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### Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible

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Article

**Beyond Crime and Commitment:  
Justifying Liberty Deprivations of the  
Dangerous and Responsible**

**Kimberly Kessler Ferzan<sup>†</sup>**

INTRODUCTION

There is a range of dangerous persons who walk among us. The sexual predator who intends to molest a child. The terrorist who plans to bomb a public square. The psychopath who will inflict injury without remorse. The determined killer who aims to end the life of another.

We want the State to protect us from these dangerous people. Truth be told, we want the State to lock them up. The scholarly literature argues that the law approaches dangerousness from two distinct and irreducible vantage points. These are “disease,” where the State may prevent and confine, and “desert,” where it may punish and incarcerate.<sup>1</sup> If the State denies the agent is a responsible agent, it can detain him. It can treat him as it treats other non-responsible agents, as a threat to be dealt with, without fear of infringing his liberty or autonomy interests. With respect to responsible actors, the State can use the criminal law. It can punish the deserving for the commission of a crime. For a responsible agent, the State should not intervene in any substantial liberty-depriving way prior to

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<sup>†</sup> Professor of Law, Rutgers University, School of Law–Camden. I benefitted from presenting this paper at the American Philosophical Association’s Eastern Division meeting, the University of San Diego Law School’s Conference on the Morality of Preventive Restrictions, and at the Rutgers–Camden Law School’s faculty colloquium. For comments on the manuscript or helpful questions at the conferences, I thank Larry Alexander, Andrew Ashworth, Mitch Berman, Roger Clark, Joshua Dressler, Ken Ehrenberg, Doug Husak, David Luban, Stephen Morse, Dennis Patterson, George Sher, Allan Stein, Rick Swedloff, Alec Walen, Peter Westen, and Lucia Zedner. Copyright © 2011 by Kimberly Kessler Ferzan.

1. Stephen Morse originally framed the dichotomy this way. Stephen J. Morse, *Neither Desert Nor Disease*, 5 LEGAL THEORY 265, 266 (1999).

his commission of an offense for fear of denying his autonomy. The State must respect that a responsible agent may choose not to commit an offense. It cannot detain an actor for who he is. It must wait to see what he will do. Thus, to the extent that we have preventive practices that do not fit either model, these mechanisms are typically condemned as unjust.<sup>2</sup>

This choice between crime and commitment leaves a gap.<sup>3</sup> We have no justification for substantial intervention against responsible agents prior to when they have committed a criminal offense.<sup>4</sup> We have no theory of when or why we may engage in substantial liberty deprivations of dangerous and responsible actors. This Article bridges that gap. It offers an account of how, in one class of cases, the actor has made himself liable to preventive interference and thus cannot object that the liberty deprivation violates his rights.

How should we understand the relationship between prevention and punishment? At first blush, prevention and punishment seem to be conceptually distinct. Prevention looks forward. Punishment looks backwards. Prevention looks at what a person will do. Punishment looks at what a person has done. Prevention does not care about responsibility. Punishment requires the actor to be responsible. As Christopher Slobogin articulates the Supreme Court's jurisprudence in this area:

Criminal punishment is based solely upon a conviction for an offense and can occur only if there is such a conviction. Preventive detention is based solely upon a prediction concerning future offenses and can occur only if there is such a prediction. Therefore, preventive detention is not criminal punishment. Indeed, the concept of "punishment" for some future act is incoherent.<sup>5</sup>

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2. See, e.g., Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 96 (1996) ("In the absence of mental illness sufficiently serious to preclude criminal responsibility, predictive confinement violates the first principle of limited government—to treat every mentally competent adult as a free and autonomous person responsible for his chosen actions—and only for his chosen actions.").

3. This is Morse's term. Stephen J. Morse, *Preventive Confinement of Dangerous Offenders*, 32 J.L. MED. & ETHICS 56, 56 (2004).

4. See *id.* at 58 ("We cannot detain [dangerous people] unless they deserve it and desert requires wrongdoing. In the interest of liberty, we leave potentially dangerous people free to pursue their projects until they actually offend, even if their future wrongdoing is quite certain. Indeed, we are willing to take great risks in the name of liberty.").

5. Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 12 (2003).

Scholars warn against allowing punishment practices to focus on dangerousness, and conversely, of allowing commitment models to capture responsible actors.<sup>6</sup> For instance, Paul H. Robinson argues that the current criminal law “cloaks” preventive practices as punishment.<sup>7</sup> As Robinson rightly notes, three strikes laws and other habitual offender penalties increase the amount of punishment not based on what the agent deserves, but based upon how dangerous he is.<sup>8</sup> This contorts the criminal law.

Simultaneously, the Supreme Court’s jurisprudence on the involuntary detention of sexual predators has drawn scholarly criticism.<sup>9</sup> The test employed by the Court, which allows confinement of those with a mental disorder and an inability to control their conduct, fails to differentiate “the bad,” who deserve punishment, from “the mad,” who ought to be confined.<sup>10</sup> The problem, as Eric Janus notes, is that although the Court wishes to maintain that “people subject to civil commitment must in some sense be *different* from ordinary recidivist criminals,”<sup>11</sup> the test adopted fails to meet this requirement because “impaired self-control is not a ‘diagnosis’ or a ‘mental disorder’ that makes sex offenders different from other criminals—it is

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6. PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 121 (2008) (“The cloaking of preventive detention as criminal justice is problematic in part because it undermines justice.”); Morse, *supra* note 3, at 65 (calling recent Supreme Court decisions allowing civil commitment of sex offenders “a real, broad and profound threat to liberty, to the distinction between crime and disorder, and to the consequent distinction between civil and criminal confinement”); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 *GEO. L.J.* 775, 794 (1997) (noting the “bleeding” and “blurring” between criminal justice and mental health).

7. Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 *HARV. L. REV.* 1429, 1444–48 (2001).

8. ROBINSON, *supra* note 6, at 122; *see also* Morse, *supra* note 3, at 66–67 (noting that enhanced sentencing laws are an erosion of desert). *But see* Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 *TEX. L. REV.* 571, 573–78 (2009) (offering a retributivist’s defense of sentencing enhancements for repeat offenders).

9. The two major recent cases in this field are *Kansas v. Crane*, 534 U.S. 407, 413 (2002), and *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997).

10. Morse, *supra* note 3, at 62 (“[The] circular definition collapses the clichéd distinction between ‘badness’ and ‘madness,’ which is precisely the distinction the definition is meant to achieve to justify civil rather than criminal commitment.”).

11. ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE* 39 (2006) (citations omitted).

precisely what makes them similar to other criminals.”<sup>12</sup> And Stephen Morse denounces the “mental abnormality” criterion approved by the Supreme Court in *Kansas v. Crane* and *Kansas v. Hendricks* as “obscure, circular, and mostly incoherent.”<sup>13</sup> The message scholars are sending is clear: prevention and punishment are two distinct practices, but in both instances, the State is failing to maintain the clear boundaries between the two.<sup>14</sup>

Although punishment and prevention are thus presented as non-overlapping practices, there is significant overlap that ought to be acknowledged. First, criminalization of conduct reduces that conduct.<sup>15</sup> Second, theorists who subscribe to a mixed view as to the justification for punishment find desert to be a necessary but insufficient criterion for punishment.<sup>16</sup> That is, mixed theorists believe we should punish if the offender deserves it *and* the punishment will prevent crimes, through deterrence or incapacitation. Moreover, in the real world, a world of limited resources where we cannot give everyone the punishment they deserve, one particularly good way to choose which criminals to focus upon is by looking to what other benefits accrue by punishing them.<sup>17</sup>

A third way that desert can intersect with preventive goals is by way of the mode of punishment. When we are selecting

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12. *Id.* at 103.

13. Morse, *supra* note 3, at 62; *see also Crane*, 534 U.S. at 413–14; *Hendricks*, 521 U.S. at 358.

14. *See, e.g., Steiker, supra* note 6, at 793–94 (condemning trends that “subordinate the distinction between ‘mad’ and ‘bad’ to the need for protection from the ‘dangerous’”).

15. Andrew Ashworth & Lucia Zedner, *Just Prevention: Preventive Rationales and the Limits of the Criminal Law*, in *PHILOSOPHICAL FOUNDATIONS OF THE CRIMINAL LAW* 281 (R.A. Duff & Stuart P. Green eds., 2011) (“[E]ven the purest retributivists must recognize that a concomitant of the decision to declare certain conduct to be a serious wrong and therefore criminal is a commitment to reduce the frequency of that conduct.”); *see also* LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN J. MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 3, 6 (2009) (noting “the criminal law aims at preventing harm” and “the criminal law both creates and reflects value by announcing which conduct is sufficiently wrong to deserve blame and punishment”).

16. *See* MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 93 (1997) (describing two kinds of mixed theories: one in which we punish only those who deserve it but only *because* social gain is achieved, and the other in which we punish people *because* they deserve it but only in instances where some social gain is also achieved).

17. For a discussion of the puzzle of applying retributive theory to the practical limitations in the real world, *see* Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 816–25 (2007).

*how* we punish—the mode of punishment—we may also decide that incarceration is a particularly important mode of punishment for the dangerous.<sup>18</sup> (To put the point another way, we could simply cut off a criminal’s left hand as punishment, but that would mean that a mere few weeks after his sentencing, he would be standing behind you in the Starbucks line ordering a nonfat mocha Frappuccino). Hence, we could reserve imprisonment for dangerous offenders, thus getting the benefit of incapacitation, and use other punishment mechanisms for offenders who are not dangerous and do not need to be detained.<sup>19</sup> Notably, the amount of punishment would then be determined by desert, but the method of punishment would be dictated by other factors.<sup>20</sup>

Finally, as a theoretical matter, prevention and punishment appear to play on the same normative and epistemic turf. Epistemically, both practices fear false positives, as both result in significant injustices—the punishment of the innocent or the detention of someone who would not harm others.<sup>21</sup> Normatively, both practices ask when a State may interfere with an individual’s liberty. And both practices also may be constrained by other values. A retributivist might believe that the death penalty is what certain offenders deserve, but because it is applied in a racist manner, it should not be used.<sup>22</sup> Prevention principles are likewise constrained by equality concerns. When prevention requires a focus on certain groups, this focused preven-

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18. Carol Steiker claims that the use of incarceration for both punishment and preventive purposes has further blurred the civil-criminal divide. See Steiker, *supra* note 6, at 796–97.

19. Dan Kahan argues that imprisonment is an important mode of punishment because of its social meaning in expressing condemnation. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594–601 (1996). However, even if all forms of punishment are not equivalent in their meanings, society might still pursue other modes of punishment that could eventually take on equivalent social meanings. Moreover, at some point, perfect communication of condemnation may simply be too costly.

20. See ROBINSON, *supra* note 6, at 251, 253–54 (noting this possibility).

21. See Denise Meyerson, *Risks, Rights, Statistics and Compulsory Measures*, 31 SYDNEY L. REV. 507, 510 (2009) (noting that if 400 people are detained “on the basis that three in four of them will re-offend, 100 harmless individuals—false positives—will be imprisoned unnecessarily”); Peter Westen, *Two Rules of Legality in Criminal Law*, 26 LAW & PHIL. 229, 283 (2007) (“Of all the injustices that can be wrongly inflicted in the name of a people, there is scarcely any as great as punishing a person—and, thus, holding him out to deserve to suffer hard treatment by virtue of having engaged in prohibited conduct—when he did *not* engage in the conduct the statute prohibits . . .”).

22. Cf. MOORE, *supra* note 16, at 151 (“[T]he costs to other values of attaining a certain form of justice[] is always a relevant concern.”).

tion threatens to undermine equality, stigmatize groups, and mask authoritarian state regimes.<sup>23</sup>

Thus, the view that punishment and prevention are wholly independent sorts of inquiries grossly oversimplifies their relationship. However, the problem is not just that the literature has lacked the requisite degree of nuance. The problem is that this way of looking at the practices has blinded us to a familiar predictive practice that is grounded in responsible agency. We can have a model that looks not only at what the agent has done but also at what he will do. Sometimes what actors do justifies acting on predictions of what they might do in the future. This is the framework of self-defense.<sup>24</sup> What the aggressor *has done* grounds the defender's right to act on the prediction of what he will do.<sup>25</sup>

The false assumption that we must choose between prediction and responsibility has blinded theorists to how and why preventive interference is sometimes justified short of state punishment. This Article fills that chasm. The self-defense

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23. See DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION* 197 (New Press, 3d ed. 2006) (2002) (criticizing the Patriot Act because "by reserving its harshest measures for immigrants, measures directed predominantly at Arab and Muslim immigrants, it sacrificed commitments to equality by trading a minority group's liberty for the majority's purported security—a trade that has from all objective measures proven ineffective"); FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* 190 (2003) ("Because allowing the use of race and ethnicity imposes a cost on those members of targeted groups who are in the area of overinclusion—Middle Easterners who have done nothing wrong—it might be preferable to distribute the cost more broadly, and in doing so raise the cost without lowering the degree of security . . . Put starkly, the question of racial or ethnic profiling in air travel is not the question of whether racial and ethnic sensitivity must be bought at the price of thousands of lives. Rather, it is most often the question of whether racial and ethnic sensitivity should be bought at the price of arriving thirty [minutes] earlier to the airport."); Meyerson, *supra* note 21, at 528 (arguing that when a regulating measure "affects fundamental interests such as liberty or privacy, or is based on invidious classifications which tend to be an arbitrary or irrelevant basis for different treatment, or strikes at the value of free choice, balancing the costs to the mistakenly affected individuals against the public's interest in security will be illegitimate").

24. As delineated below, the liability-based theory of self-defense I endorse does not rule out other alternative justifications for self-defense's permissibility. See *infra* Part II.A.

25. Stephen Morse suggests that the "principles akin to those that underwrite individual self-defense would justify limited pure preemption . . ." Morse, *supra* note 1. However, Morse's theory of self-defense, based solely on the defender's *need* to act, ignores the possibility of liability-based preventive interference. Thus, though he gestures at self-defense, he falsely assumes that self-defense is part of a purely predictive model. See *id.* at 294–303.

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model demonstrates that there are grounds for substantially depriving responsible agents of their liberty to prevent their future crimes.

Part I argues that rather than having two concepts—desert and disease—we have three: desert, disease, and liability to preventive force. This Part first reviews the current state of the desert/disease analysis and then introduces the third perspective—liability to defense. The self-defense literature has recently spawned the concept of “liability to defensive force.” Liability explains why the defender does not wrong the aggressor—because the aggressor by his own culpable attack has forfeited his rights against the defender’s use of force against him.

Part II makes the case for a predictive practice grounded in responsible agency, and argues that the normative principles that underlie self-defense are directly applicable to preventive interference generally. Self-defense and liability to preventive interference have the same normative structure. Both are preventive principles grounded in responsible action. Part II begins by making conceptual space for this interference against criminal endeavors—a space currently occupied by preparatory offenses and attempts. Part II next sketches out the requirements for preventive interference, including both a culpable mind and an overt act, as well as how the State may intervene, using the United Kingdom’s civil preventive mechanism employed to prevent terrorist acts—the control order—as a possible model.<sup>26</sup> Part II then addresses potential distinctions between the two practices, including that self-defensive actions are only authorized when a harm is imminent and that the nature of a self-defensive response is short lived. Part II argues that neither of these restrictions on individual self-defense has any normative traction when applied to State action. The Part concludes with an example of how this regime would work to prevent a criminal act by a sexual predator.

Part III addresses potential objections to the preventive interference approach. These objections include whether this model is sufficiently autonomy-respecting, whether it is properly a civil, as opposed to criminal, mechanism, whether it is affordable, and, finally, whether it will conceptually and norma-

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26. Control orders will be replaced with “terrorism prevention and investigation measures” (TPIMs). In substance, these measures remain largely the same. See Matthew Ryder, *Control Orders Have Been Rebranded. Big Problems Remain.*, THE GUARDIAN (Jan. 28, 2011), <http://www.guardian.co.uk/commentisfree/libertycentral/2011/jan/28/control-orders-protection-of-freedoms-bill>.



tively collapse into a pure preventive regime. Part III argues that this model does respect the actor's autonomy and can provide the actor with sufficient constitutional protections, even outside the criminal law. It further argues that any government must make trade-offs in determining how to allocate resources, but this regime is unlikely to be more expensive than the resort to the criminal law. Finally, Part III claims that the principles that underlie this regime do not inevitably endorse a pure preventive-detention system, and that the regime can be practically implemented in a way that takes responsibility seriously.

### I. FROM DESERT AND DISEASE TO "LIABILITY TO DEFENSE"

The general view is that prevention and punishment are logically and conceptually distinct.<sup>27</sup> Punishment focuses on past conduct by responsible agents. Prevention looks toward the future and stops dangerous persons; responsibility is irrelevant. Prevention also does not care whether the person has acted. Actions are only evidence of dangerousness, but, conceptually and normatively, action is neither necessary nor sufficient for a preventive response. The concern is that prevention stops a person based on *who he is*. Punishment, on the other hand, is a reaction to *what he has done*.

This picture ignores a common preventive practice that looks to what someone has done in the past to ground a predictive response—self-defense. In justifying self-defense, someone may become liable to preventive force—a predictive behavior—based upon what she has done: culpably attack the defender.<sup>28</sup> This section articulates the normative and conceptual boundaries of these three practices: punishment, prevention, and liability to defensive force.

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27. See ROBINSON, *supra* note 6, at 113 (“[I]t is logically impossible to ‘punish dangerousness’ . . .”).

28. I defend the view that culpability is required for liability to defensive force. See Kimberly Kessler Ferzan, *Culpable Aggression: The Basis for Moral Liability to Defensive Killing*, 9 OHIO ST. J. CRIM. L. (forthcoming Spring 2012) (manuscript at 4), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1947277###](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1947277###). This is not to say that other defensive killings may not also be justified or excused. See *infra* Part I.C.

## A. PUNISHMENT

Although we may criminalize actions to prevent harms, we should only punish those individuals who deserve it. Indeed, a system without a desert component, at least as a necessary condition, could quickly reduce to pure prevention. Without requiring that the defendant do something blameworthy, the State could intervene simply to stop other people or to stop the defendant, and neither of these consequences logically require any action by the defendant at all.

There are many competing theories of retributivism. I will not defend an account of retributivism here; instead I wish to focus on three features of retributivism as Larry Alexander and I have explicated it elsewhere: (1) that it is intrinsically good to punish the guilty as much as they deserve, (2) that it is intrinsically bad to punish the innocent mistakenly, and (3) that it is impermissible to intentionally punish the innocent.<sup>29</sup>

First, it is intrinsically good to give wrongdoers what they deserve.<sup>30</sup> If someone has done something wrong, it is a good thing for that person to be punished for it. If Alex has committed a murder, the State has an affirmative reason to make Alex suffer stigma and harsh treatment in response. Retributivism also speaks to the quantum of punishment. The more blameworthy the act, the more punishment the defendant deserves. Alex's murder ought to be punished more than, say, Bob's destruction of property. That is, proportionality is a component of retributivism.<sup>31</sup>

Retributivism is not just concerned with the intrinsic goodness of deserved suffering but also speaks to the intrinsic badness of undeserved suffering.<sup>32</sup> Thus, retributivists need not be insensitive to the error rates between false positives and false negatives. Indeed, the proof-beyond-a-reasonable-doubt

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29. ALEXANDER & FERZAN WITH MORSE, *supra* note 15, at 3–19; Cahill, *supra* note 17, at 833–34, 855–56.

30. See MOORE, *supra* note 16, at 87–88 (arguing that for the retributivist, “[p]unishment of the guilty is . . . an *intrinsic* good”); Mitchell N. Berman, *Two Kinds of Retributivism*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW*, *supra* note 15 at 433, 439 (offering the formulation that “it is intrinsically good (or intrinsically valuable) that one who has engaged in wrongdoing suffer on account of, and in proportion to, his blameworthy wrongdoing”).

31. ALEXANDER & FERZAN WITH MORSE, *supra* note 15, at 8 (“[N]o one should be (knowingly) punished more than that person deserves.”).

32. See MOORE, *supra* note 16, at 87–88.

formulation manifests this belief that it is worse for an individual to be falsely convicted than for a guilty man to walk free.<sup>33</sup>

Retributivists also believe that we may not intentionally punish the innocent. We cannot frame an innocent man and punish him for a crime he has not committed, even if this action will prevent other crimes. Although there are some questions about how we should precisely formulate this side-constraint, retributivism takes seriously the view that whatever the consequences, it is impermissible to use an innocent person as a scapegoat.<sup>34</sup>

Theorists have questioned how retributivism ought to be applied in the real world.<sup>35</sup> Larry Alexander and I have distinguished between strong, moderate, and weak retributivists.<sup>36</sup> In this respect, the moderate retributivist position is most defensible.<sup>37</sup> Weak retributivists are wrong to hold that all that is required is that we not (intentionally) punish the innocent. Rather, the fact that someone deserves punishment does give us an affirmative reason to punish him.<sup>38</sup> Strong retributivists take too stringent a position on punishment in comparison to other social goods. We should not, as strong retributivists maintain, punish the guilty come what may.<sup>39</sup> Rather, the view that is most sound is that giving the guilty what they deserve is one intrinsic good that the government should pursue, but this good must be balanced against other intrinsic goods. Money spent on punishment is money not spent on education, health care, and feeding the poor. Moreover, if money is spent on feed-

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33. Cf. sources cited *supra* note 21.

34. See Michael T. Cahill, *Punishment Pluralism*, in *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* 25, 36 (Mark D. White ed., 2011) (“The principle of *negative retributivism* opposes imposition of undeserved punishment. The view is that punishing an innocent (in the sense of undeserving) person is not only harmful but morally wrong, and, perhaps, categorically forbidden.”). *But see* MOORE, *supra* note 16, at 719–24 (noting that deontological side-constraints have thresholds over which the constraint does not apply).

35. See *generally* Cahill, *supra* note 17 (discussing how retributive theory could be applied given practical limitations).

36. See ALEXANDER & FERZAN WITH MORSE, *supra* note 15, at 7–10 (describing the three positions and endorsing a moderate retributivist view).

37. See *id.*

38. For a thought experiment that is intended to lead to this conclusion, see MOORE, *supra* note 16, at 100–01 (arguing that even if no social good would be achieved, a rapist and robber ought to be punished).

39. See, e.g., ALEXANDER & FERZAN WITH MORSE, *supra* note 15, at 7 (describing why “strong retributivism is too strong”).

ing the poor or education, it may lead to less money needing to be spent on punishment.<sup>40</sup>

A desert-based view thus requires the defendant to do something worthy of moral and legal condemnation before we incarcerate him.<sup>41</sup> Once an actor has committed a blameworthy act, the State then has good reason to intervene.<sup>42</sup> A culpable affront to a legally protected interest is a sufficient ground for State interference.<sup>43</sup> Then the individual deserves to be punished.

## B. PURE PREVENTION

Pure prevention stands at the opposite end of the spectrum. Although an exploration of the types of preventive detention, their moral justifiability, and their constitutional permissibility could fill many articles, I wish to make a few points in this section. First, we have varying preventive-detention measures that the Supreme Court has held are constitutionally permissible. It is doubtful, however, whether some of these measures are morally justified. Second, even when the Court wishes to distinguish those who should be detained from those who should be punished—as it does in the sexual predator context—the test articulated by the Court fails to provide a legally and morally principled distinction. Third, to the extent that we seek to make predictions, they are normatively problematic *as predictions*—individuals who are subjected to substantial liberty deprivations based not on what they have done, but rather the statistical category under which they fall, can rightly claim that their autonomy and liberty are not being respected. They also face an uphill battle in disproving these predictions in their cases because of the political repercussions of false negatives. Finally, as noted by other scholars, preventive measures should be non-punitive and compensated for, but it is doubtful

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40. *See id.* at 172 (“It would be a crude caricature of the retributivist to make him monomaniacally focused on the achievement of retributive justice. The retributivist like anyone else can admit that there are other intrinsic goods, such as the goods protected by the rights to life, liberty, and bodily integrity. The retributivist can also admit that sometimes some of these rights will trump the achieving of retributive justice . . .”).

41. *See generally* ALEXANDER & FERZAN, WITH MORSE, *supra* note 15 (articulating a culpability-based theory of criminal law); DOUGLAS HUSAK, *OVER-CRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008) (defending the retributivist perspective and arguing that there are internal and external constraints on what may be criminalized).

42. *See generally* ALEXANDER & FERZAN WITH MORSE, *supra* note 15.

43. *Id.*

that such measures can be practically implemented. These points are elaborated below.

As Adam Klein and Benjamin Wittes catalog, the United States engages in many types of preventive-detention measures.<sup>44</sup> These activities include wartime detention powers, the Suspension Clause, pretrial detention, material witness detention, detention of aliens, detention of the seriously mentally ill, quarantine, and protective custody powers.<sup>45</sup> Studying these practices, Klein and Wittes argue against “[t]he civic mythology of preventive detention [that] contends that American law abhors the practice, or tolerates it only as an exception, in extreme situations, to an otherwise strong norm.”<sup>46</sup> Klein and Wittes conclude that the “unifying theme is that the law unsentimentally permits preventive detention where necessary but insists upon adequate means . . . of insuring both the accuracy of individual detention judgments and the necessity of those detentions.”<sup>47</sup> Moreover, “triggers tend to develop that require a separate evaluation of both an underlying condition or status and a risk of harm.”<sup>48</sup>

As Alec Walen notes, “However descriptively accurate this sort of utilitarian account of the law may be, it is nonetheless morally indefensible. It gives short shrift to the right to liberty of autonomous actors.”<sup>49</sup> This is not to say that we can never infringe an individual’s autonomy interests. Walen, for instance, argues that most short-term preventive-detention measures are permissible, as we can ask citizens to suffer limited liberty interferences for the common good.<sup>50</sup> The moral obligation to avoid infecting others may justify quarantine.<sup>51</sup>

However, when we wish to substantially interfere with an individual’s liberty to prevent him from harming us, theorists

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44. Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SECURITY J. 85, 87 (2011).

45. *Id.*

46. *Id.* at 186.

47. *Id.* at 187.

48. *Id.*

49. Alec Walen, *A Punitive Precondition for Preventive Detention: Lost Status as a Foundation for a Lost Immunity*, 49 SAN DIEGO L. REV. (forthcoming 2011) (manuscript at 6), available at <http://ssrn.com/abstract=1872984>.

50. *Id.* (manuscript at 8).

51. The best justification for quarantine is that “there may be an obligation to seclude oneself when dangerously ill if the disease is contagious enough, and the effects are serious enough.” Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778, 812 (1996).

decry the denial of the potential offender's autonomy. That is, when we detain someone because he might harm us, we treat him, as Stephen Morse aptly characterizes it, as "bad bacteria."<sup>52</sup> In other words, we deny that he will choose wisely and just predict that he will cause harm.<sup>53</sup> We thus treat him as a risk to be managed just as we manage disease.<sup>54</sup>

The detention of sexual predators is one area in which we see the critical question of how to distinguish the non-responsible, whom we may detain, from the responsible, whose autonomy we must respect. The Supreme Court's jurisprudence is clear—someone may only be detained if there is a showing beyond dangerousness.<sup>55</sup> The Court unmistakably seeks to distinguish sexual predators who lack sufficient volitional control "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings."<sup>56</sup> That is, the task—even as the Court understands it—is to distinguish the "bad" from the "mad."<sup>57</sup>

In *Kansas v. Hendricks*, Kansas sought to detain Leroy Hendricks, who was being released from prison after serving his sentence for child molestation.<sup>58</sup> Hendricks admitted that he had uncontrollable urges to molest children and the only way he would stop would be "to die."<sup>59</sup> The Supreme Court held that Kansas's Act was constitutional when it required both past sexual behavior and "a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated."<sup>60</sup> It later clarified in *Kansas v. Crane* that this

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52. Morse, *supra* note 3, at 57.

53. Schulhofer, *supra* note 2.

54. See Corrado, *supra* note 51, at 779 ("[T]here is something very disturbing about taking away the personal freedom of someone who has not yet violated the criminal law."); Alec Walen, *A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists*, 70 MD. L. REV. 871, 877 (2011) (arguing "that an individual may not be deprived of his liberty unless the reasons for doing so respect his status as an autonomous person"). Walen describes such a person as one "who has reached a threshold capacity to use practical reason to frame and pursue a conception of a good life . . ." *Id.* at 873 (footnote omitted).

55. *Kansas v. Hendricks*, 521 U.S. 346, 357–58 (1997).

56. *Id.* at 360.

57. See Morse, *supra* note 3, at 62.

58. 521 U.S. at 353–54.

59. *Id.* at 355.

60. *Id.* at 357–58.

mental disorder must be one where individuals have “serious difficulty” controlling their behavior.<sup>61</sup>

Unfortunately, this test is extraordinarily problematic. It is overbroad. First, the mental abnormality condition does no distinguishing work. Kansas’s definition for mental abnormality is a “congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses,”<sup>62</sup> but as Stephen Morse notes, “the definition is simply a (partial) generic description of *all* behavior and it is *not* a limiting definition of abnormality.”<sup>63</sup> Moreover, with respect to the lack of control criteria, there is a significant injustice at work here. The detainees in *Crane* and *Hendricks* were sex offenders who had already been criminally punished.<sup>64</sup> If they could not control their conduct, then, as a normative matter, they should have been excused. The question of rationality should remain the same—if these actors are sufficiently rational to choose to act, then they can be punished, but they cannot be detained. If they are sufficiently irrational that they ought to be detained, then they cannot be punished.<sup>65</sup> The State should not be able to inconsistently maintain that these actors are responsible so it can punish them, and then based on the same facts, also maintain that they are non-responsible so it can detain them post-punishment. The State should be required to pick one view: either responsible and punishable or non-responsible and detainable.

Proposed alternatives to the Court’s test resurrect the same problems with finding a principle that respects autonomy. Noting that “predicating preventive detention on a showing that a person’s dangerousness is something he or she cannot control appears to be a theoretical and practical dead end,”<sup>66</sup> Christopher Slobogin offers a criterion of “undeterrability” for

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61. *Kansas v. Crane*, 534 U.S. 407, 412–13 (2002).

62. KAN. STAT. ANN. § 59-29a02(b) (West 2010).

63. Morse, *supra* note 3, at 62.

64. 534 U.S. at 410–11; 521 U.S. at 553–54.

65. See Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. REV. 77, 107 (2005) (“If we are willing to recognize the man who cannot control his behavior, the arguments against according him a responsibility defense fall flat. There is a very clear position here: if punishment is pointless, then it is inhumane to punish.”); cases cited *supra* note 64.

66. CHRISTOPHER SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* 132 (2006).

the pure prevention model.<sup>67</sup> This model includes not only those who truly do not understand the nature of their acts but also those who know they will be punished but act anyway.<sup>68</sup> The latter category includes everyone from those who kill abortion clinic doctors to terrorists—“[t]hey know they will either be caught or die, but are convinced their ideological agenda justifies their actions and glorifies their punishment or death.”<sup>69</sup> There is some question, however, whether Slobogin truly advances the ball, or whether his model likewise fails to distinguish the common criminal from the determined terrorist.<sup>70</sup> As Michael Corrado notes, “Every criminal takes a chance that he will be apprehended and punished. How great must the chance be before he moves from the category of the punishable into the category of the detainable?”<sup>71</sup> Indeed, Alec Walen adds, “it is simply false that those who cannot be deterred because they are more dedicated to committing a crime than to avoiding punishment are outside the reach of the criminal law.”<sup>72</sup>

Even if we believed there was a good enough reason to detain the dangerous, a range of problems remain. First, how should we go about selecting those individuals who should be detained? In doing so, we predict, and to predict we must assess risks. We assess risks because we do not know whether the individual will harm us or not. Because we do not have the knowledge of the omniscient, we assess the likelihood that something will happen based on the possession of some facts but not others.

In law, when we say that there is a “risk” of *x*’s occurrence, we are using “risk” in the sense of relative frequency. That is, any given reference class will yield a relative frequency for an event’s occurrence. However, one may formulate the reference class widely or narrowly, thus changing the relative frequency.<sup>73</sup>

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67. *Id.* at 106.

68. *Id.* at 106, 132–38.

69. *Id.* at 137.

70. Michael Louis Corrado, *Slobogin on Dehumanization*, in *CRIMINAL LAW CONVERSATIONS* 75, 75–76 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009).

71. Corrado, *supra* note 65, at 108.

72. Alec Walen, *Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventive Detention*, 101 *J. CRIM. L. & CRIMINOLOGY* (forthcoming 2012) (manuscript at 811 n.33) (on file with author).

73. ALEXANDER & FERZAN WITH MORSE, *supra* note 15, at 29. For a clear explanation of risks, relative frequencies, and how risks are not themselves harms, see Stephen R. Perry, *Risk, Harm, and Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 321, 323 (David G. Owen ed., 1995).



The risk that you will die in a car accident is one number. The risk that you will die in a car accident in a rainstorm is another. The risk that you will die in a car accident in a rainstorm on a Thursday is yet another number. The probability changes with the reference class. This means that the selection of the reference class affects the risk, and with respect to predictions of dangerousness, reference class selection alters how dangerous the individual appears to be. Some theorists doubt that there is a principled way to determine which reference class applies.<sup>74</sup> Others observe that even after the selection of reference classes, the use of actuarial modeling relies on suspect human judgments.<sup>75</sup>

The use of “naked statistical evidence” may also be normatively problematic.<sup>76</sup> “A piece of evidence is nakedly statistical

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74. Meyerson, *supra* note 21, at 517 (“The point is that there are potentially many unknown reference classes to which John belongs which might affect the probability of his being guilty. Since the probability of his guilt changes depending on which reference class is chosen, this shows that mere membership in a reference class is insufficient to justify a finding of guilt.”). On problems with reference classes and legal decision making generally, see Ronald J. Allen & Michael S. Pardo, *The Problematic Value of Mathematical Models of Evidence*, 36 J. LEGAL STUD. 107, 112 (2007) (“[O]utside of the reference class consisting only of the event itself—nothing in the natural world privileges or picks out one of the classes as the right one . . . .”); Mark Colyvan & Helen M. Regan, *Legal Decisions and the Reference Class Problem*, 11 INT’L J. EVIDENCE & PROOF 274, 275 (2007).

75. See Lucia Zedner, *Fixing the Future? The Pre-emptive Turn in Criminal Justice*, in REGULATING DEVIANCE: THE REDIRECTION OF CRIMINALISATION AND THE FUTURES OF CRIMINAL LAW 35, 41 (Bernadette McSherry et al. eds., 2009) (“Risk assessment of human behaviour is better understood not as the impartial application of technology . . . but as the institutionalisation of subjective opinions, prior political leanings, and prejudices. While technology itself is neutral, it is shot through with social meaning, it is politicised and filtered through the cultural lens of those applying it in ways that technological determinist accounts belie.”).

76. Victor Tadros calls offenses that pick out particular groups as imposing greater risks “individualized” and argues they violate equality:

[W]e should be particularly concerned with laws that violate equal treatment in the second sense: that pick out some individuals as particularly risky. A man below the age of twenty-five can see that driving above a certain speed is likely to be dangerous, but he cannot see *himself* as posing an extra risk of driving dangerously because of his age. Hence, these laws normally fail to engage citizens in terms that they could accept for themselves as justified. And in that sense they treat individuals as objects of control rather than as citizens to be engaged with.

Victor Tadros, *Justice and Terrorism*, 10 NEW CRIM. L. REV. 658, 684 (2007). But see SCHAUER, *supra* note 23, at 106 (arguing that a court’s refusal to admit naked statistical evidence “is a product of two significant mistakes: an overconfidence in the empirical reliability and even the very directness of di-

when it applies to an individual case by affiliating that case to a general category of cases.”<sup>77</sup> The sort of evidence presented against a criminal defendant points to facts—the defendant can dispute those facts by, for example, pointing to evidence that raises doubt as to whether he was present, or had the mental state, or lacked a justification. On the other hand, naked statistical evidence does not point to anything that a detainee can disprove. An eighteen-year-old African American man who is unmarried and unemployed is statistically more likely to offend than a forty-five-year-old, married soccer mom.<sup>78</sup> The man cannot disprove that he falls within this class—the statistics do it all. The evidence is nakedly statistical because it is “information about a category of people or events not evidencing anything relevant in relation to any person or event individually.”<sup>79</sup> This is one reason why the “condition or status” criterion in Klein and Wittes’s balancing test is so problematic.<sup>80</sup> If all that the status or condition does is make it somewhat more likely the individual will commit the offense, then the State is still relying on statistical evidence. Either way, it is an impersonal prediction. Although Denise Meyerson concludes that there is simply no way to get around this problem with respect to preventive detention, she maintains that the burden on the State ought to be substantial because individuals have a fundamental interest in not being mistakenly deprived of their liberty.<sup>81</sup> “In particular, the person should be not merely likely but very likely to cause harm, the harm should be grave, and the risk of it should be in the near future.”<sup>82</sup>

Practically, in detention hearings and in later follow-ups, the odds are against these dangerous offenders. Eric Janus describes some detention hearings as “Kafkaesque”: “If a person

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rect evidence, and an underappreciation of the essential continuity between so-called indirect or statistical evidence and evidence that on its face appears to be more individualized and thus less statistical”).

77. ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 43 (2005).

78. See Steven F. Messner & Scott J. South, *Demography*, in 2 ENCYCLOPEDIA OF CRIME AND PUNISHMENT 494, 495 (David Levinson ed., 2002) (“The primary demographic characteristics of age, sex, and race are among the most powerful individual-level risk factors for criminal offending and victimization. Evidence indicates that young people, males, and members of disadvantaged minorities are at comparatively high risk of becoming offenders and victims, at least with respect to the common street crimes.”).

79. STEIN, *supra* note 77.

80. See Klein & Wittes, *supra* note 44, at 187.

81. Meyerson, *supra* note 21, at 529.

82. *Id.* at 533.

acknowledges that there is a risk that he will reoffend, this is taken as an admission of his dangerous propensities. But if he states that he will not reoffend, this is taken as a lack of insight and is counted as a risk factor.”<sup>83</sup> And because false negatives are far more politically costly than false positives, gatekeepers have every incentive to keep potentially dangerous offenders locked up.<sup>84</sup>

A final worry is that the detention ought to be non-punitive and compensated for,<sup>85</sup> but the reality is likely to look nothing like this. As Richard Lippke concludes, there is no easy way out.<sup>86</sup> Those who are confined are likely to try to harm each other, so how, asks Lippke, will this look different from incarceration?<sup>87</sup> Visitation privileges will be difficult for those suspected of terrorism.<sup>88</sup> Lippke notes that even if these individuals are compensated, there is little they can do with their money.<sup>89</sup> Lippke concludes that “the prospects for making preventive detention symbolically or materially different from imprisonment are dim . . . like prisoners, civil detainees will have stigmatized, cramped, and truncated lives.”<sup>90</sup>

Scholars contend that there is a normative gap that should not be filled.<sup>91</sup> The State cannot detain responsible agents. It

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83. JANUS, *supra* note 11, at 33–34.

84. Morse, *supra* note 3, at 59.

85. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1062–66 (2004) (calling for compensation of detained innocents); Michael Corrado, *Punishment, Quarantine, and Preventive Detention*, 15 CRIM. JUST. ETHICS 3, 11 (1996) (arguing the State should compensate the preventively detained for their loss of liberty); Robinson, *supra* note 7, at 1446 (“[I]f a person is detained for society’s benefit rather than as deserved punishment, the conditions of detention should not be punitive.”).

86. See Richard L. Lippke, *No Easy Way Out: Dangerous Offenders and Preventive Detention*, 27 LAW & PHIL. 383, 406–13 (2008).

87. *Id.* at 411.

88. *Id.*

89. *Id.* at 412.

90. *Id.* at 413.

91. One scholar who believes that a jurisprudence of pure prevention should be developed is Alan Dershowitz. ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS 56 (2006). Dershowitz gives several reasons for our failure to have developed such a theory already:

It may sound surprising . . . to say that no jurisprudence governing preventive confinement has ever been articulated, but it appears to be true. No philosopher, legal writer, or political theorist has ever, to this writer’s knowledge, attempted to construct a systematic theory of when it is appropriate for the state to confine preventively. This is so for a number of reasons. The mechanisms of prevention have been, for the most part, informal; accordingly, they have not required articu-

must wait until a crime is committed. And, this means that there are times that the dangerous may pose a threat but the State may not interfere.

### C. LIABILITY TO DEFENSE

This analysis within the literature has largely ignored the natural analogy to self-defense.<sup>92</sup> Self-defense is a preventive practice. The defender can never wait until the harm occurs. Rather, the defender must act on a series of predictions—that the aggressor will not change his mind, that the police cannot intervene in time, that the bullet will actually hit the defender, and so on.

The self-defense literature has recently spawned a distinction between permissible killing that is liability-based and permissible killing that is not.<sup>93</sup> Take two cases.<sup>94</sup> In the first case, a Culpable Aggressor points a gun at the defender and says, “I am going to kill you.” In the second case, the defender has fallen to the bottom of a well and the defender’s mortal enemy then pushes a fat man (the “Innocent Threat”) down the well to kill him.<sup>95</sup> If the Innocent Threat lands on him, the defender will die and the Innocent Threat will live. The defender

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late defense or justification. Moreover, there are many scholars who simply deny that preventive intervention, especially preventive confinement, really exists, or if they acknowledge the existence of these mechanisms, they deny their legitimacy, thus obviating the need for a theory or jurisprudence. Finally, it is extremely difficult to construct a theory of preventive confinement that neatly fits into existing theories of criminal law and democracy.

*Id.* at 56–57.

92. Alan Dershowitz and Stephen Morse each suggest the use of a self-defense model to justify pure prevention. They do not use the liability theory advanced here. *See id.* at 24–25; Morse, *supra* note 1, at 292–93.

93. The “liability” formulation belongs to Jeff McMahan. *See, e.g.*, JEFF MCMAHAN, *KILLING IN WAR* 8–9 (2009) (“At least part of what it means to say that a person is *liable* to attack is that he would not be *wronged* by being attacked, and would have no justified complaint about being attacked.”). For theorists who distinguish their views as based on permissibility, but not liability, see Helen Frowe, *A Practical Account of Self-Defence*, 29 *LAW & PHIL.* 245, 245 (2010) (suggesting that an innocent defender may defend against anyone she reasonably believes will kill her); and Jonathan Quong, *Killing in Self-Defense*, 119 *ETHICS* 507, 516–19 (2009) (discussing agent-relative permission to defend against even Innocent Threats).

94. Readers familiar with the self-defense literature will note that there is another category of Innocent Aggressors, who non-culpably aggress against another. For ease of exposition, I have omitted this category. I would group them with Innocent Threats. Ferzan, *supra* note 28, (manuscript at 2–5).

95. *See* ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 34–35 (1974) (offering the original formulation of this problem).

has a ray gun with which he can disintegrate the Innocent Threat. Theorists struggle with whether self-defense is permissible in the Innocent Threat case, and many theorists believe that the culpability of the Culpable Aggressor is significant in distinguishing whether and how much defensive force may be used against him as opposed to the Innocent Threat.<sup>96</sup>

We can distinguish between the Culpable Aggressor and the Innocent Threat on the basis of liability. Liability in this context is best viewed as a limited forfeiture of rights.<sup>97</sup> In the same way that we can change our rights and duties through contracts, promises, and permissions, liability to defense is about acting in a way that gives others a right to repel that attack.<sup>98</sup>

One confusion here is that we seem to apply the phrase “self-defense” quite broadly to culpable attackers, innocent threats, and wild animals.<sup>99</sup> Indeed, it seems that if your neighbor’s television set flew at you during a tornado, you would justify smacking it with a tree branch by the claim that you acted in self-defense. Yet, although all of these actions share the same act in repelling an attack, they differ substantially in the thing or person harmed. It is thus important to recognize that the justificatory structure for one type of self-defense is not the justificatory structure for another.<sup>100</sup> For purposes of this article, our focus is on Culpable Aggressors.

By culpably threatening the defender, the Culpable Aggressor relinquishes his moral complaint against the defender taking the aggressor at his word.<sup>101</sup> The Culpable Aggressor

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96. See MCMAHAN, *supra* note 93, at 159 (“It is generally agreed that the proportionality restriction on killing a Culpable Threat is weaker than it is in other cases.”); Frowe, *supra* note 93, at 267–68 (arguing that Innocent Threats are entitled to fight back but culpable ones may not).

97. See Ferzan, *supra* note 28, (manuscript at 5–6) (examining the rights-based view of defensive killing). Whether it is more appropriate to frame this as a matter of forfeiture or specification of rights is a question for another day.

98. *Id.*

99. *Id.* (manuscript at 2).

100. See VICTOR TADROS, CRIMINAL RESPONSIBILITY 117 (2005) (suggesting that questions of justification and excuse be analyzed by defense tokens not defense types).

101. Ferzan, *supra* note 28, (manuscript at 2–3); see also Kimberly Kessler Ferzan, *Justifying Self-Defense*, 24 LAW & PHIL. 711, 731 (2005) (“[T]he person who culpably initiates the situation can hardly be heard to complain that the other actor takes her at her word.”). “Culpability” entails demonstrating insufficient concern for others. This would encompass not only acting purposefully, knowingly, or recklessly, but also lacking a justification or excuse for one’s conduct. See Ferzan, *supra* note 28, (manuscript at 1–6) (outlining different

cannot object that his bullet might have missed, or he might have changed his mind, or the police might have stopped him.<sup>102</sup> Rather, once the Culpable Aggressor chooses to present himself as a threat, he is not wronged by the defender stopping the threat from occurring. In other words, the Culpable Aggressor acts in a way that permits the defender to act on the defender's prediction.<sup>103</sup> No right of the Culpable Aggressor's stands in the defender's way of using responsive defensive force.

Although liability explains why one may kill the Culpable Aggressor, it cannot justify killing the Innocent Threat. The Innocent Threat is a mere projectile who did not even will the movement of his body. However, the fact that the Innocent Threat is not liable to be killed does not entail that it is impermissible to kill him. Even when someone does not deserve harm and even when that person is not liable to force being used against him, there may be instances in which it is permissible to use force.<sup>104</sup> Consider necessity. If by slapping you, I can save five lives, then I am justified in slapping you. However, in such a case, I do infringe your right and it is arguable that I (or the five saved) owe you compensation.<sup>105</sup> Of course, things are

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categories of culpability). Moreover, properly understood, purpose and knowledge normatively collapse into recklessness. See ALEXANDER & FERZAN WITH MORSE, *supra* note 15, at 31–41 (“[J]ust as recklessness contemplates that risk impositions can be justified by certain reasons, an actor’s purposeful conduct can also be justified by certain reasons.”).

102. See Ferzan, *supra* note 28, (manuscript at 13–14) (“An actor who intends to engage in an action that demonstrates insufficient concern for the interests of other people can hardly complain if that action is stopped.”).

103. Vera Bergelson’s view is that this limited forfeiture shows that rights are conditional. “If we were to define the principle of conditionality of rights in Hohfeld’s terms, it would be characterized as the victims’ *power* to change the balance of rights (in the broad sense) between themselves and the perpetrators.” VERA BERGELSON, *VICTIMS’ RIGHTS AND VICTIMS’ WRONGS: COMPARATIVE LIABILITY IN CRIMINAL LAW* 110 (2009). Bergelson explains self-defense in terms of this conditionality: “If you try to kill me, you violate your duty to me and thus lose moral parity with me. That loss of moral parity reduces your right to inviolability and allows me to disregard it *to the extent necessary to protect my right to life*.” *Id.* at 105.

104. See Quong, *supra* note 93, at 517–18 (discussing agent-relative permission to defend against even innocent threats).

105. Cf. JUDITH JARVIS THOMSON, *RIGHTS, RESTITUTION, AND RISK* 40–41 (1986) (suggesting that when one acts justifiably, one *infringes* a right but does not *violate* it). In such cases, compensation is owed. See, e.g., *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221, 222 (Minn. 1910) (finding that the defendant owes compensation for justifiable trespass). *But see* John Oberdiek, *Specifying Rights Out of Necessity*, 28 OXFORD J. LEGAL STUD. 127, 140–44 (2008) (arguing for a moral specification view wherein one simply would not

more difficult when we are comparing single lives, for example, the Innocent Threat and the defender.

Innocent Threat cases are not necessity cases, but rather are instances of agent-relative permissions or excuse. The crucial point here is that if there is a reason why you are allowed to kill the Innocent Threat, it is not because he has done anything to forfeit his right to life, but rather, because it is unfair to ask you to privilege his life compared to yours.<sup>106</sup> Thus, the structure of why it is we may permissibly kill an Innocent Threat can be easily distinguished from liability, where the aggressor waives his right by his own conduct.<sup>107</sup> The self-defense literature thus recognizes a distinction between those instances in which the aggressor as a responsible moral agent behaves in such a way that grounds a preventive response and those instances in which the aggressor's own conduct does not justify the response but the defender cannot fairly be asked to assume the burden.<sup>108</sup>

This structure has a natural application to preventive interference by the State. The aggressor is a responsible agent. He performs an act in furtherance of a culpable intention. And, based on that act, it becomes permissible to stop him.<sup>109</sup> These cases can be contrasted with "pure prevention," where, along with Innocent Threats, the question is not what the aggressor has done, but whether it is fair to allow the defender to respond.<sup>110</sup> Liability to defensive force provides a crucial framework that allows the State to intervene against responsible

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have a right when another person acts justifiably toward him and arguing that compensation is not due).

106. For an argument to this effect, see Quong, *supra* note 93, at 517–18. For a more qualified endorsement, see ALEXANDER & FERZAN WITH MORSE, *supra* note 15, at 136–38 (suggesting that such cases may be personal justifications or excuses).

107. See ALEXANDER & FERZAN WITH MORSE, *supra* note 15, at 136–38.

108. Andrew Ashworth suggests that there are times when an individual's right may be overridden and preventive detention will then be justified under strict circumstances. Andrew Ashworth, *Criminal Law, Human Rights, and Preventative Justice*, in REGULATING DEVIANCE: THE REDIRECTION OF CRIMINALISATION AND THE FUTURES OF CRIMINAL LAW, *supra* note 75, at 87, 104–07. However, the suggestion above is that when there is a forfeiture of the right, there is no need to override it. Cf. MCMAHAN, *supra* note 93, at 9 (distinguishing liability from overriding a right).

109. I owe the focus on "prevention intervention" to Alan Dershowitz. See DERSHOWITZ, *supra* note 91 (discussing the history and future of "preventive intervention").

110. Cf. *id.* at 245–50 (raising considerations relevant to whether it is fair to allow the defender to respond).

agents based on the exercise of their agency and not mere naked statistical evidence that they will one day harm us. In such cases, the defendant cannot claim, as a matter of substantive due process, that his liberty rights are being violated when he is the one who has effectively forfeited those rights.

## II. FROM SELF-DEFENSE TO PREVENTIVE INTERFERENCE

With liability-based self-defense, it is the aggressor's culpability in presenting a threat or making the defender believe the aggressor presents a threat that grounds liability.<sup>111</sup> If you make someone believe you are going to hurt him, you forfeit your moral complaint against him stopping you.<sup>112</sup> Likewise, I have argued that initiating criminal conduct should be sufficient for a preventive response from the State. In this section, I make conceptual space for this sort of liability, suggesting preventive interference may replace some inchoate crimes. I then consider what it is that an actor must do to forfeit his right against preventive interference as well as what the State may do in response. Next, I turn to how self-defense is similar and different from preventive interference generally, ultimately concluding that the same normative considerations that justify self-defense will justify other forms of preventive intervention. Finally, I use an internet child-enticement case to illustrate how this could work in practice.

### A. MAKING CONCEPTUAL SPACE FOR LIABILITY BEFORE A CRIME

Let us first begin with one particular conceptual space for preventive intervention—the time before the actor commits a crime. This space is currently occupied by preparatory offenses and attempts. These are two types of crimes where the State's goal in stopping crime is backed by punishment. Indeed, these

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111. Jeff McMahan argues that one is liable if one is morally responsible for posing a foreseeable threat, even if it was reasonable to pose that threat. See MCMAHAN, *supra* note 93, at 166–67. For the argument that McMahan's view is too broad, see Kimberly Kessler Ferzan, *Can't Sue; Can Kill*, in CRIMINAL LAW CONVERSATIONS, *supra* note 70, at 398, 398–400; Ferzan, *supra* note 28 (criticizing McMahan's view that moral responsibility is grounded in nonreciprocal risk imposition). McMahan's view, which is so expansive as to make individuals strictly liable, seems to be an improper starting point for our analysis.

112. This is subject to proportionality and necessity restraints. See MCMAHAN, *supra* note 93, at 10 (“A person cannot be liable to attack when attacking him would be wrong because it would be unnecessary or disproportionate.”).



are areas where the State's preventive ends often lead to disproportionate punishment.<sup>113</sup>

The possession of brass knuckles is an example of a preparatory offense.<sup>114</sup> The criminalization of preparatory offenses has nothing to do with retributive desert and everything to do with prevention. The justifications for the laws are that they allow early police intervention and ease prosecutorial burdens.<sup>115</sup> As Michael Moore notes, proxy crimes give "liberty a strong kick in the teeth right at the start. Such an argument does not even pretend that there is any culpability or wrongdoing for which it would urge punishment; rather, punishment of a non-wrongful, non-culpable action is used for purely preventive ends."<sup>116</sup> Paul Robinson cautions that the use of the criminal law for regulatory purposes undermines its moral strength.<sup>117</sup> Moreover, because these offenses include non-culpable conduct, they risk creating a chilling effect and deterring law abiding citizens from engaging in permissible activities.<sup>118</sup>

The preventive desire is particularly evident in the rash of criminal statutes enacted in the United Kingdom in response to terrorism. Early inchoate offenses, possession, and association with enumerated organizations have been criminalized not based on the blameworthiness of the actor but the need of the

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113. See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 854–55 (2001) (discussing the harsh penalties for drug and weapons violations).

114. *E.g.*, 18 PA. CONS. STAT. ANN. § 908 (West 2010); see also Dubber, *supra* note 113, at 835 ("By last count, New York law recognized no fewer than 153 possession offenses; one in every five prison or jail sentences handed out by New York courts in 1998 was imposed for a possession offense.")

115. See Dan Bein, *Preparatory Offences*, 27 ISR. L. REV. 185, 201 (1993) ("I believe there is an additional criterion, having to do with pragmatic considerations of enforcement rather than substantive considerations. It is the need to provide the police with the means for making preventative arrests.")

116. MOORE, *supra* note 16, at 784.

117. Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 211–12 (1996).

118. See COLE & DEMPSEY, *supra* note 23, at 229 ("[D]ata mining poses a substantial risk of chilling innocent citizens' lawful behavior. Citizens who feel that they are or may be under generalized surveillance are likely to have reduced trust in government and less willingness to participate even in lawful activities, whether it be attending political demonstrations, joining political groups, taking firearms training, or enrolling in pilot school."); Daniel Ohana, *Responding to Acts Preparatory to the Commission of a Crime: Criminalization or Prevention?*, 25 CRIM. JUST. ETHICS 23, 28 (2006) (noting that criminalizing preparatory acts can have a chilling effect on socially beneficial activity).

State to intervene.<sup>119</sup> Nevertheless, because of the profound dangerousness of actors, the penalties are stiff, including life imprisonment.<sup>120</sup> If the goal of this punishment is truly detention and not justified punishment, then this is a clear misuse of the criminal law.

There are also questions about the criminalization of incomplete attempts. When criminal law struggles to determine when a defendant has gone beyond mere preparation and has actually attempted the offense, it struggles with two competing considerations.<sup>121</sup> The first is the State's interest in prevention.<sup>122</sup> We want the police to be able to intervene.<sup>123</sup> We want the State to stop the offender before it is too late.<sup>124</sup> On the other hand, we want to take the offender's liberty and free will seriously.<sup>125</sup> The common law called this the *locus poenitentiae*—the opportunity that the offender ought to have to repent.<sup>126</sup> Indeed, the common law did not allow for abandonment of attempts precisely because it placed the act requirement far enough along the continuum so as to already create room for a change of heart.<sup>127</sup>

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119. See Zedner, *supra* note 75, at 50 (“Criminalisation of activities remote from the actual commission of an act of terrorism is justified by the need to furnish the legal grounds for action against individuals at the very earliest stages of preparation.”).

120. See Terrorism Act, 2006, c. 11, § 5(3) (U.K.).

121. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.06[A] (5th ed. 2009) (“A major difficulty in drawing a line between noncriminal preparation and a criminal attempt is that courts are torn by competing policy considerations.”).

122. See *id.* (“[T]here is the understandable desire of courts and legislators to ease the burden on the police, whose goal it is to prevent crimes from occurring.”).

123. *Id.*

124. *Id.*

125. See *id.* (“[I]f courts authorize too early police intervention, innocent persons, as well as those with still barely formed criminal intentions—persons who might voluntarily turn back from criminal activity—may improperly or needlessly be arrested.”).

126. See *The King v Barker* [1924] NZLR 865, 873 (CA) (noting a prior court's reasoning that when the defendant has not committed the last act in effectuating criminal intent and “has stopped short of this, whether because he has repented, or because he has been prevented, or because the time or occasion for going further has not arrived, or for any other reason, he still has a *locus poenitentiae*, and still remains within the region of innocent preparation”).

127. See PAUL H. ROBINSON, CRIMINAL LAW 695 (1997) (“The common law had no need for a renunciation defense in order to encourage potential offenders to stop short of the offense. When criminal liability for an attempt attaches late in the process between preparation and commission, as with the common

Although States adopt a range of actus reus formulations for attempts, Larry Alexander and I have argued that to deserve punishment, one must unleash a risk of harm over which one believes one no longer has complete control.<sup>128</sup> Notably, this would place punishment at the far end of the continuum, and police intervention in a “crime” would not be possible at any preparatory stage.

Even for those who believe it is justifiable to punish incomplete attempts,<sup>129</sup> there is the question of whether criminal punishment is preferable to preventive intervention. Although attempts prevent the harm, the State’s criminal intervention is one of punishing the actor for what he has done.<sup>130</sup> At the point of State interference, the incarceration (or other form of incapacitation) should be limited by what the defendant deserves.<sup>131</sup>

The question is whether, when properly applied, these crimes are the proper tools for pursuing future preventive ends. Is there sufficient retributive desert in early stages of preparation to warrant any substantial intervention? For instance, Alec Walen argues that forming an intention can be itself a wrongful act of “[f]louting the law.”<sup>132</sup> While Walen admittedly also seeks to have an act requirement (the communication of the threat), this act is merely evidentiary.<sup>133</sup> But how much punishment does “flouting the law” deserve?

However one comes out on the punishment of inchoate crimes, the preventive intervention proposed here can be implemented without the cumbersome machinery of the criminal law. Moreover, for reasons discussed below, it may very well be preferable. Thus, even if one is not persuaded that there are problems with much of our punishment of attempts and prepa-

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law’s proximity tests, the actor has an incentive to stop in his planned offense because by doing so he avoids all liability.”).

128. See ALEXANDER & FERZAN WITH MORSE, *supra* note 15, at 216 (arguing that a culpable act occurs once an actor believes he has given up control over an undue risk of harm).

129. See generally DRESSLER, *supra* note 121, § 27.02[A]–[D] (discussing the punishment of attempted crimes).

130. See ALEXANDER & FERZAN WITH MORSE, *supra* note 15, at 199 (“[T]he law cannot focus on what the action reveals about what the actor *might do*; rather, the action itself—what the actor *has done*—must ground blame and punishment.”).

131. *Id.*

132. Walen, *supra* note 72, (manuscript at 841).

133. *Id.* (manuscript at 852).

ratory offenses, preventive intervention remains a viable alternative to the criminal law.<sup>134</sup>

#### B. THE CONDITIONS OF ACTION AND INTERVENTION

Although the applicability of the underlying justification for self-defense gives us a rough sense of preventive intervention, it is still essential to address what specifically an actor must do so as to forfeit part of his liberty. This section sketches both how an actor may become liable to preventive interference and what sorts of interference measures would then be warranted.

How would the liability conditions be formulated? First, like self-defense, the actor should be culpable—meaning that he either has an intention to cause harm or he is willing to unjustifiably risk causing harm (and lacks a justification or excuse).<sup>135</sup> Indeed, at this point, it appears that the State has good reason to intervene. The actor has decided to do something he ought not to do.

If we are to use this regime in lieu of attempt law, then the next question is whether any action ought to be required. Should the plan to do something impermissible be sufficient for the State to intervene? Two rationales that are thought to underlie the requirement of an action for attempts—resoluteness and dangerousness—might equally apply here.<sup>136</sup> That is, in the attempt context, it is argued that we only want to punish individuals who will act on their intentions (so we know they are resolute in their intentions) and we only want to punish

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134. One might ask why the objections to punishing formulating intentions do not have equal traction here. However, in those cases, the argument is that the defendant should not be punished for something he has yet to do and that the State ought to give him the opportunity to see the better of his decision and change his mind. The sort of preventive interference suggested here does not punish the actor for something he has yet to do. Although the State should respect the opportunity for reconsideration, it may still take seriously the actor's current resolve to commit the offense. The gravity of the conduct threatened will determine the extent of intervention. If the actor renounces his intention, the State goes away.

135. Although I believe that most of this analysis can be subsumed within recklessness, I will use the traditional framework for ease of exposition. *But see* ALEXANDER & FERZAN WITH MORSE, *supra* note 15, at 23–41 (describing recklessness as subjective and a function of justifiability while suggesting that knowledge and purpose are actually types of recklessness).

136. *See* Larry Alexander & Kimberly Kessler Ferzan, *Danger: The Ethics of Preemptive Action*, 9 OHIO ST. J. CRIM. L. (forthcoming 2012) (manuscript at 10) (on file with authors) (explaining the roles of resoluteness and dangerousness in criminal attempt).

those who are truly dangerous.<sup>137</sup> Neither of these rationales seems particularly compelling in the case of preventive intervention.<sup>138</sup> Although the State may not wish to spend its resources on the wishy-washy, that concern is pragmatic. The State still has reason to intervene before the act occurs.<sup>139</sup> Additionally, if we truly care about dangerousness, we would need to see empirical data that an initial act bespeaks dangerousness more than a variety of other predictive factors. So, neither resoluteness nor dangerousness justifies an act requirement.<sup>140</sup>

Rather, there should be an act requirement simply for legality concerns.<sup>141</sup> We want to constrain the State.<sup>142</sup> Allowing the State unfettered police power to intervene in lives based on mere intentions could certainly lead to abuse. An act requirement prevents abuse by looking for conduct that corroborates the criminal intention.<sup>143</sup>

This sort of requirement, then, is about power and accuracy. We worry that the State may abuse its power and that, even when acting appropriately, it may simply get the question wrong. The evidentiary requirement of an act constrains the State from within (by increasing the likelihood of detecting individuals with culpable intentions and limiting false positives) and without (by requiring the State to produce evidence to a fact finder that cannot be speculative or arbitrary).<sup>144</sup>

Once the actor has performed an action in furtherance of his culpable mental state, what can the State do? We know what self-defense looks like—typically some sort of physical in-

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137. *Id.*

138. I would argue that they are not compelling arguments for the punishment of attempts either. *See id.* (manuscript at 10–12).

139. DRESSLER, *supra* note 121.

140. *Id.* (manuscript at 12) (“Substantial steps only prove . . . that the culpable intention exists . . . . Nevertheless, it is the intention, not those steps, that has to be the culpable element . . . .”).

141. *See SLOBOGIN, supra* note 66, at 117–18 (“Many preventative detention rules require an overt act before detention may take place.”).

142. *See generally* DRESSLER, *supra* note 121, § 5.03 (discussing the risk of arbitrary or discriminatory law enforcement practices under vague criminal legislation); SLOBOGIN, *supra* note 66, at 115 (noting the problem of giving the State too much power in the context of prevention).

143. *Id.* at 119–20.

144. Although I am not advocating a substantial step requirement or other significant *actus reus* formulation, I admit that the further along the continuum, the more the act constrains the state. Thus, even if a substantial act is not morally required for liability, it could be justified on political grounds.

jury to an attacker that is aimed at stopping the attack.<sup>145</sup> But once we think of prevention beyond the prospect of preventively detaining people, what sorts of measures are we talking about?

There are a range of measures the State may take. First, it may detain the individual. However, there are other measures that may also substantially interfere with an individual's liberty short of incapacitation. Great Britain used a control order, a construct of the Prevention of Terrorism Act 2005 (PTA).<sup>146</sup> Admittedly, these control orders were subject to significant scholarly criticisms, and this example is not intended as a proposal the United States should adopt whole cloth.<sup>147</sup> Indeed, the British government announced in 2011 that it planned to abolish control orders and replace them with "terrorist, prevention and investigation measures."<sup>148</sup> However, there is little difference between the two and control orders remain useful to illustrate how to begin to conceptualize preventive action short of punishment.

The non-derogating control order allows the Home Secretary to impose numerous restrictions on those whom he has "reasonable grounds for suspecting" are or have been involved in terrorism-related activity.<sup>149</sup> The PTA provides for just about every preventive intervention one can imagine. Specifically, what the person possesses, what activities he engages in, where he works, with whom he associates in and outside of his home, where he can go, when he can be outside his home, whether he maintains his passport, when and how his property may be searched and retained, whether he is photographed, and

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145. *E.g.*, DRESSLER, *supra* note 121, § 18.06[A][1][a] ("Subject to various limitations, a person is justified in using force upon another person if he believes that such force is immediately necessary to protect himself against the exercise of unlawful force . . . ." (citing MODEL PENAL CODE § 3.04(1) (1962)).

146. Prevention of Terrorism Act, 2005, c. 2 (U.K.).

147. *See* Tadros, *supra* note 76, at 670 ("The present use of control orders seems very difficult to justify . . . ."); Zedner, *supra* note 75, at 48–49 ("[T]he control order is . . . an extraordinary measure that does serious damage to basic presumptions of criminal procedure."); Lucia Zedner, *Preventive Justice or Pre-Punishment? The Case of Control Orders*, 60 CURRENT LEGAL PROBS. 174, 176, 181 (2007) (critiquing the Prevention of Terrorism Act's low burden of proof, unjust supervision of those who associate with the target, and damage to family relations).

148. *See* Ryder, *supra* note 26.

149. Prevention of Terrorism Act, c. 2, § 2 (U.K.).

whether he is electronically monitored are all possibilities under this provision.<sup>150</sup>

Unlike control orders, it is clear that we would want to designate some fact finder, to determine by a constitutionally set standard (perhaps, clear and convincing evidence) that an actor harbors a culpable mental state, has committed an action in furtherance of that mental state, and plans to complete the offense. Then, an agency would need to be tasked with supervising the actor in ways designed to prevent the commission of that particular crime. This supervision would be reconsidered at specific times, and supervision would cease once the State could no longer meet the burden of demonstrating that the defendant continued to harbor an illicit mental state.<sup>151</sup>

Another question is the extent to which such a regime might mandate rehabilitation. I take this to be a more difficult question. Certainly, if Joe plans to rob a bank, the State may stop Joe from so doing. But it is far more questionable whether the State should intervene by mandating that Joe attend counseling sessions or get involved in community service, as these sorts of interventions require that the State stop Joe by changing him. It may be that given some sorts of intention, and particularly in those cases where rehabilitative intervention works, the State might want to give candidates the option of this sort of interference in lieu of another. For instance, drug addiction intervention may be less costly in preventing crime than merely monitoring an addict.<sup>152</sup> But widespread character-changing interventions strike the wrong balance between liberty and security. We cease to respect personhood when we

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150. *Id.* at c. 2, § 1(4); *see also* Ohana, *supra* note 118, at 25–26 (discussing preventive restrictions).

151. *Cf.* Ohana, *supra* note 118, at 26 (“[P]reventive measures should be precluded in cases in which the actor proves that he has abandoned the unlawful endeavor as the result of a genuine change of heart. Indeed, given that the actor has voluntarily relinquished the pursuit of his unlawful endeavor, there should be no need for restrictions to negate the risk that he will try once again to execute his unlawful plan.”).

152. Michael Corrado suggests that it is inhumane to punish the addict without treatment. Corrado, *supra* note 65, at 106. He argues that if the addict cannot control his behavior then we can detain him and fix him. *See id.* at 107. This rationale is a community- or defender-based model of pure prevention. At issue here is the question of whether we can require rehabilitative change of the responsible.

try to change the person. Indeed, the retributive turn was a direct response to the failure of the rehabilitative ideal.<sup>153</sup>

Because this is a civil regulatory measure, the constitutional protections differ from criminal guarantees. As Stephen Schulhofer notes, the civil-criminal divide plays an important role in Supreme Court jurisprudence, but some criminal rights apply in civil cases.<sup>154</sup> Schulhofer maintains that some criminal safeguards should not apply to the preventive detention of sexual predators, including, “the right not to be a witness, the right to proof beyond a reasonable doubt, and the protections against double jeopardy and ex post facto laws.”<sup>155</sup> Indeed, Schulhofer goes so far as to claim, “I cannot readily imagine a genuinely civil proceeding, one designed primarily for preventive or regulatory rather than punitive purposes, for which it would be appropriate to grant a defendant the right not to testify and the right to proof beyond a reasonable doubt.”<sup>156</sup> This Article will not attempt to delineate what standards ought to be applied. Kansas’s sexually violent predator statute, considered in *Hendricks*, required proof beyond a reasonable doubt, access to defense counsel, and access to a professional mental health evaluation.<sup>157</sup> It is clear that the regime suggested here would have to develop its own constitutional dimensions to guarantee that liberty is not broadly sacrificed, but there is no reason to think that a broad constitutional jurisprudence could not be developed for these cases.

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153. See ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* xxxviii (1976) (“[T]he rehabilitative model, despite its emphasis on understanding and concern, has been more cruel and punitive than a frankly punitive model would probably be. Medicine is allowed to be bitter; inflicted pain is not cruelty, if it is treatment rather than punishment. Under the rehabilitative model, we have been able to abuse our charges, the prisoners, without disabusing our consciences. Beneath this cloak of benevolence, hypocrisy has flourished, and each new exploitation of the prisoner has inevitably been introduced as an act of grace.”).

154. Schulhofer, *supra* note 2, at 78–80 (noting that “the civil-criminal distinction is one that the Supreme Court continues to take seriously,” but the Court’s “juvenile court jurisprudence illustrates . . . a functional approach, in which the civil and criminal labels ultimately play no role in determining doctrinal outcomes”).

155. *Id.* at 81.

156. *Id.*

157. *Kansas v. Hendricks*, 521 U.S. 346, 352–53 (1997).



## C. ASSESSING THE SIMILARITIES

How does preventive interference compare to individual self-defense? Self-defense is a preventive practice.<sup>158</sup> What the defender does is to stop the harm from occurring.<sup>159</sup> It is not reactive, after-the-fact conduct—that is, it is not retaliation.<sup>160</sup> Any preventive interference is likewise, well, preventive. It is designed to stop a crime from happening.

When a culpable aggressor attacks his victim, the culpable aggressor waives his moral complaint against the defender acting preemptively.<sup>161</sup> Indeed, the defender does not wrong the aggressor even if the bullet would have missed or the aggressor would have changed her mind.<sup>162</sup> The aggressor's actions ground the defender's right to respond.<sup>163</sup>

When a defender responds, his defense is limited to those actions that are aimed at stopping the threat.<sup>164</sup> A non-deadly, minor attack may not be met with deadly force.<sup>165</sup> Nor may a defender use force that he knows is not necessary to stop the threat.<sup>166</sup>

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158. ALEXANDER & FERZAN WITH MORSE, *supra* note 15, at 109.

159. *Id.*

160. *Id.*

161. See Ferzan, *supra* note 28 (arguing culpability is the basis for moral liability); Frowe, *supra* note 93, at 265–66 (claiming that culpability is generally sufficient to render an actor liable to defensive force); Quong, *supra* note 93, at 519 (“[Y]ou have waived or forfeited your permission to act in self-defense if you have voluntarily done any one of a number of things that would also constitute waiving or forfeiting your right not to be killed. These actions include but are not necessarily limited to consenting that X may kill you, attempting to kill or gravely injure X (or some other innocent person) without his consent when X poses no threat to you, intentionally causing X (or some other innocent person) to believe that you are attempting such an act, or otherwise being culpably responsible for initiating a threat to X’s life.”).

162. See Ferzan, *supra* note 28, (manuscript at 18) (asserting that a self-defense argument does not depend upon the aggressor’s success); Ferzan, *supra* note 101 (arguing a culpable aggressor’s attack gives the defender the right to act on her prediction); Frowe, *supra* note 93, at 265–66 (contending that a culpable actor with an unloaded gun is liable to defensive force); Quong, *supra* note 93, at 519 (causing someone to believe you will kill them renders you liable to defensive force).

163. See Ferzan, *supra* note 28, (manuscript at 23–25).

164. *Id.* (manuscript at 22).

165. See, e.g., 40 AM. JUR. 2D *Homicide* § 152 (2011) (“Use of deadly force is ‘reasonable’ if the actor is in fear of a proportionate harm or force against him or her.”).

166. See, e.g., *id.* (“Where self-defense is warranted, the defendant is not expected to have perfect judgment, but he or she is required to have a good faith belief in the necessity of using deadly force.” (citation omitted)).

This structure likewise justifies preventive interference generally. An actor, who, say, lies in wait with an intention to kill, is liable to preventive interference. He has begun a course of criminal conduct that he has no right to engage in. He has done enough to reveal his current plan that the State may intervene and stop him, even if it does not yet have a right to punish him for attempting to kill.

Importantly, the argument is not that the State is engaging in self-defense. Rather, the argument is that the underlying moral permissibility of engaging in preventive acts may turn on the aggressor's own culpable action in creating the threat and then becoming liable to actions aimed at stopping it.

Moreover, in the same way that self-defense is constrained by proportionality and necessity, so, too, is State interference. A State may not preventively detain an individual who may be stopped with electronic monitoring. Like individual self-defense, the State's behavior will be constrained by the nature of the threat and its likelihood, and the range of responses and their likely effectiveness.

In both cases, the normative structure is the same. When someone attacks you, you may stop them. Preventive interference is one way the State may stop an attack on legally protected interests.

Importantly, what justifies the State's interference is not a general prediction based on facts about the actor, but what the actor has done. Liability-based prevention does not treat an individual as "bad bacteria," assuming that one's race or genetic makeup can predict future wrongdoing. Rather, the liability-based view takes seriously that we are all authors of our own destinies. It is the actor's conduct in choosing to engage in this early behavior that gives us grounds for concern. This view of prevention respects autonomy.

#### D. EVALUATING THE DIFFERENCES

Although self-defense seems to be but a species of the genus of preventive practices, it seems to have unique characteristics that differ from the sort of preventive interference suggested here. First, self-defense requires the attack to be imminent. Second, the nature of a self-defensive response is of limited duration.

The first difference is when interference may begin. We may act in self-defense when a harm is imminent.<sup>167</sup> On the other hand, the entire point of preventive interference is to intercede prior to imminent attacks.

I do not believe this difference is an objection. Theorists give three reasons for imminence: (1) to ensure that defensive harm is truly necessary;<sup>168</sup> (2) to apportion power between the citizen and the State;<sup>169</sup> and (3) to serve as the actus reus for aggression.<sup>170</sup> But none of these rationales have any traction for requiring *the State* to wait until an attack is imminent.

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167. See, e.g., *id.* (“[T]here must have been reasonable grounds for his or her belief, that the accused was in imminent danger of loss of life . . . at the hands of the person killed [i.e. the attacker].”).

168. Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 279 (2002) (“Because the requirement of imminency is an imperfect proxy to ensure that a defendant’s use of force is necessary, a better standard would require that the use of force be necessary.”); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batters*, 71 N.C. L. REV. 371, 380 (1993) (“In self-defense, the concept of imminence has no significance independent of the notion of necessity. It is, in other words, a ‘translator’ of the underlying principle of necessity . . . .”); Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 69 (“Immediate necessity, not imminence of harm, should be considered essential to self-defense claims, including those asserted by battered women.”); Stephen J. Schulhofer, *The Gender Question in Criminal Law*, SOC. PHIL. & POL’Y, Spring 1990, at 105, 127–28 (“Imminence is relevant only because it helps identify cases where flight or legal intervention will be impossible, so that violent self-help becomes truly necessary. The decisive factor is necessity, not imminence *per se*. Thus, the proper approach is . . . to require, as proposed in Model Penal Code § 3.04, that the use of force be ‘necessary on the present occasion.’”).

169. See George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570 (1996) (“[W]hen an attack against private individuals is imminent, the police are no longer in a position to intervene and exercise the state’s function of securing public safety. The individual right to self-defense kicks in precisely because immediate action is necessary. Individuals do not cede a total monopoly of force to the state. They reserve the right when danger is imminent and otherwise unavoidable to secure their own safety against aggression.”); Whitley R.P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 354–60 (2007) (arguing imminence partitions power between the citizen and the state); V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1725 (2003) (“[T]he doctrine of self-defense insists that the threat be so imminent as to prevent lawful recourse and often emphasizes this fact by requiring retreat.”).

170. Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 257–58 (2004); see also Joshua Dressler, *Feminist (or “Feminist”) Reform of Self-Defense Law: Some Critical Reflections*, 93 MARQ. L. REV. 1475, 1491–92 (2010) (noting that imminence distinguishes offense from defense).

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First, with respect to making sure that an action is truly necessary, as noted above, the liability approach does not require that the actor would have committed the crime—it is sufficient that the actor do enough to intentionally create the appearance that he will commit the offense. In other words, if there is a false positive as to the necessity of stopping the culpable actor, it is the actor's fault.<sup>171</sup> That is, once an actor becomes liable to preventive interference, the responsive action need only be subjectively necessary. Moreover, because the intervention does not harm the actor in the same way that defensive force can (especially deadly defensive force), the harm suffered by an unnecessary intervention is less significant. If the State intervenes unnecessarily because the actor causes the State to believe intervention is necessary, this minimal harm is not sufficiently substantial so as to warrant an imminence requirement for preventive interference.

The second role that imminence supposedly plays is partitioning power between State and citizen. It is hard to see why the State should have to wait for the attack to be imminent, as this view of imminence presupposes that the State can do something prior to the imminent act. True, we do have attempt laws. But do we not want some role for the State prior to the crime occurring? Hence, if the citizen ought not preventively intervene (through self-defense) if the State can act earlier, then it ought to be the case that the State is justified in acting earlier.

The final role for imminence is serving as the *actus reus* of aggression. Simply put, you cannot defend against something that is not already an attack. As a conceptual matter, we certainly need an attack before we can have a defense, but the more essential normative matter is the question of what an attacker must do to forfeit his right against attack. How far must he come? The answer is not very far. If we have clear evidence of intention, and some overt action that corroborates the intention, the actor is already doing something that he ought not do and ought to think the better of. Although citizens should be free to think illiberal thoughts, and even to consider crimes they later reconsider, early planning with an intention to complete that plan is sufficient to waive a right to interferences aimed at foiling the plan or forcing reconsideration. The actor

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171. Admittedly, there may be false positives as to whether a person is a culpable aggressor. The point above, however, is that once someone is a culpable aggressor, he cannot complain that responsive defensive force was not objectively necessary.

can be held to stand and account for his intention, even if he may later change his mind or his plan is conditional in myriad ways. The mere holding and initial acting upon an illicit plan, as currently formulated, is sufficient to allow intervention.<sup>172</sup>

A second difference between self-defense and preventive interference is the nature of the response. Self-defense, even non-deadly, is short-lived. The defender stops the attack with some use of force and the incident is over. The police may arrive after the fact to sort out criminal responsibility. The question would be how we would limit preventive interference.

Once again, preventive intervention follows self-defense's structure. The fact that someone is attacking you does not give you *carte blanche* to do as you will with your attacker. Rather, the attacker has waived a right to defensive force. In the case of preventive intervention, the State may intervene in a way that is necessary and proportionate to prevent the crime threatened. Becoming liable to preventive intervention is not a complete abdication of one's rights. It simply justifies the State in taking appropriate measures to prevent the actor from committing *that* offense.<sup>173</sup>

#### E. AN APPLICATION: "TO CATCH A PREDATOR"

We are all aware of the televised sexual predator stings.<sup>174</sup> The structure of these sexual predator stings runs along the fol-

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172. What if the actor fluctuates between a belief that would make his act justifiable and one that would not? Assume that Larry hates Heidi and believes she is a terrorist and forms the intention to kill her to stop her from harming others. He later begins to doubt that she is a terrorist, but still wants to kill her. If Larry's beliefs fluctuate, may the State intervene? The answer is that the State may intervene when Larry acts on a culpable intention (killing someone who is not a terrorist) and may continue to intervene until Larry abandons that culpable intention. As a practical matter, the State is unlikely to be required to make weekly showings that the actor harbors the culpable intention, and therefore will retain some authority over the actor during some of these fluctuations.

173. Cf. BERGELSON, *supra* note 103, at 91 ("[A] person who while acting in self-defense applied more force than reasonably necessary is responsible only for that 'extra' force because the aggressor has lost his right not to be attacked at all but retained a right not to be attacked with a disproportionate amount of force"); SLOBOGIN, *supra* note 66, at 113–15 (arguing that the nature and duration of preventive interference should bear a reasonable relationship to the harm threatened).

174. E.g., *Dateline: To Catch a Predator* (NBC television broadcast Dec. 28, 2007). For a transcript of a typical episode of one such show, see Chris Hansen, *Potential Predators Go South in Kentucky*, MSNBC (Jan. 9, 2008), [http://www.msnbc.msn.com/id/22423433/ns/dateline\\_nbcto\\_catch\\_a\\_predator/](http://www.msnbc.msn.com/id/22423433/ns/dateline_nbcto_catch_a_predator/).

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lowing lines: Have a police officer or other adult pose as a child in an Internet chatroom. Wait until some actor proposes having sexual contact with the child. Arrange a meeting place. Ask the actor to bring some sort of gift—generally, items designed to show (1) the actor is trying to romance a child and (2) the actor knows the other person is a child (for example, “Please bring beer and cigarettes because I am only in junior high.”). When the actor arrives, have him see the minor with whom he intends to have sexual contact. Have the minor leave and then humiliate the target with a television interview.

How would this work under a preventive interference regime? At the point in time when the actor communicates his intention to have sexual relations with the child, intervene. The State might put an electronic monitor on him, have the right to search his computer and home at unexpected times, and bar him from being within so many feet of a school. With his consent, he could meet with a counselor. His case could then be reviewed in six months to determine whether he still harbors the intention to have sexual contact with a minor.<sup>175</sup>

### III. ASSESSING LIABILITY TO PREVENTIVE INTERVENTION

Preventive measures have traditionally been criticized along three lines. First, critics argue that pure prevention fails to take autonomy seriously. Second, critics claim that prevention circumvents the criminal process. Third, critics argue that preventive measures are extraordinarily expensive. In addition, with respect to this proposal, a critic might question whether liability to preventive intervention can be conceptually and normatively distinguished from pure prevention. This section looks at liability to preventive interference along these lines of critique and argues that liability to preventive interference takes autonomy seriously, is appropriately characterized as civil, is less expensive than many other means of detention, and provides a principled rationale that will prevent slipping down the slope to pure prevention.

#### A. TAKING AUTONOMY SERIOUSLY

As discussed in Part II.B., there are serious concerns with a pure preventive system. Among the issues with pure preven-

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175. See *infra* Part III.D (discussing the length of intervention and the burden of proof).

tion are that such intervention fails to take people's autonomy seriously, to announce rules, to give individuals opportunities to comply, and to treat individuals as responsible agents when we punish them.

Although the account offered here is not one of pure prevention, some might argue that this proposal also fails to take autonomy seriously. Antony Duff argues that early preparatory steps should not be criminalized for reasons that may have equal applicability to this proposal.<sup>176</sup> He claims that to respect someone's freedom, the State may only intervene by trying to dissuade the potential offender, but if "instead we intervene forcibly to prevent him advancing his criminal enterprise, we cease to treat him as a responsible agent: we deny him the freedom to decide for himself whether to desist; we pre-empt his future actions by force, and thus infringe his autonomy."<sup>177</sup>

However, it is unfounded to claim that we may not interfere with someone's criminal plans. We do it all the time. We lock our doors, alarm our cars, and protect our valuables. We certainly do not claim that criminals ought to have unfettered ability to commit crime and that any restrictions on that freedom interfere with their autonomy.<sup>178</sup>

The State is also permitted to limit our freedom in myriad ways for good reason. As Michael Corrado notes, it collects taxes, jails convicts, requires schooling, and compels military service.<sup>179</sup> Protecting citizens' security is a good reason for State interference.<sup>180</sup> Indeed, Andrew Ashworth and Lucia Zedner do not argue that "social crime prevention" ("organizing activities to take (young) people away from crime") and "situational crime prevention" ("target hardening, opportunity reduction, and security systems") are not also preventive measures by the

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176. R.A. DUFF, CRIMINAL ATTEMPTS 389 (1996).

177. *Id.*

178. For an analysis of "preemptive enforcement" where the government makes it impossible to commit a crime (for example, requiring Internet service providers to block child pornography), see generally Daniel Rosenthal, *Assessing Digital Preemption (and the Future of Law Enforcement?)*, 14 NEW CRIM. L. REV. (forthcoming fall 2011) (on file with author) (discussing preemptive enforcement in the context of digital technologies).

179. Corrado, *supra* note 51, at 803.

180. See Ashworth & Zedner, *supra* note 15, at 279, 281 ("Any account of the state's obligations towards citizens ought surely to include the obligation to take all reasonable measures to protect people from death or serious physical harm.").

State.<sup>181</sup> Rather, Ashworth and Zedner argue that they are *less intrusive*, and that to preserve liberty, the State should always prefer these less intrusive measures.<sup>182</sup>

Most importantly, the model proposed in this Article is at root a model of agency, not prediction. This is not about someone's characteristics, or reference class, or diagnosed dangerousness. The preventive interventions defended here are designed to react to criminal intentions—to redirect criminals, prevent their planned crime, and perhaps even aid in the prosecution of the crime if the criminals slip through our hands. This model is premised upon the actor's choice. I respect your autonomy when I take your promises seriously, and I respect your autonomy when I take your threats seriously as well.<sup>183</sup>

Indeed, as Daniel Ohana notes, Duff's position does not register any distinction between someone who has begun a criminal enterprise and someone who has not:

Duff's principled objection to any form of preventive intervention *vis-à-vis* the actor (aside from dialogue) means that an actor who has engaged in acts preparatory to the commission of a crime is to be addressed in a manner that does not differ *essentially* from the manner in which the law addresses other citizens who benefit fully from the "presumption of trustworthiness." But surely there is a significant difference in moral status here. The actor who performs preparatory actions will not be worthy of the trust of fellow members of the community to the same extent or in the same manner as law-abiding citizens who do not even entertain thoughts of engaging in criminal activity or who, even if they do, refrain from taking concrete steps toward bringing them to fruition. To be sure, the actor did not actually do wrong. However, he did *falter* . . . [and] his normative relationship to fellow members of his community has been *tainted*.<sup>184</sup>

Similarly, Michael Corrado notes that he "cannot imagine a more basic right of the community than to use the instrument of the law to restrain those who currently intend—in the strong sense of 'intend' which imports the beginning of an effort to harm—to commit a crime."<sup>185</sup> The idea that Corrado champions is punitive restraint, which he too distinguishes from pure prevention. Corrado, a frequent critic of pure prevention, recogniz-

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181. Andrew Ashworth & Lucia Zedner, *Preventive Orders: A Problem of Undercriminalization?*, in *THE BOUNDARIES OF THE CRIMINAL LAW* 59, 74 (R.A. Duff et al. eds., 2010).

182. *Id.*

183. This model thus stands in contrast with Slobogin's, as Slobogin's regime sends the following message: "You have done something harmful, which you must not let happen again." SLOBOGIN, *supra* note 66, at 156–57.

184. Ohana, *supra* note 118, at 33 (citation omitted).

185. Corrado, *supra* note 51, at 790 n.60.



es the promise in such a middle ground, though he never defends it in detail.<sup>186</sup>

#### B. TAKING SIDES ON THE CIVIL-CRIMINAL DIVIDE

This proposal stands at the center of the civil-criminal divide. Retributivists reject punishing these actors because they have yet to do anything blameworthy.<sup>187</sup> However, theorists likewise reject viewing the State's intervention as civil because the criminal process allows for greater procedural protections than exist in the civil regime.<sup>188</sup>

One concern is legality. Citizens want notice of when something becomes the State's business.<sup>189</sup> The State seems to have tremendous power to intervene.<sup>190</sup> But there is no reason to assume that the bases for preventive intervention cannot be delineated—indeed, this proposal takes conduct that is now delineated as criminal and recasts it as grounds for preventive regulation. As a matter of notice, this proposal is not problematic because the conduct is tied to the criminal law.

Following Slobogin, it is also advisable that the person have committed an act prior to any State interference.<sup>191</sup> Here, an act requirement to limit State abuse seems appropriate. That is, though we may think that the mere formation of an intention grounds a right of proportionate response, there are grounds for concern if the State has sweeping authority to intervene with thought crimes. However, once the actor has per-

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186. *See id.* (“Separating out punitive restraint from preventive detention, conceding that someone may be punitively restrained for as long as he actively intends to harm another, and recognizing a certain grayness in the notion of ‘actively intending’ successfully would lower the heat in the debate over preventive detention.”).

187. *See, e.g.,* DUFF, *supra* note 176 (arguing that punishing early preparatory steps abrogates autonomy).

188. Zedner, *supra* note 147, at 177–79. Zedner states:

In sum, the Control Order is an extraordinary measure that does serious damage to basic presumptions of criminal procedure. It lays waste to the presumption of innocence; to the right to a fair trial; to adversarial justice; to transparency (not least in its use of Special Advocates); and to proportionality.

*Id.* at 179 (citations omitted).

189. *See, e.g.,* DRESSLER, *supra* note 121, § 5.02 (“A statute must give ‘sufficient warning that men may conduct themselves so as to avoid that which is forbidden.’”).

190. *See, e.g.,* SLOBOGIN, *supra* note 66, at 115 (“The legality objection to preventative detention is that the meaning of dangerousness cannot be satisfactorily cabined, thus allowing the state too much power.”).

191. *Id.* at 119–20.

formed any act, the State has conduct that can corroborate the intention.<sup>192</sup>

Beyond legality, there are procedural protections that follow from delineating a restriction as criminal. And, indeed, some commentators claim that the protections that we associate with the criminal process are constitutive of the criminal law. Thus, Ashworth and Zedner claim that the United Kingdom's control orders and its antisocial behavior orders are instances of undercriminalization:

Yet if the criminal law is conceived not only in *substantive* terms, as corresponding to particular principles of responsibility and liability for wrongdoing, but also . . . in *procedural* terms, as pertaining to and invoking a particular set of procedural practices and, most importantly, protections, it can be argued that recent government initiatives resort to criminal law too little as well as too much.<sup>193</sup>

The problem, however, is that if a crime substantively does not belong within the criminal law—because it truly prevents offenses rather than aiming to punish the blameworthy—then no desire to give a regulatory civil regime criminal procedural protections should justify criminalizing the conduct. In such instances, Ashworth and Zedner agree that when a crime does not satisfy substantive principles, “it should remain a preventive measure.”<sup>194</sup> They note that “[d]eveloping a framework for preventive justice would not be a simple endeavor, but it is an urgent one.”<sup>195</sup>

It is also worth noting that the current substantive criminal law does not provide any principled check on State abuse. As Bill Stuntz noted, even if something ought to be punished because it has elements *ABC*, legislatures criminalize *AB*, leaving it to prosecutorial discretion as to whether *C* exists.<sup>196</sup> So, we may only want to punish individuals with burglar's tools who actually intend to use them, but the law leaves the intent element out and prohibits the mere possession of such tools.<sup>197</sup>

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192. *But see supra* note 144 and accompanying text (stating that acts that are closer to satisfying a substantial-step *actus reus* requirement constrain the state more than those that are further away on the continuum).

193. Ashworth & Zedner, *supra* note 181, at 81.

194. *Id.* at 86.

195. *Id.* at 87.

196. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001).

197. *See id.* at 516 (“Possession of burglars’ tools, which may mean no more than possession of a screwdriver, is routinely criminalized . . .”). For instance, the New York Court of Appeals upheld a conviction for possession of burglars’ tools based on the following facts: A police officer testified that on a certain

The legitimacy of that law is based solely on a prediction that the offender will use the tools—but this is *not* something the prosecutor has to prove. So, no matter how many procedural hurdles the prosecution has to surmount—for instance the requirement of proof beyond a reasonable doubt—these guarantees are simply circumvented by criminal codes that punish potentially innocent conduct. As Richard McAdams has argued, the elimination of *C* from crime *ABC* to make it a crime of *AB* essentially requires the State to prove *ABC* by less than a reasonable doubt because it removes the requirement of proving *C* altogether.<sup>198</sup>

Moreover, because of rampant overcriminalization, prosecutors arrive at the bargaining table with more chips.<sup>199</sup> And, at the bargaining table, prosecutors may constitutionally secure waivers of myriad constitutional rights.<sup>200</sup> Most cases are plea bargained, and thus, most constitutional protections have no real bite.<sup>201</sup>

Now, of course, it is not appropriate to compare an idealized theory of preventive interference with the non-ideal real world criminal law. Idealized theory of any kind will prevail over the perils of ordinary men. But even if we had an ideal

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evening he saw defendant and co-defendant walking along a deserted street and peering into parked automobiles. Defendant had a newspaper under his arm, and defendant and co-defendant stopped in front of a parked panel truck for about 30 seconds. The officer approached them and observed a screwdriver protruding from the newspaper, and the officer then arrested them and found a knife on defendant's person. In the officer's opinion, both the screwdriver and the knife could be used to break into automobiles. *People v. Diaz*, 23 N.Y.2d 811, 811–12 (1969).

198. Richard H. McAdams, *The Political Economy of Criminal Law and Procedure: The Pessimists' View*, in CRIMINAL LAW CONVERSATIONS, *supra* note 70, at 517, 519–20; *see also* Tadros, *supra* note 76, at 687 (“[W]here the criminal law is absurdly broad, as it is in the UK, the right to a fair trial is more or less meaningless.”).

199. Stuntz, *supra* note 196, at 520 (“Charge-stacking, the process of charging defendants with several crimes for a single criminal episode, likewise induces guilty pleas, not by raising the odds of conviction at trial but by raising the threatened sentence.”).

200. *See* Andrew E. Taslitz, *The Political Economy of Prosecutorial Indiscretion*, in CRIMINAL LAW CONVERSATIONS, *supra* note 70, at 533, 534–35 (“The law would thus permit a prosecutor to refuse to negotiate until a defendant first waives his rights to receive exculpatory evidence, to challenge certain forms of prosecution evidence at trial, to bring later ineffective assistance of counsel claims, to raise prosecutorial misconduct objections, to waive any post-conviction right to raise claims of innocence, and even to waive the right to keep admissions made during negotiations from the jury at trial.”).

201. *Id.* at 534 (noting that plea bargaining resolves approximately ninety percent of criminal cases).

criminal law, we would want some mechanism for the State to prevent crimes before they occur. And, in this idealized world, there is no reason why the Due Process Clause of the Constitution could not mark new territory in creating a jurisprudence of preventive interference.<sup>202</sup> In crafting this jurisprudence, we would want to look at standards of proof, rules of evidence, obligations to reveal exculpatory information, and the like. I do not doubt that this will be difficult; indeed, the implications for terrorist investigations, which require secrecy and employ confidential informants and uncover operations, would make this path a difficult one to chart. Nevertheless, there is no reason to think that the Constitution could not protect us on the civil side of the divide.

There are also real benefits derived from keeping preventive interference on the civil side. First, the actor is not branded a criminal.<sup>203</sup> Therefore, although he may be prevented from engaging in some actions—such as carrying a gun for a particular time period—a more general loss of rights (voting, gun possession in the future, etc.) and employment opportunities will not inevitably flow from this sort of liability. This will allow the actor to abandon his plan and reintegrate into society far more seamlessly than if the criminal law were to become involved.

It might be objected that when we subject this individual to detention based on culpability then we are “subjecting a class of defendants to stigmatic deprivations of liberty without providing them with the very protections that are designed to safeguard against inappropriate, stigmatic deprivations of liberty.”<sup>204</sup> But the intent here is not to stigmatize. The State’s goal

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202. That the Fifth and Fourteenth Amendments of the Constitution prohibit depriving any person of “life, liberty, or property, without due process of law” does not preclude the creation of a civil framework for preventive interference that respects due process. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

203. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 638 (1997) (arguing in the context of community-based policing and constitutional concerns about vagueness that surround loitering statutes that “given the stigma that attends arrest for even a minor criminal offense, civil sanctions are preferable when they are sufficient to the task, and especially when conduct that may pose serious community problems nevertheless fails to bear the hallmarks of blameworthiness associated with criminal law”); Tadros, *supra* note 76, at 687–88 (noting this benefit of control orders over expansion of the criminal law).

204. Memorandum from Peter Westen to author (Feb. 27, 2011) (on file with author).

is not to mark out someone as a potential criminal but rather to engage in acts that prompt (or force) a change of mind.<sup>205</sup> Moreover, this approach is not being used in order to circumvent greater procedural protections. If this regime requires proof beyond a reasonable doubt, so be it. Further, as technology progresses, the State will have a greater ability to intervene discretely.<sup>206</sup>

Second, if the actor seeks to rebut that he is dangerous, then preventive interference asks the correct question—is the actor dangerous, rather than the one asked by the criminal law—does the actor deserve punishment.<sup>207</sup> To put the point another way, the criminal law often implements overinclusive legislation. It prevents mature fifteen-year-olds from consenting to intercourse; it prevents excellent drivers from moving at seventy-five miles per hour; it bars battered women who need to act from killing in self-defense until a threat is imminent.<sup>208</sup> In such cases, the criminal law has no mechanism for the defendant to show that the underlying justification of the rule does not apply to her.<sup>209</sup> The same problem would arise with allowing preparatory offenses to be used to prevent crime. Sometimes the offenses would stop criminals who would have gone through with it, but other times, the crime would catch those who would have desisted. But the actor would have no way to show that he should not be incarcerated because he would have changed his mind. Hence, this civil mechanism, which would allow the actor to show that he no longer harbors the intention, allows the law to look directly at dangerousness; the state may cease to be involved once the rationale for interference no longer exists.

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205. See *supra* Part I.A (stating that we criminalize actions to prevent harms).

206. See generally Julie A. Singer et al., *The Impact of DNA and Other Technology on the Criminal Justice System: Improvements and Complications*, 17 ALB. L.J. SCI. & TECH. 87, 104–06 (2007) (discussing the ways in which developments in technology allow law enforcement to track suspects more discretely).

207. See Tadros, *supra* note 76, at 687–88 (noting this benefit of control orders over expansion of the criminal law).

208. See generally Larry Alexander & Kimberly Kessler Ferzan, *Beyond the Special Part*, in PHILOSOPHICAL FOUNDATIONS OF THE CRIMINAL LAW, *supra* note 15, at 253, 269–77 (discussing the impact of overinclusive rules).

209. See FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 39 (1991) (noting that rules may be overinclusive because the probabilistic generalization may be incorrect on a given occasion).

### C. REAL WORLD PREVENTION

Retributivism has come under fire for its ivory tower philosophy, and theorists have noted that the actual application of retributivism in the real world requires trade-offs.<sup>210</sup> The same is true of prevention. Even if an individual is liable to preventive interference, the State will have to decide when and where to invest its resources.<sup>211</sup> And, my claim—that there is normative and conceptual space for preventive interference—is not a claim that this is the best way for a government to spend its money, though I do believe this approach to be far superior (and less costly) than the current imposition of criminal punishment for inchoate and preparatory offenses.

Indeed, we ought to approach prevention with care. We currently live in a world where we fear “risks.”<sup>212</sup> As just one cautionary tale, Eric Janus brilliantly documents how our emphasis on sexual predator laws has done real damage.<sup>213</sup> As he argues, focus on sexual predators shifts emphasis to these rare and unusual cases and away from the vast majority of cases—where sexual violence is perpetrated by family and acquaintances. It thus marks a regressive shift in our public awareness of where the real dangers lie.<sup>214</sup>

Another important concern is how these sorts of interventions will affect the potential offender. Sex offender registries may ostracize sex offenders, preventing reintegration and rehabilitation.<sup>215</sup> We may also worry that we do real damage to

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210. See, e.g., Cahill, *supra* note 17, at 819–20; Russell L. Christopher, *The Prosecutor’s Dilemma: Bargains and Punishments*, 72 *FORDHAM L. REV.* 93, 105 (2003) (“[T]he incompatibility of retributivism and bargain justice now renders illegitimate not bargain justice, but rather retributivism.”); Mark D. White, *Retributivism in a World of Scarcity*, in *THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS* 253, 264–70 (Mark D. White ed., 2009) (noting the compromises of retributivism).

211. See discussion *supra* Part I.

212. See JANUS, *supra* note 11, at 91, 102–04 (discussing the societal fear of sexual predators).

213. See *id.* at 75–92 (discussing the negative consequences of sexual predator laws).

214. See, e.g., *id.* at 8, 75–92 (“We need to transfer our willingness to spare no expense from the highly visible but ultimately fruitless quest for perfect safety to the less flashy but broader efforts to get at the root causes of sexual violence and to take sensible safety precautions in regard to the vast majority of sex offenders who are released into the community.”).

215. See *id.* at 70.

non-culpable actors and family members who simply associate with the targeted actor. (Of course, we do real damage to the family when we put such people in jail.<sup>216</sup>) The State must decide whether such measures cause more harm than they prevent.

Finally, all measures will be expensive, and we ought to think long and hard about how to spend our money. Take two of Janus' thought experiments:

By orders of magnitude, predator commitments are more expensive than other effective societal interventions that save lives. The cost per life saved by flu vaccinations is \$500, by breast cancer screening is \$17,000, and by highway improvements is \$60,000. In contrast, I estimate the cost of preventing a single sexual crime by means of civil commitment to be at least \$200,000 and perhaps as much as \$3.25 million.<sup>217</sup>

And:

In 2004, the total state expenditure in Minnesota on treatment and supervision of convicted sex offenders (in prison and after release in the community) was approximately \$4.2 million. Added to the 2004 budget of \$26 million for predator commitments, the total equals the state's "sexual violence prevention" fund. Commitments eat up about 87 percent of this prevention fund but account for at most 12 percent of recidivist sexual crime. The state devotes only 13 percent of its sexual violence prevention fund to addressing the remaining 88 percent of recidivist crime.<sup>218</sup>

Because it is political suicide to be anything other than "tough on crime," legislators keep writing checks the States cannot cash.<sup>219</sup> The growing escalation of imprisonment is extraordinarily costly.<sup>220</sup> This prevention alternative may allow potential offenders to stay within the communities and thus is less costly than the current (first) resort to the criminal law.

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216. On the issue of the criminal justice system and how it affects the family generally, see DAN MARKEL ET AL., PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 76–77 (2009).

217. JANUS, *supra* note 11, at 126.

218. *Id.* at 127.

219. Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 417, 437 (arguing that legislators view opposition to punitive laws as political suicide).

220. It costs nearly \$20,000 per year to keep someone incarcerated in Florida. *Budget: Inmate Cost Per Day Over Five Years*, FLA. DEP'T OF CORR., <http://www.dc.state.fl.us/pub/annual/0910/budget2.html> (last visited Oct. 14, 2010). The cost in New Jersey is about \$47,000 per year. MEREDITH KLEYKAMP ET AL., DRUG POLICY ALLIANCE, WASTING MONEY, WASTING LIVES: CALCULATING THE HIDDEN COSTS OF INCARCERATION IN NEW JERSEY 7 (2008), available at <http://www.drugpolicy.org/sites/default/files/hiddencostsNJ.pdf>.

## D. PURE PREVENTION ALL THE WAY DOWN

Some may question whether this game is worth the candle. Theorists may question whether culpability has any special relevance because it may be possible to justify pure prevention. Others may worry that culpability cannot stop the slide along the slippery slope to pure prevention, either as a theoretical or practical matter.

The first concern asks whether there is something important about culpability. If some amount of pure prevention is (perhaps) inevitable, why erect this elaborate architecture? The answer is that culpability—and more specifically, *liability*—does matter.

Consider first the case of self-defense. When aggressors culpably try to kill you, you may kill any number of them. Culpable aggressors cannot defend against your defensive actions. Third parties can only assist you; they cannot come to the culpable aggressor's aid. You do not owe the culpable aggressor compensation for killing him. This structure reflects what is important about liability—the aggressor, by attacking culpably, gives up rights.

On the other hand, defending against innocent threats and innocent aggressors is quite different. Even if one thinks that one is permitted to kill one innocent threat, it is certainly questionable whether you may kill 100 innocent threats.<sup>221</sup> And, it is even more questionable whether a disinterested third party may intervene to help you.<sup>222</sup> Moreover, many believe that the innocent aggressor or threat may defend himself.<sup>223</sup> And some theorists have suggested that you will owe compensation for killing the innocent aggressor.<sup>224</sup>

Our differential treatment of these cases is explained by the difference in rights. Culpable aggressors forfeit rights.<sup>225</sup> Assuming one may kill innocent aggressors and threats, innocent threats and aggressors have their rights infringed.<sup>226</sup> Ra-

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221. See Larry Alexander, *Self-Defense, Justification, and Excuse*, 22 PHIL. & PUB. AFF. 53, 62 (1993) (questioning the proposition that an individual is justified in killing the innocent aggressor(s), no matter how numerous).

222. See *id.* at 62–63 (discussing the rationale of a bystander).

223. See Frowe, *supra* note 93, at 268.

224. *E.g.*, THOMSON, *supra* note 105, at 41 (“If you are an ‘innocent threat’ to my life (you threaten it through no fault of your own), and I can save my life only by killing you, and therefore do kill you, I think I do owe compensation, for I take your life to save mine.”).

225. See *supra* text accompanying notes 101–03.

226. See *supra* sources cited notes 105–06.



ther than treating self-defense as a one-justification-fits-all construct, our analysis is clearer and sounder when we recognize the difference in justificatory structure, a distinction that does have different implications.

Preventive intervention is likewise distinct from pure prevention. Preventive interference is justified by culpable action; the agent is liable to this interference and has no right against this interference.<sup>227</sup> On the other hand, if we employ predictive technology to lock up the highly dangerous, we do so for us, not based on any responsibility of these dangerous actors.<sup>228</sup>

This difference matters. First, although theorists have suggested that if we preventively detain individuals, we might owe them compensation,<sup>229</sup> this is not the case with those who are liable to preventive interference. Second, just as any defense against innocent aggressors and threats is highly contentious but killing the culpable aggressor appears to be a “no-brainer,” preventive interference that is grounded in responsible agency is more easily justified than the complex questions of autonomy, security, and false positives that surround pure predictive models.<sup>230</sup> Procedurally, the government should be required to make more substantial showings more frequently when interference is not justified by liability or non-responsibility. For these reasons, culpability does have special relevance in justifying this predictive enterprise.

The other concern is that there is no principled line between this proposal and pure prevention. The normative concern might be expressed this way: “Preventive intervention is about prediction. Given that all that liability does is give us grounds to make a prediction, why bother with liability? If you are going to predict, then predict.”<sup>231</sup>

To respond to this objection, one must confront two different ways to view human beings—as mechanistic creatures in a causal web and as practical reasoners who are capable of responding to norms.<sup>232</sup> In the context of the determinism debate, the question is whether responsibility and desert are compati-

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227. See discussion *supra* Part II.C.

228. See *supra* Part I.B.

229. See *supra* sources cited note 85.

230. See *supra* Part I.B.

231. I owe this objection to Stephen Morse.

232. See Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 414–15 (discussing the distinction between viewing individuals as caused and viewing them as practical reasoners).

ble with a causally determined universe.<sup>233</sup> The compatibilist stance is that responsibility can be compatible with determinism.<sup>234</sup> We can be responsible even if our acts are caused. Along similar lines, philosophers puzzle over the possibility of pre-punishment.<sup>235</sup> If *X* is going to commit a crime, then why not punish *X* before he commits the crime? The answer must be that we take choice seriously, no matter how predictable, and we take punishment as a response to that choice seriously as well.

Preventive interference can offer the same response. It may be that we can predict with equal confidence that both *A* and *B* will commit a crime. If *A* has formed the intention, but *B* hasn't, why let the intention matter? The answer is that we take *B*'s autonomy seriously by waiting. Although it may be an act of caring or kindness to order for a friend or spouse before he arrives at a restaurant, predicting—even predictable choices—takes responsibility out of our hands. Liability to preventive interference allows us to take autonomy seriously.

As an example, consider the “Anticipated Culpable Aggressor” (ACA).<sup>236</sup> In the self-defense context, the problem might arise this way: Assume that Irene knows that Joe is about to hear a phone message that Irene was promoted and Joe was not; that she believes (correctly) that Joe will form the intention to kill her over the job; and that she knows that Joe has a

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233. See *id.* at 413–14 (arguing that the luck argument depends on the distinction between a mechanistic-casual account of behavior and a practical reasoning account).

234. See *id.* at 415 (“[C]ompatibilists have good reason to ‘draw the line’ at human action because only action can be guided by reason and not because action is free of the causal forces of the universe—of ‘luck.’ There is always a causal story, but results cannot be guided by reason. The potential for the law to guide people by reason is a good justification to hold people morally responsible for action but not for results.”).

235. See Christopher New, *Punishing Times: Reply to Smilansky*, 55 ANALYSIS 60, 61 (1995) (arguing that waiting is just an “empty gesture” if we know the defendant will commit the act); Christopher New, *Time and Punishment*, 52 ANALYSIS 35, 35–36 (1992) (introducing the puzzle); Saul Smilansky, *The Time to Punish*, 54 ANALYSIS 50, 52 (1994) (arguing that pre-punishment does not show respect for persons); Daniel Statman, *The Time to Punish and the Problem of Moral Luck*, 14 J. APPLIED PHIL. 129, 129, 133 (1997) (arguing that Christopher New should be willing to punish even prior to the formation of an intention to commit a crime).

236. See ALEXANDER & FERZAN WITH MORSE, *supra* note 15, at 131–33 (discussing this category but not reaching a conclusion as to when preventive intervention might be justified).

gun in his waistband and is a quick draw.<sup>237</sup> May Irene kill him before he hits play on his answering machine?<sup>238</sup> Less theoretically, we might also question when a State may engage in preemptive war.<sup>239</sup> In the context of preventive interference, one might expect a sexual predator to form an intention to molest a child, but he may not harbor such an intention now.

There are two ways to deal with these cases, and the answer will be rather context-specific. To the extent that one harbors a disposition that will likely render that person irresponsible later (or less responsible), the person has a duty to fix that character defect.<sup>240</sup> As Michael Corrado has pointed out, however, this is not the case when the later act will itself be a responsible one—then the person's only duty is not to commit the act.<sup>241</sup> Thus, there will be some cases in which the actor may be committing a culpable omission by failing to tend to a character defect. In many other cases, however, we cannot rely on any liability account. Unless an account of justifiable pure prevention is forthcoming, we will have to wait until the intention is formed and an action in furtherance of that intention is undertaken.

The final consideration is the practical one. How will this system become any less Kafkaesque than our current prevention mechanisms?<sup>242</sup> That is, the political incentives will remain the same. The risk of a false negative is politically more problematic than the harm perceived from a false positive (particularly after the first finding of an intention).<sup>243</sup> Moreover, one might worry that a fair application of the standard will

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237. See Larry Alexander, *A Unified Excuse of Preemptive Self-Protection*, 74 NOTRE DAME L. REV. 1475, 1477 (1999) (suggesting a similar hypothetical).

238. See *id.*

239. See Jeff McMahan, *The Conditions of Liability to Preventive Attack*, in THE ETHICS OF PREVENTIVE WAR (Deen K. Chatterjee, ed.) (forthcoming June 2012) (manuscript at 3–5), available at [http://www.sas.rutgers.edu/cms/phil/dmdocuments/The Conditions of Liability to Preventive Attack.pdf](http://www.sas.rutgers.edu/cms/phil/dmdocuments/The%20Conditions%20of%20Liability%20to%20Preventive%20Attack.pdf) (arguing that when soldiers voluntarily join the army, they can be expected to attack if ordered, and if their government will soon fight an unjust war, the soldiers are liable to preventive attack).

240. See ALEXANDER & FERZAN WITH MORSE, *supra* note 15, at 85, 167. Stephen Morse has suggested that a defendant may likewise have an obligation to take affirmative steps to prevent his acting on a culpable intention. See Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 152–54 (1996).

241. Corrado, *supra* note 85, at 10 (arguing that a potential offender's duty is not to perform the act, as opposed to being obligated to turn himself in).

242. See *supra* text accompanying notes 83–84.

243. See *supra* text accompanying note 84.

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have the opposite effect—it will be too easy for the prospective criminal to lie and to be released.

The answer lies in how this system can be constructed to shift the burdens as time goes on, so that the long term intervention would require frequent showings of substantial proof of a continuing intention. Although a full defense of the mechanics of this model requires a paper in its own right, let me offer the following possible sketch. Assume that a hardened terrorist states that he plans to bomb schools to strike fear into the hearts of Americans and he is then spotted walking around an elementary school to which he has no ties. Modifying the control order model, the State will be required to make a showing (let us assume clear and convincing evidence) to a fact finder that the actor intended to commit a crime and that he took a step in furtherance of that intention. Certainly, we want a rather high standard of proof before the State is entitled to intervene. If we are going to detain the individual or otherwise restrict his liberty, we ought to be certain that he harbored a culpable mental state and has acted upon it.

At this point, I believe the burden may be shifted to the defendant to show that he no longer harbors that intention. Once the State has shown culpable action, it has given a clear reason for State intervention. The defendant only regains his right if he has abandoned his criminal plan. At this initial stage, it is not unfair to require the defendant (who lost his rights by his own accord and has best access to the information that would show he no longer has the intention) to bear the burden.

In the terrorist example, this would mean that the State could present a witness who will testify that the prospective terrorist stated he planned to bomb schools and a witness to establish that the prospective terrorist was spotted in an elementary school to which he had no ties. This would be sufficient to intervene against the prospective terrorist unless he could show that he no longer harbors the intention. He might, for example, testify that he does not plan to bomb the United States and is planning to leave the country. Now, certainly the fact finder has a difficult job to do. It needs to assess whether to believe the prospective terrorist. If the terrorist is an excellent liar, this may be difficult, just as it is in a criminal trial. However, at this point, the deck is stacked against him—he has to convince the fact finder that he no longer plans to commit an offense.

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If the previous intention is found and the defendant does not convince the fact finder that the intention no longer exists, the State may proceed to intervene with the least restrictive means possible. It may electronically monitor, use curfews, etc. Violation of the set parameters can result in imprisonment. The length of the period of intervention before reassessment can be set by the gravity of the crime. The State may be entitled to intervene for one year for terrorism, and other especially heinous offenses, but for six months for less extreme offenses. In addition, there may certainly be cases where given the gravity of the harm and the inability to stop it short of preventive detention, that detention itself would be called for.

After the initial period is over, the intervention is revisited, with the State being required to put forth further positive proof that the defendant still harbors an intention, by, say, clear and convincing evidence. Intervention might then be justified for another six months, with a requirement that the State put forth evidence for any third or further renewal by proof beyond a reasonable doubt. This burden changing and shifting approach will place significant pressure on the State to come forward with substantial evidence if it wishes to continue interfering in someone's life for a prolonged period of time. Take Hendricks.<sup>244</sup> It may be that long term preventive detention would be justified against him so long as he (1) harbored an intention to molest a child and (2) acted on it, and after that liability obtained, the State could continue to show that given Hendricks's past behavior it is likely that he continues to harbor that intention. This is not to say propensity or psychological testimony should be sufficient for liability—more is required to show that Hendricks did harbor a culpable intention that needs to be stopped. But once he truly harbors that intention, the State should have a wide range of proof at its disposal—particularly given that its burden is increasing.

In addition, not only could burden shifting be possible, but the type of intervention applied could vary.<sup>245</sup> That is, when an individual first harbors a culpable mental state and acts upon it, there is significant need for intervention—and in the case of terrorists, significant need to intervene by detention to break up the criminal plans. However, as time goes on, with periodic evaluations, we may find that less restrictive means are possible.

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244. See *supra* Part I.B.

245. I owe this suggestion to Alec Walen.

## CONCLUSION

The State has an important role in protecting its citizens. Yet, the State's hands have been tied by the view that it must choose between crime and commitment. There is, however, a third model for State intervention. The self-defense literature recognizes that the reason why it is permissible to defend against culpable attackers is because of their actions. The culpable aggressor's attack waives his right against the defender's use of defensive force. Similarly, when individuals have initiated a course of criminal conduct, they, too, have waived a right against defensive behavior. They have waived the right against preventive interference by the State.

This Article has not sought to provide grounds for every possible sort of preventive interference. Rather, this Article's focus has been on one type of case where the State is permitted to intervene, and that is the case in which the defendant has made himself liable to that intervention. Liability to preventive interference allows the State to intervene at the early stages of a criminal plan. It justifies the State's engagement in myriad behaviors from electronic monitoring to unannounced searches. Yet, it is morally limited, as what is proportionate is only that conduct designed to stop a particular crime.

This approach is superior to other preventive detention models as it takes autonomy seriously, lies on the correct side of the civil/criminal divide, and is ultimately less costly than a resort to the criminal law and prevention through incarceration.

Although such an approach would require a new constitutional jurisprudence, it is time that one was crafted. We can no longer afford to contort the paradigms of crime and commitment to reach the dangerous. The call is clear. Liability to preventive interference requires a jurisprudence of its own.