic, and the jeopardy in which he has placed us, as statistical persons, is heightened.

The predatory habit has two aspects: it has an historical route which can be reconstructed in part, such as a mugger's rap sheet, and a probable future that can be statistically anticipated. The violent offender can be expected to act again. The strength of such a habit is the measure of its probability value. This value ranges over both aspects and permits reliable predictions to be made about a group of offenders, not about specific individuals, but about the percentage which will continue to offend. The proportion of
those who will persist can be determined fairly accurately. So while the dangerousness of an arbitrarily selected individual cannot be established with certainty, the same is not true of the size of the subset which will be undeterred.

A habit is identified on the basis of actuarial considerations. A man's past deeds constitute the set of distinguishing variables. The habit also is a vector from which predictions can be made, so it may therefore be said to have a future as well. But probabilities are never certainties, so while the directional momentum from the past may cause us to suspect that the pattern of criminality will continue, we realize it is possible that a man's criminal career may have actually come to its natural conclusion with the most recent act, whether or not he was apprehended. But it is the observed past behavior of the individual which is the standard that permits him to be identified as a dangerous repeat felon. A person is said to have a habit on the basis of past deeds alone, and while some do relinquish it soon after the acquisition, most do not. Those with persistence are eventually halted by the more powerful societal forces with which they cannot successfully vie. But at present they are not halted in time to save the statistical victim, the next person in the series.

It is the nature of the act, not the age of the assailant, which ought to concern us the most. By the time a young teen has committed four or five grievous infractions, the
die has been cast; he has weighed the alternatives, made his choice, and placed us in danger. It is not an injustice to think in terms of quarantine for him, a preventive detention for someone who has proven himself to be an undeterrable violent offender.

Predictions of dangerousness are not subjective impressions grounded in bias or feeling. There is a statistical basis for such anticipations. Examination of the past offers important clues about what to expect. When someone with this habit is identified—-and they invariably are, not only by victims but also by siblings and parents, peers and teachers, police and judges—-intervention must be swift and forceful. To argue that this interferes with a young man's self-concept and normal development is to forget that intervention does eventually come, but only after statistical lives have acquired names. We must learn to intercept this pattern more dynamically at its inception. It is not a matter of civil rights. It is not a question of whether to intervene or not, but when. Currently our intervention comes much too late. The potentially dangerous offender has privileges, to be sure. But so has his next statistical victim. We sense the tension of competing rights, including the right of the potential victim not to become an actual statistic.

Citizens of the United States are granted certain rights by the Constitution. These privileges impose limitations on the manner in which the state is permitted to interfere with
our lives. Some privileges are enumerated, such as the right to freedom of speech, or the right to peaceful assembly, or the right to a trial by jury. Others remain unenumerated, but the Ninth Amendment provides that the enumeration of the rights that are actually cited "shall not be construed to deny or disparage others retained by the people."

The establishment of specified rights creates a penumbra of unspecified rights which, though not explicitly named, may nonetheless be assumed to be implicitly given, provided they are consistent with the expressly stated purpose of the Constitution. The most general statement of constitutional intent is contained in the Preamble, where it is asserted that the very purpose of forming the union is to "establish justice" and to "insure domestic tranquility," as well as to "promote the general welfare" and to "secure the blessings of liberty," not only for ourselves but for the generations to come. It is clear that unsafe neighborhoods are inconsistent with this intent, and that public places which are zones of fear contradict the expressly stated purpose of the founders.

The statistical person must surely be in possession of the twin rights to neighborhoods which are safe and to public places which are free from fear. These are unenumerated rights vouchsafed by the forgotten amendment, the Ninth, and to deny them is to create a reductio ad absurdum which renders counterfeit the most general stated intent of the Constitution as
ordained in the Preamble.

It is clear that the predator is encroaching upon these rights with which the statistical person is endowed. In our eagerness to safeguard the rights of the violator, we have neglected those of the victim. The rights compete, and therefore cannot all be honored. It is imperative that, as a society, we reverse this priority. Justice is better served when the safety of the many is preserved, than when the rights of the guilty predator are protected at the expense of those upon whom he preys. As matters now stand, the rights of the statistical victim are presumptively denied by the state whenever a known predator is allowed to exercise his rights in such a way as to remain in circulation. This is constitutionally unfair to that victim whose name we do not yet possess, and whose rights are being systematically ignored.

On the other hand, it is assuredly the case that, in a fair and democratic society, the rights of the dangerous offender are deserving of protection. The remaining concern is where, exactly, the offender should be situated while his rights are being humanely guarded. Certainly he must not be allowed access to the streets where new victims can easily be found. He must be housed in a facility, where we can extend to him every humanitarian courtesy during the entire period of his detention. He must, for instance, not be made liable to harm from other inmates. Even a dangerous man has the right to
full protection from other dangerous men.

The time has arrived when, for repeat offenders, the artificial distinction between juvenile and adult justice must be abolished for certain types of crimes. Acts of predation qualify as outrages which should be targeted for special attention, regardless of the age of the assailant, whose next victim of whatever age will preemptively be denied his or her right to safety unless the predator is contained. That next victim, who is statistically significant, presently exists and, at least for the moment, is just as alive and healthy as the predator whom we are prepared to unleash. Why should he be returned to the streets? It would make exactly as much sense to turn a vicious dog loose in a schoolyard, and then cynically sit back to enjoy the carnage.

There are those who recommend a policy of perpetual sympathy for predators, pleading that society made them what they are. These cultural determinists argue that the young men who commit these offenses are not really responsible at all, since they are themselves victims of social and economic forces in society at large. Therefore a policy of toleration and leniency is advised. But this argument is specious. To exempt predators from responsibility, on the ground that they are impelled by social forces far larger than they, is to imply that their blameworthy behavior is caused not by themselves but by others, namely the rest of society, consisting of just
those people who by definition do not engage in predatory acts. But any attempt to absolve offenders, in a fashion such as this, is to be drawn to the transparently absurd conclusion that violent crime is ultimately caused by exactly those individuals who commit no violent crimes. This is preposterous. No plausible case can be made for toleration or for leniency, on the grounds that the offender is not responsible for his offenses.

A formula for the preventive detention of repeat violent offenders must be evolved. The existing system is biased in favor of the predator. There is every reason to think that prejudicial legal advantages ought to be withdrawn from such a person. As a society, we do ourselves a grave disservice in allowing the predator to employ, in his defense, the very system he despises. It is a curiosity that we make the rules of the system fully available to someone who is not playing by the rules of the system. In the tension between the competing rights of the predator and those of the potential victim, our chief obligation as a society must be to the safety of that unnamed person who is spared, thanks to the selective incapacitation of a dangerous man. A policy of preventive detention is recommended. By any reasonable standard of justice, even that of social utility in its most elementary form, the statistical victim has an unimpeachable right to neighborhoods which are safe and to public places that are free from fear.
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