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DEADLY DILEMMAS III: SOME KIND WORDS FOR PREVENTIVE DETENTION

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I. INTRODUCTION

“Preventive detention” is a phrase guaranteed to provoke moral indignation on the part of many citizens and legal experts alike, leading to charges that it is un-American and caustic to our traditional legal and moral values.¹ Preventive detention appears to its critics to involve, among other things, an egregious short-circuiting of the traditional legal doctrine that the state is justified in apprehending and incarcerating its citizens only when there is probable cause to believe that such persons have either harmed others, or come very close to doing so, with only a small space for restraining someone preventively. By contrast, preventive detention envisages the arrest, conviction, and punishment of persons, not because of grievous harms they have actually committed or risks of grievous harm they have already imposed on others but because of suspicions that—left to their

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¹ When John Mitchell, Nixon’s Attorney General, announced the Administration’s plan for introducing federal legislation that would permit judges at bail hearings to use dangerousness as a criterion for denying bail, Laurence Tribe wasted no time in condemning the proposal. The legislation, he insisted, was likely to be

the first step of a profound shift in our system of criminal justice—a system that, at least until now, has operated on the premise that crime should normally be prevented by the threat of subsequent punishment rather than the imposition of prior imprisonment [The proposed legislation relies] on a mode of constitutional discourse exceptionally hospitable to the authoritarian values of “order” and dangerously inimical to the libertarian values of “law.”

Laurence Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 375 (1970). He concluded that “the acceptance of the [Nixon-Mitchell] proposal . . . would undermine the role of the Constitution as an embodiment of principled restraints on government.” *Id.* at 376. Then-Senator Sam Ervin characterized the Nixon preventive detention proposal as “pervert[ing] the historic and legitimate purpose of bail—to assure the appearance of the accused at trial.” Sam J. Ervin, Jr., *Preventive Detention*, A *Species of Lydford Law*, 52 GEO. WASH. L. REV. 113, 114 (1983).

own devices—they are disposed to commit acts likely to cause grave harm in the future. As the phrase itself suggests, preventive detention involves the incarceration of persons not as punishment for harms already wrought but as a device for preventing future harms that the state surmises they are likely to inflict if not incarcerated.

In the view of many, such policies perversely turn traditional legal (and moral) thinking topsy-turvy by legitimizing the incarceration of potential wrongdoers not for harms they have committed but for harms that they might do in future should we fail to incapacitate them. Moreover, at least in the view of its critics, preventive detention's tendency to favor detention for future dangerousness ignores the retributionist theory of just deserts as the only acceptable rationale for punishment and holds, instead, that a fully legitimate and entirely free-standing aim of incarceration is crime prevention.

In this Article, we intend to explore whether preventive detention is the unwelcome and subversive innovation it is widely depicted as being. While we have no intention of defending all or even most forms of preventive detention in their concrete instantiations, we think that preventive detention is, under many circumstances, a legitimate and principled part of the criminal law. More than that, we shall show that preventive detention—though not explicitly by that name—has long been, and continues to be, a core part of Anglo-Saxon legal practice. And at the deepest level, the animating principle of preventive detention—that the government may intervene in order to prevent future harms—rather than being an anomaly of a scandalous backwater of criminal law in fact is a general organizing principle of government. Its detractors have neglected this because of their inaccurate characterization of law generally, criminal law specifically, and the peculiar focus on one small part of legal regulation—serious felonies in particular—that neglects how that aspect of legal regulation is embedded in law generally. In addition to its overly reductive nature, the standard commentary on the criminal law involves another equally debilitating flaw of being excessively prescriptive and ignoring the law as it is. Whether because of the moralistic tone or not, the standard commentary neglects that how and whether to engage in preventive detention is another example of the unavoidable deadly dilemmas of governing.² As we shall show, eliminating preventive detention from the law would not just eliminate the “wrong” of incarceration prior to a conviction for a specific act but in addition would add innumerable

² Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65 (2008); Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 CHI.-KENT L. REV. 23 (2010).

“wrongs” of criminal acts against people that would have not occurred had the perpetrator been under state control.

Before we turn to explore how pervasive preventive detention has become in American criminal (and parts of civil) law and precisely what the real trade-offs are that it poses, it is crucial to formulate as clearly as we can precisely what preventive detention means. Its critics in particular tend to adopt a hyperbolic version of what preventive detention amounts to, as we shall see shortly. Simply put, our proposal is that preventive detention is best understood as being simultaneously a policy about what constitutes a crime and about what justifies governmental intervention. On the former front, preventive detention entails that an activity, *A*, can be properly considered a crime (and defined as such by statute) if it is plausible to believe that doing *A* substantially increases the risk that grievous harm to innocent citizens will ensue eventually from *A*.

If *A* leads immediately and directly to such harm, of course, then we likewise have a criminal act. On that issue, preventive detention and traditional retributionist theories are on the same page. Where the two sides tend to differ—so far as characterizing crimes goes—is about whether an act or event that in itself produces no harm should nonetheless be criminalized, if it significantly increases the risk that future harm will ensue. Preventive detention theorists are much more inclined to criminalize such activities than retributionists are.

Attitudes toward sentencing are even more sharply divided between the two camps. Retributionists incline to the view that the punishment should fit the crime, and that the function of punishment is to give criminals no other than their just deserts. On this view, once a felon has “repaid his debt to society,” he is to be released and can begin life anew with a fresh slate, so far as the criminal law is concerned. Preventive detentionists, on the contrary, hold that the principal function of punishment or incarceration is to protect society from dangerous persons. The greater the danger that someone represents, the longer his incapacitation should be. Where serial felons are concerned, retributionists generally incline to the view that their prior crimes should be ignored in the sentencing phase, since the defendant has already served his time for his previous convictions. Detentionists, by contrast, hold that a pattern of numerous prior convictions makes it much more likely that the defendant will continue to be a risk to society and therefore warrants longer (sometimes much longer) incarceration.

Opponents of preventive detention rarely couch that doctrine in the terms that we have just used. Instead they ask us to imagine a system of law in which persons perceived to be dangerous by the police are arrested, held without charge, and incarcerated for an indefinite period until, if ever, the state decides that they no longer constitute a danger. This would indeed

qualify as a form of preventive detention but not one that anyone with the slightest respect for the rule of law would espouse. To see how misleading this characterization is, imagine the following scenario: We have a state in which the police arrest those they think guilty of a crime. After a brief preliminary hearing in which a judge routinely confirms the verdict of the police, convicted suspects who committed grievous crimes are summarily executed while those convicted of lesser crimes are sent to prison for three months. Such a criminal justice system would clearly be retributionist and the graduation in punishment mirrors the severity of the crime. Still, this example would be no refutation of retributionism in general since there are plenty of conceivable retribution-based models that do not ride roughshod over our notions of due process and fair play. By the same token, preventive detention does *not* entail indefinite detention *nor* a denial of the right to be informed upon arrest of the charges one faces nor the possibility of incarcerating someone for any significant length of time without due process. What preventive detention does entail is that assessments of the danger posed by the defendant to society can play a role both in defining the character of a criminal act and in determining the punishment appropriate for it. The fact that we can imagine both retributionist and detentionist schemes that would be nightmarish is no argument against either since neither camp holds that its own theories of crime and punishment are sufficient (only necessary) for the construction of an acceptable system of criminal justice.

Our core question, then, is simply this: Do/should we incarcerate persons only as just punishment for the serious harm(s) they have already done to their fellow citizens or as a mechanism for shielding the latter from future harms that the former may well perpetrate? The answer to that question, as we shall see, must be: a mixture of both. While many of the paradigmatic categories of criminal wrongdoing involve the (usually intentional) infliction of serious harm (murder, rape, aggravated assault, kidnapping, arson, and the like), vast categories of crimes—including many serious felonies—do not require the doing of harm or, in some cases, even the intention of doing harm. The latter actions are nonetheless designated as crimes because they are taken as adequate indicators that their perpetrators are disposed to engage in dangerous acts.

If such persons are not stopped in their tracks before doing harm, they are apt to engage in actions that may inflict grievous harm on innocent victims. These non-harmful preliminary acts are criminalized precisely because they betoken future dangerousness. Given this characterization of preventive detention, it has to be acknowledged that current trial and incarceration policies involve heavy elements of preventive detention, broadly understood. We often deprive persons of their liberty because of a

seemingly well-grounded fear that, left to their own devices, they might do serious harm to others. We lock them away not to ensure that they get the just deserts for their previous harm doing (in some cases, they have not yet done any harm) but as a way of protecting society from the future harmful consequences of their dangerous behavior.

This becomes clear once one realizes that vast numbers of different types of acts are criminalized even though particular tokens of those acts produced no harm whatever to anyone. Legislators nonetheless criminalize such acts (a) because they pose a serious future danger to others and (b) because the legislators believe that someone who commits such acts once is prone to do dangerous acts repeatedly if not incarcerated. Sometimes the incarceration is of very limited duration, e.g., a denial of bail awaiting trial. Other times, it is for a much longer stretch, as permitted under the sentencing guidelines for seriously serial felons. Very occasionally, the period of incarceration is indefinite and subject to periodic review and renewal, such as in the case of the criminally insane. The incarceration purportedly serves both to incapacitate (for a time) the perpetrators of such acts and, except in the case of insanity, perhaps even to deter others from engaging in such acts. Since it is important to recognize that preventive detention drives, and for a long time has driven, much of the substantive criminal law, this Article will probe just how deeply preventive detention concerns have already permeated the criminal justice system, and just how radically that system would be transformed for the worse if issues of prospective danger rather than already accomplished harm were driven out of the justice system.

More generally still, the present focus on preventive detention in the context of serious felonies neglects important aspects of the structure of American law. We turn to that point next.

II. CRIMINALIZING THE PRELUDE TO HARMFUL ACTS

Before discussing the many specific areas in the criminal law that exemplify versions of preventive detention, we wish to start with how in our opinion the present debate is conceptually impoverished. The standard parameters of the debate involve tacit agreement that the criminal law is a separate enough entity to justify treating it divorced from other forms of legal regulation and that it is also unique from other forms of legal regulation in its imposition of *punishment*. Both claims are largely false, and in their falsity lies no small part of the explanation as to how present commentary on preventive detention has been led astray.

Reading the literature on the theory of the criminal law would lead one to believe that “the criminal law” is an easily isolatable entity that is unique in its imposition of costs on citizens (punishments are costs). Although

traditional, this seems to us to be a curious way to think about the criminal law. A more accurate conceptualization of what is called “the criminal law” is that it is but one small part of a thick web of regulation, indeed a collection of many overlapping thick webs of regulation, that govern behavior, and that at best it can be identified, not as analytically distinct, but instead as occupying a range on various continua. We will examine each of these points in turn.

Each of the actions that a person takes is subject to multiple legal constraints. There are innumerable governing agencies that enact overlapping laws, and individual governing agencies enact multiple overlapping regulatory regimes. A murder in a public place could conceivably violate not only the homicide statute, but also an environmental statute, a health statute, and a gun regulation statute. This seemingly silly example is not silly at all but a powerful metaphor for the reality of legal regulation in modern America. The concerns that motivate “the criminal law”—the preservation of health and safety—motivate an untold number of loci of legal regulation that just as much regulate the act of pulling the trigger as does the homicide law. Two distinguished criminal law theorists, Larry Alexander and Kimberly Kessler Ferzan, in their interesting new book, recently asserted that

[u]ltimately, what underlies the criminal law is a concern with harms that people suffer and other people cause—harms such as loss of life, bodily injury, loss of autonomy, and harm to or loss of property. The criminal law’s goal is not to compensate, to rehabilitate, or to inculcate virtue. Rather, the criminal law aims at preventing harm.³

We would quibble with whether the criminal law would not be entirely happy with preventing harm through compensation, rehabilitation, and education, but putting aside that quibble, what area of law could not be so described? What area of law isn’t aimed at preventing harm to people or property? We are at a loss to come up with an answer.⁴

Analogously, the “sanctions” that are employed to achieve the ends of the law range over the gamut from moral persuasion to serious impositions on liberty. Fines are of course ubiquitous, but so too is imprisonment designed as punishment intended to deter and to prevent future harms.

³ LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 3 (2009).

⁴ Property law in part is concerned with preserving property, obviously. Tort law is designed in part to reduce harm to people and things. Contract law provides for the efficient trading of things of value and limits predatory behavior. Even election law and constitutional law have the interests of people and property as their objects; it is hard to imagine what other interests there might be to protect. For example, separation of powers matters not for the purity of the government but because of its pragmatic consequences for the citizenry.

Imprisonment for contempt is one example, but the range of possible contempts is large, from ignoring a court order to cease and desist, or a restraining order, or behaving badly in court. Injunctions can require or forbid actions, again backed by the force of law. A person can be quarantined from society for health reasons, and involuntarily committed for mental health reasons, in both cases because he or she may be a risk to themselves or others. A person can be incarcerated because he is a material witness who may not cooperate or because he has been threatened. He can be jailed for breaking any of the conditions of his parole or probation. The list goes on and on.

But even this list of ways in which the thick web of overlapping regulation imposes sanctions that are mistakenly thought of as criminal sanctions understates the extent of governmental intervention in modern lives and its consequences. As we have developed in a series of papers, the commonality of all governmental decisions seems to be that they all, literally, affect who will live and who will die.⁵ Where or whether hospitals or roads are built, what areas of research to fund, what foreign escapades to engage in all have this effect, as does locking people up for noncapital crimes (many die “wrongfully” as a result of murder or suicide in prison, and of course health is usually not improved while in lock up either).

To which the criminal theorist might respond: “You’ve missed the point. Punishment is the essence of the criminal law, and it is missing in your examples.” But it is not. People are held in contempt as a form of punishment. They are locked up for violating restraining orders as a form of punishment. And many think that a justification of criminal interventions (note, not “punishment”) is to correct or rehabilitate, which is not punishment at all; it is education. Thus, it is the case that not only do “non-criminal” regulatory regimes have a great impact in ways indistinguishable from criminal law, but criminal law has an impact indistinguishable from “non-criminal” regulatory regimes.

Return now to our previous point. This all makes perfect sense if the “law” is a collection of thick overlapping webs of regulation, with its various justifications for action. What conventionally passes for the criminal law is nothing but a few places on various continua of these regulatory efforts. Perhaps the single most important aspect of those continua is to stop social harm by providing the conditions of efficient social coordination. To do that, government invokes all of the justifications for the criminal sanction all over the place: it tries to educate (rehabilitate); deter; sanction (punish); and quarantine/restrain (imprison).

⁵ See sources cited *supra* note 2.

In addition to being overly reductive, the usual commentary on the criminal law is uniformly normative. It comprises normative critique after normative critique, but perhaps in part because of its overly reductive nature the critiques are almost oblivious to the actual structure of the law and applied instead to a stripped-down, idealized version. The positivist question of what is emanant in the law is often neglected.⁶

Not surprisingly, when one finally gets past the commentary and to the criminal law, one finds it using the various tools of enforcing social order that it has available to it, regardless what the commentators may think. Consider the following.

A. INCHOATE CRIMES AS A SPECIES OF PREVENTIVE DETENTION.

The law is full of activities defined as crimes even though such activities do not necessarily result in harms or risk of harm to anyone. Suppose a group of thugs is planning to rob a bank. They have several meetings in a tavern where they work out a detailed plan for the operation. One member of the group is a police informant who notifies the authorities about the plan a fortnight before the proposed heist. Apart from his own testimony, he has made recordings of several of the planning sessions. What is likely to be the police response? Will they wait for the bank robbery to occur and then round up the members of the gang? On the contrary, they are likely to immediately arrest the participants and charge them with conspiracy to rob a bank. The decision not to postpone arrest until after the robbery itself is perfectly proper. Given the unpredictability of such events, postponing arrest until after the robbery might mean that some bank employees are injured or killed or that some members of the gang escape subsequent capture or that innocent passersby are wounded in a shootout between the police and the robbers.

The police can intervene in advance because the legislature has criminalized conspiracy to rob banks, an activity that is not intrinsically harmful to anyone, since many budding conspiracies never reach the point of realization. Even though conspiring to rob a bank is often a victimless crime, it is important to criminalize such conspiracies, not least because doing so sometimes enables the police to prevent a harmful act before its

⁶ For example, as George Fletcher pointed out, Michael S. Moore wrote a wonderful book on placing blame and never mentioned victims. George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 51 (1999) (citing MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997)). Larry Alexander and Kim Ferzan wrote an equally wonderful book examining risk as the basis of criminal liability and never inquired into how the resulting criminal law could be enforced. ALEXANDER & FERZAN, *supra* note 3; see also Ronald J. Allen, *Modeling Criminal Law*, 29 LAW & PHIL. 469 (2010).

occurrence. If lawmakers had not criminalized conspiracy, the police, even if they had foreknowledge of the robbery, would simply have to wait to intervene until the robbery actually occurred. Such a delay would serve no one's interests, except those of the felons.

Although some modern commentators suggest that the use of preventive detention is a new, lamentable, and in general foreign tool in the repertoire of Anglo-Saxon law, this is clearly false. In England in 1305, the British Ordinance of Conspirators made it a crime for two or more people to “[confederate] or bind themselves by Oath, Covenant or other Alliance” to bring false witness against innocent people.⁷ In 1606, Guy Fawkes and his co-conspirators were tried, convicted, drawn, castrated, quartered, and beheaded for planning to blow up the Houses of Parliament.⁸ In the year 1586, a law was passed by the English Parliament, that if any conspiracy was formed against Queen Elizabeth's life, in favor of any other person, that person should suffer equally with the conspirators. Mary Queen of Scots was subsequently tried under this statute.⁹ There have been federal conspiracy laws on the books in the U.S. since at least 1825.¹⁰ What is true of conspiracies is likewise true of other inchoate crimes, such as solicitation of a criminal act, facilitation of a criminal act, incitement to a criminal act, threat of a criminal act, and attempt.¹¹ In all these cases, legislators have criminalized a variety of actions that often precede harmful acts. By making those preliminary activities illegal, the state is in a position to intervene prior to the commission of the target crime and to incarcerate those involved in its planning and funding. Essentially, the state is placing a bet here. It is betting that those who conspire to commit a certain crime are reasonably likely both (a) to commit the crime in question if unimpeded and (b) to commit other crimes of a similar nature. That bet will not always be correct of course. Sometimes, planned crimes are not executed, not because the state has intervened to stop them but because the planners themselves abandon the project. The fact that some prospective crimes in the planning stages are abandoned by the participants means that intervention by the state is not always preventing grievous harm.

We criminalize inchoate crimes because we believe (a) that the crime being planned, incited, solicited, or facilitated may well come to fruition if not blocked beforehand by the police and (b) that people who plan/facilitate/solicit/threaten one of these crimes will probably

⁷ Ordinance of Conspirators, (1305), 33 Edw. I.

⁸ ALAN HAYNES, *THE GUNPOWDER PLOT: FAITH IN REBELLION* 107 (1994).

⁹ PETER PARLEY, *TALES ABOUT GREAT BRITAIN AND IRELAND* 417 (4th ed. 1845).

¹⁰ Act of March 3, 1825 ch. 65, § 23, 4 Stat. 115, 122 (1825).

¹¹ For a review of such provisions, see WAYNE R. LAFAYE, *CRIMINAL LAW* 568–723 (4th ed. 2003).

plan/facilitate/solicit/threaten other crimes that we would like to prevent. In short, the criminalization involved in defining an inchoate crime is driven principally by the desire to give the police legal machinery for intervening so as to prevent a harmful crime before it occurs. Inchoate crimes are paradigmatic instances of preventive detention. If we understand preventive detention as a form of incarceration imposed to prevent a dangerous person from committing a crime, the instrument of the inchoate crime is clearly part of the same family.

As with preventive detention, designating something as an inchoate crime represents a belief that certain acts are powerful predictors of more egregious acts in the pipeline or even further down the road. Such predictions may sometimes be false and certainly less sure than proof beyond a reasonable doubt. Nonetheless, that is often a risk worth taking, as we shall argue below.

If conspiracy to commit *X* or facilitation or solicitation of *X* or threat to do *X* were not predictively correlated with doing *X* (where *X* is unambiguously a harm), then there would be no rationale for criminalizing conspiracies, facilitations, threats, and solicitations. For a so-called inchoate crime to be reasonably treated as a criminal act, we must have reason to believe that the preparation and planning of a crime will often lead to the commission of the crime itself. Without such a correlation, criminalization of the preparatory activities would be wholly unjust. Consider the case of the writer of detective stories. He will often devote weeks of his time conceiving of a crime, figuring out how it could be done with minimum likelihood of detection, and fine-tuning the sequence of events to include many plausible details. No one, however, would imagine that working out the fine structure of a fascinating crime for a novel should be criminalized for the simple reason that mystery novelists rarely use their criminal ingenuity for committing real crimes. Nor when two crime writers collaborate on a novel do we imagine that they thereby form a criminal conspiracy.

B. POSSESSION CRIMES

Legislators have likewise decided to criminalize certain dangerous activities, on occasion even when the usual ingredients of an inchoate crime (e.g., intent) are wholly absent. Consider a few examples:

1. Gun Possession by Felons (and Others)

Once someone has been convicted of a felony, and especially if the felony is a violent one, it becomes a federal crime for that person to be in

possession of a firearm and a crime for any gun dealer to knowingly or negligently sell a firearm to him.¹² Even in jurisdictions with otherwise very liberal gun possession and gun carry laws, the felon with a gun is criminalized. So, too, is an armed fugitive, an armed illegal alien, and an armed veteran with a dishonorable discharge.¹³

Obviously, the bare possession of a gun by a felon is no guarantee that grievous harm is in the offing. His intentions in acquiring the weapon may have been innocent, for instance, hunting or self defense. Nonetheless, the state reckons that allowing firearms to come into the hands of those who have already shown a violent streak could put ordinary citizens at grave risk of being victimized. Arresting a felon with a gun and sending him to prison, often for a considerable period, can be justified only if we accept that the state may legitimately incarcerate some of its citizens not for harmful acts they have already committed but as a means of preventing harmful acts they may be about to commit.

2. Explosives Possession

Any person—prior felon or not—found with bombs or bomb-making equipment in his possession (and without a license for them) may be incarcerated, even if he has conspired with no one, threatened no one, and (to this point) harmed no one.¹⁴ The laws criminalizing the unlicensed possession of bombs and the tools to assemble them are patently driven by concerns of prospective harm prevention. Those same statutes make it illegal to sell explosives to former felons and illegal to give instruction in how to make explosives to those who may use such devices for violent purposes. There is no obvious just deserts rationale for criminalizing such acts, since the laws criminalizing instruction in bomb-making equipment do not even require the state to prove intent on the part of the instructor to make—let alone to detonate—a bomb.¹⁵ By contrast, crime prevention provides an obvious rationale for detaining those with the equipment necessary for fabricating an object capable of grievously harming many unsuspecting, innocent persons.

¹² 18 U.S.C. § 922(g) (2006).

¹³ See *id.* for an even fuller list of those whose possession of a gun constitutes a federal felony.

¹⁴ *Id.* § 842.

¹⁵ *Id.*

3. Possession of Burglar's Tools

Possession of certain kinds of tools useful in burglary, but having other uses as well, with the intent to use them is criminalized in many states.¹⁶

The list of possession offenses in fact is astonishing. As one distinguished commentator notes, "New York boasts no fewer than 115 felony possession offenses, all of which require a minimum of one year in prison; eleven of them provide for a maximum sentence of life imprisonment."¹⁷

C. UNINTENDED IMPOSITION OF THE RISK OF SERIOUS HARM

In a direct affront to most criminal theorists, the criminal law provides for a series of offenses that are nothing but penalization of risk creation. Various forms of vehicular regulation are obvious examples, ranging from laws governing safety devices on cars, to speed limits, to forbidding the use of cell phones, to limits of blood alcohol levels in drivers. Possession of guns within city limits was a common crime prior to the *McDonald* case.¹⁸ Vagrancy and loitering laws in various modern manifestations constructed to avoid constitutional limits,¹⁹ limits on entering or staying in public places,²⁰ and sleeping on the streets²¹ are all risk-avoidance crimes. Investigative and prosecutorial decisions are also made to attack the sources of risk, using whatever statutes may be put to the purpose. For example, it

¹⁶ KY. REV. STAT. ANN § 511.050 (West 2010); *Green v. State*, 591 So. 2d 965 (Fla. App. 1991).

¹⁷ Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 859 (2001). This figure does not include misdemeanor possession offenses.

¹⁸ This type of law was struck down by the Supreme Court in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

¹⁹ *Papachristou v. Jacksonville*, 405 U.S. 156 (1972), casts doubt on vagrancy laws, but public order offenses made a comeback fifteen or so years later under the influence of James Q. Wilson and George Kelling's arguments about broken windows policing. Cf. James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29. These laws in turn were dealt a blow by *City of Chicago v. Morales*, 527 U.S. 41 (1999), striking down the Chicago gang ordinance. Immediately after the *Morales* decision, the Chicago City Council enacted a new anti-loitering, anti-gang statute tailored to respond to the case: CHICAGO, ILL. MUN. CODE § 8-4-015 (1992). For a discussion, see RONALD J. ALLEN, JOSEPH L. HOFFMANN, DEBRA A. LIVINGSTON & WILLIAM J. STUNTZ, CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL 590-623 (2005).

²⁰ See, e.g., Lancaster, CA, CODE OF ORDINANCES § 12.04.050 (requiring a permit to use city parks between 11:00pm and 6:00am); Kenton County, KY, CITY ORDINANCES § 94.16 (making it unlawful to be in any park between dusk and dawn).

²¹ For a remarkable compendium of such law, see National Coalition for the Homeless: Reports and Papers, <http://www.nationalhomeless.org/publications/reports.html> (last visited Apr. 11, 2011). A Washington statute forbade sitting on sidewalks during business hours. *City of Seattle v. McConahy*, 937 P.2d 1133 (Wash. Ct. App. 1997).

is probably unconstitutional to criminalize membership in a gang,²² yet there is a 120-page U.S. Department of Justice *Gang Prosecution Manual*²³ explaining precisely how to do just that. Many jurisdictions criminalize unprotected, consensual sex when one party is knowingly HIV-positive, even though the rates of transmission of that disease from any one such act are low.²⁴

III. SENTENCING POLICIES AS A FORM OF PREVENTIVE DETENTION

It is commonplace in the United States to take preventive detention into account in criminal sentencing. California's famous experiment with a "Three Strikes and You're Out" law is well known.²⁵ Less well known is that

[t]hese laws became more prominent over the last couple of decades, with almost every state, as well as the federal government, either adopting some new, more punitive habitual offender laws, or reinforcing their existing regime. This resurgent trend in the use of habitual offender laws culminated in the 1990s, when a number of states rushed to adopt "three strikes" laws.²⁶

Imposing consecutive rather than concurrent sentences based on a prior record is commonplace in the United States,²⁷ as is using dangerousness of various kinds to enhance sentences.²⁸ Dangerousness is also taken into account in parole decisions.²⁹ Numerous statutes provide for sentencing enhancement of dangerous offenders in particularized areas, such as sexual predation.³⁰

Similar to the typical state sentencing law, the Federal Sentencing Guidelines place heavy emphasis on dangerousness. The introductory comment to Chapter Five of the Guidelines remarks that "[t]o protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful

²² *Scales v. United States*, 367 U.S. 203, 223 (1961).

²³ U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *GANG PROSECUTION MANUAL* (2009), <http://www.nationalgangcenter.gov/Content/Documents/Gang-Prosecution-Manual.pdf>.

²⁴ Numerous states have such laws. *See, e.g.*, GA. CODE ANN. § 16-5-60 (West 2008).

²⁵ CAL. PENAL CODE §§ 667(e)(2)(A)(ii), 1170.12(c)(2)(A)(ii) (West 2004).

²⁶ Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 705 (2006).

²⁷ *See, e.g.*, MONT. CODE ANN. § 46-18-401 (2009).

²⁸ *See, e.g.*, OR. REV. STAT. § 161.735, 161.737 (2009).

²⁹ For a discussion of some of the complexities that arise, see *Hayward v. Marshall*, 603 F.3d 546 (9th Cir 2010) (en banc).

³⁰ *See, e.g.*, MO. REV. STAT. § 558.018 (West 1999).

rehabilitation.”³¹ In applying this standard, sentencing courts originally were authorized to depart from the Guidelines³² “[i]f reliable information indicates that the criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes”³³ Information justifying departure includes “[p]rior sentence(s) not used in computing the criminal history category”³⁴ and “[p]rior similar adult criminal conduct not resulting in a criminal conviction.”³⁵

IV. THE CRIMINALLY INSANE

As Professor Paul Robinson astutely noted some time ago, under pressure from Supreme Court rulings making it more difficult to civilly commit people, the states began to use the criminal law to reach the same result.³⁶ This came about in two different ways. First, the insanity defense was changed in many jurisdictions to include such verdicts as guilty but insane.³⁷ Second, states enacted statutes to permit the continued incarceration of prisoners at the expiration of their sentences based upon a showing of a mental disease or defect and continued dangerousness.³⁸ The federal government followed suit with a similar statute,³⁹ which the Supreme Court upheld last year against constitutional challenge.⁴⁰ At an even higher level of generality, the Court has made clear and the states have taken advantage of the fact that individuals behaving dangerously may be convicted of crimes regardless of their actual state of mind at the time they acted. In *Montana v. Egelhoff*,⁴¹ the Court upheld a Montana statute that forbade a murder defendant from offering evidence of his voluntary intoxication on the issue of his state of mind.⁴² He could be convicted of

³¹ Federal Sentencing Guidelines Ch. 4, pt. A (2010).

³² The Guidelines are no longer mandatory under bizarre rulings from the Supreme Court. *See, e.g.*, *United States v. Booker*, 543 U.S. 220 (2005).

³³ U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(a)(1) (2010).

³⁴ *Id.* § 4A1.3(a)(2)(A).

³⁵ *Id.* § 4A1.3(a)(2)(E).

³⁶ Paul H. Robinson, *Foreword: The Criminal–Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693 (1993).

³⁷ *Id.* at 701.

³⁸ Approved by *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *Kansas v. Crane*, 534 U.S. 407 (2002).

³⁹ 18 U.S.C. § 4248 (2006).

⁴⁰ *Comstock v. United States*, 130 S. Ct. 1949 (2010).

⁴¹ 518 U.S. 37 (1996).

⁴² For a critical discussion, see Ronald J. Allen, *Foreword: Montana v. Egelhoff—Reflections on the Limits of Legislative Imagination and Judicial Authority*, 87 J. CRIM. L. & CRIMINOLOGY 633 (1997).

intending to kill even though he was so drunk that he was probably unable to intend anything. This is social hygiene with a vengeance.⁴³

V. BAIL DENIAL

Increasingly over the last generation, dangerousness (and thus preventive detention) has been used as a criterion for denial of bail for felons, especially those accused of a serious crime. While such a policy has often been characterized as a sharp break with prior practices in the common law,⁴⁴ the fact is that England's Parliament successfully claimed unto itself the right to determine bail eligibility on a crime-by-crime basis from the thirteenth century.⁴⁵ American courts followed suit and it has long been true that defendants awaiting trial charged with murder have routinely had their petitions for bail denied. The dramatic change, then, has not been in whether defendants have an unconditional right to bail (supposedly grounded in the presumption of innocence) but in the willingness of the legal system to openly acknowledge—instead of surreptitiously presume—that it is probably bad policy to free potentially dangerous felons while they await trial.

Since the 1970s, it has been the pattern in the United States for roughly one in sixteen of those awaiting trial for crimes of violence to be denied bail.⁴⁶ While the ostensible reason for bail denial is sometimes fear of flight and occasionally the likelihood that the defendant will intimidate witnesses, the most common reason for bail denial is a finding that a

⁴³ The Supreme Court has also facilitated social hygienic practices by implicitly letting states exclude unreliable evidence on mental states. See, e.g., Ronald J. Allen, Clark v. Arizona: *Much (Confused) Ado About Nothing*, 4 OHIO ST. J. CRIM. L. 135 (2006).

⁴⁴ See sources cited *supra* note 1.

⁴⁵ The Statute of Westminster in 1275 eliminated the discretion of sheriffs (and thus, ultimately, of the King) with respect to which crimes would be bailable, conferring that decision on Parliament itself. Statute of Westminster I, 1275, 3 Edw. 1, c. 12 (Eng.). Bailable and non-bailable offenses were specifically enumerated. In the U.S., the Judiciary Act of 1789 provided that all noncapital offenses were bailable. Ch. 20, § 33, 1 Stat. 73, 91 (“[U]pon all arrests in criminal cases, bail shall be admitted, except where punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein . . .”).

⁴⁶ TRACEY KYCKELHAHN & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, at 2 (2008). We cite this trend as starting in 1970 with Congress’s passage of a pretrial detention statute as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 642 (1970) (codified in scattered titles and sections of the D.C. Code). This legislation made it much easier to deny bail on grounds of dangerousness. What began as a law for the District of Columbia was quickly extended nationwide.

defendant accused of a violent crime poses a significant danger to the community.⁴⁷

When these practices were first being codified, Laurence Tribe argued that the data available about the criminal acts of defendants who were given bail showed that the majority of them were law abiding. As he pointed out, “[l]ess than 9.2% of all defendants released between arrest and trial through the D.C. Bail Project during the 2 ½ years of its operation were charged with committing offenses”⁴⁸ What he fails to point out (leaving aside that the data from the D.C. study include only the crimes actually solved by the police and fails to tell us how many of that 9.2% committed multiple crimes) is that this rate of criminality of violent felons on bail indicates that such persons are approximately 12,000% more likely than an ordinary citizen to be charged with homicide. If that does not satisfy a criterion of “dangerousness,” it is difficult to know what would.⁴⁹

Nor are these crimes merely minor or trivial. As we have pointed out elsewhere, some 13% of *all* homicide arrests from 1990 to 2002 involved persons who were either on active bail or were fugitives from bail.⁵⁰ The fact that the 0.12% of the United States’s adult population who are on bail or fugitives from bail are implicated in one out of every eight homicides

⁴⁷ The Supreme Court often pretends that jail time served while on bail is not “punishment” but simply community protection; that distinction in this context seems strained at best. *United States v. Salerno*, 481 U.S. 739 (1987).

⁴⁸ Tribe, *supra* note 1, at 372 n.3. Similarly, David Rabinowitz claimed a few years later that “[s]tudies have revealed a low recidivism rate for individuals on bail.” David J. Rabinowitz, *Preventive Detention and United States v. Edwards: Burdening the Innocent*, 32 AM. U. L. REV. 191, 201 (1982). The most recent figure for recidivism rates among those on bail who are convicted of crimes committed while on bail can be estimated at about 15%. Of those who are on bail, 21% were arrested for a new offense, and we can assume that 68% of those arrested will be convicted based on the general conviction rate. See THOMAS H. COHEN & BRIAN A. REAVES, *FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002*, at 24 tbl.23 (2002); KYCKELHAHN & COHEN, *supra* note 46, at 2.

⁴⁹ In 2000, there were some 13,000 murders committed in the U.S. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2002*, at 186 tbl.287, available at <http://www.census.gov/prod/2003pubs/02statab/law.pdf> (presenting 2000 statistics). Thirteen percent of them resulted in the arrests of bailees or fugitives. See BRIAN REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *VIOLENT FELONS IN LARGE URBAN COUNTIES (1990–2002)*, 4 tbl.5 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/vfluc.pdf>. Approximately one in every 152 persons on bail for a violent crime is charged with a murder committed while on bail. That is, 0.6% of these bailees were charged with homicide. By contrast, the likelihood that a randomly selected adult citizen was charged with murder in 2000 is 0.004%. See U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2011*, at 205 tbl.323 (2011) (utilizing 2008 data), available at <http://www.census.gov/compendia/statab/2011/tables/11s0323.pdf>.

⁵⁰ REAVES, *supra* note 49, at 4 tbl.5. Reaves points out that the BJS data on crime in the seventy-five largest counties accounts for “about half of all reported violent crimes nationwide.” *Id.* at 1.

might suggest that those awaiting trial are, as a class, a nontrivial danger to the rest of us. Supposing that most of those arrested for homicide are guilty and that most homicides that take place would not have occurred if the actual perpetrator had been incapacitated, a policy of denying bail to all defendants accused of a violent crime or with a history of violent crimes, it follows that we could prevent the deaths of around 1,500 citizens every year.

It is important to remind ourselves further that these troubling figures describe the nefarious activities only of those whom judges found “nondangerous” and thus released on bail. Had there been, as Professor Tribe proposed, no provision for denying bail to the most obviously dangerous defendants, the figures on the risks of released defendants on bail would presumably have been even more stunning.

VI. SHOULD THE PRESENT SYSTEM BE SCRAPPED TO RETURN TO THE FIRST PRINCIPLES OF MODERN CRIMINAL LAW THEORISTS?

The standard response to the prolific use of various forms of preventive detention noted above is essentially to brush by the reality of the criminal law and argue that the criminal law deals with fault-based impositions of punishment and that deviations from a fault-based, retributive regime are unjustified.⁵¹ To us, this simply reiterates a romanticized or idealized vision of the criminal law specifically and social control more generally that is contradicted by the facts. One quite distinguished theorist, Paul Robinson, has noted this and has argued for scrapping the present law in favor of a theoretically purer vision that would largely eliminate all but retributive sentences from the criminal law. He would allow various forms of civil actions to compensate for the increased social danger that might result from the elimination of criminal preventive detention. His argument deserves reproduction in full:

[T]here is disutility in a criminal justice system that imposes punishment that is not seen as deserved. First, the imposition of criminal liability and punishment that is not seen as deserved has a broader effect than simply the injury and injustice to the offender at hand. Moral condemnation is an inexpensive yet powerful form of deterrent threat. It demands none of the costs associated with imprisonment or even supervised probation; yet, for many persons, it is a sanction to be very much avoided. This marvelously cost-efficient sanction is available, however, only if the system retains its moral credibility. If the system is seen to convict where no community condemnation is appropriate, the condemnation of criminal conviction is weakened.

An even greater compliance mechanism than the deterrent effect of shame and condemnation is suggested by recent empirical studies. The studies suggest that most

⁵¹ See, e.g., ALEXANDER & FERZAN, *supra* note 3; MOORE, *supra* note 6. See also Attorney General Mitchell’s bail plan, discussed *supra* note 1.

persons are motivated to obey the law, not because they fear being caught and punished (or shamed), but because they believe in the moral weight of the law. That is, most people obey the law, not because they fear the pain of criminal sanction, but because they want to do what is right. They are driven, in large part, by their perception of themselves as honest, law-abiding people. But the effectiveness of the law in gaining compliance in this way is again a function of the law's credibility for doing justice. If the law closely matches people's shared intuitive notions of justice, it grows in its power to act as a model for their conduct. If the law is seen as being unjust, its power as a moral force is diminished. A society that imposes criminal liability on persons that the community regards as not sufficiently blameworthy risks destroying this motive to adhere to the laws. It risks becoming a society in which the only motive not to commit criminal conduct is to avoid being caught and punished.

Aside from the added deterrent effect of the shame of conviction and the compliance derived from the moral credibility of criminal law, the perceived "justice" of criminal law is crucial to gaining the cooperation and acquiescence of those persons involved in the process (including offenders, witnesses, and jurors). Greatest cooperation will be elicited where the criminal liability rules and the community's views of justice generate identical results. Conflict between the two undercuts the moral credibility of the system and thereby engenders resistance and subversion.

If these arguments are correct, it would be better to limit the criminal law so that only those offenders clearly perceived as blameworthy are convicted, and to extend the civil commitment system beyond the commitment of the mentally ill, to include offenders who are excluded from criminal liability as blameless for any reason but who are predicted to commit serious offenses if released.⁵²

As we discuss in the conclusion, we think there should be prudential limits on preventive detention, but we are not convinced by the claim that the use of preventive detention will have deleterious effects on the citizenry's respect for or willingness to obey the law. Neither of the necessary assumptions that this argument rests upon have much support. As to moral condemnation, the question is not the effect of eliminating it from the law; the question is whether doing things in addition to it will undercut whatever effect it has. Assuming that there is such an effect from moral condemnation,⁵³ is it plausible to think that the moral force of

⁵² Robinson, *supra* note 36, at 707–08.

⁵³ There is a lot of talk from criminal law theorists about such matters, but we are unaware of any study that convincingly sorts out such effects from other consequences of the criminal process, and certainly none that establishes that this is a concern of the citizenry as compared to the theorists. We are most definitely not saying that moral condemnation has no effects; the question is what the law does in addition to the moral condemnation emanating from individuals' own moral views. In our opinion, this is an example of where the rhetoric of the literature runs far ahead of any serious empirical support. Tom R. Tyler's *Why People Obey the Law* (1990 rev. 2006) is often cited in favor of various propositions about the moral force of the law. Tyler's main finding was that the perception of the law as legitimate did affect compliance (although he did not sort out deterrence effects adequately), but that the primary determination of the perception of legitimacy was procedural not substantive justice. That does not say much about the issues under examination here.

condemning someone for assaulting others will be reduced because the person is sentenced to a longer jail term as a recidivist who is believed to be unable to control himself? Or alternatively, is it likely that people will have a different view of homicidal behavior because some convicted individuals are kept behind bars longer out of justified fear concerning how they will behave if released or because someone is sent to jail as a stalker before he commits an assault? It does not seem plausible to us, and there is no evidence of which we are aware that suggests such effects might occur. As to the second assumption, in the absence of evidence that a preventive detention component to the criminal law is likely to change significantly anyone's view of criminal behavior, there could not be any evidence that this nonexistent change is likely to affect people's behavior.

The entire argument is curious for another reason. It seems to confuse what is cause and what is effect. On the one hand it claims that the law fashions people's intuitions and on the other that law inconsistent with people's intuitions will lead the law into disrepute. Both cannot be true. To be sure, there could be subtle feedback relationships between intuitions and the law. But again, how likely is it that these will lead people to scrap their intuitions about whether it is morally wrong to hurt people, for example, simply because the criminal law took on a social hygienic task along with its punitive components?

Even more curious is the argument that all of this can be avoided by the simple expedient of changing the name; the moral force of the law will be undercut if those criminally convicted receive an extended term in jail because of their dangerousness or are convicted of a risk-creating crime, but incarcerating the same person for the same reason in a civil context will pose no such threat. Again, both cannot be true unless the citizenry is amazingly sensitive to and protective of a few nuances of criminal jurisprudence. Their loyalty to the criminal law would fall not because of an injustice imposed but because a person who deserved to be isolated from society was treated in one legal proceeding rather than another. Our guess is that this would elicit no more than a shrug from the average citizen.

And most curious of all, at least to us, is the implicit suggestion that the citizenry generally disagrees with the use of the criminal law preventively. Where does the impetus for statutory change come from if not from legislators responding to constituent demands? If there is any convincing evidence that the public generally thinks it is wrong to criminalize stalking or to sentence a recidivist to a longer term, we are unaware of it. Our observations are that there is a public outcry when, for example, a woman is assaulted by a thug who disregards a restraining order, and that the discontent with the law comes if anything from its failure to

intervene earlier.⁵⁴ It would indeed be a problem if the law were significantly out of touch with constituents' demands, but the problem, as the national election of 2010 seems to support and in any event a significant part of political science research definitely supports,⁵⁵ would be more that of the legislators than of the populace.

It also bears noting that, were these concerns about eviscerating the criminal law empirically accurate, crimes rates should have drifted upward over the last twenty years or so, or at least there should have been upward pressure. The law in 1993 was, from the retributivist's perspective, suboptimal to say the least, filled with preventive detention excrescences, and this trend has continued.⁵⁶ The result should have been an increasingly weak criminal law due to the cumulative effect of its moral basis being undercut by its inappropriate use for social hygienic purposes, yet the exact opposite seems to have occurred. Crime rates have not gone up since 1993 but instead have plummeted drastically. New York State, for example, in 1993 had a population of approximately 18,000,000 and suffered 2,420 murders, 5,008 rapes, and 85,802 assaults.⁵⁷ In 2009, with a population of approximately 19,500,000, the state had 836 murders, 2,801 rapes, and 42,170 assaults.⁵⁸ To put this in perspective, the rate per 100,000 inhabitants fell for murder from 13.3 to 4.0, for rape from 27.5 to 13.2, and for assault from 471.5 to 223.5.⁵⁹ Nationwide figures demonstrate the same phenomenon. According to the FBI's *Uniform Crime Statistics*, the rate of violent crime per 100,000 inhabitants fell from 747.1 in 1993 to 429.4 in 2009.⁶⁰ We are all too cognizant that there are lies, damned lies, and statistics, but these numbers are so dramatic as to survive any quibbling about methodology, representativeness, and the like. We also recognize that the causal variables resulting in crime are enormously complicated. Perhaps the misuse of the penal sanction contributes to crime rates, but the

⁵⁴ For an example of the thousands of outraged news accounts, see Ramon Antonio Vargas, *Murdered Woman in New Orleans Tried but Could not Escape Abusive Boyfriend*, TIMES-PICAYUNE (Sept. 28, 2010, 7:50 PM), http://www.nola.com/crime/index.ssf/2010/09/murdered_woman_in_new_orleans.html.

⁵⁵ The *locus classicus* and one of the inspirations for the empirical study of the determinants of the behavior of elected officials is David Mayhew's *Congress: The Electoral Connection* (1973).

⁵⁶ See Part III, *supra*, for discussions of the "three strikes" law phenomenon.

⁵⁷ FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 1993, at 74 tbl.5 (1993).

⁵⁸ Fed. Bureau of Investigation, U.S. Dep't of Justice, *Table 5—Crime in the United States, by State 2009* (Sept. 2010), http://www2.fbi.gov/ucr/cius2009/data/table_05.html.

⁵⁹ *Id.*

⁶⁰ Fed. Bureau of Investigation, U.S. Dep't of Justice, *Table 1—Crime in the United States 2009*, (Sept. 2010), http://www2.fbi.gov/ucr/cius2009/data/table_01.html.

overall effects are swamped by other variables. One of those variables, of course, might be the beneficial effects of preventive detention.⁶¹ Whatever the causal background, it is difficult to look at general patterns of crime in the United States and think that the country since 1993 has pursued a systematically perverse path.⁶²

VII. INDICES OF DANGER: HOW CAN PREVENTIVE DETENTION BE RECONCILED WITH A RIGOROUS STANDARD OF PROOF?

We are quite mindful of the fact that dangerous activities do not invariably lead to harm and that, accordingly, criminalizing such activities puts an innocent citizen at greater risk of being convicted than he would be if only past harmful acts could serve as a basis for trial and conviction. It is sometimes suggested that the uncertainties associated with predicting whether danger will ensue from potentially dangerous acts is flatly incompatible with the usual protections against false conviction ensured by the demand for proof beyond a reasonable doubt.

But the added risk with a dangerousness criterion of criminality is powerfully counterbalanced by an important social good; namely, the prevention of harmful acts. The principal trouble with limiting the criminal law to actual rather than prospective harm doing is that the law can then intervene only after an irreversible harm has been done. While we can ensure that the perpetrator pays for his crime in terms of years of incarceration, this is small and cold comfort for the victim. By contrast, the criminalizing of potentially harmful activity has the important payoff that it often prevents victimhood in the first place. If we did not criminalize threats, conspiracies, solicitations, incitements, and attempts, the police would have precious few tools for intervening prior to harm-doing.

This key difference between the two situations makes it clear that the utility calculation about the acceptable level of error for crime prevention is very different from the associated calculation of the costs of error in post-harm adjudications. Failure to intervene to prevent a likely harm is a much more costly mistake than failure to convict a defendant who has already

⁶¹ For evidence of the impact of preventive detention on crime rates, see Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163 (2004). As a precaution against reading too much into such empirical evidence, we should mention *Reconsidering Incarceration: New Directions for Reducing Crime* by the Vera Institute of Justice, for a sophisticated discussion of the limits of empirical research such as Levitt's. DON STEMEN, CENTER ON SENTENCING AND CORRECTIONS, *RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME* (2007), available at http://www.vera.org/download?file=407/veraincarc_vFW2.pdf.

⁶² Again, this is not to editorialize for any particular program. For example, we think the War on Drugs is pretty perverse—plainly perverse, actually.

done his mischief. In the latter case, the harm-producing crime is a sunk cost that cannot be undone merely by convicting its perpetrator. In the former case, the harm-doing itself can be prevented. Because the profile of the costs and benefits of action in the two cases is starkly different, we should be willing to impose a greater risk on the defendant in the case of a prospective harm than in the case of a harm that has already been done.

VIII. CONCLUSION

One might try quickly to summarize the core thesis here by recalling the familiar proverb that “an ounce of prevention is worth a pound of cure.” That quotation, usually but falsely attributed to Benjamin Franklin and generally associated these days with medicine and health, actually comes from the *De Legibus* of Henry de Bracton, England’s most famous thirteenth-century jurist.⁶³ Interestingly, the law reflects this sentiment, although the legal commentary does not, and it has been one of our goals simply to point that out. Another goal is to somewhat rehabilitate the sentiment in the view of the commentators so that it can at least be a polite topic of conversation. Constructing and maintaining social order is a daunting task that must take a vast array of risks into account, including both the risks posed by predators and the risks posed by an overweening government. How best to do so is inhibited, we fear, by the moralistic and rhetorical tone of much of the legal commentary. We are not fans of an unconstrained risk-based approach to the criminal law; in fact, we think it would be substantively abhorrent and procedurally impossible to implement.⁶⁴ At the same time, it is abhorrent not to act to stop harm from occurring where the risk of that harm reaches a certain probability, as the law has recognized since time immemorial. The difficult task and the conversation that should come next is how to trade off these variables—how the risk of harm to people or property, on the one hand, and the risk of harm from a potentially abusive government on the other, relate to each other.

⁶³ See 4 ENCYCLOPEDIA BRITANNICA 369 (11th ed. 1910).

⁶⁴ Allen, *supra* note 6.