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Foreword

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SYMPOSIUM: PREVENTIVE DETENTION

FOREWORD

Charlie DeVore*

At first blush, suspected terrorists, sex offenders, and criminals with severe mental illness appear to have little in common. However, people in each of these categories are currently being detained in the United States not for crimes they have committed, but rather to prevent future wrongdoing. Preventive detention is the product of serious tension between constitutional protections and the risk of extreme and irreversible harm. Broadly stated, the U.S. Constitution does not allow the state to imprison people for potential or future harmful actions. Yet policymakers have found this limitation untenable in certain circumstances where the state would otherwise only be able to intervene after serious harm has been done. Raising the stakes, people in the three categories listed above are commonly thought to be undeterrable. If this is true, preventive detention may be the only way to avoid the crimes they would otherwise commit.

The Articles in this Symposium issue analyze the developing trend of preventive detention in the United States. Professor Joseph Margulies identifies the call for preventive detention of suspected terrorists as a result of the increasingly punitive American response to deviance and risk. Professors Ronald Allen and Larry Laudan assert, on the other hand, that preventive detention is not “an anomaly of a scandalous backwater of criminal law,” but rather a principled and legitimate part of the criminal justice system.¹ Professor Alec Walen states that the current regime of preventive detention for terrorist suspects is unworkable, and suggests a

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¹ Ronald J. Allen & Larry Laudan, *Deadly Dilemmas III: Some Kind Words for Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 781, 782 (2011).

reform in the “true threats” doctrine as an alternative to this detention. While Professor Gregory McNeal agrees that U.S. counterterrorism detention policy is dysfunctional and incoherent, he asserts as a practical matter that the policy is unlikely to change because of the strength of the status quo and the equilibrium in polarizing rhetoric about detention. Expanding this discussion to the intersection of mental health and criminal law, Professor Stephen Morse tracks a mentally ill individual’s potential path through the criminal justice system, identifying several problematic circumstances in which a person with severe mental illness may be preventively detained. Finally, Professor Corey Rayburn Yung discusses the expanding doctrines that allow preventive detention of sex offenders, and cautions that these doctrines could be applied to allow detention in other areas of criminal law.

Together these Articles recognize an emerging system of preventive detention in a wide range of legal situations that must be carefully considered and evaluated to determine whether the benefits it bestows on society are worth the costs it imposes. The *Journal* would like to thank the authors for their thought-provoking contributions to this Symposium. We would also like to thank the *Journal’s* 2010–11 editorial board and staff, especially Assistant Symposium Editors Zachary Dillon and Sarah Grady, for their diligent work in bringing these Articles to their final published form.