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Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases

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Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases

CHRISTOPHER SLOBOGIN*

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* Milton Underwood Professor of Law, Vanderbilt University Law School. This Article recapitulates ideas that I have been advancing in various works since 2003. See CHRISTOPHER SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* (2006); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121 (2005). Most recently, I have developed these themes in Christopher Slobogin, *Legal Limitations on the Scope of Preventive Detention*, in DANGEROUS PEOPLE: POLICY, PREDICTION AND PRACTICE 37 (Bernadette McSherry & Patrick Keyser eds., 2011), and Christopher Slobogin, *Prevention of Sexual Violence by Those Who Have Been Sexually Violent*, 34 INT'L J.L. & PSYCHIATRY 210 (2011). This Article in essence combines the latter two works.

For their comments on an earlier version of this Article, I would like to thank the participants in the Conference on the Morality of Preventive Restriction of Liberty hosted by the University of San Diego School of Law on April 29 and 30, 2011. I especially thank Larry Alexander, Douglas Husak, Stephen Morse, Alec Walen, and Lucia Zedner for their comments.

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I. INTRODUCTION

Prevention of crime is clearly a legitimate goal of government. As the title to this Symposium intimates, however, pursuit of that goal through restrictions on liberty can raise serious moral quandaries. In previous work, I have developed a set of principles describing how the government's interest in avoiding harm to its citizens may be achieved through the individual prevention mechanisms of incapacitation, specific deterrence, and rehabilitation without unduly undermining deontological, retributive precepts.¹ I have applied those principles to civil and criminal commitment regimes,² detention of enemy combatants,³ and the death penalty.⁴ Here, the focus is on noncapital sentencing.

Sentencing can act as a mechanism for achieving individual prevention objectives in at least four ways. The first approach, found in determinate sentencing regimes, is to punish people proportionate to their desert based on the nature of their crime and their culpability; in this type of

1. CHRISTOPHER SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE OF MENTAL DISABILITY OF LIFE AND LIBERTY* 103–51 (2006).

2. *Id.* at 122–38.

3. Christopher Slobogin, *Defending Preventive Detention*, in *CRIMINAL LAW CONVERSATIONS* 67, 84–85 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009).

4. Christopher Slobogin, *Capital Punishment and Dangerousness*, in *MENTAL DISORDER AND CRIMINAL LAW: RESPONSIBILITY, PUNISHMENT AND COMPETENCE* 119 (Robert F. Schopp et al. eds., 2009).

regime, prevention of crime is a by-product, not a goal, of punishment.⁵ A competing approach, commonly called indeterminate sentencing, is to base disposition explicitly on risk assessment and risk management, with release or conditional release dependent on periodic review of the degree of risk posed.⁶ A hybrid “limiting retributivism” approach, recently recommended by the American Law Institute, involves setting a range of punishment according to desert, but allowing a risk assessment at the front end of the process to determine the period of confinement within that range.⁷ Another hybrid, the “post-sentence commitment” approach represented by sexually violent predator (SVP) statutes that currently exist in the United States, is to intervene based on risk *after* a desert-based sentence has been served.⁸

Among the electorate and legislatures in the United States, all of these sentencing schemes have been popular, with the states close to evenly split as to which of the regimes, or combination thereof, is adopted.⁹ Among modern-day legal academics, in contrast, determinate sentencing and limiting retributivism tend to be preferred over indeterminate sentencing and post-sentence commitment, at least in part because the latter two options are viewed as immoral.¹⁰ This Article contends to the contrary that, properly constituted, indeterminate sentencing is both a morally defensible method of preventing crime and the optimal regime

5. For standard definitions of determinate and indeterminate sentencing, see Kevin R. Reitz, *Demographic Impact Statements, O'Connor's Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 FLA. L. REV. 683, 703 (2009).

6. *Id.*

7. MODEL PENAL CODE: SENTENCING §§ 6.01(1), 6B.09(3), at 1, 53 (Tentative Draft No. 2, 2011); see also Christopher Slobogin, *Introduction to the Symposium on the Model Penal Code's Sentencing Proposals*, 61 FLA. L. REV. 665, 670–71 (2009) (discussing the preliminary council draft version of Tentative Draft No. 2). Norval Morris is usually credited with first advancing the limiting retributivism idea. See NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (Sanford H. Kadish et al. eds., 1974).

8. See W. Lawrence Fitch, *Sexual Offender Commitment in the United States: Legislative and Policy Concerns*, in *SEXUALLY COERCIVE BEHAVIOR: UNDERSTANDING AND MANAGEMENT* 489, 490–91 (Robert A. Prentky et al. eds., 2003).

9. See Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1196–97 (2005) (noting that eighteen states plus the federal government have adopted sentencing guidelines that tend in the direction of determinate sentencing but that a number of states have also rejected the guidelines approach).

10. Michael Tonry, *Introduction: Thinking About Punishment*, in *WHY PUNISH? HOW MUCH? A READER ON PUNISHMENT* 3, 6 (Michael Tonry ed., 2011) (“By 1980 . . . [m]ost writing on punishment philosophy and theory had a pronounced retributive slant.”).

for doing so, at least for crimes against person and most other street crimes.¹¹

More specifically, the position defended in this Article is that, once a person is convicted of an offense, the duration and nature of sentence should be based on a back-end decision made by experts in recidivism reduction, within broad ranges set by the legislature. Compared to determinate sentencing, the sentencing regime advanced in this Article relies on wider sentence ranges and explicit assessments of risk, cabined only very loosely by desert. Compared to limiting retributivism, the key difference is that risk assessments are periodic rather than made at the front end, thus producing sentences that are much more individualized and flexible. Finally, post-sentence commitment based on risk would not make sense in an indeterminate sentencing regime that is already focused on that criterion.

The territory covered in this Article, particularly as it addresses the debate between deontological retributivists and utilitarians, is well trodden. But this Article seeks to provide new perspectives on the morality, legality, and practicality of indeterminate sentencing. It starts with an outline of what a properly constituted indeterminate sentencing regime would look like. It then defends this regime against numerous objections.

II. CONSTITUTIONALLY SOUND INDETERMINATE SENTENCING

In theory, indeterminate sentencing is the sentencing regime that is the most cost-effective means of protecting the public from recidivism because it is explicitly designed to limit both false negatives and false positives. In contrast to determinate sentencing and limiting retributivism, indeterminate sentencing that works as it should is less likely either to permit premature release—and thus generate false negatives—or to authorize prolonged confinement beyond that necessary to ensure societal protection—and thus create false positives.¹² In contrast to post-sentence

11. Indeterminate sentencing might be optimal for fraud and white collar crimes as well, but both risk assessment and risk management are at a more nascent stage for these crimes. General deterrence might also have more of a role to play in this setting, although this Article generally takes a jaundiced view of deterrence as a meaningful crime prevention mechanism. See *infra* text accompanying notes 129–32. Alternatively, many of these crimes might be better handled in the civil system. See Darryl K. Brown, *Criminal Law's Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 661–62 (2011).

12. Joan Petersilia, *California's Correction Paradox of Excess and Deprivation*, in 37 CRIME AND JUSTICE 207, 252–53 (Michael Tonry ed., 2008) (“[Under California’s determinate sentencing regime a] large percentage of Californians who are nonviolent criminals are accumulating very extensive criminal records [yet] may not be any more dangerous than offenders in other states who are left ‘on the street’ and successfully handled through an array of community-based intermediate sanctions. [At the same

commitment, it avoids any incarceration unrelated to risk reduction that occurs in connection with the sentence preceding commitment as well as the negative effects of singling out autonomous individuals for special preventive intervention that stem from the post-sentence commitment.¹³

Indeterminate sentencing has no chance of realizing these benefits in a morally defensible manner, however, unless it adheres to constitutionally sound tenets. Elsewhere I have argued that seven principles should govern the state's exercise of preventive intervention authority, *whenever* it is exercised: (1) the principle of legality, which requires commission of a crime or imminently risky conduct before preventive detention takes place; (2) the risk-proportionality principle, which requires that government prove a probability and magnitude of risk proportionate to the duration and nature of the contemplated intervention; (3) the related least drastic means principle, which requires the government to adopt the least invasive means of accomplishing its preventive goals and thus may well preclude confinement as well as require treatment in many cases; (4) the principle of criminal justice primacy, which requires that systems of preventive detention separate from criminal justice be limited to detention of those whose subsequent behavior is unlikely to be affected even by a significant prospect of serious criminal punishment; (5) the evidentiary rule that, when government seeks preventive confinement, it may only prove its case using actuarial-based probability estimates or, in their absence, previous antisocial conduct; (6) the evidentiary rule that the subject of preventive detention may rebut the government's case concerning risk with clinical risk assessments, even if they are not as provably reliable as actuarial prediction; (7) the procedural principle that a subject's risk and risk management plans must periodically be reviewed using procedures that ensure voice for the subject and avoid executive branch domination of the decisionmaking process.¹⁴

The first four principles impose substantive limitations on preventive intervention. The final three principles are procedural in nature. Below, the rationale for each is summarized, both in an effort to advance thinking

time], California's sentencing system also releases violent offenders who amass lengthy criminal records—individuals who, in a system more carefully tailored to protect public safety, probably should not have been released in the first place.”); *see also infra* Part IV.

13. For discussion of these negative effects, see SLOBOGIN, *supra* note 1, at 122–26.

14. *See* Slobogin, *supra* note 4, at 120–24.

about prevention generally and with the goal of elaborating how the principles apply to sentencing.

A. The Act Requirement: A Crime or Imminently Risky Conduct

As an empirical matter, almost all individuals who are considered a serious risk to others are likely to have committed at least one previous criminal act. In theory, however, an assessment of risk does not require a predicate crime. The right combination of psychological, physiological, and situational factors might permit a fairly robust prediction that violence will ensue without such an act. For instance, knowledge that an individual is a psychopath and a member of a gang committed to defending its turf might lead to a high certainty that the individual will commit a violent act in the near future.

Even if the prediction is highly accurate, however, preventive detention should not take place in the absence of *conduct* that is either a crime or highly and obviously predictive of one. This conclusion flows from the principle of legality, which applies in both the criminal and civil contexts, and in the United States stems from the Due Process Clause found in both the Fifth and Fourteenth Amendments of the Constitution.¹⁵ The principle of legality posits, *inter alia*, that the basis for depriving individuals of life, liberty, or property may not be so vague or so broadly framed that government officials can intervene at their whim.¹⁶ Thus, for instance, the U.S. Supreme Court has struck down a loitering statute because it “contains no standard for determining what a suspect *has to do* in order to satisfy [its] requirement[s]” and therefore “vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute.”¹⁷

The legality principle protects liberty interests not only by restricting the discretion of police, prosecutors, and courts but also by ensuring that individual autonomy is respected, a goal that is worth pursuing even if one’s perspective is purely consequentialist. Interventions based solely on the nature of one’s genes, condition, or environment would be very

15. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”).

16. See generally John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 212 (1985) (“The rule of law . . . means that the agencies of official coercion should, to the extent feasible, be guided by rules—that is, by openly acknowledged, relatively stable, and generally applicable statements of proscribed conduct. The evils to be retarded are caprice and whim, the misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria of selection.”).

17. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (emphasis added).

difficult to avoid. Many commonly used risk factors either are unchangeable—as is the case with age, gender, and some forms of paranoid mental disorder—or cannot realistically be changed without significant help or effort—as with poverty, unemployment, psychopathy, and substance abuse.¹⁸ Allowing government to intervene preventively upon proof of such risk factors without additional proof of antisocial conduct would result in counterproductive curtailments of liberty. For instance, it might pressure even law-abiding citizens to avoid any condition or situation, however innocuous in itself, that is potentially associated with risk, and it might impose highly distracting burdens on those who, whether generally law-abiding or not, have difficulty avoiding such conditions or situations.

The practical consequence of the legality principle is that preventive detention may not occur unless the individual has committed a crime—presumably defined at least in part consistent with desert—or has engaged in conduct that poses an imminent risk of crime. The latter situation might occur when police have reasonable suspicion that the person is about to engage in criminal activity¹⁹ or a person with a communicable disease enters the public domain.²⁰ On the same reasoning, once detention takes place the imposition of new or greater restrictions on liberty is prohibited unless additional criminal or imminently risky conduct occurs.

The legality principle not only requires antecedent conduct before liberty deprivation may occur but also mandates a clear statement as to the basis for the intervention.²¹ In the prevention context, this basis consists not only of the triggering act that was just described but also of the act or acts sought to be prevented. The first type of conduct can be called “predictive conduct” and the second “object conduct.” Very often, predictive and object conduct will be of the same type; for example, an

18. See *infra* Part III.B.

19. See *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The definition of reasonable suspicion has spawned a rich literature, which can be informed by legality concerns. Cf. Danyne Holley, *The Supreme Courts: Did September 11th Accelerate Their Sanctioning the Constitutionality of Criminalizing Suspicion?*, 7 *PIERCE L. REV.* 39, 44–52, 80–83 (2008) (discussing the constitutionality of criminalizing refusal to cooperate with the police).

20. See *Jacobson v. Massachusetts*, 197 U.S. 11, 26–39 (1905).

21. Jeffries, *supra* note 16, at 196 (“[T]he vagueness doctrine is the operational arm of legality. It requires that advance, ordinarily legislative crime definition be meaningfully precise—or at least that it not be meaninglessly indefinite.” (footnote omitted)).

assault may be predictive of assault. In other contexts, the predictive conduct will be different from the object conduct; for instance, stalking may be predictive of assault. The legality principle demands that both the predictive and object conduct be defined beforehand, preferably through legislation, although in the case of predictive conduct, inclusion in a court order or risk assessment instrument might be sufficient. If the predictive conduct is not a crime, the government must adduce proof that it is imminently risky or the legality principle will be violated.²²

This latter requirement is most relevant in the commitment and street stop contexts, where preventive action is often based on conduct that is not clearly criminal, rather than at sentencing, which is based on a conviction for crime. However, in the United Kingdom, courts are now issuing antisocial behavioural orders (ASBOs) that permit imposition of a five-year sentence based on noncriminal behavior. Specifically, the object conduct sought to be prevented by such orders may consist of any behavior that causes or is “likely to cause harassment, alarm or distress,” and the predictive conduct may consist of anything the court decides might lead to such harm, such as drinking or entering certain areas.²³ ASBOs violate the legality principle if the object conduct they specify is not found in the criminal code or if the predictive conduct they specify does not imminently lead to the object conduct.²⁴ If these legality violations occur, sentences triggered by violation of ASBOs are illegitimate.

B. The Risk Necessary for Intervention: The Risk-Proportionality Principle

The most important substantive question raised by preventive detention is the degree of risk necessary to justify intervention or, in the case of sentencing, prolongation of the intervention. At one extreme, society could decide that once a person meets the act predicate, that person could be preventively detained upon any showing of risk for any type of antisocial behavior. At the other extreme, society could prohibit intervention until the government adduces proof beyond a reasonable

22. Cf. Alan M. Dershowitz, *Dangerousness as a Criterion for Confinement*, 2 BULL. AM. ACAD. PSYCHIATRY & L. 172, 176 (1974) (arguing that the harms that justify intervention in commitment cases should be as clearly delineated as they are under the penal laws).

23. Andrew Ashworth & Lucia Zedner, *Just Prevention: Preventive Rationales and the Limits of the Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF THE CRIMINAL LAW 279, 298 (R.A. Duff & Stuart P. Green eds., 2011) (quoting Crime & Disorder Act, (1998 Annual Abridgment) § 1(1)(a), HALS. STAT. (4th ed.) 191 (Eng.)) (internal quotation marks omitted).

24. More is said about when conduct is clearly predictive below. See *infra* Part II.E.

doubt that the person will commit a serious, violent crime. Neither of these positions is consistent with long-standing justice principles, however; instead the law has taken a contextual approach. For instance, as interpreted by the U.S. Supreme Court in *Jackson v. Indiana*, the Due Process Clause of the Fourteenth Amendment mandates that “the nature and duration of commitment bear some *reasonable relation* to the purpose for which the individual is committed.”²⁵ In essence, *Jackson* announces what I will call the risk-proportionality principle, to distinguish it from retribution-based proportionality.

In a determinate sentencing regime, punishment is generally supposed to be proportionate to desert (culpability). In an indeterminate sentencing regime, dispositions should be proportionate to risk. Risk can be measured along a number of dimensions, but the two most important are the probability that harm will occur and its magnitude.²⁶ Although a high probability and magnitude of harm might justify serious preventive measures, including long-term confinement, minimal probability and magnitude of harm should rarely be the basis for significant preventive intervention.²⁷

American law has long implicitly recognized this risk-proportionality principle.²⁸ Preventive intervention always requires some justification, and that justification becomes more onerous as the intervention becomes more significant. Even a brief detention on the street requires reasonable suspicion that criminal activity is occurring or is imminent.²⁹ Short-term emergency civil commitment requires probable cause to believe a person is a danger to others,³⁰ and pretrial detention requires a preponderance showing or clear and convincing evidence that a felony will otherwise

25. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (emphasis added).

26. See ALEXANDER D. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 678–82 (1974).

27. However, expressive and deterrence concerns may dictate nominal sentences beyond those warranted by a single-minded focus on prevention. See *infra* text accompanying notes 136–37.

28. The German Federal Constitutional Court has explicitly recognized it. Bundesverfassungsgericht [BVerfG] [Federal Administrative Court] Feb. 2, 2004, docket number 2 BvR 2029/01 (Ger.), available at www.bundesverfassungsgericht.de/entscheidungen/rs20040205_2bvr202901.html.

29. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

30. CAL. WELF. & INST. CODE § 5150 (West 2010) (providing that emergency detention requires probable cause regarding mental disorder and risk to others); cf. *Gerstein v. Pugh*, 420 U.S. 103, 111–12 (1975) (requiring probable cause for arrest).

occur.³¹ Moving up the ladder, long-term civil commitment requires clear and convincing evidence that hospitalization is needed to prevent serious bodily injury.³² Sexually violent predator commitment usually requires proof beyond a reasonable doubt that another sex offense will be committed, and a death sentence based on risk is permissible only upon proof beyond a reasonable doubt that a violent crime will otherwise occur.³³ A version of the risk-proportionality principle is also recognized in connection with detention of enemy combatants, where courts have held that “evidence that may have justified the initial detention will not serve in retrospect to convince a court to bless it.”³⁴

Unfortunately, although the typical *standards of proof* reflect proportionality analysis, many statutes and courts fudge the intervention-threshold issue by failing to adhere to risk-proportionality reasoning in defining the *legal standard*—the probability of risk and the magnitude of risk that must be shown. Under Texas’s death penalty statute, for instance, an offender is considered eligible for the death penalty when the state can show beyond a reasonable doubt “a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”³⁵ Even though dangerousness so defined must be proven under the reasonable doubt standard—which sounds consistent with proportionality reasoning—the statute defines dangerousness itself in terms of “a probability.” Thus, a Texas prosecutor seeking a death sentence need only show a *probability* of harm beyond a reasonable doubt. Furthermore, the magnitude of harm described in this statute—a criminal act of violence—is extremely vague and, to the extent an assault is considered violent, insufficiently proportionate to the preventive intervention at stake. Together, the probability and magnitude elements of this statute mean that the dangerousness aggravator under Texas death penalty law is proven even if there is less than a 50% chance that the offender will commit another crime and even if that crime is only a simple assault.

31. See, e.g., Federal Bail Reform Act of 1984, 18 U.S.C. § 3142(e)–(f) (2006 & Supp. III 2010); see also *United States v. Shakur*, 817 F.2d 189, 194–95 (2d Cir. 1987) (requiring that risk of flight be proven by the preponderance standard in pretrial detention cases).

32. *Addington v. Texas*, 441 U.S. 418, 432–33 (1979).

33. See, e.g., KAN. STAT. ANN. § 59-29a07(a), (e) (2005); TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2006).

34. Benjamin Wittes, Robert Chesney & Rabea Benhalim, *The Emerging Law of Detention: The Guantánamo Habeas Cases as Lawmaking* 25 (Univ. Tex. Pub. Law & Legal Theory, Research Paper Series, Paper No. 165, 2010), available at <http://ssrn.com/abstract=1540601>. The Israeli Supreme Court has reached a similar conclusion. See *CrimA (TA) 6659/06 A. v. Israel 1*, 43–44 (2008) (Isr.), translated in http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf.

35. TEX. CODE CRIM. PROC. ANN. art. 37.071.

If the proportionality principle underlying *Jackson* were taken seriously, these types of practices could not continue. In the United States, the anchor for risk-proportionality analysis should be the reasonable suspicion required for a police stop because that legal standard is mandated by the Fourth Amendment's stipulation that seizures be reasonable.³⁶ Reasonable suspicion has been quantified at approximately a 20%–30% level of certainty that the person stopped is about to engage in some sort of criminal activity,³⁷ and under the Supreme Court's case law, that level of risk permits a detention on the street of no more than twenty minutes.³⁸ Using that rule as a baseline for risk-proportionality reasoning, *incarceration* for preventive purposes should require proof of a higher degree of risk, perhaps at the 50% level, which is analogous to the probable cause required for an arrest. If confinement becomes prolonged, it should require increasingly higher showings of risk, both in terms of probability and magnitude, while the death penalty could be imposed only upon sufficient proof of near certainty that the person will commit a seriously violent felony.

If implemented in the manner described, the risk-proportionality principle requires a level of proof that, compared with current preventive detention practices, will reduce false positives—people declared to be a legally sufficient risk but who are not—but will also probably increase false negatives—people who do not pose a legally sufficient risk but who in fact will recidivate if released. The tradeoff between false positives and false negatives need not be a zero-sum game, however. Although reducing either rate below 25% is very difficult, researchers have been able to develop prediction techniques that come close to this goal. Thus, for instance, an Area Under (the Receiving Operating Characteristic) Curve (AUC) of .78, a not-uncommon value for actuarial risk assessment instruments, can provide a cutoff score that produces a 30% false positive

36. *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (“[T]here is ‘no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.’” (quoting *Camara v. Mun. Court*, 387 U.S. 523, 536–37 (1967))).

37. C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1327–28 tbl.4 (1982) (reporting the results of a survey of federal judges asked to quantify probable cause and reasonable suspicion).

38. *United States v. Sharpe*, 470 U.S. 675, 683 (1985).

rate and a 20% false negative rate.³⁹ Note also that failing to meet the higher proof standards merely means the government cannot *confine* the individual. There are often less restrictive ways of reducing risk that can limit the number of false negatives⁴⁰ and that may even be mandated under the next principle to be discussed.

C. Disposition: The Least Drastic Risk-Reducing Intervention

Assume now that a person has committed the necessary predicate act and that the degree of risk necessary to justify some sort of state intervention has been shown. The next issue that arises is the type of disposition that the government may impose on the individual. Here, again, substantive due process plays a significant role. It is a constitutional axiom under American law that if the government deprives an individual of a fundamental right, such as liberty, it must do so in the least drastic manner necessary to achieve its objective.⁴¹

The government's objective in this setting is prevention of harm to others. Thus, in the dispositional context the least drastic means principle means that, even if risk justifying confinement has been proven, confinement may occur only if necessary to achieve prevention of harm and may continue only if it remains necessary to achieve that aim. In *Jackson*'s wording, confinement must bear a "reasonable relation" to the government's need to protect society or it is not permissible.⁴² Thus, as many states recognize, a person subject to civil commitment as dangerous to others is entitled to the least restrictive available disposition, which might consist of outpatient rather than inpatient commitment.⁴³ Similarly, a person committed as an SVP may not be confined if less restrictive options, including community registration and notification laws, ankle bracelets, or community treatment, can adequately protect society. Most dramatically, the least drastic means principle means that the death

39. See CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 107 (2007) (citing relevant research).

40. See, e.g., Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 26–30 (2009) (describing successful community treatment programs for violent juvenile offenders).

41. *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) ("Our opinions applying the doctrine known as 'substantive due process' hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest." (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))).

42. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

43. See Ingo Keilitz, David Conn & Andrea Giampetro, *Least Restrictive Treatment of Involuntary Patients: Translating Concepts into Practice*, 29 ST. LOUIS U. L.J. 691, 707–08 (1985).

penalty can virtually never be used as a method of prevention, even if the high degree of risk necessary to justify it is proven, because the option of confinement can achieve the government's goal equally effectively.⁴⁴

Jackson's language, echoed in other U.S. Supreme Court decisions such as *Youngberg v. Romeo*⁴⁵ and *Seling v. Young*,⁴⁶ has one other important implication for the dispositional consequences of a finding of risk. If available treatment will reduce the duration of the government's intervention and the individual is willing to undergo it, that treatment must be provided. As *Youngberg* put it, "[L]iberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint."⁴⁷ An individual committed to a mental institution as dangerous to others is entitled to treatment with antipsychotic medication if medication would reduce the time in confinement and is medically appropriate. A prisoner whose sentence is based on risk to society should, within reason, be offered vocational and rehabilitative opportunities that can reduce that risk.

The right to treatment in a preventive regime can also be viewed as a compensatory mechanism. Several commentators have concluded that to the extent confinement is preventive rather than punitive in nature, some sort of monetary restitution is required.⁴⁸ In the sentencing context, where disposition is triggered by a culpable act, separating out a disposition's punitive impact from its preventive aspects is probably impossible. In any event, as Lippke points out, compensation of dangerous offenders is "politically infeasible" and "unlikely to alter significantly the material conditions of preventive detention."⁴⁹ Treatment, on the other hand, is politically sellable and, if at all successful, can alter the nature of the intervention and might even accelerate release.

44. Slobogin, *supra* note 4, at 126.

45. *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) ("It may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence.").

46. *Seling v. Young*, 531 U.S. 250, 265 (2001) ("[D]ue process requires that the conditions and duration of confinement under the Act bear some reasonable relation to the purpose for which persons are committed." (citing *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992))).

47. See *Youngberg*, 457 U.S. at 319 (emphasis added).

48. Michael Corrado, *Punishment, Quarantine, and Preventive Detention*, 15 CRIM. JUST. ETHICS 3, 11 (1996); Ferdinand D. Schoeman, *On Incapacitating the Dangerous*, in SENTENCING 175, 181 (Hyman Gross & Andrew von Hirsch eds., 1981).

49. Richard L. Lippke, *No Easy Way Out: Dangerous Offenders and Preventive Detention*, 27 LAW & PHIL. 383, 413 (2008).

Treatment can be seen as compensation for that part of confinement that is preventive because it is designed to assist the individual in addressing psychological or situational risk factors—some of which may exist because of societal flaws—that otherwise will likely lead to conflict and further punishment.

D. Criminal Justice System Primacy: The Undeterrability Predicate

Preventive detention can take place within the criminal justice system or outside of it. Pretrial detention, indeterminate sentencing, and capital sentencing are triggered by the commission of a crime and may occur only if a culpable mental state has been proven. In contrast, according to the U.S. Supreme Court, numerous other preventive detention regimes—quarantine, civil commitment, commitment of people found not guilty by reason of insanity, commitment of sexually violent offenders after they have served their sentence, and detention of enemy combatants—are noncriminal in nature.⁵⁰ With the possible exception of the enemy combatant situation, the deprivation of liberty that occurs via these separate regimes is based entirely on an assessment of what the person will do, not what the person has done. Although, as noted earlier, the legality principle mandates a predicate act, in all of these situations that requirement exists solely as a side constraint on government power; it is not the *justification* for the intervention.

This distinction between criminal and noncriminal prevention is important because it triggers application of one last substantive limitation on preventive detention, a limitation that might prohibit intervention even when the government can demonstrate the requisite conduct, the requisite risk, and a readiness to implement the least drastic disposition necessary to contain it. The limitation comes from the Supreme Court's holding in *Kansas v. Hendricks*, which dealt with the constitutionality of

50. See *Boumediene v. Bush*, 553 U.S. 723, 783 (2008) (“Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order.”); *Kansas v. Hendricks*, 521 U.S. 346, 362–69 (1997) (holding that sexual predator statutes are civil in nature); *Addington v. Texas*, 441 U.S. 418, 428 (1979) (“[A] civil commitment proceeding can in no sense be equated to a criminal prosecution.”). Two other preventive schemes that might be classified as noncriminal are material witness detentions under statutes such as 18 U.S.C. § 3144 and predeportation detention under 8 U.S.C. § 1226(c). But in fact both of these detentions should be triggered by a crime—contempt of court and illegal entry, respectively. To the extent they are not, they should be impermissible under the principles endorsed here and, at least in connection with material witness detentions, may also be unconstitutional. Ricardo J. Bascuas, *The Unconstitutionality of “Hold Until Cleared”*: Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet, 58 VAND. L. REV. 677, 731 (2005).

SVP statutes.⁵¹ In that case, the petitioner argued that his SVP commitment after he had served his sentence for child molestation violated substantive due process, for the simple reason that he was not seriously mentally ill. Hendricks's lawyers pointed out that, historically, civil commitment had been reserved for people with psychosis and similar mental problems and that the SVP statute expanded this traditional role by permitting commitment of people with personality disorders. The Supreme Court refused to strike down the SVP law. But it did signal that dangerousness is insufficient, on its own, to justify preventive detention outside the criminal justice system. Without admitting it was doing so, the Court amended the SVP statute at issue in *Hendricks* by stating that the law required the government to show that the person not only is dangerous but also has great difficulty in controlling his or her behavior; as the Court put it, the person must be "dangerous beyond [his or her] control."⁵² In *Kansas v. Crane*, the Court reiterated that holding, while also stating that there may be "considerable overlap" between difficulty in controlling behavior and "defective understanding or appreciation."⁵³

The Court has never provided a clear rationale for this lack of control/lack of appreciation limitation on preventive detention. As many have pointed out, the explanation cannot be that those committed under these laws are excused by reason of insanity, because then they would not have been subjected to their precommitment sentence.⁵⁴ But a rationale does exist if one assumes that individuals who experience the "dangerous beyond control" dysfunction are very hard to deter. On this assumption, the criminal justice system is powerless to protect society from these people, and the government is justified in establishing a preventive regime for them separate from the criminal process. In other words, the state may resort to a system other than the criminal justice process to prevent harm to others when, and only when, the individual is characteristically unaffected by the prospect of serious criminal punishment—when the person is truly "undeterrable" by the criminal sanction.⁵⁵

51. *Hendricks*, 521 U.S. 346.

52. *Id.* at 357–58.

53. *Kansas v. Crane*, 534 U.S. 407, 415 (2002) (Scalia, J., dissenting) (quoting Insanity Def. Work Grp., *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 685 (1983)) (internal quotation marks omitted).

54. See, e.g., Stephen J. Morse, *Protecting Liberty and Autonomy: Desert/Disease Jurisprudence*, 48 SAN DIEGO L. REV. 1077, 1112–14 (2011).

55. SLOBOGIN, *supra* note 1, at 129–41.

At least four categories of people might be considered eligible for detention in a noncriminal system on the ground that they are undeterrable by criminal sanctions. The first category consists of those offenders who are seriously mentally ill. People with psychosis who commit crimes often do not know they are doing so or think they are acting in self-defense. Fear of the criminal law can have no impact on their actions. On this view, a separate preventive detention system for insanity acquittees or a civil commitment system for people who suffer from psychosis is justifiable.

Second, some offenders with severe impulse control problems, although not as compromised as people with psychosis, might be said to be undeterrable at the time of their crime. As Justice Scalia stated in *Crane*, if SVP laws make sense, it is because “[o]rdinary recidivists choose to reoffend and are therefore amenable to deterrence through the criminal law” while “those subject to civil commitment under [SVP laws] . . . are unlikely to be deterred.”⁵⁶ However, the degree of undeterrability must be significant or this reasoning could easily end up justifying preventive intervention against “ordinary recidivists” as well. As the Minnesota Supreme Court held in *In re Blodgett*, sex offender commitment requires proof not only of risk but also of “an utter lack of power to control their sexual impulses.”⁵⁷ Other people who might fall into this category are those at the extreme end of the psychopathy spectrum—those who evidence complete disrespect and disregard for the law—and people with severe addictions who could be said to have disorders of desire.⁵⁸

The third category of individuals who might qualify for preventive intervention outside the criminal justice system is comprised of enemy combatants and others whose goal is to destroy the state. Of course, these individuals are typically neither mentally ill nor severely compromised volitionally. But they are under orders to harm soldiers and, in the case of terrorists, innocent civilians; their entire existence is devoted to killing others even if their own death is the result. For that reason many enemy combatants and some terrorists might also be

56. *Crane*, 534 U.S. at 420 (Scalia, J., dissenting) (emphasis omitted).

57. *In re Blodgett*, 510 N.W.2d 910, 913 (Minn. 1994) (quoting *State ex rel. Pearson v. Probate Court*, 287 N.W. 297, 302 (Minn. 1939), *aff'd*, 309 U.S. 270 (1940)) (internal quotation marks omitted); see also *Thomas v. State*, 74 S.W.3d 789, 791–92 (Mo. 2002) (holding that commitment requires proof of “serious difficulty in controlling . . . behavior”); *In re Commitment of W.Z.*, 801 A.2d 205, 216–18 (N.J. 2002) (holding that commitment requires proof of an “inability to control one’s sexually violent behavior”).

58. *Cf. Morse*, *supra* note 54, at 1110, 1116 (arguing that psychopaths “cannot grasp or be guided by the good moral reasons not to offend,” an incapacity that could be “expressed as either a cognitive or control defect,” and also concluding that “internal duress” or “disorders of desire” might explain some crimes committed by addicts (internal quotation marks omitted)).

considered undeterrable. Consistent with this rationale, in recent years most American judges who have addressed the issue of when a person fits the combatant category have focused on “whether the individual functions or participates within or under the command structure of the organization—*i.e.*, whether he receives and executes orders or directions.”⁵⁹ Even those who have supported terrorist efforts may not be preventively detained outside the criminal justice system if they do not meet this test. But those who do meet it may be detained until the “cessation of hostilities” or at least until they can demonstrate they do not pose a risk to innocent citizens.⁶⁰

The final category of individuals who could be said to be undeterrable consists of those who endanger others simply through the act of remaining free within the jurisdiction. Individuals with highly communicable diseases are illustrative. The harm to others presented by such people when they are in the public domain is literally unstoppable. Unlike the ordinary recidivist who can choose to avoid harm to others, contagious individuals have no control over harm they cause, unless they are confined.

An alternative rationale often advanced for long-term preventive detention, mentioned above, is that in a society that values autonomy such detention is only permissible for individuals who are *lacking* in autonomy.⁶¹ Many nonautonomous people, such as those found insane,

59. *Hamlily v. Obama*, 616 F. Supp. 2d 63, 75 (D.D.C. 2009).

60. *Id.* at 70; *cf.* Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 42–43, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 973 (providing for “internment . . . only if the security of the Detaining Power makes it absolutely necessary” and for semiannual review of the decision); U.S. DEP’T OF DEF., DIRECTIVE 1300.7, TRAINING AND EDUCATION MEASURES NECESSARY TO SUPPORT THE CODE OF CONDUCT (1988) (describing “parole agreements” allowing release of prisoners of war who promise not to bear arms).

61. *See, e.g.*, Eric S. Janus, *Hendricks and the Moral Terrain of Police Power Civil Commitment*, 4 PSYCHOL. PUB. POL’Y & L. 297, 298 (1998) (“Properly understood, the *Hendricks* decision will limit civil commitment to those who are ‘too sick to deserve punishment.’” (quoting *Millard v. Harris*, 406 F.2d 964, 969 (D.C. Cir. 1968))); Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1025–27, 1077 (2002) (arguing that sexual predator commitment should be limited to those who are “nonresponsible”). Alec Walen accepts this premise but nonetheless develops some exceptions that seem consistent with, albeit broader than, the undeterrability rationale. Alec Walen, *A Punitive Precondition for Preventive Detention: Lost Status as a Foundation for a Lost Immunity*, 48 SAN DIEGO L. REV. 1229, 1236–37 n.27, 1256, 1259–60 (2011) (arguing that preventive detention is permissible for those who (1) lose their “status as a presumptively law-abiding person” when they commit numerous felonies or a very serious crime; (2) have a duty to quarantine themselves; or (3) are not policeable in their home country).

are also undeterrable in the sense used here. But many individuals identified above as undeterrable—perhaps impulsive sex offenders and certainly enemy combatants and those afflicted with contagious diseases—are autonomous actors. The lack-of-autonomy rationale does not explain why the latter groups may be preventively detained, despite the fact that both combatants and the contagious—clearly autonomous actors—have always been subject to such detention. More importantly, the lack-of-autonomy rationale speaks only to the absence of a strong individual interest in avoiding preventive detention; it does not explain why the state has an interest in pursuing preventive detention outside the criminal justice system. In contrast, the undeterrability rationale clarifies that the state’s interest in protecting its citizens is at its height when the criminal justice system can have no impact. In other words, the undeterrability rationale better explains from both the individual’s and the state’s perspective why many nonautonomous actors may be preventively detained—their undeterrability, not their lack of autonomy—and also explains why some autonomous actors may be so detained.

To readers who are concerned that this formulation unduly denigrates autonomy, two responses are in order. First, those who are truly undeterrable either are lacking in autonomy or have demonstrated a characteristic willingness to exercise their autonomy in the wrong direction; in neither situation is the individual’s autonomy worthy of respect. In any event, autonomy and its close cousin desert should not be automatic trump cards against preventive detention. As this Article develops further below,⁶² there are solid reasons for depriving autonomous yet dangerous actors of liberty even if the liberty deprivation exceeds whatever punishment desert principles might dictate.

E. Proof of Risk: Probability Estimates

Under the risk-proportionality principle, the government is required to prove a high degree of risk in order to justify confinement. A very important question is how the government can meet its burden of proof in preventive detention cases. Traditionally, evidence of risk was “clinical” in nature. The best evidence of this sort relies on intensive interviews with the subject of the risk assessment and on scrutiny of third-party records and witnesses, designed to discern patterns of antisocial behavior, the degree of impulsivity, typical responses to perceived slights, and the like. More recently, researchers have devised actuarial instruments that allow evaluators to place a given individual within a numerical risk category. For instance, the Violence Risk Appraisal Guide (VRAG) relies

62. See *infra* text accompanying note 117.

on twelve variables found to be predictive of risk: degree of psychopathy, elementary school misconduct, DSM diagnosis, age at time of offense, and history of alcohol abuse are among the items considered in the course of producing a score that can then be correlated with recidivism rates of people who received similar scores.⁶³ Structured professional judgment (SPJ) approaches are less statistical in orientation but can still result in individual scores, which in turn have been associated with statistical risk estimates.⁶⁴

In the United States, courts are still in a state of flux as to which type of risk assessment they prefer. The Supreme Court has made clear that, as a *constitutional* matter, the government may rely on even the most suspect type of prediction testimony in proving risk.⁶⁵ However, the rules of evidence still govern matters of proof in a given jurisdiction. In *Daubert v. Merrell Dow Pharmaceuticals*⁶⁶ and its progeny, especially *Kumho Tire Co. v. Carmichael*,⁶⁷ the Supreme Court has construed the rules applicable in federal courts to prohibit expert testimony unless its basis has been subject to some sort of verification process, ideally including the generation of error rates that provide the factfinder with a sense of how much weight to give to the testimony. Further, even if expert testimony is sufficiently probative under *Daubert*, it is still inadmissible if it has the potential for biasing or overinfluencing the jury—a consideration applicable to all evidence, expert and lay.⁶⁸ Although few courts have excluded expert prediction testimony under these rules, they are beginning to pay closer attention to the issue.⁶⁹

I have argued that under the balancing analysis required under the federal evidence rules, government experts in risk assessment proceedings that will result in incarceration should be limited to statistically based probability estimates of the type most commonly produced by actuarial instruments, unless the defense opens the door to use of clinical or SPJ

63. See VERNON L. QUINSEY ET AL., *VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK* 143 (1998).

64. For a more elaborate description of these various approaches, see SLOBOGIN, *supra* note 39, at 101–06.

65. *Barefoot v. Estelle*, 463 U.S. 880, 896–903 (1983).

66. 509 U.S. 579 (1993).

67. 526 U.S. 137 (1999).

68. See FED. R. EVID. 401, 403.

69. See CHRISTOPHER SLOBOGIN, RALPH REISNER & ARTI RAI, *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 487–88 (5th ed. 2009) (describing recent cases).

risk assessment testimony.⁷⁰ Actuarial prediction testimony is clearly superior to unstructured clinical prediction testimony with respect to both the probative value and prejudice inquiries, for a number of reasons. First, research has firmly established that predictions based on the clinical method, although typically better than chance, are less valid than actuarial predictions by a significant magnitude.⁷¹ Second, clinical predictions are very hard to assess in terms of error rates because the clinical method varies from evaluator to evaluator; in contrast, actuarial-based predictions provide standardized error rate information. Third, although actuarial prediction testimony identifies a quantified probability estimate that can be compared with the standards of proof described earlier, experts relying on clinical prediction can at most make general statements about risk, such as “the offender poses a higher than average risk” or “the respondent represents a low risk.” These latter types of statements can mean very different things to different evaluators and in any event are not susceptible to verification. These considerations mean that actuarial evidence has much greater probative value than unstructured clinical prediction testimony.

With respect to the prejudice inquiry, laboratory research and evidence from actual cases indicate that, despite its more questionable reliability, clinical prediction testimony presented by the government is extremely influential with judges and juries, much more so than actuarial prediction, perhaps because of its seemingly more “individualized” nature.⁷² Clinical testimony that a person is likely to be violent is difficult to rebut even with effective cross-examination and opposing witnesses.⁷³ The danger is great that factfinders attribute too much weight to this type of testimony precisely because it is so vague.

Unless associated with probability estimates, expert opinions derived from SPJ assessments suffer from the same evidentiary deficiencies that afflict unstructured clinical assessment. SPJ is apt to be more closely focused on relevant risk and protective factors than any other approach,

70. See SLOBOGIN, *supra* note 39, at 122–29.

71. Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443, 1455–58 (2003).

72. See SLOBOGIN, *supra* note 39, at 122–24 (describing three studies); see also Daniel A. Krauss, John G. McCabe & Joel D. Lieberman, *Dangerously Confused? Jurors’ Reactions to Expert Testimony on Dangerousness in a Sexually Violent Predator Trial*, 36 LAW & HUM. BEHAV. (forthcoming 2012) (reporting a study finding that jurors were more likely to be influenced by less scientific expert testimony).

73. Shari Seidman Diamond et al., *Juror Reactions to Attorneys at Trial*, 87 J. CRIM. L. & CRIMINOLOGY 17, 40–41 (1996) (finding that even robust cross-examination and rebuttal information do not undermine clinical prediction testimony to the effect that the defendant is dangerous).

and it is very useful in developing risk management plans once preventive detention or an indeterminate sentence is authorized.⁷⁴ But because in its unvalidated form it generates *only* information about risk management, it does not provide the court with an empirically based assessment of an individual's degree of risk.

Only actuarial-based predictions provide the latter type of information. Although data about groups cannot provide provably accurate information about individual risk levels, that conceptual conundrum does not change the well-documented fact that actuarial prediction produces relatively low false positive and false negative rates and favorable AUC values of .7 to .8.⁷⁵ Furthermore, as developed below, even SPJ and clinical assessments are ultimately based on assumptions about individuals developed from study of or experience with other individuals, so those methods of assessment do not avoid the group-to-individual prediction problem. When the issue at hand is whether the state may deprive an individual of liberty, actuarial risk assessment provides the most probative and least prejudicial information.

Accordingly, in those cases where the government must prove risk in order to incarcerate, it should be required to rely on statistical probability estimates based on actuarial evaluation procedures or structured professional judgment instruments that have been similarly tested, unless it can show that such estimates are not possible. The latter situation might arise for at least two reasons. First, actuarial instruments might not be properly validated; the VRAG was initially devised based on studies of predominantly white Canadians and thus, until it had been cross-validated on various other populations, was of limited use.⁷⁶ Second, statistical estimates might be based on outcome variables that are of questionable worth in court. For instance, the researchers who developed

74. See generally Lorraine Johnstone, *Assessing and Managing Violent Youth: Implications for Sentencing*, in DANGEROUS PEOPLE: POLICY, PREDICTION, AND PRACTICE 123, 126 (Bernadette McSherry & Patrick Keyzer eds., 2011) (describing various uses of structured professional judgment).

75. Douglas Mossman, *The Imperfection of Protection Through Detection and Intervention: Lessons from Three Decades of Research on the Psychiatric Assessment of Violence Risk*, 30 J. LEGAL MED. 109, 132 (2009).

76. Marnie E. Rice, Grant T. Harris & N. Zoe Hilton, *The Violence Risk Appraisal Guide and Sex Offender Risk Appraisal Guide for Violence Risk Assessment and the Ontario Domestic Assault Risk Assessment and Domestic Violence Risk Appraisal Guide for Wife Assault Risk Assessment*, in HANDBOOK OF VIOLENCE RISK ASSESSMENT 99, 105 (Randy K. Otto & Kevin S. Douglas eds., 2010) (describing subsequent validation studies in the United States and Europe).

the VRAG defined the term *violent recidivism* to include two simple assaults within a seven-year period.⁷⁷ This information is arguably irrelevant in both a death penalty proceeding, which ought to be focused on seriously violent recidivism, and a civil commitment proceeding, which ought to be focused on imminent harm. In these types of situations, judges might decide to exclude actuarial prediction testimony.

Even if relevant actuarial information is unavailable, however, government should not be permitted to use clinical prediction testimony in its place, given the reliability and prejudice problems noted above. Rather, the court should consider two options. The first option is simply to find that the state cannot prove its case with admissible evidence. The second is to permit the state to prove risk based on prior antisocial behavior of a type that is relevant to the proceeding. If a risk assessment must be made in the absence of statistical probability estimates, prior behavior provides the most probative method of providing evidence of risk.⁷⁸

F. Individualization: The Subject-First Rule

Assume now that the government has proven the requisite degree of risk with statistically based probability estimates. Certainly, the offender or respondent—henceforth called the “subject” of the preventive detention proceeding—can respond in kind. But the subject should also be able to respond with clinical prediction testimony, despite the more questionable probative value of that type of evidence. Predictions based on clinical assessment are still, on average, better than chance selection and thus have some probative value.⁷⁹ Furthermore, actuarial-based probability estimates often do not capture all of the individual protective factors that might reduce risk, which clinical prediction testimony can provide. Most importantly, clinical prediction testimony presented by the defense does not have the potentially prejudicial impact that such testimony has when it is presented by the government. The defense position on risk at a

77. *Id.* at 102.

78. John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 423 (2006) (stating, with respect to prior criminal history, that “no risk factor has been more thoroughly studied and none ha[s] generated more reliable results”). Monahan goes on to argue that, in the sentencing context, risk assessments should be based *solely* on past criminal acts. *See id.* at 427–28. That argument is addressed later in this Article. *See infra* text accompanying notes 113–17. For now, it can simply be noted that “as a practical matter, it is hardly protective of the individual’s interests to make prediction a sentencing issue and then deny the factfinder the best means of making the prediction.” SLOBOGIN, *supra* note 39, at 114.

79. Douglas Mossman, *Assessing Predictions of Violence: Being Accurate About Accuracy*, 62 J. CONSULTING & CLINICAL PSYCHOL. 783, 789 (1994).

sentencing or commitment hearing is that the subject will not repeat what the judge or jury has just decided the subject recently did. Under such circumstances, defense testimony about risk is not likely to overinfluence the jury and should be admissible whether relying on actuarial, structured professional judgment or unstructured clinical assessment.

Thus, the courts should consider adopting a “subject-first” rule with respect to clinical prediction evidence. Generally, this type of evidence should not be admissible. But if the subject wants to use such evidence in an effort to individualize the prediction, he or she should be allowed to do so. At that point, the prosecution should be able to respond in kind. This proposal is analogous to the familiar character evidence rule that prohibits, out of fear it will otherwise prejudice the factfinder, prosecution introduction of prior bad acts unless and until the defense “opens the door” by introducing evidence of good character.⁸⁰

G. Procedures: Periodic Review and Due Process

In order to ensure that the risk-proportionality and least drastic means principles are implemented properly, preventive regimes must routinely reconsider both the nature of the risk posed by individuals detained and whether their current disposition is necessary to achieve the government’s goals—the latter an inquiry that includes an assessment of whether alternative treatment regimes would be more effective at reducing recidivism. *Hendricks* made clear that such periodic review is *required* for preventive regimes outside the criminal justice system.⁸¹ This requirement should also be imposed on prevention decisions within the criminal process for the same reasons. Decisions about pretrial detention and indeterminate sentences both need to be revisited on a frequent basis to ensure adherence to the risk-proportionality and least drastic means principles and to ascertain the effects of risk management.

As to the procedures that should apply in initial and periodic review hearings, one central point about the applicable American law must be emphasized. The Sixth Amendment’s guarantees that the accused shall be afforded notice, counsel, confrontation rights, and public jury decisionmaking apply only in “criminal prosecutions.”⁸² However, the

80. FED. R. EVID. 404(a).

81. *Kansas v. Hendricks*, 521 U.S. 346, 363–64 (1997).

82. U.S. CONST. amend. VI.

Fourteenth and Fifth Amendments' stipulations that deprivations of life or liberty may not occur in the absence of due process of law apply to all proceedings, criminal and civil. Depending on the circumstances, due process may impose some or all Sixth Amendment-type rights on prevention proceedings.⁸³

At the same time, due process analysis is flexible. Sixth Amendment doctrine requires that all criminal prosecutions provide the rights it lists, and Fifth Amendment doctrine prohibits compulsion of testimony in all "criminal cases." The overall goal under the Due Process Clause, in contrast, is to create a fair, accurate, and efficient process, which means that experimentation with various procedural frameworks is permissible in noncriminal cases.⁸⁴ Thus, to the extent sentencing is not considered part of the "criminal prosecution" or the "criminal case," it can be a forum for trying out diverse procedural mechanisms. Given the technical nature of risk assessment, the criminal procedure right most vulnerable to relaxation in sentencing and noncriminal proceedings is the right to adjudication by jury.⁸⁵ It is also noteworthy that the Fifth Amendment right to remain silent probably does not apply in full force at sentencing⁸⁶ and does not apply at all outside the criminal context.⁸⁷ Given its negative impact on factfinding, the ability to refuse to answer questions without any repercussions—such as drawing adverse inferences from silence—may not be an essential aspect of due process in these proceedings.⁸⁸

A third procedural mechanism that probably would have to disappear in a regime focused on risk is plea bargaining. Because neither the judge nor the prosecutor would control an indeterminate sentence, the prosecutor would not be able to promise a reduced term in exchange for

83. Cf. *In re Gault*, 387 U.S. 1, 13, 30–59 (1967) (holding that, under the Due Process Clause, juveniles tried as delinquents are entitled to notice, counsel, the right to confront accusers, the right to remain silent, a transcript of the proceedings, and the right to appeal).

84. See generally Mark R. Fondacaro, Christopher Slobogin & Tricia Cross, *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955, 967–71 (2006).

85. Although the jury must find beyond a reasonable doubt all facts that extend the sentence beyond the statutory maximum, any sentence within the maximum or any indeterminate sentence is not affected by this holding. See Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 666–67 (2006).

86. See *Mitchell v. United States*, 526 U.S. 314, 330 (1999) (reserving the question of whether silence can be used as evidence of lack of remorse or unwillingness to accept responsibility at sentencing hearings).

87. *Allen v. Illinois*, 478 U.S. 364, 374 (1986) (holding that there is no right to remain silent in SVP proceedings).

88. For elaboration of this point and other possible procedural variations, see CHRISTOPHER SLOBOGIN & MARK R. FONDACARO, *JUVENILES AT RISK: A PLEA FOR PREVENTIVE JUSTICE* 95–121 (2011).

a guilty plea, making traditional bargaining impossible. Many observers of the criminal justice system would welcome the abolition of this subterranean justice system, where dispositions are negotiated between the prosecutor and defense counsel outside the presence of judge, jury, and the defendant, often in violation of both desert and consequentialist agendas.⁸⁹ But others might worry that a system in which outcomes in criminal cases could not be negotiated would collapse. This seems unlikely, however. Many offenders in a risk-based system might be willing to plead guilty or provide the government information about coperpetrators in the hope that their action will tend to show remorse and a willingness to reform, traits that are directly relevant to risk assessment.⁹⁰ A good portion of those who do not plead guilty could still be convicted relatively easily. In most cases, the litigated issues would surround the risk determinations described above, not guilt or innocence, and would occur at sentencing, not trial.

H. Summary: Application to Sentencing

The government may restrict a person's liberty for the purpose of detention only under the following conditions: First, it must demonstrate that the person has been convicted of a crime or has engaged in imminently risky conduct. Second, both before the initial intervention and periodically thereafter, the government must demonstrate, at proceedings consistent with procedural due process, that the intervention is both proportionate to the probability and magnitude of the risk, as proven by appropriately normed probability estimates, and the least drastic means of achieving the government's prevention goal. Finally, when the intervention occurs outside the criminal justice system, the government must prove that the person is very unlikely to be deterred even by the prospect of serious criminal punishment.

All of these principles find antecedents in American constitutional law. They also can be derived from an analogy to justification doctrine in criminal law, which provides a defense to conduct that would otherwise be a crime if it is the most effective and parsimonious means

89. See, e.g., Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2000–09 (1992).

90. This appears to be the practice in the juvenile justice system, where leniency based on expressions of remorse, lessons learned, and acceptance of responsibility is standard. See Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 302 (2006).

of protecting oneself or others from a harm that is greater than the offense.⁹¹ Preventive intervention based on the best possible risk assessment and limited to dispositions that are both proportionate to the risk posed and the least drastic means of forestalling it is consistent with a broad choice-of-evils notion.

If the foregoing analysis makes sense, a sentencing regime focused on prevention must honor: (1) the principle of legality, (2) the risk-proportionality principle, (3) the least drastic means principle, (4) the principle of criminal justice primacy, (5) the evidentiary requirement that the government prove its case using actuarial-based probability estimates or, in their absence, previous antisocial conduct, (6) the subject-first rule, and (7) the procedural principle that a subject's risk and risk management plans periodically be reviewed using procedures consistent with due process. Application of these principles would result in a system of indeterminate criminal dispositions structured along the following lines.

First, of course, sentencing must be preceded by conviction of an offense, which would satisfy the principle of legality—principle one—and would also render moot principle four, because preventive detention would take place within the criminal justice system.⁹² Second, the nature and duration of the sentence imposed after the conviction would depend, under principles two and three, upon the probability and magnitude of the risk posed by the offender and the means available to diminish the risk. Relying on risk-proportionality reasoning, initial confinement on preventive grounds might be limited to situations where the state can prove the offender poses a greater than 50% risk of a serious offense, and even then only if no less restrictive means—ankle monitors, intensive probation, notification and registration requirements—can achieve the state's prevention aim. A lower probability or lower magnitude risk should at most permit monitoring in the community, and even if confinement is initially authorized, under risk-proportionality reasoning it could continue only if increasingly greater risk is demonstrated. Regardless of the setting, principle three also requires that the state provide treatment that can reduce risk of further offending and thus render less restrictive the preventive intervention.

91. Various commentators have made this comparison, although they have limited the scope of preventive actions permitted by the justification analogy to a greater extent than I do here. See, e.g., Larry Alexander, *A Unified Excuse of Preemptive Self-Protection*, 74 NOTRE DAME L. REV. 1475, 1477 (1999); Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. REV. 157, 160–61 (1996). Furthermore, the analogy is imperfect because here the state, operating in deliberation, rather than the individual, operating in the heat of the moment, is carrying out the preventive action.

92. In contrast to post-sentence commitment, about which more is said below. See *infra* Part III.F.

Principles five and six work in tandem in structuring how the government can meet the all-important proof requirements outlined above. Principle five states that the government's case-in-chief in cases seeking incarceration must rely on actuarial risk assessment instruments in proving the probability and magnitude of risk, primarily because other means of proving risk, such as unstructured and structured clinical judgment, do not provide numerical probability estimates and tend to be both less accurate and more likely to mislead the factfinder. However, in recognition of the fact that actuarial instruments are based on group characteristics, principle six permits the offender to contest the actuarial probability estimate with an individualized clinical risk assessment, with the caveat that the government may respond in kind.

Finally, principle seven requires that the proof process at sentencing be consistent with due process requirements, which at a minimum should probably include the rights to a neutral factfinder, counsel, and confrontation of the state's evidence, as well as an explanation of the ultimate decision and the right to appeal that decision, at least when there is no consensus during the initial review.⁹³ Principle seven further requires that a similar process take place at regular intervals to ensure adherence to the risk-proportionality and least drastic means principles. These periodic hearings presumably would often result in changes in the nature and duration of the intervention, including conditional and outright release, sometimes before and sometimes after expiration of the sentence that would have been imposed had desert been the guiding dispositional principle.

III. AN ANALYSIS OF INDETERMINATE SENTENCING

This outline of a principled approach to indeterminate sentencing suffices for the present purpose of responding to several objections to sentencing regimes that are based on risk assessments. In the order

93. The relevant Supreme Court decisions are *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and *Morrissey v. Brewer*, 408 U.S. 471 (1972), which set out due process rights in probation and parole revocation proceedings. Both cases emphasized that the complexity of the proceedings is a significant determinant of whether these rights should be extended to a particular proceeding. *Gagnon*, 411 U.S. at 786–87; *Morrissey*, 408 U.S. at 487–89. Risk assessments probably fall in the “complex” category. It has also been suggested that judges be involved in back-end decisionmaking. See, e.g., Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 536 (2010).

addressed here, those objections are that indeterminate sentencing: (1) relies on inaccurate predictions, (2) is unjust, (3) denies dignity to the offender, (4) fails to vindicate the victim, (5) provides an insufficient deterrent effect among potential criminals, (6) reduces respect for and compliance with the law among normally law-abiding individuals, (7) is too optimistic about rehabilitative programs, (8) is too costly, (9) tends to produce unequal treatment, demoralization, and cynicism among offenders, and (10) as a result of a number of these concerns, is unconstitutional. This is a daunting array of objections, but they can all be answered in ways that reinforce the value of indeterminate sentencing and diminish the attractiveness of determinate sentencing, limiting retributivist sentencing, and post-sentence commitment.

A. *Objection 1: Indeterminate Sentencing and Inaccuracy*

Risk assessment is an inexact science. The probability estimates produced by actuarial instruments and other types of prediction methods are suspect for a number of reasons. They may not be validated on a population similar to the offender in question and thus may overstate or understate the risk potential that a more precisely validated instrument would produce. They may be based on faulty algorithms. They may be misapplied, especially to the extent they rely on badly kept records, biased information from third parties, or subjective determinations such as diagnoses. Even if correctly constructed and applied, many of the statistical risk categories these actuarial instruments identify fall below the 50% level needed to justify initial confinement under the proposed proof requirements and thus might create pressure on experts and factfinders to bend the probability estimates in cases that are close to the margin.⁹⁴

All of this is correctable of course.⁹⁵ Just as importantly, those who point out these flaws in risk assessment seldom compare them with the inaccuracy associated with the culpability assessment mandated by sentencing in determinate and limited retributivism regimes. According to the American Law Institute, this assessment requires accurate

94. For general discussion of the problems associated with actuarial prediction, see Donna Cropp Bechman, *Sex Offender Civil Commitments: Scientists or Psychics?*, CRIM. JUST., Summer 2011, at 24, and John F. Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time To "Disinvent the Wheel?"*, 29 LAW & HUM. BEHAV. 55 (2005).

95. For an optimistic view about risk assessment from a previously hostile observer, see Jonathan Simon, *Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice*, 1 ANN. REV. L. & SOC. SCI. 397, 411–14 (2005), which views positively the improved science behind risk assessment and the ability of actuarial instruments to provide probability estimates in lieu of dichotomous dangerousness assessments.

information about three criteria: the relative gravity of the offense, the harm done to the victim, and the blameworthiness of the offender.⁹⁶ None of these criteria is amenable to scientific measurement. Offense gravity, victim injury, and blameworthiness can all be ranked in an ordinal fashion, but consensus about the precise punishment range, particularly if the three variables are considered simultaneously, is probably impossible to achieve.⁹⁷ Even if consensus can be reached, defining the relevant terms and applying them consistently is a gargantuan task, as any criminal law professor knows.⁹⁸ Particularly difficult in this regard is obtaining a reliable determination of offender blameworthiness, which, at a minimum, requires discerning the offender's mental state at the time of the offense and probably also requires an assessment of character.⁹⁹ Past mental states are notoriously difficult to discern,¹⁰⁰ even by the defendant, much less lay factfinders, and the possible permutations of character are endless.

As a result of all of this, sentences based on retribution are rife with "inaccuracy." Two offenders sentenced according to desert can receive wildly different sentences in different jurisdictions, and perhaps even in the same jurisdiction, depending—perhaps but not always—on the degree of victim injury, the age of the victim, and the prior record of the

96. MODEL PENAL CODE: SENTENCING § 1.02(2) (Tentative Draft No. 1, 2007), *discussed in* SLOBOGIN, *supra* note 7, at 670.

97. Christopher Slobogin, *Some Hypotheses About Empirical Desert*, 42 ARIZ. ST. L.J. 1189, 1191–93 (2011) (describing data supporting this point); Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place* (forthcoming 2012) (describing research showing tremendous variation in assignments of punishment, whether based solely on desert or on desert and utilitarian principles).

98. A recent study found that even when lay persons are given very clear instructions and asked to apply them to scenarios described in terms of the language of those instructions, almost all have great difficulty distinguishing "knowledge" from "recklessness," and over 40% could not distinguish "negligence" from other mental states. Frances X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. (forthcoming 2011) (manuscript at 44–46).

99. *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.").

100. See SLOBOGIN, *supra* note 39, at 42–48 (detailing reasons why mental states are so hard to decipher). As Deborah Denno states, "[W]hat people intend, think, and believe are paramount to assessing guilt; in some cases, they can mean the difference between life and death. How odd for a legal system to base so much on something about which it seems to know so little." Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 2005 U. ILL. L. REV. 601, 605 (2005).

offender. For many types of crimes, huge sentencing differentials depend upon whether a person acts with “premeditation” or instead merely “intended” the act, or acted “recklessly” instead of “negligently,” despite the difficulty of defining the relevant terms and ascertaining what was going on inside a person’s head at the time of the crime. The assertion that any given sentence is the “correct” one from a retributive perspective is merely guesswork, and one could even say a gesture of enormous chutzpah.

To take one example of this phenomenon from among hundreds of thousands of examples, consider the remarks of one author writing about a man suffering from schizophrenia who killed a young woman. In the author’s opinion, the six-year sentence that was imposed in this case “seems both respectful of [the offender] as a moral agent and at the same time sympathetic to him due to his mental illness.”¹⁰¹ The sentiment behind this statement is understandable and the reasoning not implausible. But one could also argue that because the killing was intentional, the offender’s motive was anger, and the offender hid the victim’s body after the killing, greater punishment was “deserved.” Alternatively, one could argue that because the offender was seriously mentally ill, the morally appropriate result was, instead, acquittal by reason of insanity. As the author candidly states, “Perhaps in the future if we learn more clearly the relationship between mental illness and volition, we may come to a different judgment . . . [b]ut, judged by our imperfect knowledge of this relationship,” the sentence “seems appropriate.”¹⁰² To base a six-year deprivation of liberty on “imperfect knowledge” and on what “seems appropriate” is unavoidable in a retributive regime and therefore probably justifiable. But it can hardly be called an outcome that is correct “beyond a reasonable doubt” or by any other measure.

As I have said elsewhere, “If we are willing to countenance these harsh penalty differentials based on such a high degree of uncertainty, we may be hard pressed to criticize a preventive detention regime on unreliability grounds.”¹⁰³ In a recent article, Denise Meyerson has contested this type of comparative argument. While accepting that inaccuracy is inevitable in either type of system, she contends that the probabilistic nature of retributive judgments is more palatable than the probabilistic nature of risk assessments because the two types of inaccuracy are different in kind.¹⁰⁴ Attributions of guilt, she asserts, tend to be “individualized” because they are based on a causal link to one or more “internal” factors

101. William T. Pizzi, *Colorado v. Connelly: What Really Happened*, 7 OHIO ST. J. CRIM. L. 377, 389 (2009).

102. *Id.*

103. SLOBOGIN, *supra* note 1, at 110.

104. Denise Meyerson, *Risks, Rights, Statistics and Compulsory Measures*, 31 SYDNEY L. REV. 507, 512 (2009).

directly associated with the offender, such as motive or, as in the case above, anger and mental illness.¹⁰⁵ Assessments of risk, in contrast, are “nakedly statistical,” in that they are based on “external” data generated from study of other individuals and transformed into risk factors such as criminal history, diagnosis, and gender of the victim.¹⁰⁶ Even if such a risk assessment places an individual in a group 75% of whom will reoffend, Meyerson states, “strictly speaking it does not make sense to say of any particular individual [in that group] that he or she has a 75 per cent risk of re-offending or that he or she is likely to re-offend.”¹⁰⁷ Such predictions are based on “data about classes of people which are insensitive to relevant but unknown differences among the individuals in that class.”¹⁰⁸ A given individual either will or will not reoffend, for a complex set of reasons, only some of which are captured in a risk assessment. Thus, even though retributive judgments are also based on probabilities and can often be wrong, Meyerson states, they are more acceptable than predictive judgments.

This critique, long recognized by others,¹⁰⁹ mischaracterizes both culpability and risk assessments. Culpability assessments, particularly when focused on mental states as opposed to whether the offender committed the *actus reus*, are also often based on nomothetic information. In the murder case mentioned above, for instance, the determination about how much punishment is deserved will depend upon one’s subjective views about the definition and effects of anger and mental illness, based on general impressions of how those conditions operate. The fact that the law allows juries to draw an inference that one intends the natural consequences of one’s actions is an explicit recognition that stereotypes can affect culpability decisions.¹¹⁰ And despite the fact that an offender either did or did not offend with the requisite mental state, the law allows these types of probabilistic assessments to inform sentencing. Conversely, risk assessment is not necessarily lacking in “individualized” determinations. The more sophisticated actuarial instruments contain a

105. *Id.* at 517–19.

106. *Id.* at 515 (citing David Kaye, *Naked Statistical Evidence*, 89 YALE L.J. 601 (1980) (book review)).

107. *Id.* at 521.

108. *Id.* at 522.

109. Similar arguments are canvassed in PAUL E. MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND A REVIEW OF THE EVIDENCE 20–22 (1954).

110. *See* United States v. Martin, 772 F.2d 1442, 1446 (8th Cir. 1985).

large number of risk factors requiring an assessment of the offender's personality, behavior, and demographic traits, all of which are linked not just empirically but logically and possibly causally to recidivism potential.¹¹¹ Furthermore, under principle six noted above, offenders have the right to individualize the assessment further by proffering clinical prediction testimony.

In the end, the key difference between the probabilities associated with culpability judgments and the probabilities associated with risk assessment is that the latter assessments are, as Meyerson states, "naked"—but only in the literal sense rather than the metaphorical sense in which she uses that word. The numerical probability estimates provided by actuarial instruments flaunt in our faces how bad we are at making the judgments associated with risk. But the fact that our failure in the predictive context can be quantified should not hide the countervailing fact that we are no better at making subjective postdictive judgments.

The difficulties of proving risk and culpability do differ, however, with respect to the consequences of a mistake. Although it is often said that it is better to let ten guilty men go free than to convict one innocent person, that calculus probably should change if we have good reason to know that a good proportion of the guilty will, if released, go on to cause serious harm to others.¹¹² In other words, false negatives in risk assessment are arguably much more costly than false negatives in culpability assessment. At the same time, the cost of a false positive may not be as great in the former instance as in the latter because, under principle four's least drastic means requirement, confinement will occur less often and because, under principle seven's periodic review requirement, mistakes are at least susceptible to discovery.

B. Objection 2: Indeterminate Sentencing and Justice

Another way risk assessment differs from culpability assessment relates not to accuracy but to less tangible moral values. Although culpability assessments are commonly based on what a person did at the time of the crime—and perhaps during previous crimes as well—risk assessments are more likely to be based, at least in part, on factors over which an individual has relatively less control. Under American constitutional law, demographic traits other than race can probably be predicates for prediction.¹¹³ But one might still condemn as unfair

111. See Rice, Harris & Hilton, *supra* note 76, at 99–115.

112. Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, J. CRIM L. & CRIMINOLOGY 778, 793 (1996).

113. Monahan, *supra* note 78, at 430–32.

confinement of an individual based on immutable or static characteristics such as age, gender, and childhood history, factors that often play a substantial role in evaluations of risk.¹¹⁴ Even some risk factors over which a person has some control, such as being jobless or single, could be considered improper bases for intervention because in themselves they are not remotely criminal in nature. Thus, some have argued that any form of detention based on risk is unjust,¹¹⁵ while others have contended that only preventive detention based on prior criminal history, to which moral blame can be attributed, is appropriate.¹¹⁶

There is no doubt that offenders do not deserve aggravated sentences simply because they are young, unemployed, and suffered abuse as children, nor do they deserve lesser sentences because they are older, have steady jobs, and enjoyed carefree upbringings. If anything, the desert calculus in these cases should be reversed, to the extent culpability can be diminished because of youthful heedlessness and straightened circumstances or enhanced because of a decision to commit crime despite advantages. Even if risk assessment is based entirely on prior criminal history, the resulting sentence will bear little resemblance to a sentence based on the multiple offender's desert. The latter type of sentence will attempt to be proportionate to the nose-thumbing evil the new offense represents rather than to the risk the old offenses forecast.

In short, if criminal justice is defined solely in terms of retribution, then risk-based indeterminate sentencing—and post-sentence commitment—is unjustifiable. So is a sentence imposed under limiting retributivism theory because any adjustment to the length of the sentence within the retributive range is based on factors relating to risk, not desert; indeed, as suggested above, it will probably be inversely related to desert. That leaves determinate sentencing as the only just dispositional method.

114. See, e.g., Kirk Heilbrun, Kento Yasuhara & Sanjay Shah, *Violence Risk Assessment Tools: Overview and Critical Analysis*, in HANDBOOK OF VIOLENCE RISK ASSESSMENT, *supra* note 76, at 1, 9 & tbl.1.2 (listing common risk factors).

115. Brian Netter, *Using Group Statistics To Sentence Individual Criminals: An Ethical and Statistical Critique of the Virginia Risk Assessment Program*, 97 J. CRIM. L. & CRIMINOLOGY 699, 706–20 (2007) (“[I]n light of the ethical concerns, any jurisdiction seeking to impose either risk-based prediction or demographic-based sentencing must find a considerable crime-fighting benefit.”).

116. Monahan, *supra* note 78, at 428 (“Past criminal behavior is the only scientifically valid risk factor for violence that unambiguously implicates blameworthiness, and therefore the only one that should enter the jurisprudential calculus in criminal sentencing.”).

That conclusion makes sense, however, only if we allow retributivists to hijack the word *justice*. Justice does not have to be defined solely in terms of blameworthiness and offense gravity. Determinate sentencing is unjust to the victim of an offender who has been released prematurely, as well as to the prematurely released offender who must now suffer avoidable punishment for a crime the offender would not have committed had detention and treatment continued. It is also unjust to the contrite offender who is ready to be law-abiding but must serve out the sentence he or she “deserves.” In both of the latter two situations, the state is disserving the offender, whose liberty interests desert theorists are purportedly trying to protect. Furthermore, blameworthiness, as retributivists conceive it, is not irrelevant in an indeterminate sentencing regime. The requirement of a conviction for an offense requiring at least a negligence *mens rea* ensures that the offender has committed a morally culpable act. Most importantly, though individual risk factors may have little or nothing to do with blameworthiness, they are marshaled in an effort to predict blameworthy conduct—a crime chosen by the individual.¹¹⁷

In at least some cases, desert and prevention goals may be reconcilable in a way that implements both forms of justice. To the extent possible, for instance, preventive dispositions should be fashioned with their degree of “punitive bite” in mind.¹¹⁸ Similarly, parole can be granted or denied based on conduct in prison—in terms of adhering both to prison rules and to rehabilitation goals that address underlying risk factors—with the dual purpose of communicating to the prisoner society’s approval or condemnation of the conduct and of preventing or discouraging further antisocial conduct.¹¹⁹

117. Some who subsequently commit crime might not be blameworthy. Cf. Lippke, *supra* note 49, at 399–400 (suggesting that the individuals who are so dangerous as to warrant preventive confinement might also lack responsibility for their behavior). In such cases, preventive detention is permissible even under most desert-based views. See *supra* text accompanying note 61.

118. Cf. Ben M. Crouch, *Is Incarceration Really Worse? Analysis of Offenders’ Preferences for Prison over Probation*, 10 JUST. Q. 67, 79 tbl.2 (1993) (assessing a survey of Texas inmates indicating that two-thirds preferred one year in prison to ten years of probation, and the other third equated one year in prison to three years of probation); Robert E. Harlow, John M. Darley & Paul H. Robinson, *The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions*, 11 J. QUANTITATIVE CRIMINOLOGY 71, 85 tbl.II (1995) (evaluating punitive bite of various intermediate sanctions).

119. Cf. Michael M. O’Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 47 AM. CRIM. L. REV. (forthcoming 2011) (proposing a rationale for indeterminate sentencing along these lines).

*C. Objections 3 and 4: Indeterminate Sentencing and
Offender-Victim Dignity*

Because indeterminate sentences are based on risk rather than culpability, another concern is that they denigrate the dignity of the offender and the victim. Herbert Morris, for instance, insisted that desert-based punishment is necessary to affirm the responsibility, and therefore the humanity, of the person who violates the law.¹²⁰ Jean Hampton argued that desert-based punishment is required to affirm the victim's worth.¹²¹ Antony Duff has similarly focused on the "communicative purpose" of punishment; to him, punishment is a necessary expression of "what we, as a polity, owe to victims, to offenders, and to ourselves as a political community" as well as an effort to further the offender's "moral rehabilitation" through persuasion as opposed to brute control.¹²²

The fact that an indeterminate sentence must be preceded by a conviction that announces the offender's moral culpability may meet the goals expressed by Morris, Hampton, and Duff.¹²³ The verdict tells the offender, the victim, and society at large that the offender has been found accountable. If it is still felt that sentencing must also serve that function, a closer look at how indeterminate sentencing works should allay concerns about whether it adequately attends to offender dignity and victim vindication (the impact of indeterminate sentencing on societal views is considered in Part III.D).

As a matter of constitutional law, an indeterminate sentence must include treatment designed to reduce risk—or to use modern nomenclature, a risk-needs management program—that will concomitantly reduce the duration of the intervention. Otherwise, the least drastic means principle would be violated.¹²⁴ Risk management can take a number of different forms. But a consistent feature of any such program is that it stresses offender responsibility for criminal actions, in a much more direct manner than a pronouncement by a judge that the offender deserves a

120. HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 46 (1976).

121. Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY 111, 125 (1988).

122. R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 80 (2001); R.A. Duff, *Guidance and Guidelines*, 105 COLUM. L. REV. 1162, 1182–83 (2005).

123. Andrew von Hirsch, an avowed retributivist, has written that a fine might convey sufficient censure for murder. ANDREW VON HIRSCH, CENSURE AND SANCTIONS 38 (1993).

124. See *supra* notes 41–49 and accompanying text.

particular sentence for what he or she has done. For instance, in the sex offender context, a very common risk management technique is cognitive behavior therapy, which stresses the offender's ability to change behavior through cognitive restructuring and avoiding risky situations.¹²⁵ The primary message of this type of therapy is that actions have consequences and that offenders are accountable for those consequences. As one article described this type of therapy,

Treatment focuses on reducing denial and cognitive distortions or minimizations, which are the rationalizations that offenders use to justify and maintain their behavior . . . [and also] attempts to develop victim empathy within the offender under the assumption that recognition of victim impact will serve as a motivator to avoid future offending behavior.¹²⁶

As this last comment indicates, risk management programs do not ignore the victim's concerns either. Indeed, compared to determinate sentencing, where the victim is forgotten once sentence is imposed—and perhaps even before that point—risk management often incorporates victims into the dispositional process. The best known method of doing so is most commonly called “restorative justice,” a term meant to describe an array of programs that include offender-victim mediation and offender apology and restitution.¹²⁷ Restorative justice not only is designed to reduce offenders' risk by impressing upon them the palpable harm they have caused and facilitating their reintegration into the community but also is meant to empower the victim by allowing him or her to confront the offender and perhaps even to help fashion disposition.¹²⁸

125. Aviva Moster, Dorota W. Wnuk & Elizabeth L. Jeglic, *Cognitive Behavioral Therapy Interventions with Sex Offenders*, 14 J. CORRECTIONAL HEALTH CARE 109, 111–12, 117–18 (2008).

126. Judith V. Becker & William D. Murphy, *What We Know and Do Not Know About Assessing and Treating Sex Offenders*, 4 PSYCHOL. PUB. POL'Y & L. 116, 128 (1998).

127. See generally JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989) (discussing the framework and theory of reintegrative shaming as a way to control crime).

128. Carter Hay & Mark Stafford, *Rehabilitation in America: The Philosophy and Methods, from Past to Present*, in PUNISHING JUVENILES: PRINCIPLE AND CRITIQUE 67, 79 (Ido Weijers & Antony Duff eds., 2002) (“[A] punishment-based system . . . ignores the financial, physical and emotional losses that victims have suffered. . . . Restorative justice [in contrast, stresses that] justice is served only when offenders provide victims with restitution that returns them to the greatest extent possible to their original circumstances.” (citation omitted)).

D. Objections 5 and 6: Indeterminate Sentencing, Deterrence, and Norm Compliance

One might assume that if potential offenders know that any sentence they receive will be indeterminate rather than a time certain, they may be more likely to roll the antisocial dice. In fact, the effect of criminal law doctrine on crime is much more complex. Research strongly suggests that for most offenders concern about punishment has very little impact on the decision to commit crime.¹²⁹ As one study of imprisoned offenders found, the vast majority of criminals “are impervious to harsher punishments because no feasible detection rate or punishment scheme would arrest the impelling forces behind their behaviors, which might include drugs, fight-or-flight responses, or irrational thought.”¹³⁰

To the extent criminal sanctions are able to buy deterrence, indeterminate sentencing may even maximize it. Potential first time offenders cannot know ahead of time either the nature or the duration of their disposition if convicted, an uncertainty that could increase reluctance to commit crime.¹³¹ In the meantime, potential reoffenders, if they think about punishment at all, will probably guess—often correctly—that the government’s response to new crimes will be progressively tougher, which should also enhance deterrence.¹³²

The deterrence objection to indeterminate sentencing is closely related to the concern alluded to above that it undermines the expressive function of the criminal law. As Henry Hart put it years ago, a criminal justice system based on prevention rather than desert might “undermine

129. Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst when Doing Its Best*, 91 GEO. L.J. 949, 976–89 (2003) (giving conceptual and empirical reasons for questioning deterrence).

130. David A. Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging*, 4 AM. L. & ECON. REV. 295, 308 (2002). Even reviews that take a more positive view of deterrence research admit that the crime reduction benefits of punishment are often “minute” and in any event “context specific.” Robert Apel & Daniel S. Nagin, *General Deterrence: A Review of Recent Evidence*, in CRIME AND PUBLIC POLICY 411, 416, 423, 425 (James Q. Wilson & Joan Petersilia eds., 2011).

131. See Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 445–46 (2004); Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 137–41 (1997) (discussing “prudent obfuscation” and vague terminology as a means of fostering law-abiding behavior).

132. Naomi Harlin Goodno, *Career Criminals Targeted: The Verdict Is In, California’s Three Strikes Law Proves Effective*, 37 GOLDEN GATE U. L. REV. 461, 469–71 (2007) (describing studies purporting to find that California’s three-strikes law has had a significant deterrent effect).

the foundation of a free society's effort to build up each individual's sense of responsibility as a guide and a stimulus to the constructive development of his capacity for effectual and fruitful decision."¹³³ A more instrumental argument along these lines, made by Paul Robinson and John Darley, is that if sentences depart dramatically or consistently from consensus views on the punishment that is deserved, people will lose respect for the law and perhaps even become more willing to disobey it.¹³⁴ Both of these points suggest that indeterminate sentences could lead to more criminal activity among the general population, not just among those who are intrinsically predisposed to antisocial behavior but also among those who are typically law-abiding.

A system that did not visit any sanction on those who commit crime, or that routinely released serious offenders after a short time and confined minor offenders for prolonged periods, might well produce the hypothesized effects. But there is virtually no empirical support for the position that an indeterminate sentencing regime of the type proposed here would foster noncompliance with the law.¹³⁵ Certainly the indeterminate regimes that have existed throughout the first three-quarters of the twentieth century have not been associated with lessened deterrence, a loosening of society's moral structure, or greater disdain for the law and government authorities. It is also worth noting that the criminal law is only a minor player in shaping societal character; family, peers, schools, churches, and various other institutions are much more likely to function in such a role.¹³⁶

Nonetheless, the concerns discussed here may require sentences longer than those strictly necessary as a prevention measure, in two situations. First, it may turn out, contrary to the assertions just made, that indeterminate sentencing in its pure form is so poor at capturing the urge to condemn that noncompliance, even by normally law-abiding

133. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 410 (1958).

134. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 456 (1997) (“[A] distributive theory that tracks the community’s perceived principles of justice has a greater power to gain compliance with society’s rules of lawful conduct.”).

135. Compare Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 2003, 2007 (2010) (finding a statistically significant but small noncompliance effect when sentences are drastically “unjust”), and Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1414–16, 1423–24 (2005) (similar findings), with Slobogin & Brinkley-Rubinstein, *supra* note 97, at 43 (stating, based on four studies, that noncompliance effects appear to be weak and that, in any event, they “dissipate quickly over time”). Perhaps also relevant here are findings that offenders often prefer prison to probation. See Crouch, *supra* note 118, at 85–86.

136. See Robert F. Meier & Weldon T. Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 AM. SOC. REV. 292, 302 (1977).

citizens, increases. If so, legislatures could authorize and courts could impose high sentencing maxima, graded among crimes according to desert. This arrangement would probably satisfy expressive retributive urges but at the same time allow earlier release if a risk assessment so dictates; it would also allay the concerns of those worried about de facto lifetime confinement based on risk assessments uncapped by any dispositional limitation. Second, when they know risk is the sole focus of sentencing, some people who believe they have few risk factors may calculate that they get at least one free bite at the apple and commit crime as a result. In these situations, some prison time might be necessary even in the absence of significant risk. The combination of these concerns might result in a sentencing system similar to the original Model Penal Code's scheme, which established wide sentencing ranges for felonies that all began at one year and increased in breadth according to crime severity, with the caveat that even one-year sentences could be reduced in light of the crime and the history and character of the defendant.¹³⁷ This type of system would differ from limiting retributivism because no particular minimum sentence would be required, the sentence range would be broader, and most importantly, risk would be determined at the back end by an expert panel rather than at the front end by a judge.

E. Objections 7, 8, and 9: Indeterminate Sentencing and Treatment, Cost, and Offender Morale

Indeterminate sentencing would be focused on reducing risk through rehabilitative efforts. Two traditional objections to this approach are that rehabilitation seldom works and that, in any event, it is extremely costly. A related objection is that when release decisions depend on back-end calculations by correctional officials—as is the case with indeterminate sentencing—rather than front-end evaluations by judges—as occurs under either determinate sentencing or limiting retributivism—unequal treatment, demoralized offenders, and cynicism about the system are more likely.¹³⁸

137. MODEL PENAL CODE § 6.06 (1962) (setting sentence ranges from one to twenty years or life imprisonment for first-degree felonies, one to ten years for second-degree felonies, and one to five years for third-degree felonies); *id.* § 6.12 (allowing “reduction of conviction” if the sentence is “unduly harsh” in light of “the nature and circumstances of the crime and . . . the history and character of the defendant”).

138. FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 49, 52, 57, 72–73 (1981).

Rehabilitation is not a panacea. But even the criminal behavior of sex offenders, who are a particularly difficult group to treat, can be reduced through modern treatment programs. For instance, a review of sex offender treatment programs around the world found that, on average, treatment cut sexual recidivism almost by half, from 17% to 10%, and general recidivism by more than a third, from 51% to 32%.¹³⁹ Metareviews of other offender treatment programs, especially those using cognitive-behavioral therapy, show similar reductions in recidivism.¹⁴⁰ These figures represent a major public health improvement in all senses of the term.

Comprehensive correctional programs obviously cost more than a prison system that merely aims at exacting punishment. Indeterminate sentencing, correctly implemented, requires periodic evaluations and hearings, treatment teams, and rehabilitation resources in the community as well as in places of confinement. Once established, however, community programs are less expensive on a per capita basis than institutions¹⁴¹ and are much better at reducing recidivism than institutions, which tend to exacerbate it.¹⁴² Overarching societal costs must also be taken into account. The cost of a typical life of crime is estimated to be at least \$1.3 million.¹⁴³ Rehabilitation shortens that type of life. It also shortens time spent incarcerated and under state supervision, resulting in further savings.

Of course, all of these programs can take place in a determinate sentencing regime as well. But the legal basis for treatment in a determinate regime is much weaker. A constitutional right to treatment, designed to reduce risk, does not exist in a system in which desert is the goal because treatment is not relevant to that goal; offenders do not “deserve” treatment. In any event, a treatment orientation does not sit

139. R. Karl Hanson et al., *First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders*, 14 *SEXUAL ABUSE* 169, 183, 185 (2002).

140. See Francis T. Cullen & Cheryl Lero Jonson, *Rehabilitation and Treatment Programs*, in *CRIME AND PUBLIC POLICY*, *supra* note 130, at 293, 302–03 (reporting that most “mean . . . effect sizes represent recidivism reductions in the 20 percent range, varying upward to nearly 40 percent”).

141. See DEP’T OF HEALTH & HUMAN SERVS., *YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL* 105–14, 119 (2001) (concluding after a review of the relevant research through 2000 that preventive juvenile justice programs “cost less over the long run than mandatory sentences and other get-tough approaches”).

142. See, e.g., Jeffrey Fagan, *This Will Hurt Me More than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency*, 16 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 1, 28 (2002) (“There is a consistent pattern of higher rates of criminal offending among adolescents punished as adults compared to adolescents punished as juveniles.”).

143. Mark A. Cohen, *The Monetary Value of Saving a High-Risk Youth*, 14 *J. QUANTITATIVE CRIMINOLOGY* 5, 7 & tbl.IV (1998).

well in a retributive framework. Treatment in the community, which should be a dispositional staple of indeterminate sentencing, does not translate easily into retributive punishment,¹⁴⁴ which is usually associated with some type of institutionalization. Furthermore, because sentences are set at the front end in both a determinate sentencing regime and a regime based on limiting retributivism, success at treatment has no effect on release, a feature that presumably diminishes the incentive to participate in rehabilitative programs in the first instance.¹⁴⁵

The front-end nature of determinate systems is seen by some as a major benefit, however, because it eliminates the potential for discriminatory or arbitrary decisions about release. Undoubtedly, such a potential exists, especially if correctional personnel are ill-trained, risk-averse, or lethargic.¹⁴⁶ Furthermore, even a well-run program may strike some offenders as unfair when they see another offender convicted of the same offense released before they are, or when they are not released despite what they perceive to be good faith efforts to reform.¹⁴⁷ The latter phenomenon can be exacerbated by risk assessment techniques that rely primarily or wholly on static factors such as age at time of offense, gender, and prior criminal history, about which the offender can do nothing.

These concerns can be addressed in part by ensuring that trained professionals conduct periodic reviews based on structured professional judgments that take into account clinical and management risk factors as well as historical ones.¹⁴⁸ An additional advantage of these structured

144. Some might argue otherwise. See DUFF, *supra* note 122, at 100–02; see also *supra* note 118 and accompanying text (discussing the effects of punishment and how some offenders may prefer prison sentences to longer periods of probation).

145. Petersilia, *supra* note 12, at 255 (“The elimination of discretionary parole release undercut incentives for inmates to rehabilitate themselves while incarcerated.”).

146. For instance, experience with the United Kingdom’s Imprisonment for Public Protection statute indicates that five years after its implementation only 4% of those detained under that statute have been released after their two-year presumptive term expired. JESSICA JACOBSON & MIKE HOUGH, UNJUST DESERTS: IMPRISONMENT FOR PUBLIC PROTECTION 35 (2010).

147. Marc F. Plattner, *The Rehabilitation of Punishment*, 44 PUB. INT. 104, 107–08, 110 (1976).

148. This is a common practice in modern risk assessment and risk management. See, e.g., Heilbrun, Yasuhara & Shah, *supra* note 114, at 7–10. As it turns out, many of the most useful risk factors—substance abuse, prior supervision failure, negative attitudes, impulsivity, exposure to destabilisers, and noncompliance with remediation attempts—are dynamic. Jeremy W. Coid et al., *Most Items in Structured Risk Assessment Instruments Do Not Predict Violence*, 22 J. FORENSIC PSYCHIATRY & PSYCHOL. 3, 10–13 (2011).

assessments is that they ensure transparency about the decisionmaking process. Together with the periodic review requirement, they are arguably much less subject to abuse than the everyday charging and bargaining decisions made by prosecutors, which are notoriously difficult to monitor and result in extremely disparate verdicts, yet form the sole bases for sentences in determinate sentencing regimes.¹⁴⁹ Unfortunately, abuses of discretion occur in any system. It is not clear that indeterminate sentencing is worse than any other system in that regard.

F. Objection 10: Indeterminate Sentencing and the Constitution

One might try to combine some or all of the foregoing objections into an omnibus claim that indeterminate sentencing violates one or more provisions of the Constitution. Purely as a doctrinal matter, however, this sort of claim is unlikely to prevail. As already noted, reliance on race in making a risk assessment is or should be a violation of the Equal Protection Clause,¹⁵⁰ but otherwise actuarial and clinical risk assessment is probably immune from constitutional challenge.¹⁵¹ The Supreme Court has made clear that sentencing decisions that do not exceed the maximum established by the legislature, which would either not exist or be set at high levels in an indeterminate sentencing regime, can be made by judges or by parole boards without violating the Sixth Amendment right to jury trial.¹⁵² And with respect to the fundamental issue of whether sentences may be based on risk, as far back as 1937 the Supreme Court opined that the government

149. It is widely acknowledged that enormous disparity existed even under the old mandatory federal guidelines. Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 *YALE L.J.* 1420, 1451–52 (2008); see also Kevin R. Reitz, *Sentencing*, in *CRIME AND PUBLIC POLICY*, *supra* note 130, at 467, 489 (concluding, based on a survey of research trying to assess disparity in determinate sentencing systems, that “the goal of uniformity is so plastic that it is not worth very much”); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 20–21 (1998) (noting, after alleging significant discrimination in prosecutorial charging practices, that “[s]elf-regulation by prosecution offices is largely nonexistent or ineffective, and Supreme Court jurisprudence has protected prosecutors from both public and judicial scrutiny” (footnote omitted)).

150. See, e.g., *United States v. Taveras*, 585 F. Supp. 2d 327, 336, 338 (E.D.N.Y. 2008).

151. See *Monahan*, *supra* note 78, at 430–32; see also *Barefoot v. Estelle*, 463 U.S. 880, 896–903 (1983) (upholding admissibility of expert psychiatric testimony about future dangerousness).

152. *Blakely v. Washington*, 542 U.S. 296, 309 (2004) (noting that although indeterminate sentencing “increases judicial discretion,” it does not do so “at the expense of the jury’s traditional function of finding the facts essential to lawful imposition of the penalty” and thus does not violate the Sixth Amendment).

may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes. . . . [The offender's] past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him.¹⁵³

If there were any doubt about the issue, it was removed forty years later in *Jurek v. Texas*,¹⁵⁴ in which the Supreme Court held that even a death sentence can be based solely on a determination of dangerousness.¹⁵⁵

Post-sentence commitment—the fourth type of dispositional regime described at the beginning of this Article—does not get off so easily under the Constitution, however. It has already been noted that when the Supreme Court upheld SVP laws in *Kansas v. Hendricks*, it also firmly stated that once an offender has served his or her sentence, commitment based on risk is permissible only if the offender is “dangerous beyond [his or her] control.”¹⁵⁶ As summarized in principle four, in the sex offender post-sentence commitment context this language requires proof of serious mental illness or serious impulsivity—amounting to obliviousness to the prospect of criminal punishment—before an individual who has completed a sentence may be committed.¹⁵⁷ Unless this type of proof is forthcoming, post-sentence commitment visits a true injustice on offenders because it treats an autonomous individual as a nonautonomous “predator” or as an autonomous actor willing only to choose antisocial behavior. Unfortunately, courts have routinely permitted post-sentence commitment in the absence of this undeterrability predicate.¹⁵⁸ In such cases, a constitutional claim should have merit.

The reason a similar predicate is not required in order to impose an indeterminate sentence is that this type of disposition immediately follows upon conviction and is implemented as part of the criminal process. Only when risk-based dispositions take place outside the criminal context must there be, as *Hendricks* held, an additional predisposition showing, to the effect that the individual is characteristically unaffected

153. *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937).

154. *Jurek v. Texas*, 428 U.S. 262, 275–76 (1976).

155. *Id.* at 274–75; see also Ted Sampsell-Jones, *Preventive Detention, Character Evidence, and the New Criminal Law*, 2010 UTAH L. REV. 723, 752–56 (2010) (noting that incapacitation, not retribution, was the primary motivation for punishment in colonial times).

156. *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

157. SLOBOGIN, *supra* note 1, at 133–40.

158. *Id.* at 254.

by the dictates of the criminal law.¹⁵⁹ When offenders are capable of being deterred—even if they are not in fact deterred in a given instance—they should be handled through the criminal justice system or left alone.

IV. A KEY CAVEAT: HOW BEST TO PREVENT RECIDIVISM?

Even if the foregoing analysis is correct, indeterminate sentencing loses its allure if it is not appreciably better than other sentencing regimes at reducing crime. The evidence on this point is admittedly mixed. A recent theoretical treatment of this issue concluded that “[t]he more mandatory are the guidelines, the larger is the increase in crime.”¹⁶⁰ But the most sophisticated study on the topic, relying on 1990s pre/post data, found that although mandatory parole release—in essence, determinate sentencing—turned out to be worse than discretionary parole release at reducing recidivism in New York and North Carolina, it was better than discretionary release at reducing reoffending in Maryland and Virginia; the study also found that in Texas and Oregon the releasing mechanism had no significant effect on recidivism.¹⁶¹ The authors concluded that “[t]he effects on recidivism may depend more on the workings of post-release supervision policies and rehabilitation programs in specific states than from sentencing models themselves.”¹⁶² They also noted that the observed differences could result from “various supervision approaches within the states, differing expertise of state parole boards, or differing crime categories that are legislatively mandated” and called for further research to disentangle these effects.¹⁶³ Research comparing determinate and indeterminate sentencing in terms of other outcome variables, such as the percentage of prisoners who have committed violent offenses and

159. See *Hendricks*, 521 U.S. at 358.

160. Joanna Shepherd, *Blakely's Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime*, 58 HASTINGS L.J. 533, 574 (2007).

161. Yan Zhang, Lening Zhang & Michael S. Vaughn, *Indeterminate and Determinate Sentencing Models: A State-Specific Analysis of Their Effects on Recidivism*, CRIME & DELINQUENCY 1 (Dec. 8, 2009), <http://cad.sagepub.com/content/early/2009/12/08/0011128709354047.full.pdf+html>.

162. *Id.* at 18.

163. *Id.* at 19. For other studies that arrived at opposing results about the recidivism-reducing effects of discretionary and determinate sentences, see Richard Rosenfeld, Joel Wallman & Robert Fornango, *The Contribution of Ex-Prisoners to Crime Rates*, in PRISONER REENTRY AND CRIME IN AMERICA 80, 102–03 (Jeremy Travis & Christy Visser eds., 2005), which concludes that “expanded use of discretionary parole supervision” is the best method of protecting the public, and William D. Bales et al., *An Assessment of the Development and Outcomes of Determinate Sentencing in Florida*, 12 JUST. RES. & POL’Y, Spring 2010, at 41, 47, 64–66, which found that the “primary” reason for Florida’s increase in prison population has been an increase in felony convictions rather than its conversion to determinate sentencing, and that truth-in-sentencing has contributed to recidivism reduction.

the effect on the size of incarcerated populations, has also returned mixed results.¹⁶⁴

The import of these findings is that the efficacy of indeterminate sentencing conducted consistently with the principles set out in this Article is unknown. More localized study is essential. In the meantime, we should not abandon indeterminate sentencing but continue to experiment with it.

V. CONCLUSION

All of the articles in this Symposium accept the premise that, under some circumstances, the state may deprive people of liberty based solely on the risk they pose to others. But all of them either limit preventive power so significantly that public safety concerns are largely ignored or devote insufficient attention to limitations that should be imposed on any preventive detention that takes place. The first part of this Article assumes that preventive intervention by government is both inevitable and desirable and lays out principles that should govern that exercise of power.

The second part of this Article focused on sentencing and argued that indeterminate sentencing is superior to both desert-based sentencing and post-sentence commitment as a prevention mechanism. It also defended indeterminate sentencing against charges that the risk assessment and risk management model on which it rests is not viable, too costly, inadequate as a general deterrent, and unjust to the offender, the victim, or society as a whole. Although relevant empirical work to date is inconclusive, if implemented in a manner consistent with fundamental constitutional and evidentiary principles, indeterminate sentencing is likely to be not only the optimal method of preventing recidivism but also the most jurisprudentially sound method of doing so.

164. See Don Stemen & Andres F. Rengifo, *Policies and Imprisonment: The Impact of Structured Sentencing and Determinate Sentencing on State Incarceration Rates, 1978–2004*, 28 JUST. Q. 174, 174–77 (2011); Kevin R. Reitz, *Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Factors*, 84 TEX. L. REV. 1787, 1787 (2006).

