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Preventive Justice and the Presumption of Innocence

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One of the state's most critical roles is to protect its citizens from harm. Threats of harm may be natural or human. Human threats may exist within or without. Any government must take seriously the need to protect its citizenry.

When it comes to preventing potential terrorists, sex offenders, and even run of the mill criminals from harming us, the state has an interest in intervening as early as possible. However, in its attempts at early prevention, the state appears to be caught between the demands of criminal law's substance and criminal law's procedure. If the state turns to the criminal law, the reaction of criminal law theorists and practitioners is "Get that stuff out of here. It doesn't belong."[1] Many offenses aimed at early prevention of criminal conduct are normatively problematic. Vagrancy offenses, which would give police wide-ranging discretion, are unconstitutional.[2] Possession offenses would and do allow intervention at the earliest stages of preparation, but they also result in significant intrusions into the lives of law-abiding citizens, even when such citizens intend no crimes or when the citizens will change their minds.[3] And, theorists (rightly) cry foul when the legislature creates double and triple inchoate offenses by criminalizing acts, such as enticement, that are not themselves substantial enough for an attempt. If the rationale for courts' denials that preparatory acts constitute attempts is that a defendant should not be within the reach of the criminal law, then this rationale is inappropriately circumvented when legislators create preparatory offenses out of the very same acts. In each of these cases, the criminal law is being extended to provide greater prevention. But when the criminal law punishes merely standing around, merely possessing, and the earliest of preparatory acts, we have reason to believe that the criminal law is being misused.

The response to the argument that these sorts of regulations do not belong within the substantive criminal law seems simple: Go civil. Don't blame; detain. But alas, here comes the second sort of argument – the argument from the procedural side of the criminal law. Once the state has shrugged off the substance of the criminal law, it has also potentially freed itself from the wide array of procedural protections otherwise due to a criminal defendant.[4] So, when Great Britain sought to combat terrorism with control orders, orders that essentially provided for home detention of suspected

[1] I am among those theorists. See Ferzan (2011b).
[2] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).
[3] Ashworth (2011); Dubber (2001).
[4] Ashworth & Zedner (2010, p. 87):

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

terrorists,[5] it was met with robust critical scrutiny in the courts as the government's actions were viewed as an attempt to circumvent civil liberties.[6]

Andrew Ashworth levies the strongest charge against regimes like control orders. He claims that these procedures evade the presumption of innocence ("PoI") and thereby threaten it.[7] He asks, "What could be simpler, then, than for a government to circumvent the presumption by promoting legislation that provides for the imposition of civil orders on citizens?"[8]

This is quite a charge. The PoI is recognized across countries.[9] It is protected by the European Convention on Human Rights.[10] It is, according to the U.S. Supreme Court, an "undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of criminal law."[11]

What, then, is a well meaning government supposed to do when caught between the Scylla of substance and the Charybdis of procedure? The path of least resistance is certainly to contort criminal law's substance; it is a rather unregulated mess anyway.[12] However, rather than defile and distort the criminal law, the better option is to chart a new path for preventive justice.[13] That path needs substantive content that specifies the grounds on which someone may be detained or otherwise prevented from accomplishing an illicit goal. That is, we need to know when it is permissible for the state to prevent. But that path also needs procedure.[14] And, most importantly, it needs to confront Ashworth's allegation that the entire enterprise runs afoul of the PoI.[15] It is that procedural challenge that this paper takes up.

The problem is that discerning how the PoI bears on preventive justice is no easy task. Indeed, it seems that theorists rarely mean the same thing by the "PoI" when they employ it. My goal in this paper is to break apart the myriad invocations of the presumption and then to argue that we can extrapolate two themes that have bearing on preventive actions by the state. One is a potential requirement of procedural symmetry. That is, we might ask whether the civil regime should have the same procedural protections as the criminal law. The second implicit claim to be confronted is one of

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[5] Control orders were replaced with "terrorism prevention and investigation measures" (TPIMs). In substance, these measures remain largely the same. *See* Ryder (2011).
[6] See, e.g., SSHD v. JJ (and others), [2007] 3 W.L.R. 642; SSHD v. AF, [2009] 3 W.L.R. 74 (2009).
[7] Ashworth (2006, p. 63).
[8] *Id.* (p. 90).
[9] See Bassiouni (1993, p. 266 n. 142 & 143)(finding five international conventions and sixty seven constitutions with the PoI); Stuckenberg (this issue) ("there seems to be no legal order left which openly rejects the maxim").
[10] European Convention on Human Rights (ECHR) § 6(2).
[11] Coffin v. US, 156 U.S. 432 (1895).
[12] Stuntz (2001).
[13] I borrow the term "preventive justice" from Ashworth and Zedner. See http://www.law.ox.ac.uk/projects/PreventiveJustice.
[14] Ashworth and Zedner (forthcoming 2012) ("The development of appropriate restraining principles and of procedural protections in respect of coercive civil preventive measures is, therefore, no less pressing than in respect of the criminal law itself.").
[15] Notably, Ashworth (and Zedner) agree that the criminal law ought not to be distorted in the name of procedure. See *id.*

the criminal law's substantive priority. The idea is that the criminal law has first (and perhaps exclusive) jurisdiction over certain kinds of questions.

This paper does three things. First, I briefly sketch a regime of preventive interference that I have previously defended.[16] Given that the application of both the procedural symmetry and substantive priority claims are going to apply differently for different regimes, this section aims to provide context for the PoI inquiry. Second, I break apart the myriad invocations of the PoI, ultimately extrapolating themes of both procedural symmetry and substantive priority. Simply put, some claims about the PoI bottom out in claims about how the state ought to treat us in terms of procedure while other claims about the PoI bottom out in claims about the primacy of the criminal trial. Third, I discuss how the claims of procedural symmetry and substantive priority apply to the regime that I have defended, concluding that the criminal trial is not entitled to substantive priority and tentatively endorsing a beyond a reasonable doubt (BRD) standard for the civil regime.

I. Defending Detention

In *Beyond Crime and Commitment*, I argue that some acts of preventive interference by the state can be justified in the same way that we justify self-defense against Culpable Aggressors.[17] The self-defense literature distinguishes between permissible killing that is liability-based and permissible killing that is not.[18] Take two cases. In the first case, a Culpable Aggressor points a gun at the defender, and says, "I am going to kill you." In the second case, the defender has fallen to the bottom of a well and the defender's mortal enemy then pushes a fat man (the "Innocent Threat") down the well to kill him.[19] If the Innocent Threat lands on him, the defender will die and the Innocent Threat will live. The defender has a ray gun with which he can disintegrate the Innocent Threat. Theorists struggle with whether self-defense is permissible in the Innocent Threat case, and many theorists believe that the culpability of the Culpable Aggressor is significant in distinguishing whether and how much defensive force may be used against him as opposed to the Innocent Threat.[20]

We can distinguish between the Culpable Aggressor and the Innocent Threat on the basis of liability. "Liability" in this context is best viewed as a limited forfeiture of rights.[21] In the same way that we can change our rights and duties through contracts, promises, and permissions, liability to defense is about acting in a way that relinquishes one's right and complaint against others acting to repel one's attack.[22]

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[16] Ferzan (2011a).
[17] *Id.*; see also Alexander and Ferzan (2012); Ferzan (2011b).
[18] See Frowe (2010); Quong (2009).
[19] See Nozick (1974, pp. 34-35)(offering the original formulation of this problem). For ease of exposition, I have omitted Innocent Aggressors, whom I would group with Innocent Threats.
[20] Frowe (2010, pp. 267-68); McMahan (2009, p. 159).
[21] Ferzan (2012).
[22] *Id.*

By culpably threatening the defender, the Culpable Aggressor relinquishes his moral complaint against the defender taking the aggressor at his word.[23] The Culpable Aggressor cannot object that his bullet might have missed, or he might have changed his mind, or the police might have stopped him.[24] Rather, once the Culpable Aggressor chooses to present himself as a threat, he is not wronged by the defender stopping the threat from occurring. In other words, the Culpable Aggressor acts in a way that permits the defender to act on the defender's prediction. No right of the Culpable Aggressor's stands in the defender's way of using responsive defensive force.

Although liability explains why one may kill the Culpable Aggressor, it cannot justify killing the Innocent Threat. The Innocent Threat is a mere projectile who did not even will the movement of his body. However, the fact that the Innocent Threat is not liable to be killed does not entail that it is impermissible to kill him. Note, however, that if there is a reason why you are allowed to kill the Innocent Threat, it is not because he has done anything to forfeit his right to life, but rather, because it is unfair to ask you to privilege his life compared to yours.[25] Thus, the structure of why it is we may permissibly kill an Innocent Threat can be easily distinguished from liability, where the aggressor forfeits his right by his own conduct. The self-defense literature thus recognizes a distinction between those instances in which the aggressor as a responsible moral agent behaves in such a way that grounds a preventive response and those instances in which the aggressor's own conduct does not justify the response but the defender cannot fairly be asked to assume the burden.

This structure has a natural application to preventive interference by the state. The aggressor is a responsible agent. He performs an act in furtherance of a culpable intention. And, based on that act, it becomes permissible to stop him. These cases can be contrasted to "pure prevention," where along with Innocent Threats, the question is not what the aggressor has done, but whether it is fair to allow the defender to respond. Liability to defensive force provides a crucial framework that allows the state to intervene against responsible agents based on the exercise of their agency and not mere predictions that they will one day harm us.

Let me be clear about the nature of this claim. I am not stating that the government is acting in self-defense. Rather, I am arguing that the very principles by which a Culpable Aggressor renders himself liable to defensive force and therefore is not wronged by preventive interferences are equally applicable when the state aims to stop the aggressor from harming others. It is certainly the case that because the state has significant resources (and perhaps the luxury of time) that the state will not operate in the same "stop 'em in their tracks"[26] way that an individual must in a case of self-defense. And, thus, although the differences between citizen and state may lead to different implications for the types of preventive interferences that are permissible in the context, the point – *that the aggressor has forfeited his moral complaint against such actions* – remains. Therefore, it is possible to have an autonomy-respecting preventive regime.

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[23] *Id.*
[24] See *id*.
[25] Quong (2009).
[26] I owe this phrase and objection to Sandra Marshall.

With respect to state preventive interference, how would the liability conditions be formulated? First, like self-defense, the actor should be culpable—meaning that he either has an intention to cause harm or he is willing to unjustifiably risk it (and lacks a justification or excuse). Indeed, at this point, it appears that the state has good reason to intervene. The actor has decided to do something he ought not to do. For legality purposes, an act should also be required.[27] Allowing the state unfettered police power to intervene in lives based on mere intentions could certainly lead to abuse.

Once the actor has performed an action in furtherance of his culpable mental state, what may the state do? We know what self-defense looks like—typically some sort of physical injury to an attacker that is aimed at stopping the attack. But once we think of prevention beyond the prospect of preventively detaining people, what sorts of measures are we talking about?

There are a range of other measures that may also substantially interfere with an individual's liberty short of incapacitation. Great Britain used a control order, a construct of the Prevention of Terrorism Act of 2005.[28] Admittedly, these control orders were subject to significant scholarly criticisms, and this example is not intended as a proposal the United States should adopt whole cloth.[29] Indeed, the British government announced in 2011 that it planned to abolish control orders and replace them with "terrorism prevention and investigation measures."[30] However, there is little difference between the two and control orders remain useful to illustrate how to begin to conceptualize preventive action short of punishment.

The non-derogating control order allows the Home Secretary to impose numerous restrictions on those whom he has "reasonable grounds for suspecting" is involved in terrorism-related activity.[31] The PTA 2005 provides for just about every preventive intervention one can imagine. Specifically, what the person possesses, what activities he engages in, where he works, with whom he associates in and outside of his home, where he can go, when he can be outside his home, whether he maintains his passport, when and how his property may be searched and retained, whether he is photographed, and whether he is electronically monitored are all possibilities under this provision.[32]

Unlike control orders, it is clear that we would want to designate some fact finder, to determine by a constitutionally set standard that an actor harbors a culpable mental state, has committed an action in furtherance of that mental state, and plans to complete the offense. Then, an agency would need to be tasked with supervising the actor in ways designed to prevent the commission of that particular crime. This supervision would be reconsidered at specific times, and supervision would cease once a showing was made that the defendant no longer harbors an illicit mental state.[33]

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[27] See generally Dressler (2009, § 5.03); Slobogin (2006, p. 115).
[28] Prevention of Terrorism Act of 2005 [hereinafter "PTA"].
[29] See Tadros (2007a); Zedner (2007).
[30] Ryder (2011).
[31] PTA §2.
[32] PTA §1(4).
[33] See also Ohana (2006, p. 26).

Clearly, this brief summary cannot fully defend the standards by which different interferences could be justified. The question here, however, is whether the entire idea is a nonstarter because it threatens the PoI. Even if substantively defensible, the regime must confront Ashworth's challenge.

II. The Letter and Spirit of the PoI

Does such a regime threaten the PoI? That depends entirely on what the PoI requires. I shall assume that this regime may properly be considered civil, as declaring the regime to be criminal would simply circumvent the entire analysis of what a civil regime requires. I defend this treatment elsewhere.[34]

To U.S. readers the entire concept of the PoI applying to preventive detention strikes a discordant chord because within the United States, the presumption is close to hollow rhetoric. The Court's interpretation of this presumption is extraordinary narrow. Kentucky v. Wharton held that failure to give an instruction on the PoI does not in and of itself violate the Constitution.[35] US v. Salerno upheld the constitutionality of the Bail Reform Act, allowing a court to prejudge the defendant's case and to use the fact of indictment as evidence that the defendant will commit another offense.[36] Even Estelle v. Williams, which almost gave teeth to the presumption by holding that the state cannot force the defendant to be tried in prison garb, failed to give the presumption much bite by holding that the failure to object waived the error.[37] Generally, the PoI is thought just to be the reasonable doubt rule.[38]

In contrast, in adjudicating alleged violations of the PoI as codified by the European Convention on Human Rights, the European Court of Human Rights has given the PoI sharp teeth. Two cases should suffice to draw the stark contrast in jurisprudential approach. In Allenet de Ribemont v. France, the court held that the PoI was infringed when prior to trial, high ranking French police officers commented to the press that the defendant was an accomplice to murder.[39] In Geerings v. Netherlands, a judge determined by a balance of probabilities that the defendant did commit thefts and ordered forfeiture of his assets. However, because the defendant had been acquitted of these charges, the European Court of Human Rights held that this violated the PoI.[40]

My goal is not to analyze the PoI as understood by United States Supreme Court or the European Court of Human Rights. Rather, because we aim for preventive *justice*, we should take a look at the theoretical arguments regarding the PoI's meaning. That is, we cannot answer Ashworth's challenge merely by stating that his arrow misses the target as we might narrowly interpret that target.

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[34] Ferzan (draft).
[35] 441 U.S. 786 (1979).
[36] 481 U.S. 739 (1987).
[37] 425 US 501 (1976).
[38] Laudan (2006, p. 40); Stumer (2010, p. xxxviii).
[39] (1995) 20 EHRR 557, [1995] ECHR 15175/89.
[40] [2007] ECHR 30810/03.

Our goal should be to first start by trying to understand what work the presumption does for theorists who invoke it.

Theoretically within and without the United States, there is broad disagreement about the meaning of the PoI.[41] Theorists have invoked the PoI with respect to trial, preventive detention, pleas, prosecutorial ethics, self-incrimination, preventive detention, and even criminalization. It is seen as a narrow, concrete rule to some authors -- that is, the PoI *just is* the BRD rule.[42] In contrast, others argue that "[t]he presumption of innocence should be accorded a broad meaning as a symbol of the proper attitude of the state towards the individual."[43] Liz Campbell endorses both positions; to her, the PoI is both a procedural rule and a more general embodiment of "civic trust, respect for the person, and protection from the State."[44]

Needless to say, theorists seem to be talking past one another, and quite frequently, the presumption appears to be little more than rhetorical window dressing while other background assumptions are doing the real heavy lifting. My goal in this paper is not to argue for one understanding of the presumption. Instead, I aim to extrapolate themes that have bearing on preventive detention. For our purposes, I will argue that we can extract both the procedural symmetry argument and the substantive priority claim from the various usages of the presumption. No doubt this extrapolation may run roughshod over some nuances, but ultimately, I think these nuances are immaterial for our goal, which is not to settle on a construction of the presumption. Moreover, I certainly leave open the possibility that a theorist could account for all these various invocations within one theory of political morality.[45]

Because there are so many moving pieces, both in terms of the various stages in which the presumption might apply (pretrial detention v. trial, etc.), and as to what it might mean, it is worth putting various constructions on the table, and then seeing how these constructions pertain to the various stages.

A. Constructions of the PoI

1. Material or Probatory?

We need to first distinguish between probatory (court-decided, legal) innocence and material (factual, actual) innocence (or guilt).[46] A probatory PoI means that the jury (or other state actor) starts with the presumption that it simply has no evidence of the defendant's guilt. A material PoI would

[41] Laudan (2006, p. 91).
[42] For a cautionary note against an expansive reading of the presumption, see Schwikkard (1998)(arguing (1) by conjoining other rights with the presumption, these rights become vulnerable when the presumption itself is inapplicable and (2) different policy justifications lead to different conclusions about when rights may be infringed and the normative force of the presumption will be undermined if it is allowed to be overridden frequently).
[43] Kitai-Sangero (2009, p. 908).
[44] Campbell (this issue).
[45] See, e.g., Duff (forthcoming a) (offering an account that reconciles the PoI at trial, pretrial detention, and police investigative practices).
[46] Laudan (2006, p. 12).

mean that the jury is asked to presume that the defendant is not in fact guilty. In other words, to believe that an individual is materially innocent is to believe that *he did not in fact commit the offense* whereas to believe an individual is probatory innocent is to believe that one *has no proof that the defendant committed the offense*.[47]

It bears noting that we may not need to choose amongst these conception at the outset, as both conceptions of innocence may have a role in some cases. Consider questions about prosecutorial ethics. If we think that actual innocence has bearing on what a prosecutor should do post-conviction, then whether the defendant really is innocent matters.[48] However, when deciding whether to go to trial, we might ask whether a prosecutor should be guided by his personal beliefs about the facts, what he thinks he can prove, or both.[49]

2. Real or Rhetorical?

Another fundamental question concerning the PoI is whether it has any real work to do. If it is just a corollary of the reasonable doubt rule, which itself is compelled by due process, then does the PoI do anything besides add rhetorical flourish to other more central ideas?[50] That is, there are background arguments about political morality that must be made to give the presumption content, including arguments about whether to give the presumption a material or probatory innocence construction. These arguments are not compelled by the nature of a presumption or by the nature of innocence. Rather, they are compelled by other concepts within our political morality. Thus, one should always question what is doing the real work.[51]

Notably, this question is all the more complex because the European Convention on Human Rights codifies the presumption, but the European Court on Human Rights allows the presumption to be infringed.[52] This means that the presumption may ultimately be unpacked into more abstract principles that are doing the real moral work, but in the European context, pointing to the presumption is pointing to something more than rhetorical, simply because it is codified as such.

Relatedly, if we take the PoI in some instances to point to something aspirational, we will want to ask how we can get from an abstract ideal to a concretized rule. We might readily grasp why our political morality compels proof beyond a reasonable doubt. But when the presumption is taken to compel other acts, we must ask how the theoretical idea relates to the doctrine being justified. We cannot simply rest on our laurels by citing to the presumption. A further account is needed. Thus, it is

[47] Although the "no evidence" presumption is not a presumption of innocence, Rinat Kitai-Sangero argues in favor of the PoI because of the psychological effect it will have; she claims that innocence prevents alienation of the accused from the state and it also provides a stronger psychological barrier to improper investigative methods and unnecessary pretrial detention. Kitai (2002, pp. 275, 278, 280). Note, no proof is not equivalent to even odds. See Friedman (2000).
[48] Laufer (1995).
[49] Cf. Lippke (this issue).
[50] Cf. Stuckenberg (this issue).
[51] *Id.*
[52] Salabiaku v. France, (1991) 13 E.H.R.R. 379.

essential in evaluating how theorists invoke the presumption to understand exactly what it is that they are claiming and why.

B. Possible Applications of the PoI

1. The PoI at Trial

The clearest application of the PoI is to the trial. In this context, the thinnest interpretation of the PoI is that it just is the corollary of the reasonable doubt rule.[53] But even at this point, our faith in the clarity of the presumption can unravel. What exactly does it mean to tell the jury they need to presume the defendant is innocent? Is this material or probatory innocence? Laudan raises a range of concerns with viewing the PoI as one of material innocence: How can jurors simply adopt beliefs contrary to facts (such as that the defendant was arrested and charged, and thus likely isn't innocent) and how do individual jurors hold the belief that the defendant is materially innocent until the very moment when the jury collectively reaches the conclusion that the beyond a reasonable doubt standard is satisfied?[54] Laudan argues instead for probatory innocence: "What is important is that the juror concedes that she has no proof now about guilt and that, therefore, she lacks any clue about which side will eventually prevail. This is a patently true description of her situation and any juror should accede to its truth."[55]

The most natural extension of the PoI is to exculpatory defenses.[56] Many American theorists question the singular focus on offense elements and suggest that defenses should be disproved beyond a reasonable doubt.[57] Indeed, the analysis of the *Winship/Mullaney/Patterson* trilogy has felled many a tree. And across the Atlantic, the PoI is explicitly protected by the European Convention on Human Rights. The UK's Human Rights Act 1988 reinforces its application domestically. The European Court of Human Rights has required that member states confine presumptions "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defense."[58] The application of this amorphous test led the *Sheldrake* court to employ a balancing test for analyzing alleged violations of the PoI, whereby reversal of the burden of persuasion is acceptable when it is proportional to a legitimate objective.[59] This test has provoked significant criticism.[60]

Clearly, placing a "beyond a reasonable doubt" burden on the state speaks to underlying theoretical commitments.[61] Most importantly, the presumption expresses a concern that an individual should not be branded a criminal unless we are as close to certain as is possible. False conviction is an

[53] Laudan (2006, p. 40); Stumer (2010, xxxviii).
[54] Laudan (2006, pp. 101-103).
[55] *Id.* p. 106.
[56] Cf. Laudan (2006, p. 113) with Jeffries and Stephan (1979).
[57] Dripps (1987); Sundby (1989).
[58] Salabiaku v. France, (1991) 13 E.H.R.R. 379.
[59] Stumer (2010, p. 26).
[60] Ashworth (2006); Stumer (2010); Tadros (2007b).
[61] Campbell (this issue); Ashworth (2006).

egregious wrong. Second, we might also think that the presumption speaks to the significant differences in resources between the state and the criminal defendant.

It is in this application that the presumption is at its most concrete, but perhaps also at its least useful. Certainly, our political morality, through the Due Process Clause, ought to require not only that the state have the burden but also that it be significant. And, the jury ought to be reminded that they do not have any proof of guilt until that guilt is presented. These things are required, but it is not clear whether the invocation of the "PoI" is doing any work.[62] That is, we might conclude that (1) in this context, innocence is probatory, not material and (2) that the invocation is rhetorical, rather than real (at least in the American context), as the real bite comes from the Due Process Clause or other views about political morality.

Under this construction, how does the PoI apply to preventive justice? The take away of this application is that we must vigilantly guard against the state's misuse of its power, either intentionally or by mistake, by placing a significant onus on the state before it infringes a person's liberty. Hence, the PoI is an ideal that compels certain procedures and might mandate that the same procedures apply to preventive regimes as to punitive ones.

2. *The PoI and Other Criminal Processes*

Some theorists seek to deploy the PoI in other criminal proceedings and dispositions, including pleas, deferred prosecutions, and pretrial detention.[63] Consider pretrial detention. Shima Baradaran argues that the PoI should preclude certain factors, including the indicted offense and future dangerousness, in determining whether to release a defendant on bail.[64] These factors, Baradaran argues, conflict with the view that the defendant ought to be presumed innocent until conviction.[65]

Notice that the application of the presumption in the context of pretrial detention stands is nothing like the previous invocation. It is first and foremost a claim about substantive priority, and indeed substantive exclusivity – *only at a criminal trial may the evidence be evaluated so as to make a determination about guilt*. It is consistent with either a view that the defendant ought to be treated as materially innocent, or probatory innocent, or both. More importantly, this view of the presumption means that it is essential to the correct treatment of the case, as opposed to being superfluous to due process. Indeed, the PoI is needed to provide content to due process—namely, that it is not a matter of proving some fact by some specific burden, but that only the trial can adjudicate these facts. It is, as Stuckenburg calls it, a view of the presumption as a "flank defense" that protects the primacy of the criminal process.[66] To put the point another way, having a judge decide pretrial detention factors beyond a reasonable doubt would not cut it. The criminal trial is the only appropriate venue for this determination.

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[62] Cf. Stuckenberg (this issue).
[63] Baradaran (2011); Husak (this issue).
[64] Baradaran (2011).
[65] See also Duff (forthcoming a).
[66] Stuckenberg (this issue)(presumption protects against anticipating the outcome of the criminal trial, circumventing the outcome, and undermining the outcome).

This claim--that only a criminal trial may judge guilt--has implications when the state aims to stop an actor from committing an offense. It leads to the question of whether a preventive regime can stand alongside the criminal law. We might worry that no procedural protections can remedy a claim of substantive priority.

3. *The PoI and Criminal Investigations*

The presumption is also thought to animate or closely relate to other procedural rights, including those related to self-incrimination and search and seizure.[67] Of course, as one seeks to extend the presumption beyond trial, the question of what the presumption means becomes even more difficult. If police are to believe the defendant innocent, how do they justify searching him?[68] And if the standard for overcoming the presumption is met for the search, why is the defendant entitled to the presumption anew when it comes to bail or even trial?[69] What about the relationship between citizen and state entitles the defendant to de novo review of the very same issue at every stage of criminal inquiry?

What would it mean for the PoI to apply at these points? As noted above, it can't mean that the police must treat the defendant as if he is actually innocent, because then they could not justify their conduct.[70] Rather, it seems that the presumption is again an abstract moral ideal that animates more concrete rights – such as the right to remain silent.[71] Notably, if the presumption is applicable here, it reveals that not only do we not have one addressee, the jury, but we do not even have one standard. After all, no one thinks that the police need proof beyond a reasonable doubt before they conduct a search. And, that means that there is something of a sliding scale that must balance the state's need to investigate crime against the individual's liberty. It would mean that the presumption does not entail proof beyond a reasonable doubt.

For our purposes, we should note that the presumption, as it would apply here, again points to procedural symmetry, but not to the criminal law's substantive priority. There is nothing about the claims of *how* the state ought to act in these contexts that has any clear implications for *when* the criminal law ought to be used.

4. *The Presumption's Other Duties*

[67] Laufer (1995, pp. 332-334); Stumer (2010, p. xxxix).
[68] See Kitai (2002, p. 269) (discussing how some scholars claim that the presumption raises a logical contraction because if "the innocence of the person is assumed…it is impossible to explain logically why an investigation is being conducted and charges filed without reaching an absurd conclusion that all accused persons are prosecuted by law enforcement agencies without basis").
[69] Laudan (2006, pp. 93-94).
[70] See Stuckenberg (this issue).
[71] Ashworth (2008).

And still the PoI's job is not done. Theorists argue that it constrains preventive detention;[72] limits state stigmatization;[73] and even places limits on the very content of the criminal law.[74] Consider the recent European Court on Human Rights decisions, maintaining that the presumption is implicated when a state actor articulates of an opinion on the defendant's guilt before trial or a court expresses doubts about the defendant's innocence after acquittal. In both of these situations, the state is stigmatizing the defendant without proceeding through the correct mechanism.[75] If these actions engage the presumption, then it is because the European Court on Human Rights maintains that there are only some institutions that may properly declare guilt. It therefore begins to look like a flank defense, protecting the integrity of the criminal trial by holding that the adjudication of criminal guilt is the only mechanism by which it becomes permissible for the state to "speak" about the defendant's guilt. Then, the presumption has bite not only as substantive priority, but also as substantive exclusivity.

C. Summary

There is, of course, much to be said for being able to wrap one's preferred conception within the blanket of the PoI. The rhetorical force of one's argument is more persuasive when what the state threatens to do is pull at the golden thread.[76] Moreover, some confusion is unavoidable because the presumption is codified in the European context, but it is not in the United States.

Nevertheless, as I hope is clear from the discussion above, the claims about the PoI can be (somewhat) neatly sorted into claims that speak to procedure and claims that speak to the priority of the criminal law. The irony is that with respect to claims about procedure, the presumption is both at its most concrete and at its most unnecessary. The questions of how the state should treat its citizens and the burdens that should be imposed upon the state follow quite directly from an account of political morality. (It is not my intention to offer such an account here, but rather to simply point out that this is from whence the presumption gains its content in these cases.) In contrast, the PoI seems to have its most significant bite when it defends the territory of the criminal law by arguing that the criminal law has exclusive jurisdiction, or substantial priority, over other sorts of determinations. In these cases, the presumption holds that a defendant cannot incur negative consequences from accused wrongdoing absent a finding of criminal guilt.

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[72] Kitai-Sangero (2009).
[73] Campbell (this issue).
[74] Tadros and Tierney (2004). Although I have tried to remain agnostic about the use of the PoI, this usage strikes me as too broad. See Ashworth (2006, pp. 77, 78) (limits on construction of criminal offenses come from a different fundamental principle); Duff (forthcoming b) (arguing for a formal reading of the PoI and a distinct principle for criminalization); Roberts (2005, p. 154)("On my account, substance and procedure are independent, incommensurable dimensions of penal law that cannot be reduced to interchangeable tokens and traded like currency."). Moreover, a properly tempered usage would appeal to the political morality of which the PoI is a part. For an excellent example, see Tomlin (2012).
[75] Campbell (this issue).
[76] Woolmington v. DPP, [1935] AC 462, 481.

III. The PoI and Preventive Justice: Procedural Symmetry, Substantive Priority, Both, or Neither?

Thus far, I have aimed to sort the PoI claims into two themes that could have bearing on preventive regimes. The first question is whether the criminal law has substantive priority over preventive regimes. The second question is whether procedural symmetry is required. I will argue that criminal law does not "occupy the field" in such a way as to preclude preventive justice. I will then address procedural symmetry. Because any procedural symmetry claim will depend upon the nuances of a particular regime (detaining terrorists is different in kind from detaining the dangerous and mentally ill), I will discuss procedural symmetry with the regime I have defended in mind. Ultimately, I will tentatively endorse a beyond a reasonable doubt standard.

A. The Substantive Priority of the Criminal Law

As we have seen, the PoI sometimes seems to protect the territory of the criminal law. If the PoI requires that the state treat citizens with a degree of trust *unless and until* they are found guilty of a crime, then does a preventive regime improperly funnel potential offenders out of the criminal justice system? I think we should pay careful attention to Justice Stevens' worry in *Allen* that "permitting a State to create a shadow criminal law without the fundamental protection of the Fifth Amendment conflicts with the respect for liberty and individual dignity that has long characterized, and that continues to characterize, our free society."[77] We aren't dealing with the Fifth Amendment here, but the concern about a shadow criminal justice system remains.

What does a claim of substantive priority consist in? Consider, for example, the way the substantive priority point might work with pretrial detention. The concern with pretrial detention is a prejudging of the defendant's guilt. If the state may detain an individual *based partially upon the likelihood that he committed the crime for which he is indicted* and partly upon the potential to commit other offenses, then we may be rightly concerned that there is some sort of conclusive finding, itself sufficient to justify detention, that occurs prior to the criminal trial to which the defendant is entitled. A defendant might rightly complain that such detention violates the substantive claim of the PoI. The substantive priority point may be put most forcefully as "Treat me as materially innocent, unless and until you can convict me."

The question for a preventive regime is, if the state seeks to intercede prior to the commission of a criminal offense in a way that prevents that offense from occurring does it somehow prejudge the guilt of the offender? Does it essentially *predict criminality* thus leading to two potential criticisms: (1) that the defendant is not being given the ability to choose rightly and (2) the defendant is being denied the mechanism by which he can establish his innocence – the trial itself. I am not going to attend to the first objection because it is a substantive objection that should be raised in the context of a particular regime. That is, the worry expressed by the first objection is that by predicting that someone will not

[77] Allen v. Illinois, 478 U.S. 364, 384 (1986) (Stevens, J. dissenting).

choose rightly and acting based on that prediction, the state is failing to trust the potential offender in the way that it should.[78] I won't provide a substantive defense of my regime here.[79]

As for the second question, when is the potential offender entitled to a trial? That is, what is the scope of the substantive priority claim? Stuckenberg suggests that the critical inquiry in determining when a measure implicates the presumption is when it is intended to be punitive.[80] He does not rule out pretrial detention or preventive detention so long as they are not penal in character, the innocent could equally be subject to them, and compensation is available upon acquittal.[81] From the holdings of the European Court on Human Rights, Campbell extracts the general principle that "the presumption of innocence is engaged where an agent of the State expresses a view on a person's culpability instead of determining and attributing criminal guilt in the traditional way, but only where this declaration encourages the public to believe him guilt, and where there is a prejudgment of the assessment of the facts by any competent judicial authority."[82] These views seem to indicate that so long as the mechanism for preventive detention does not judge "criminality" and communicate such, the criminal law has no jurisdiction over the matter. This would mean that preventive actions, so long as they are not intended as criminal nor intended to communicate criminality, do not substantively engage the presumption.[83]

Although this might be one way out, I think we should interrogate the substantive priority claim somewhat more directly, as I think it is somewhat dubious to think that the criminal law actually should maintain exclusive jurisdiction over adjudications of guilt. That is, criminal law has to share the blame game with other fora. To begin with, in practice, there are myriad state behaviors that preempt use of the criminal process that we find wholly unobjectionable. Substantive priority would mean that criminal enforcement agencies should not defer to available civil remedies. Yet, it seems counterintuitive to think that the United States Attorney's Office should not consider whether the Securities and Exchange Commission can adequately deal with securities fraud as a civil matter.

Indeed, what is perhaps most interesting is the theoretical conflict between the substantive priority argument and the view of the criminal law as last resort. Now, the view that the criminal law should be a last resort is difficult to articulate.[84] Moreover, it is hard to square the last resort view with the position that the criminal law should express censure or achieve retributive justice.[85] As to either of these goals, it seems that the criminal law need not, and sometimes should not, take a back seat. Nevertheless, it bears noting that a preventive regime that would avoid resorting to the criminal law is arguably more consistent with the ultima ratio principle than is the substantive priority argument.

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[78] This formulation of what is otherwise called an "autonomy" or "free will" objection is due to Patrick Tomlin's insightful interjection during the Minnesota preventive justice conference.
[79] But see Ferzan (2011a).
[80] Stuckenberg (this issue).
[81] *Id.*
[82] Campbell (this issue).
[83] *Cf.* Kansas v. Hendricks, 521 U.S. 346 (1997); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963).
[84] *See* Husak (2004); Jareborg (2004).
[85] Ashworth and Zedner (2012)(arguing that the last resort principle is about effectiveness and the nature of the wrongdoing determines whether the action should be handled within the civil or criminal domain); Husak (2004).

Additionally, if this sort of claim has bite, then one might wonder whether the appropriate remedy for it is simply procedural parity. If the concern is simply that one can be "branded" a criminal without the beyond a reasonable doubt standard and other procedural protections, then any pull of substantive priority might simply be remedied by require procedural parity rather than by requiring the use of the criminal law itself. If we need BRD, then let's have BRD.

To this point, we have seen that preventive regimes may have two ways of avoiding the substantive priority of the criminal law. First, if the regime does not communicate criminal censure (*e.g.,* detaining the mentally ill), the substantive priority claim is not implicated. Second, if the regime requires BRD, the substantive priority charge may sometimes be met.[86] These two rejoinders will cover a wide range of cases, but not all. It cannot be the case that pretrial detention is authorized so long as the judge finds that the defendant committed the charged offense beyond a reasonable doubt. Nor does it explain why civil findings of securities fraud are permissible.

So, how do we walk the line between admitting that we have myriad mechanisms that stigmatize and judge culpability that don't run afoul of the PoI and recognizing that there are some instances, such as pretrial detention, that do seem to fail to recognize the rightful role of the criminal trial? Let me venture two answers. First, there is likely much wisdom in the European Court of Human Rights' requirement that a criminal proceeding must be initiated for the PoI to be engaged.[87] The substantive priority thesis has the most bite when we think that once the state has gone down the criminal law road, it must do it the right way. It should neither prejudge guilt nor ignore not guilty verdicts. This is why our current approach to pretrial detention implicates the PoI. However, according to this construction of the substantive priority claim, a preventive regime that aims to displace the criminal law would not implicate the PoI.

This leaves the concern that there are other stigmatizing acts. Does the PoI have any bearing outside the criminal process itself? To my mind, the reason that that PoI seems to clash with concerns about DNA collection, the forfeiture of assets after an acquittal of the crime, or the use of a prior charge (or even prior acquittal) as a bad act admissible under Federal Rule of Evidence 404(b) stems from a completely different problem. The United States, at least, lacks the resources to declare innocence. If the defendant is acquitted, can civil proceedings begin? Of course, we say, because this is a different standard. But that misses the thrust of the PoI objection – that the criminal justice system does not proclaim innocence in any manner. Ultimately, this is not a PoI objection; it is a concern about the lack of preclusive effect of an acquittal. When acquitted, a defendant's name is never cleared and suspicion lives on.[88] Advocates who wish to wipe the slate clean must create a mechanism for so doing—an adjudication of innocence, not just "not guilty."[89] No doubt there are difficulties with creating such a mechanism. The critical point, however, is this: the question of what preclusive effect an acquittal should have is not a PoI question.

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[86] *See* Campbell (this issue) (suggesting this remedy is sufficient with respect to ASBO's).
[87] Although this is the obvious reading of the ECHR, other interpretations have been advocated. See Campbell (this issue); Trechsel with Summers (2006, §I.C.1).
[88] *See* Campbell (this issue).
[89] Leipold (2000).

What does this mean for preventive detention? It means that so long as the state opts for a preventive mechanism, and not the criminal law, it can do so, irrespective of whether such a system communicates some amount of censure. The criminal law does not have sole dibs on being a censuring institution. However, to the extent that a preventive system does have some of the trappings of a criminal institution, or speaks to the same sorts of concerns, procedural symmetry may be warranted.

B. The Argument for Procedural Symmetry

In addressing the question of procedural symmetry, this paper will consider only the burden of proof. This is an undertaking in itself. Notably, considerations beyond the PoI must be taken into account in determining which other procedural rights should be provided in a preventive regime. These are certainly important questions, but they are questions for another day.

Ultimately, what is crucial about procedural symmetry claims is that they are extracted from claims about the relationship between the citizen and the state. They are fundamentally questions about how the state should treat us, what stance it should have toward us, and how procedural burdens should work in light of power imbalances. The state treats us differently in different sorts of situations, and thus, we need to pay close attention to how preventive interferences are similar to, and different from, the criminal process.

In criminal cases, the state must prove BRD that the defendant committed the offense. (I am going to presuppose that BRD is the appropriate standard for criminal trials.) An argument for procedural symmetry would require a reason for imposing this same burden in prevention cases. Some theorists view the BRD standard as a way of distributing errors—by adopting a standard that far prefers false acquittals to false convictions.[90] That would mean that we would need to think that the type of errors warrant a BRD standard for prevention cases. On the other hand, other theorists view the burden of proof, not as distributing errors, but as a commitment to refusing to balance the individual against the community. Alex Stein argues BRD is about "the state's fundamental political obligation to treat its citizens with equal concern and respect,"[91] where this respect requires that the "legal system may justifiably convict a person only if it did its best in protecting that person from the risk of erroneous conviction and if it does not provide better protection to other individuals."[92] BRD thus evidences a "comprehensive and unyielding immunity" from the risk of erroneous conviction."[93]

Therefore, in asking whether these requirements likewise require proof beyond a reasonable doubt in civil cases, we should consider three questions. The first question is whether the wrong of false detention is the same as the wrong of false conviction such that the same standard ought to apply. The second question is whether, even if the wrongs are different, they are equally bad, or the wrong of false detention is sufficiently weighty such that the same standard ought to apply even though they are

[90] Laudan (2006, p. 68).
[91] Stein (2005, p. 175).
[92] *Id.*
[93] *Id.* p. 177; see also Stumer (2010, p. 21).

different wrongs. The third avenue for analysis would take up an evaluation of type I and type II errors to see whether the balance between false positives and false negatives would likewise yield a beyond a reasonable doubt standard.

1. *Same Wrong, Same Standard?*

The cleanest argument for symmetry would be one that claims that the very interest at stake with respect to punishment is also at stake with respect to preventive detention. That is, we might proceed along a similar vein as Patrick Tomlin's approach to criminalization; he claims that "if what drives our support for the PoI is that we wish to protect people from inappropriate punishment, then the risk of punishing them for non punishment-worthy conduct should elicit the same level of concern as the risk of punishing them for things they have not done."[94]

Although our inquiry is different than Tomlin's, we can start with his premise – that the PoI bears a direct connection to the fact that we believe it is morally wrong for innocent individuals to suffer punishment and that it is so wrong as to warrant a high burden of proof.[95] Unjust punishment is intrinsically bad.[96]

Unfortunately, this approach does not support the symmetry thesis. Normatively, prevention and punishment are not the same sorts of acts. When the government punishes, it aims to give the defender what he deserves, and the liberty deprivation and stigma the offender suffers are constitutive of that punishment. Prevention, on the other hand, does not have this structure. The goal is to stop the crime from occurring and the liberty deprivation is associated with that goal.

To see this most clearly, consider a direct case of self-defense. Assume that a defender mistakenly believes that someone is aggressing against him. Here, there is something understandable about what the defender does, and we can ask, what confidence level the defender must have before he should act. Because the defender aims to protect himself—rather than to condemn his aggressor—we might think the defender need not wait for practical certainty before defending himself. And, if the defender acts on evidence that would, say, satisfy the clear and convincing evidence standard, the type of complaint the aggressor would have would differ from that of someone wrongfully punished. Hence, because a false positive in these practices constitutes a different wrong, we cannot unquestioningly import the criminal standard into the civil regime.

2. *Different Wrong, Same Standard?*

The argument that a false positive in the context of prevention is not the same wrong as a false conviction does not tell us anything about whether the wrong is still itself sufficient to warrant proof

[94] Tomlin (2012).
[95] One might think that BRD is over determined by a number of factors. Ashworth includes the citizen/state relationship, the imbalance of resources, the fallibility of the system, and the official censure as all justifying BRD. Ashworth (2006, p. 75).
[96] Tomlin (2012).

BRD.[97] Let us return to self-defense and think about a mistaken self-defender. Generally, we think that the reasonably mistaken self-defender is, at the very least, excused. A defender who thinks someone is attacking him, but is wrong in his judgment, does not seem to convey the same moral message that a punisher conveys. How wrongful is the liberty restriction (and perhaps unintended sitgma) of a preventive action?

Now, we might note the difficulty in transition from an individual's act of self-defense to the state using its machinery to achieve the same goal. However, it is critical to recognize that the goal is indeed the same. We focus on the fact that when we are dealing with self-defense, the goal is not to achieve some further good (such as giving an offender what he deserves) but simply to protect oneself. This is the role of the state. The aim is first and foremost security for all citizens. The state can achieve this security by situational crime prevention, a preventive regime, and/or the threat of punishment (backed by its imposition). All three of these methods, when mistakenly imposed (that is employed against someone who is not a threat), convey some sort of meaning to the innocent. Situational crime prevention shows a lack of trust, the preventive regime I advocate shows a lack of trust with a basis in the intention to commit a future crime, and punishment shows condemnation for wrongdoing.

Indeed, we are less troubled by situational crime prevention (also known as put the cookie jar where little Johnnie can't reach it.) If we really worried that being prevented from doing things we never intended to do was superlatively evil, we would worry about every physical barrier that could have been merely a sign; every internet search blockage by our employers that we don't even know about because we never perform impermissible searches to begin with; every carefully crafted email designed to prevent our affront that we never would have been insulted by anyway. I do not doubt that we may suffer significantly from false predictions of our future wrongdoing, but the claim of "I wasn't going to" is not the claim of "I didn't." Prevention *qua* prevention just is not morally on par with punishment.

The regime I propose, of course, isn't just moving the cookie jar out of reach. It is a state process, culminating in a finding that Johnnie did indeed intend to take a cookie, with a remedy that the state gets to intrude in Johnnie's life until Johnnie dispenses with that intention. Still, the state's goal is not to say anything about Johnnie—those findings are incidental to the state's primary goal—which is still protection. The question is, given that self-defense certainly does not require proof beyond a reasonable doubt before acting against a believed culpable aggressor, does the machinery of the state itself translate the wrong into one of equal severity? To my mind, the clear and convincing standard that is sufficiently to lock someone up as mentally ill and dangerous is more on par with the wrong imposed by a false positive under the preventive regime proposed.[98]

3. *Error Distribution*

Even if preventive interference is not as wrong as the punishment of the innocent, we might think that the costs of type one and type two errors nevertheless counsels in favor of a BRD standard.

[97] I thank Liz Campbell for pressing me on this point.
[98] Cf. Addington v. Texas, 441 U.S. 418 (1979).

However, a careful parsing of this claim yields that prevention warrants a lower standard than punishment. Consider false positives. In the criminal context, a false positive means that we are locking up an innocent person (a terrible injustice) and that we are letting a guilty person go free (another injustice).[99] In the preventive context, we restrict the liberty of someone who would not commit an offense (a substantial injustice) but we may be wrong that there is any criminal plan at all, so we are not unwittingly freeing the future guilty. It may simply be the case that there is no wrongdoer because there is no criminal intent. False positives are worse for punishment regimes than for preventive ones.

What harms are caused by false negatives? We are relatively familiar with the concerns caused by false negatives in the context of a criminal trial – the guilty go free. This may or may not lead to more crime, depending on whether the actor is likely to recidivate. On the other hand, with respect to prevention, a false negative means that a harm will occur that otherwise would not. Therefore, getting a false negative is worse for prevention.

In summary, the harms caused by false positives look less significant in the preventive context – we are not missing the real wrongdoer and the harm we cause to the wrongfully detained is not as significant (it is still significant, though). The harms caused by false negatives look more significant because we fail to stop someone from completing his criminal plan. Thus, when weighing the error distribution, it appears that there is more reason to adopt a clear and convincing standard than proof beyond a reasonable doubt.

4. Adversarial Deficits

The question now is whether adversarial deficits tip the balance to a BRD standard. To this point, I have argued that an erroneous act of preventive interference is not the same wrong as a wrongful conviction; it is not as wrong as a wrongful conviction; and the tradeoffs between false positives and false negatives militate for a lesser standard for preventive justice. Yet, there is one concern that I have yet to address: the resource disparity between the state and the citizen. The state differs from the typical defender, as it has resources and (perhaps) time on its side.[100] (It is worth noting, however, that if this regime is not criminal, then the state lacks some of its strongest investigatory tools.)

Ultimately, I consider this to be a very close case. If I were advising the legislature, I would opt for a beyond a reasonable doubt standard. We have every reason to fear that our current security fetishism leads to overreaction and the improper sacrifice of individual liberties.[101] Still, I wonder whether BRD is truly normatively compelled. A preventive system, with release when one is no longer a threat, is different in kind than the criminal law. And, the argument as to tradeoffs between false positives and false negatives is quite compelling in pointing to a clear and convincing evidence standard. My endorsement of BRD is thus quite tentative. I just think this case lies at the borderline.

[99] Laudan (2006).
[100] Thanks to Antony Duff for continually pressing me on this point every chance he got.
[101] See Waldron (2010).

Conclusion

At the end of the day, what matters is not the label of a system as criminal nor the invocation of the presumption of innocence. Rather, what matters is that the state accord its citizens with the proper respect. It must protect them from outside threats but it must guard against the possibility that the state itself will infringe citizens' liberty out of fear. This holds true irrespective of what we may ultimately decide the PoI means.

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