

THEORIES OF PERSONHOOD:
Capturing the Legal Subject in a
Dangerousness-Based Model of Preventative Detention

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Abstract: Through exploring recent amendments to the “Not Criminally Responsible” provisions of the *Criminal Code*, this paper problematizes the use of a dangerousness-based model of preventative detention to justify infringing on the liberty interests of an individual who has mental illness. It proceeds in two parts. Part one outlines the distinctive model of preventative detention that governs the detainment of certain individuals with mental illness and considers how theories of diminished personhood may underlie this distinct scheme. Through the valence of Franz Kafka’s *The Metamorphosis*, part two considers the detrimental effects of this diminished personhood theory, as well as the negative impacts of preventative detention on the individual detained. Ultimately, this paper argues that the persistence of a dangerousness-based model of preventative detention is problematic because it conflates an individual’s autonomous self with his or her illness, thus instilling feelings of shame in the subject and leading to a diminution or repudiation of his or her personhood.

Keywords: Not Criminally Responsible, Preventative Detention, Dangerousness, Criminal Code, Law and Literature, Franz Kafka, Metamorphosis

*Was't Hamlet wronged Laertes? Never Hamlet.
If Hamlet from himself be ta'en away,
And when he's not himself, does wrong Laertes,
Then Hamlet does it not, Hamlet denies it.
Who does it then? His madness. If't be so,
Hamlet is of the faction that is wronged;
His madness is poor Hamlet's enemy.*

—William Shakespeare, *Hamlet*¹

The text has disappeared underneath the interpretation.

—Friedrich Nietzsche²

Predictions of dangerousness are often used to justify state intervention in situations that involve mental health problems. This system of “preventative action” to promote the safety of the public is in many ways unique to mental health law.³ A dangerousness-based model of intervention provides that the state may only restrict an individual’s freedom in the form of involuntary hospitalization and/or treatment if that individual is perceived to be a danger to oneself or others.⁴ Championed by the civil libertarians in the 1960s and 1970s, this approach to addressing mental health issues is generally considered to better protect an individual’s autonomy and liberty interests than competing justificatory approaches to treatment and hospitalization.⁵

In Canada, reliance upon a dangerousness-based model of preventative detention is on the rise. In particular, recent amendments to the “Not Criminally Responsible” (“NCR”)

¹ William Shakespeare, *Hamlet*, ed by G R Hibbard, (Oxford: Oxford University Press, 2008) 5.2.179-185.

² Friedrich Nietzsche, *Beyond Good and Evil: Prelude to a Philosophy of the Future* (Oxford: Oxford University Press, 1998) at 37.

³ Jennifer A Chandler, “Mental Health and Disability in Canadian Law: Evolving Concepts, Concerns and Responses” in Jennifer A Chandler & Colleen M Flood, eds, *Law and Mind: Mental Health Law and Policy in Canada* (Toronto: LexisNexis 2016) 1 at 19.

⁴ Richard D Schneider, Anne G Crocker, and Marichelle C Leclair, “Mental Health Courts and Diversion Programs” in Jennifer A Chandler & Colleen M Flood, eds, *Law and Mind: Mental Health Law and Policy in Canada* (Toronto: LexisNexis 2016) 303 at 305.

⁵ *Ibid.*

provisions of the *Criminal Code* (Section XX.I) have re-emphasized that public safety is the paramount consideration when determining if an individual found NCR is eligible for a conditional or absolute discharge.⁶ In addition, these legislative changes have created a new, “high-risk offender” category, which provides additional barriers for certain individuals found NCR to re-enter the community.⁷ These amendments give rise to a host of questions. To what extent can individuals be preventatively detained on the basis of public safety? Can a “dangerousness” basis for detention be abused? And perhaps most importantly, what do these legislative changes say about Canadians’ underlying assumptions regarding individuals with mental illness?

This paper problematizes the use of a dangerousness-based model of preventative detention to justify infringing on the liberty interests of an individual who has mental illness. It proceeds in two parts. Part one outlines the distinctive model of preventative detention that governs the detainment of certain individuals with mental illness and considers how theories of diminished personhood may underlie this distinct scheme. Through the valence of Franz Kafka’s *The Metamorphosis*, part two considers the detrimental effects of this diminished personhood theory, as well as the negative impacts of preventative detention on the individual detained. Ultimately, this paper argues that the persistence of a dangerousness-based model of preventative detention is problematic because it conflates an individual’s autonomous self with his or her illness, thus instilling feelings of shame in the subject and leading to a diminution or repudiation of his or her personhood.

⁶ *Criminal Code*, RSC C 1985 c C-46, s 672.54 [*Criminal Code*], as amended by SC 2014, c 6, s 9.

⁷ *Criminal Code*, RSC C 1985 c C-46, s 672.64(1), amended by SC 2014, c 6, s 12.

I. *Retributive Justice versus Risk Management: Comparing the Criminal Code's Sentencing and NCR provisions*

To understand the distinctiveness of applying a predictive harm model to govern the detainment of mentally ill persons, it is useful to compare it to another system that regularly engages an individual's *Charter* rights by way of detention: the criminal justice system. This section compares the legal treatment of criminals and the mentally ill by examining the detention schemes for individuals found guilty of a crime under the *Criminal Code* with their mentally-ill counterparts who are found Not Criminally Responsible.

Section XX.I of the *Criminal Code* outlines the procedural framework that applies to individuals found NCR on account of mental disorder. Although it is contained within the *Criminal Code*, Section XX.I stands outside of the strict dichotomy of a finding of guilt or not guilt for the alleged offence, since a finding of NCR is neither a conviction nor an acquittal.⁸ In *Winko v British Columbia (Forensic Psychiatric Institute)*, McLachlin J (as she then was), writing for the majority, outlines the rationale behind Section XX.I as follows:

Under [Section XX.I], once an accused person is found to have committed a crime while suffering from a mental disorder that deprived him or her of the ability to understand the nature of the act or that it was wrong, that individual is diverted into a *special stream*. Thereafter, the court or a Review Board conducts a hearing to decide whether the person should be kept in a secure institution, released on conditions or unconditionally discharged.⁹

This conception of Section XX.I as a “special stream” of the criminal justice system is crucial to understanding its unique operation. Upon diversion to this special stream, the animating goals driving the criminal justice system's application are reconfigured. As stated by McLachlin J in *Winko*, “the emphasis [of Section XX.I] is on achieving twin goals of protecting the public and

⁸ R. v. Conway, 2010 SCC 22 at para 87, [2010] 1 SCR. 765 [Conway].

⁹ *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at 1, 175 D.L.R. (4th) 193 para 22 [*Winko*] (emphasis added).

treating the mentally ill offender fairly and appropriately.”¹⁰ In other words, the objective of protecting the public from harm is balanced against the need to recognize that “due process” and “fundamental fairness” are accorded to the individual found NCR.¹¹

In contrast, Section 718 of the *Criminal Code* outlines the purpose and principles of sentencing that apply when an individual is found guilty of an offence. The fundamental purpose of sentencing is the same as the NCR provisions: to protect the safety of the public.¹² This is achieved through imposing just sanctions that have one or more of the following objectives: denunciation of the criminal conduct; deterrence from committing future offences;¹³ rehabilitation of offenders; reparation to victims and community; promotion of responsibility of the offender; and where necessary, the separation of individuals from society.¹⁴ The application of these sentencing principles is shaped by the overarching concept that every sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender.¹⁵

At first blush, the motivations behind the sentencing and NCR provisions do not seem to significantly diverge. After all, the main directive of both provisions is to ensure the safety of the public. A crucial difference, however, is the temporal nature of detention imposed to achieve this end. Sentencing provisions are governed by principles of proportionality and culpability. These principles ensure that when a guilty person is sentenced, the severity of the offender’s sentence, which may include a period of detention, must be proportionate to the offender’s moral culpability for the offence. This prescribes limits on the justifiable detention for an offender, and

¹⁰ *Ibid*, para 30.

¹¹ *Ibid*, para 22.

¹² *Criminal Code*, *supra* note 6, s 718.

¹³ This includes both specific deterrence, which deters the offender from future criminal conduct, and general deterrence, which deters the general public from future criminal conduct: *Ibid*, s 718(b).

¹⁴ *Criminal Code*, *supra* note 6 at ss 718(a)–(f).

¹⁵ *Ibid*, s 718.1.

thus renders the sentence “finite.”¹⁶ By contrast, “because the NCR accused’s liberty is not restricted for the purpose of punishment, there is no corresponding reason for finitude” when detaining an individual found NCR.¹⁷

This “finitude disparity” can be explained by the different temporal orientations of the *Criminal Code’s* sentencing and NCR provisions. Sentencing provisions are focused on promoting public safety by ensuring accountability for *past* conduct. NCR provisions, on the other hand, are focused on promoting public safety by assessing the potential for *future* conduct of a dangerous nature. This system of preventative detention is therefore untethered to the principles of fault or proportionality that guide sentencing. It is simply concerned with ensuring that an individual is not discharged absolutely until he or she no longer poses a significant threat to the safety of the public.

Why do we permit the preventative and potentially infinite detention of individuals with mental illness in the name of public safety, while similar sanctions are not imposed on non-mentally ill offenders? Non-mentally ill offenders who present a significant risk to the safety of the public are consistently released back into the community after the termination of their sentences; and indeed, around 41 to 44% of these individuals subsequently reoffend.¹⁸ Some scholars have argued that, if detention is to be regarded as acceptable on the basis of putative “risk” alone, all individuals who present a significant risk to the safety of the public, with or without the presentation of a mental disorder, should be subject to the same prospect of

¹⁶ *Winko, supra* note 7 para 93.

¹⁷ *Ibid.*

¹⁸ Letter from Canadian Alliance on Mental Illness and Mental Health to Hon Robert Nicholson, Minister of Justice and Attorney General of Canada (25 February 2013), online: CAMIMH <<http://camimh.ca/2013/03/camimh-bill-c-54-letter-to-robert-nicholson/>>

potentially infinite detainment.¹⁹ Indeed, Elyn Saks points out that “if increased likelihood of dangerousness is enough reason to commit the dangerous mentally ill, it should also be enough reason to commit the dangerous, youthful male, who is likelier to be violent than the general public – and much more so than the symptomatic mentally ill.”²⁰ Most people intuitively recoil at the notion of preventative detainment when it is applied outside of the context of mentally ill persons, yet we accept that this treatment routinely befalls individuals with mental illness. How can this differential treatment of the mentally ill be justified?

Some scholars have argued that preventative detainment in the context of mental illness is distinguished from that of the non-mentally ill through concepts of autonomy. In *Punishment and Freedom*, Alan Brudner defines “real autonomy” as “the realized potential of free beings to act from self-authored ends rather than those given immediately by passion and to actualize those ends in works that adequately reflect them.”²¹ Brudner contends that the agency right of an individual with mental illness is justifiably infringed upon in cases where that agent’s ability to exercise autonomous choices is drastically impaired.²² He argues that an agency right may be overridden for reasons that realize the dignity claim underlying the right, that the absolute right itself upsets.²³ This means that if a mentally-ill individual exercising an autonomy right will harm “goods” (such as “life” or “physical health”) that are essential to exercising his or her capacity for choice, the autonomy right may be justifiably infringed upon.²⁴ Brudner goes on to add that those who are dangerous and unable to act from “self-authored ends” may have

¹⁹ George Szukler, “Fifty Years of Mental Health Legislation: Paternalism, Bound and Unbound”, in Sidney Bloch, Stephen A Green & Jeremy Holmes, eds., *Psychiatry: Past, Present, and Prospect* (Oxford: Oxford University Press, 2014) at 133.

²⁰ Elyn R Saks, *Refusing Care: Forced treatment and the rights of the mentally ill* (Chicago: University of Chicago Press, 2002) at 50.

²¹ Alan Brudner, *Punishment and Freedom*, (Oxford: Oxford University Press, 2009) at 282 [Brudner].

²² *Ibid* at 281.

²³ *Ibid* at 282.

²⁴ *Ibid*.

their autonomy rights justifiably infringed upon if preventative detention will promote the protection of the competing agency interests of the general public.²⁵

Other theorists complicate the idea that autonomy infringements may be so elegantly justified in the absence of wrongdoing. Herbert Morris puts forward a compelling argument that violating individuals' autonomy rights for the purpose of treatment is tantamount to failing to treat them as persons.²⁶ For Morris, treating a human being as a person requires (1) permitting that person to make the choices that will determine what happens to him or her, and (2) respecting that person's choices.²⁷ On this basis, he distinguishes the systemic treatment of criminals from the mentally ill. By imposing punishment, the criminal law implicitly respects—indeed, requires—that the criminal acted as an agent who made an autonomous choice for which proportionate sanctions are justified. By contrast, the actions of the mentally ill are treated as “mere happenings,” rather than occurrences driven by agential choices for which there were reasons.²⁸ One system is premised upon retributive justice for past choices, while the other is based upon risk management of future actions that are not tied to choice. Under Morris' theory, these differing conceptions of choice demonstrate that the criminal justice system respects the personhood of its subjects in a way that the mental health system does not.

Why is it that, for Morris, the capacity to make choices and have others respect those choices is essential to being treated as a person? He suggests that the capacity for meaningful choice is a distinctly human trait that serves to define the person:

Human beings pride themselves in having capacities that animals do not. A common way [...] of arousing shame in a child is to compare the child's conduct to that of an animal.

²⁵ *Ibid.*

²⁶ While Morris' paper focuses on treatment fuelled by compassion, one may draw from his discussions of personhood when assessing the regime of preventative detention. Herbert Morris, “Persons and Punishment,” (1968) 52:4 *The Monist* 475 [Morris].

²⁷ *Ibid* at 492.

²⁸ *Ibid* at 480.

In a system where all actions are assimilated into happenings we are assimilated to creatures [...] whom we have always thought possessed of less than we. [...] We have thought of ourselves as capable where animals are not of making, of creating, among other things, ourselves.²⁹

Is it not true, however, that animals also make choices, such as when to pounce, where to nest, and with whom to mate? Why does Morris call a person's act a "choice" and a creature's act a "happening"? Brudner's theory of agency may perhaps clarify the distinction. The "choices" of animals may be understood as "given immediately by passion" rather than actualizing "self-authored ends." In this way, the acts of a creature may be characterized as mere "happenings" that emit from the animal. By contrast, persons, unlike creatures, exercise the capacity to make "self-authored" choices, and Morris implies that this capability enables us to "creat[e] ... ourselves." In this difficult passage, Morris seems to suggest that the person (or in other words, the "autonomous self") is defined by, yet separable from, our choices.

It follows that by understanding the acts of an individual with mental illness as "happenings" rather than choices, one fails to acknowledge the individual's personhood. By reducing a person's acts to a symptom of his or her mental illness, one arguably extinguishes the concept that an individual with severe mental illness truly has an autonomous self that is defined by, yet separable from, one's choices. It is this slippery concept – the disappearance of the underlying "autonomous self" – that seems to represent the root cause of the differential treatment of criminals and the mentally ill. In the criminal justice system, the autonomous self is recognized as related to, yet distinct from, a previous wrongful act. The autonomous self is punished for freely choosing to undertake a previous action that does not conform to society's rules.³⁰ In recognizing that the self has the capacity for choice, the rationale behind punishment

²⁹ *Ibid* at 486.

³⁰ *Ibid* at 485.

is that it will motivate the offender to modify his or her behavior and exercise his or her freedom of choice differently in the future. In other words, the criminal law recognizes a self that is (1) distinct from one's actions, and (2) capable of rational choice. According to Morris, it is through recognizing a criminal's capacity for choice that the criminal justice system treats the offender as a person.

By contrast, under the NCR provisions, the autonomous self is obscured by mental illness, which is understood to be the root cause of an action that violates societal norms. In order to ensure that such violations do not occur in the future, the state does not incentivize individuals to make "better choices" through finite periods of retributive detention, because the previous violation is not considered to be caused by a rational choice. Instead, the state removes an individual from the public sphere if it identifies him or her as inclined to be subject to the dangerous, choiceless "happenings" that Morris describes. The absence of choice thus transforms the purpose of detention from one of past-oriented retribution into one of future-oriented risk management. The mental health system operates to preventatively detain "unfortunate carriers of disease who must be controlled" for potentially infinite periods of time.³¹ The severely mentally ill, who do not have a recognized capacity for choice, become defined by their "happenings" and their illness. Morris questions whether under such a view, the "self" can be said to persist at all.³²

At their core, it appears that the criminal and mental health legal systems have strikingly different conceptions of the person to whom the law relates. Indeed, on Morris's view, the individual with mental illness is arguably not treated as a proper "person"—in other words, an autonomous "self" capable of choice. These different theories of the legal subject serve to alter the functions of both legal systems, which furthers Morris' contention that the criminal garners

³¹ *Ibid* at 487.

³² *Ibid* at 487.

more respect from the state than the mentally ill. One detains agents for finite periods to promote better decision-making; the other detains subjects for potentially infinite periods to prevent future harm. Put another way, the functions of both systems can be framed in the following terms: the criminal law imposes guilt on an offender, while the mental health system imposes shame on the mentally ill.

The distinction between guilt and shame, while subtle, taps into the heart of the differential treatment of criminals and the mentally ill. In Martha Nussbaum's book, *Disgust, Shame, and the Law*, guilt and shame are distinguished in the following way: "Shame [...] pertains to a trait or feature of the person, whereas guilt pertains to an act."³³ Nussbaum expands on the distinction as follows:

Guilt [...] react[s] to the perception that one has done a wrong or a harm. Thus, whereas shame focuses on defect or imperfection, and thus on some aspect of the very being of the person who feels it, guilt focuses on an action [...] but need not extend to the entirety of the agent, seeing the agent as utterly inadequate.³⁴

The criminal and mental health law systems conform with this distinction. The criminal law functions as a system of retributive justice that imposes guilt on an individual for a previous act. The mental health system, on the other hand, is concerned with a base "defect or imperfection" – namely, the presentation of a mental illness. Unlike the offender, whose previous acts are distinguishable from the self, an individual with mental illness is perceived to have an affliction that pollutes the capacity to choose and thus "extends to the entirety of the agent." While the criminal law is concerned with a problem that has manifested in a previous action, mental health law is concerned with a problem that is manifested in the *person*.

Ultimately, this distinction between *acts* and *persons* helps to capture the fundamental

³³ Martha Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton, NJ: Princeton University Press 2004) at 229 [Nussbaum].

³⁴ *Ibid* at 207.

difference between the criminal justice and mental health systems. Although both systems strive to promote public safety, the means by which this is end is achieved drastically differ. While the criminal justice system is charged with the relatively manageable task of responding to past wrongful *acts*, mental health law tasked with the momentous challenge of anticipating and mitigating the future risk posed by an entire *person* to promote the safety of the public. As this section has sought to demonstrate, the reasons for this divergence are complex, multifarious, and unstated. At the root of the matter, the criminal justice and mental health systems are premised on two different conceptions of the legal subject. The criminal law conceives of the offender as an autonomous agent who, capable of choice, is separable and distinct from his or her actions. By contrast, mental health law does not recognize the individual's capacity for choice, and in doing so neglects to treat an individual with mental illness as a person separable from the "happenings" that the mental illness promotes. It is this unstated repudiation of personhood that serves to promote the distinctive preventative detention model that governs the "dangerous" mentally ill.

II. Morris, Shame, and Kafka: A Visualization of Preventative Detention

While the previous section explored the implicit assumptions giving rise to the preventative dangerousness model in the context of mental illness, it does not necessarily problematize them. It is easy to say that one does not like the "ring" of diminished personhood, nor the notion that the mental health system in certain circumstances fails to treat the mentally ill as "people." To understand the implications of these assertions in their complexity, however, it is useful to turn to the aid of metaphor. This section explores the harms of the repudiation of personhood and preventative models of detention through the valence of Franz Kafka's *The*

Metamorphosis.

The Metamorphosis follows the perspective of Gregor, a travelling salesman who wakes up one morning in the body of an “enormous bug.”³⁵ The first peculiarity about this story is that at the outset, Gregor appears quite unperturbed by this news. The biggest concern that occupies Gregor is purely related to coordination; he has trouble turning onto his side and scratching an itch.³⁶ Aside from that, Gregor simply endeavours to begin his normal, daily routine: “first, [Gregor] wanted to get up in peace and unmolested, get dressed and, especially, have breakfast, and only then give the matter [of his transformation] further thought.”³⁷ At the story’s outset, Gregor distinguishes himself from his mildly inconvenient predicament.

It is through Gregor’s interactions with his family and employer that his condition transforms from an inconvenience into a problem. Upon leaving his room, his family and employer exhibit immediate negative reactions towards Gregor’s newly exposed corporeal form: the mother collapses; his father shields his eyes and begins to weep; and the clerk, hand pressed against his mouth, “step[s] slowly back as if driven by some invisible force applying a uniform pressure.”³⁸ Gregor’s subsequent attempts to approach his family antagonize his spectators further. The mother shrieks and runs away; the chief clerk disappears down the stairs; and his father, hissing, drives Gregor back into his room with a cane.³⁹ According to the narrator, “in [the father’s] present mood it didn’t even remotely occur to [the] father to open the other leaf of the door in order to create an adequate passageway for Gregor [...] his *idée fixe* was merely that Gregor was to get into his room as quickly as possible.”⁴⁰ It seems that in the furor, Gregor’s

³⁵ Franz Kafka, *The Metamorphosis and Other Stories*, translated by Stanley Appelbaum (New York: Dover Publications, 1996) at 11 [Kafka].

³⁶ *Ibid* at 2.

³⁷ *Ibid* at 13.

³⁸ *Ibid* at 20.

³⁹ *Ibid* at 23.

⁴⁰ *Ibid* at 24.

father does not differentiate Gregor from his external, insectile figure. There is no consideration of Gregor's capacity for choice or voluntary compliance. Any recognition of Gregor's autonomous self is eclipsed by Gregor's corporeal form, which instills reactions of astonishment, hostility, and fear within those who encounter him.

The reactions of Gregor's employer and parents towards Gregor's appearance evoke an unfortunate, long-standing cultural response towards individuals with severe mental illness. As noted by Dr. Muller, and quoted by McLachlin J *Winko*:

There is a widely held belief in our culture that the mentally ill are predisposed to act in a violent or dangerous manner ... their unpredictable, strange and often inappropriately obtrusive behaviours easily produce a reaction of fear. When we experience fear, we all too readily attribute that fear to dangerousness of the exciting object, rather than considering whether our reactions may not be excessive or misplaced. The more frightened we become, the more dangerous we assume that which excites the fear is.⁴¹

The family's fear of the "enormous bug" serves to override the family's recognition of Gregor's personhood; he is first and foremost treated as an unpredictable threat. This is further evidenced by the father's presumption of danger upon learning that Gregor had escaped from his room: "it was clear to Gregor that his father had put a bad interpretation on [Gregor's sister's] excessively brief communication and assumed that Gregor had been guilty of some act of violence."⁴² The father's fear overpowers any consideration of his son's gentle nature and the insect's lack of previous violence when he assumes that the enormous bug did harm.⁴³ Just as an individual's severe mental illness may incite fear, heighten perceptions of dangerousness, and prevent the recognition of an individual's agency, so too does Gregor's form.

The family's treatment of Gregor instigates a dehumanizing metamorphosis whereby Gregor's underlying personhood becomes obscured by his predicament. While at the story's

⁴¹ *Winko*, *supra* note 7 para 35.

⁴² Kafka, *supra* note 35 at 36.

⁴³ *Ibid* at 36.

outset Gregor differentiates himself from his circumstances, as the tale progresses, Gregor's identity becomes conflated with that of his external, insectile state. Kafka illustrates how Gregor's family plays a critical role in this transformation. Interestingly, the only choices that Gregor's sister Grete respects are those which reaffirm Gregor's animalistic identity. For example, she facilitates Gregor's habit of crawling across the walls and ceiling by removing the furniture that restricts his freedom of movement, thus "transforming [his room] into a cave";⁴⁴ however, this process makes Gregor anxious that he may "simultaneously forget [...] his human past."⁴⁵ Similarly, by confining Gregor to his room and excluding Gregor from the dinner table, the Samsas affirm Gregor's "otherness" that separates him from his human family. Over time, Gregor begins to assume the identity that has been ascribed to him. For example, one evening, when Grete begins to sob at the dinner table, instead of longing to join his family, "Gregor hissed loudly with rage because it didn't occur to anyone to close the door and spare him the sight and the commotion."⁴⁶ Gregor's process of dehumanization is facilitated by his family, who fail to recognize that despite Gregor's externalities, Gregor is, in a way, still *Gregor*. The mother's statement, "when Gregor comes back to us again," mistakenly assumes that Gregor's person, capable of choice and separable from his corporeal form, is gone.⁴⁷ Ultimately, Kafka's story demonstrates the social process of conflation whereby a predicament external to the self may come, over time, to obscure and eventually define it.

Through Gregor's perspective, the reader is able to experience the effects of the repudiation of one's personhood. Gregor's tale gives the reader a chilling glimpse into the

⁴⁴ *Ibid* at 34.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* at 42.

⁴⁷ *Ibid* at 33.

“featureless solitude” of a life where one’s autonomous self is not recognized by others.⁴⁸ Gregor’s days are “monoton[ous],” and devoid of “all direct human communication.”⁴⁹ “Tired and dejected,” Gregor remains motionless, in the dark, for hours on end.⁵⁰ Unsure of what to do about Gregor, the Samsas continue to confine him to his room, which becomes progressively dirtier and gradually fills with “superfluous things that couldn’t be sold but nobody wanted to throw out.”⁵¹ In a process evocative of “warehousing,” Gregor comes to be considered as an unsaleable object to be stored for a potentially indefinite amount of time. The effects of infinite detention are thus disturbingly realized.

In addition to experiencing profound neglect and isolation, Gregor also begins to develop a deep sense of shame. As Nussbaum notes, “Guilt [...] makes the statement ‘you committed a bad act.’ Shame [...] makes the statement, ‘you are a defective type of person.’”⁵² Gregor’s growing feelings of shame correspond with the conflation of his entomological form with his identity. After Gregor’s first, disastrous encounter with his family, it is with a “slight feeling of shame” that he first decides to crawl under the couch; however, to Gregor’s chagrin, he is unable to wholly conceal the insectile figure that incited such hostility and fear.⁵³ As Gregor becomes defined by the insect, his appearance comes to represent Nussbaum’s “base defect or imperfection” that “extends to the entirety of the agent.” Incapable of changing his fear-inducing form, Gregor’s attempts to conceal himself become more elaborate: to spare his family from the sight of even the small portion of his body that protruded below the couch, “one day – he needed four hours for this task – [Gregor] carried the bedsheet on his back over to the couch and draped

⁴⁸ *Ibid* at 31.

⁴⁹ *Ibid* at 34.

⁵⁰ *Ibid* at 43.

⁵¹ *Ibid*.

⁵² Nussbaum, *supra* note 33 at 230.

⁵³ Kafka, *supra* note 35 at 25.

it in such a way that he was now completely covered.”⁵⁴ When his mother finally enters his room, Gregor refrains from allowing any part of himself to become exposed from under the shroud.

These actions demonstrate how, over time, Gregor becomes afflicted with a deep sense of shame towards his entire person. Indeed, the narrator describes Gregor’s act of camouflage as “clos[ing] himself off completely.”⁵⁵ Unable to change the fear-inducing characteristic that has been conflated with his identity, Gregor is compelled to conceal his entire self from his family. Gregor’s feelings of inadequacy and shame culminate in Gregor’s last moments of life, as he becomes convinced of his necessity to relieve his family of their burden and wholly “disappear.”⁵⁶ As described by Julia Annas, shame is linked to a ““broken spirit” – a long-term inability to recover self-respect and a sense of one’s own worth.”⁵⁷ In this way, shame – instilled within Gregor by the repudiation of Gregor’s personhood – is arguably what ultimately kills him.

Gregor’s fatal experience of shame can in some ways be understood as a troubling reflection on the damaging effects of a preventative detention system. Based upon theories of requisite change, the preventative detention system may inadvertently impose shame on its subjects for their inability to relieve themselves of their affliction. As noted by Morris,

we should prefer the pain and suffering of a system of punishment to a world in which we only experience shame [...] for with guilt there are relatively simple ways of ridding ourselves of the feeling we have [...] but with shame we have to bear it until no longer are the [same] person.⁵⁸

Kafka’s story illustrates the psychological damage caused by a system that imposes shame on an individual, rather than guilt for a previous act. As Nussbaum notes, “punishments may treat the

⁵⁴ *Ibid* at 31.

⁵⁵ *Ibid* at 32.

⁵⁶ *Ibid* at 49.

⁵⁷ Nussbaum, *supra* note 33 at 231.

⁵⁸ Morris, *supra* note 26 at 489.

act very harshly, while still expressing the sense that the *person* is worthy of regard and of ultimate reintegration into society.”⁵⁹ Gregor, on the other hand, experiences a conflation of his person with his circumstance. He seems to eventually accept that, unlike the criminal, he will never be included in the “circle of humanity” of which he initially expressed hope to be a part.⁶⁰ The only conceivable means by which Gregor would be permitted to re-enter the family unit is if he reassumes his human form; and this “human” Gregor is not quite the same as the metamorphosed one whom he is currently recognized to be.⁶¹ Ultimately, these systems of preventative detention, based upon theories of requisite change, affirm the personhood of the “cured” at the expense of renouncing that of the “afflicted.” One is encouraged to enter the social fold, while the other will always be precluded from entry. By basing the finitude of detention upon the requisite change of a person, such a system may impose debilitating shame upon the individual who is required and unable to change.

While Kafka’s novel provides a rich illustration of Morris’ concepts of personhood, it also serves to test them. In particular, Kafka’s tale may be interpreted as challenging Morris’ contention that individuals with serious mental illness are persons insofar as they have a “future interest” in their own personhood.⁶² Morris’ conclusion that we must “bring back to the to the community of persons those whom it is possible to bring back”⁶³ is reminiscent of Gregor’s mother’s comment, where she imagines a time “when Gregor comes back to us again.”⁶⁴ By contrast, Kafka’s story challenges the conclusion that the person ever really left. It is true that at the outset, Gregor has difficulty executing his choices with his threatening and alien corporeal

⁵⁹ Nussbaum, *supra* note 33 at 233.

⁶⁰ Kafka, *supra* note 35 at 19.

⁶¹ I recognize the difficulty of making such a distinction below.

⁶² Morris, *supra* note 26 at 501.

⁶³ *Ibid.*

⁶⁴ Kafka, *supra* note 35 at 33.

form; however, this does not mean that Gregor lacks the capacity to choose, and thus there is no person for society to acknowledge. While Morris' conclusion focuses on expending efforts to bring "back" the person whose choices garner society's respect, Kafka seems to contend that we should instead rethink our conception personhood to better respect the individual who is currently in front of us.

Interestingly, Kafka seems to promote the practice of respecting and facilitating the exercise of one's autonomy as the only effective "cure" for Gregor's predicament. The story's only mention of a cure for Gregor's affliction occurs when Gregor first learns how to walk in his new body. When Gregor finally propels himself onto the floor, he realizes that "his little legs [...] obeyed perfectly [...] they were eager to carry him wherever he wanted to go; and he now believed that a *definitive cure* for all his sorrow was immediately due."⁶⁵ It seems that for Kafka, there is something inherently curative about exercising one's autonomy in the face of affliction that appears to inhibit it. Crucially, Kafka draws attention to the Samsas' ability to assist Gregor's in his plight; at the outset of the story, as Gregor struggles to get out of bed, "it occurred to [Gregor] how simple everything would be if someone came to help him."⁶⁶ Had Gregor's family been able to overcome their fear of Gregor's insectile form, they could have helped to *affirm* Gregor's personhood by facilitating his exercise of autonomy, rather than restrict and undermine by waiting for Gregor to "come back." Instead of providing treatment so that an individual may, as Morris puts it, "resume his functioning as a person,"⁶⁷ Kafka seems to suggest that we should refocus the inquiry to challenge the definition of what a "functioning person" is.

⁶⁵ *Ibid* at 22.

⁶⁶ *Ibid* at 15.

⁶⁷ Morris, *supra* note 26 at 501.

Taken together, Kafka's *The Metamorphosis* is a fruitful lens through which Morris' abstract discussions about the denial of personhood may be realized as well as challenged. This story presents a complex portrait of the interacting societal forces that lead to the practice of preventative detention: these include society's fear of the mentally ill; society's consequent overestimation of dangerousness; and society's repudiation of an individual's personhood through a process of conflating the autonomous self with its affliction. Kafka's tale gives readers the ability to gain purchase on the nebulous concept of personhood and apprehend the detrimental impacts that refutation of personhood has upon an individual. One is better able to picture the feelings of loneliness, dehumanization, and shame of such treatment when one views it through Gregor's eyes. Finally, Kafka's challenges Morris' suggestion that society should make attempts to "bring back to the community of persons all those whom it is possible to bring back."⁶⁸ Instead, Kafka implies that we should redraw the very boundaries of this "community of persons" to include those who still retain the capacity for choice, yet might otherwise fall outside the classically-drawn "circle of humanity" as it has been historically rendered.⁶⁹

III. Conclusion

This paper has traced the development of the NCR provisions to determine the theoretical differences that underlie the dissimilar detention schemes of criminals and the mentally ill. At its core, this difference stems from disparate conceptions of the legal subject to whom the law relates. While the criminal law respects the choices of its subject, thus reaffirming the subject's personhood, the mental health system treats an individual's acts as "happenings," thus allowing the mental illness to eclipse the person. This conception of "diminished" or "repudiated"

⁶⁸ *Ibid.*

⁶⁹ Kafka, *supra* note 35 at 19.

personhood forms the basis on which certain individuals with mental illness are subject to a potentially infinite period of detention, unlike their non-mentally ill counterparts. Kafka's *The Metamorphosis* problematizes a system of preventative detention by illustrating the damaging impacts that flow from society's implicit repudiation of the personhood of certain individuals with mental illness. Kafka's story provides a disturbing visualization of the process of dehumanization and shaming that occurs when one's external predicament is conflated with one's autonomous self. Ultimately, Kafka's tale challenges us to better respect the autonomy interests of these individuals by rethinking our basic conception of what a person is.

Under Morris' framework, an individual is only treated as a person if he or she has the capacity for choice and such choices are respected. As a result, society is accorded great influence in determining what a person is. Kafka's story demonstrates the difficulties that plague answering such a question succinctly. How is Gregor the salesman related to Gregor the "enormous bug,"⁷⁰ or Gregor the "monstrous creature"?⁷¹ Which of these Gregors is, in fact, a person? Are they all the same person? Are they all utterly distinct? Kafka captures the multifarious, irreducible nature of personhood: changeable yet constant, public yet private, separable yet intertwined with one's circumstance. Society is thus charged with a daunting task in determining whose choices to recognize, facilitate, and respect.

In recognizing society's role in developing this rather nebulous concept, Kafka and Morris both suggest that we critically evaluate the underlying prejudices that may influence our collective understanding of personhood. We must guard against processes of dehumanizing conflation whereby we see the illness, but not the person. Such psychological processes are likely rooted in our own anxieties about how to define our society as well as our own

⁷⁰ *Ibid* at 11.

⁷¹ *Ibid* at 47.

autonomous selves. As Nussbaum notes, “people who inflict shame are very often [...] expressing [...] a shrinking from their own human weakness and a rage against the very limits of human life.”⁷² We must not allow such prejudicial feelings to infiltrate our application of a preventative detention system, if such a system should continue to persist.

⁷² Nussbaum, *supra* note 33 at 232.