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**Lifting the Cloak:
Prevention Detention as Punishment**

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**LIFTING THE CLOAK:
PREVENTION DETENTION AS PUNISHMENT**

By Douglas Husak*

Abstract

Negative judgments about the justifiability of preventive detention are prevalent among theorists who hold retributivist rationales for criminal law and punishment. I argue that many of their objections rest too uncritically on doctrines of penal theory that are not always supported by sound arguments even though they are widely accepted. If we challenge conventional wisdom and adopt the positions I favor on these topics, we will have a hard time citing serious principled objections to preventive detention unless we share similar objections to state punishment. Admittedly, the positions I defend would make states far less likely to resort to preventive detention, but that is a different matter altogether.

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I: Preliminary Comments

Several preliminary comments are needed before I turn to the crux of my argument. First, no consensus about the *definition* of preventive detention can be gleaned from the voluminous literature that surrounds it.¹ Many writers use these terms to refer specifically to one or more particular systems of preventive detention that currently exist. Although I will conclude that no grounds of principle differentiate all systems of preventive detention from punishment, I am quite certain that none of these actual practices---such as the indefinite confinement of suspected terrorists in Guantanamo---qualifies as state punishment or should be evaluated by reference to the standards applicable to criminal justice.² I should not be interpreted to lend support to these existing practices. Even those scholars who purport to discuss the topic of preventive detention more broadly tend to characterize it by the procedures used to impose it. Stella Elias, for example, understands preventive detention as "detention without trial or charge".³ I see no reason, however, to include procedural features in a *definition* of preventive detention. We should not stipulate, for example, that only the executive and not the judiciary can order persons to be detained preventively, or that fair hearings are necessarily denied to such persons. Adding such elements to a definition is bound to add to the difficulties of defending this general practice. In what follows, I construe preventive detention as any state practice of confining individuals in order to prevent them from committing future harms.

I claim that the arguments I will present render it difficult to reject preventive detention *in principle*. But several empirical misgivings make this inquiry much less urgent *in practice*. As virtually every commentator has been quick to point out, our present ability to predict future dangerousness is meager.⁴ In addition, the use of

¹ "There is no standard, internationally agreed-upon definition of preventive detention." Stella Burch Elias: "Rethinking 'Preventive Detention' from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects," 41 *Columbia Human Rights Law Review* 99, 110 (2009). The author proceeds to construct a useful taxonomy of practices of preventive detention distinguished by eight criteria: "the legal basis for detention; notification; appearance before a judicial, administrative, or other authority; maximum period of time in detention; access to legal counsel; right to a fair and public hearing; judicial *review; and rules regarding interrogation." *Id.*, p.128.

² See the discussion in Douglass Cassel: "Pretrial and Preventive Detention Of Suspected Terrorists: Options and Constraints Under International Law," 98 *Journal of Criminal Law & Criminology* 811 (2008).

³ *Op.Cit.* Note 1, p.102.

⁴ Of course, some social scientists are more pessimistic than others. See the serious reservations

prediction in criminal justice may be counterproductive even when its reliability is not in question.⁵ We should not be willing to tolerate too many false positives and undesirable consequences before we lose confidence that an institution of preventive detention is acceptable. Moreover, in many and perhaps most of the cases in which we *are* able to predict proclivities to cause future harm with tolerable precision, the state has alternative means to reduce these harms that are more easily justified and thus are preferable to preventive detention. We possess an arsenal of weapons to decrease the likelihood of future harms; preventive deprivations of liberty are close to a last resort among them. I will not discuss these alternative strategies, although many exist.⁶

Because they are so widely appreciated, I need not belabor these empirical points. Unless our ability to predict future harm is relatively accurate, the case in favor of any system of preventive detention collapses. Thus it is no *objection* to my project to allege that prediction is highly fallible. Henceforth I simply *assume* that our predictive powers are reasonably good. How good must they be? I add only a single comment to the familiar uncertainties and alleged disadvantages of predicting dangerousness. Since my general aim is to determine whether preventive detention can be transformed into state punishment---and whether the rules that authorize it can be made into criminal offenses---we should not demand that predictions of dangerousness have a high degree of accuracy unless we are prepared to make similar demands about the criminal laws we accept. I contend that many penal statutes are best construed as inchoate crimes of *risk-prevention*---crimes designed to prevent harms before they occur. Drunk driving is an obvious example, but the many possession offenses in our criminal codes will serve as my favorite illustrations. The reason the state bans the possession of given items such as brass knuckles, for example, is because persons who possess them are thought to create an unacceptable risk.⁷ How accurate is the prediction that persons who

described by D. Cooke and C. Michie: "Limitations of Diagnostic Precision and Predictive Utility in the Individual Case: A Challenge for Forensic Practice," 34 *Law and Human Behavior* 259 (2010). These authors conclude that rates of error make predictions of violence in individual cases "practically meaningless." *Id.*, p.263.

⁵ See Bernard E. Harcourt: *Against Prediction* (Chicago: University of Chicago Press, 2007).

⁶ Proposals to rectify the causes of crime typically represent modes of prevention. One of many strains of preventive thought is discussed under the heading of "situational crime prevention." See, for example, the collection of essays in Andrew von Hirsch, David Garland, and Alison Wakefield, eds.: *Ethical and Social Perspectives on Situational Crime Prevention* (Oxford: Hart Pub. Co., 2000).

⁷ See, for example, the proscription of "metal knuckles" in 18 *Pa.Cons.Stat.* §908 (2010).

possess brass knuckles will cause future harm? I do not know; I pose this rhetorical question to suggest that we should not require the state to be significantly *more* accurate in predicting future dangerousness when we assess a practice of preventive detention that has been structured along the lines I will propose. We need not require, for example, that persons will cause harm beyond a reasonable doubt or even by a preponderance of the evidence in order to be justified in depriving them of liberty. These high standards of proof are and ought to be required in order to be *convicted* of a crime. But no such standard is or ought to be applied to justify the *enactment* of an inchoate offense designed to reduce the risk of future harm. Perhaps *no* inchoate crime of risk-prevention---certainly not the offense of drunk driving---could hope to satisfy this exacting test.

In addition, I assume that the kinds of case in which we are most tempted to favor preventive restrictions of liberty are those in which the harm to be averted is severe. No one should be eager to detain persons to prevent them from committing minor offenses such as shoplifting. To do so would probably be counterproductive. In addition, enacting new crimes to disable persons from committing minor offenses would create proportionality difficulties---a matter to which I will return. I am not persuaded, however, that this condition is satisfied in each of the circumstances in which preventive detention is currently utilized. Fortunately, it is clear that in at least *some* of the cases in which preventive detention is currently used---against persons Richard Falk has dubbed *mega-terrorists*, for example---this assumption almost certainly is met.⁸ In any event, my objective is not undermined if we conclude that preventive detention should be used sparingly---far more sparingly than some of its proponents seem to believe. This conclusion would not differentiate preventive detention from state punishment, since the latter should also be used less frequently. We have too much criminal law and too much punishment, and a general theory of criminalization is needed even more urgently than a theory about the conditions that warrant preventive detention.⁹

I say that we cannot *fully* evaluate the morality of preventive deprivation of liberty without re-examining some of the deepest and most divisive questions about the

⁸ As the name suggests, mega-terrorists pose unacceptable risks of causing enormous harm. See Richard Falk: *The Great Terror War* (Gloucestershire, U.K.: Arris Books, 2003).

⁹ See Douglas Husak: *Overcriminalization* (New York: Oxford University Press, 2008).

morality of punishment because I admit that *some* progress can be achieved without attending to the issues I discuss. Sensible and significant contributions to this topic have been made even by theorists who neglect the problems I address. Many commentators have defended various means to improve existing systems of preventive detention. The morality of these practices depends partly on the fairness of the procedures that are used to implement them, and these procedures can be assessed quite apart from the topics I treat here.

I further contend that we cannot find *serious* principled reasons to oppose preventive detention if we believe punishment to be justified. I concede that a few principled barriers will remain after my efforts have been completed. In particular, as I will discuss in greater detail below, the principle of proportionality functions differently in the two domains. I will argue that this difference is less great than first appearances indicate and that it is not fatal to my endeavor to show how preventive detention might be transformed into state punishment.

I also say that *we* cannot fully evaluate the morality of preventive deprivation of liberty without addressing some of the deepest and most divisive questions about the morality of punishment. The *we* in this sentence is intended to apply to those of us who hold retributivist theories of penal sanctions. Like many other *isms*, the nature of retributivism is deeply contested.¹⁰ For present purposes, I understand retributivism to be the general name for a group of theories that regards desert as central to efforts to justify the substantive criminal law and state punishment. A commentator does not qualify as a retributivist if he neglects desert altogether or awards it only a marginal role in his endeavors to find a rationale for punishment. Of course, we may disagree about whether a given theorist affords desert a prominent or marginal place. No formula exists to mark this contrast; it turns out to be controversial whether any number of contemporary theorists should be classified as retributivists. Since I regard consequentialist justifications of punishment as indefensible, I will have little more to say about them here.

It is crucial to understand both the motivation for this paper and the role retributivism plays in the argument that follows. Liberals committed to human rights

¹⁰ See R.A. Duff: "Retrieving Retributivism," in Mark D. White, ed." Retributivism: Essays on Theory and Policy (Oxford: Oxford University Press), p.3.

and the rule of law are justifiably horrified by existing systems of preventive detention in the real world. Consequentialists are hard-pressed to respond to this problem because they have always regarded the prevention of future harm as the central purpose of criminal law and punishment.¹¹ Thus anyone who is skeptical of preventive detention and wants to guard against the abuses to which it might lead is best advised to locate his reservations within a retributive framework that promises to treat persons according to their deserts. Admittedly, retributivism has come under heavy fire in the past few years, although its opponents tend to be better at recounting its shortcomings than to describe what should replace it. Theorists who propose to substitute desert with deterrence at the heart of their penal philosophy should be careful what they wish for. Retributivism offers the best prospects to reform practices of preventive detention and render them more humane and acceptable to liberals. But even retributivists must be cautious in renouncing preventive goals. As I will argue, abandoning prevention altogether as a legitimate objective of penal justice would jettison huge parts of criminal law that ought to be retained. Existing systems of preventive detention are objectionable precisely because they do *not* conform to the standards retributivists employ to evaluate the substantive criminal law and the punishments deserved by persons who violate it. The beginning of A solution to this problem is to appreciate that these systems *under* rather than *over*criminalize.¹²

What should we conclude if an existing system of preventive detention is *not* structured in the ways I will recommend? Suppose, that is, that it is not transformed into state punishment as I understand it. Does it follow that such a system cannot be justified? Not at all. What follows is that any such defense will differ in crucial respects from a defense of punishment. In all likelihood, a justification of preventive detention would have to show that the deontological constraints we typically preserve when rights are implicated would have to be relaxed in light of the enormous risks posed by those we

¹¹ They tend to respond by pointing out that the unfettered use of prediction in penal justice may begin a slide down a slippery slope with enormous potential for abuse. Some of these worries are described in Franklin E. Zimring and Gordon Hawkins: "Dangerousness and Criminal Justice," 85 *Michigan Law Review* 481 (1986-1987).

¹² See Andrew Ahworth and Lucia Zedner: "Preventive Detention Orders: A Problem of Undercriminalization," in R.A. Duff, et.al., eds.: The Boundaries of the Criminal Law (Oxford: Oxford University Press, 2010), P.59.

want to detain preventively---such as mega-terrorists.¹³ I count myself among those “threshold deontologists” who put aside my non-consequentialist principles when the harms to be averted are sufficiently grave.¹⁴ Although I take such an attempt to justify preventive detention seriously, it encounters several difficulties¹⁵ I will not pursue here. My aim is to show that a defense of *some* sort of preventive detention need not appeal to a supposed “catastrophe exception” to our willingness to protect rights. Instead, a defense can be developed squarely within a retributive justification of criminal law and punishment.

My ensuing arguments will depend on controversial positions about rules and doctrines of criminal law theory. Many commentators reject my positions, and I am aware that my arguments against their views are inconclusive. I am confident, however, that I can solve *one* problem sometimes raised against preventive deprivations of liberty. Paul Robinson protests that preventive detention is often *cloaked* as criminal justice.¹⁶ According to this objection, preventive detention is a subterfuge or ruse, cleverly disguised to be something it is not. I fully agree that we should not resort to deceit in criminal justice. My aim is to lift the cloak that allegedly conceals this practice and to describe what would be required to make the rules that authorize preventive deprivations of liberty into a respectable part of the criminal law.

II: *Can Preventive Detention Qualify As Punishment?*

It may seem odd to insist that a full evaluation of the morality of preventive deprivations of liberty should depend on deep questions about the justification of criminal law and state punishment. Despite the obvious similarities between these two practices, a number of legal philosophers think it is relatively clear that preventive detention is *not* punishment and cannot be assimilated to it. I construe these philosophers to believe not only that existing systems of preventive detention are not punishment at the present

¹³ For a critical examination of these strategies, see Don E. Schied: “Indefinite Detention of Mega-terrorists in the War on Terror,” 29 *Criminal Justice Ethics* 1 (2010). See also the thoughtful replies to Schied in the symposium in 30 *Criminal Justice Ethics* 68-123 (2011).

¹⁴ See Michael Moore: “Patrolling the Borders of Consequentialist Justifications: The Scope of Agent-Relative Restrictions,” 27 *Law and Philosophy* 35 (2008).

¹⁵ See Alec Walen: “A Unified Theory of Detention, With Application to Preventive Detention for Suspected Terrorists,” 70 *Maryland Law Review* (forthcoming, 2011).

¹⁶ Paul H. Robinson: “Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice,” 114 *Harvard Law Review* 1429 (2001).

time, but also that preventive detention cannot be reformed to *become* punishment. Deprivations based on risks of future criminality, no matter how well-grounded, are widely regarded as an abuse of the criminal law. Paul Robinson succinctly expresses one version of this view: "[T]he use of the criminal justice system as the primary mechanism for preventing future crimes seriously perverts the goals of our institutions of justice."¹⁷ I propose to challenge this assumption---or, at a minimum, to show that the difficulties of defending it on principled grounds are greater than many legal philosophers suppose.

To begin, we must identify what the criminal law *is*. How do we know whether a law enacted by the state qualifies as one of its *criminal* laws? I advance the first of many controversial theses: the criminal law *just is* that body of law that subjects persons to state punishment. If punishment is the sanction the state is authorized to inflict for violations of a rule, it follows that that rule is part of its criminal law. Conversely, if a rule is part of the criminal law, it follows that the state is authorized to punish persons who violate it. Thus the rules that allow preventive detention should be conceptualized as part of the criminal law---that is, as criminal offenses---if and only if it is appropriate to categorize preventive detention as punishment. Is it? Despite widespread agreement that preventive detention is *not* punishment, we need to be clear *why* most penal theorists are convinced that the two institutions are conceptually distinct. In other words, we must examine why most commentators are persuaded that preventive restrictions on liberty cannot qualify as punishments so that the rules that authorize these sanctions cannot be conceptualized as part of a state's criminal law. In order to answer this question, we must clarify what *punishment* is---that is, what makes a particular sanction an instance of state punishment. The key to this inquiry, I believe, is to focus on what it is about punishment that requires justification. Although legal philosophers obviously disagree about *how* to defend punishment, they also disagree about *what* it is about punishment that must be defended. I contend that state punishment requires a justification because it contains (at least) two essential features that are normatively problematic: what I will call *hard treatment* (or *deprivation*) and *stigma* (or *censure*).

¹⁷ *Id.*, p.1434. In what follows, I ignore Robinson's unexplained use of the word "primary". To my knowledge, no one believes that criminal justice is the preferred mechanism to prevent future harms.

Few will deny that punishment includes the first of these ingredients. As H.L.A. Hart recognized, a state response to conduct does not qualify as punitive unless it involves “pain or other consequences normally considered unpleasant.”¹⁸ These consequences might be of various kinds: persons might be killed, imprisoned, mutilated, fined, deported, banished, or the like. I will generalize by saying that all modes of punishment involve hard treatment or deprivation. Hart also appreciated, however, that not all state inflictions of consequences normally considered unpleasant are modes of punishment. Consider taxes, license revocations, benefit terminations, and other disqualifications. These deprivations do not typically count as punitive, despite the severe hardship they may cause. Thus a second condition must be satisfied before a sanction should be categorized as an instance of state punishment, although there is more debate about how this additional condition should be formulated. I contend that a state response to conduct does not qualify as punitive unless it is designed to censure and to stigmatize.¹⁹ For this reason, I concur with those many legal philosophers who believe that punishment has an important *expressive* dimension.

If this account were wholly adequate, we would lack the resources to explain why preventive detention is not state punishment. It goes without saying that preventive detention involves a hardship or deprivation. It is only slightly less obvious that most impositions of preventive detention are stigmatizing and involve censure. Of course, I recognize some exceptions to this generalization. But unless the person preventively detained has some disability or excusing condition that renders blame unwarranted, it would be facetious to contend that he is not blamed. Surely an enormous amount of stigma is heaped upon the typical mega-terrorist. Why, then, is preventive detention almost universally regarded as something other than punishment? Why are the rules that authorize it generally treated as something other than criminal laws?

In the remainder of this Section I will critically discuss four of the many possible answers that might be given to this basic question. Each of these answers has its merits; many suffice to show that systems of preventive detention that presently exist are not properly regarded as part of the state's penal justice system. I will argue, however, that

¹⁸ H.L.A. Hart: *Punishment and Responsibility* (Oxford: Oxford University Press, 1968), p.4.

¹⁹ For an impressive defense of the view that punishment includes both hard treatment and censure, see Andrew von Hirsch: *Censure and Sanctions* (Oxford: Clarendon Press, 1993).

none of these four answers creates insuperable barriers to conceptualizing preventive detention as punishment. If I am correct, no insurmountable reasons of principle differentiate criminal offenses from the rules that authorize preventive detention. As a result, a complete moral assessment of either practice cannot afford to neglect an evaluation of the other.

I characterize the first two answers to my basic question as *formalistic* inasmuch as they can easily be overcome with a few changes in positive law. The first possible answer invokes the principle of legality: *nulla poena sine lege*. According to the demands of legality, punishments are imposed only on persons who have committed (or are believed to have committed) a crime.²⁰ But persons preventively detained, this first answer continues, have not committed a criminal offense. Hence they are not punished. As one commentator expresses the point, “criminal punishment is based solely upon a conviction for an offense and can occur only if there is such a conviction. Preventive detention is based solely upon a prediction concerning future offenses and can occur only if there is such a prediction. Therefore, preventive detention is not punishment.”²¹

How should we assess this first possible answer?²² Only a handful of commentators are likely to contend *both* that preventive detention is a punishment *and* that it is imposed for something other than a criminal offense. Few theorists openly reject the principle of legality and recommend punishing persons who have not committed a crime. Still, this answer fails to show that preventive detention cannot be punishment. In the first place, it is question-begging. *If* preventive detention qualifies as punishment according to our best understanding of the nature of punishment, and we accept the conceptual claim with which I began, it follows that the rules that authorize it *are* part of the state's criminal law, even if they are not presently regarded as such.

In any event, any problem raised by this first answer is easily rectified---at least in theory. Whether or not a person commits a criminal offense depends solely on the content of positive law. If we want to punish the persons we propose to preventively

²⁰ Hart, it might be recalled, included this answer in his influential definition of “the standard or central case” of punishment. See *Op.Cit.* Note 18, p.5.

²¹ Christopher Slobogin: A Jurisprudence of Dangerousness,” 98 *Northwestern University Law Review* 1, 12-13 (2003).

²² Among other difficulties, it is hard to interpret the “based upon” relation Slobogin uses to formulate his thesis. I understand it to be identical to the “for” relation---although the latter is also ambiguous. See *infra* Notes 34-37.

detain but need to ensure that they are guilty of a criminal offense in order to do so, we need only amend positive law to enact new statutes for these persons to breach. If predictions of future dangerousness are reasonably accurate---as I have presupposed---they must be based on traits of persons derived through actuarial generalizations.²³ A massive amount of empirical research has tried to identify these factors.²⁴ Although many concrete proposals have been defended,²⁵ I make no effort to canvass or evaluate them here.²⁶ Henceforth I simply refer to the traits that predict future dangerousness as *x, y, & z*. Again, I do not for a moment belittle the difficulties of identifying these traits and thus of enacting offenses to proscribe them.²⁷ The material elements of the new statutes to be enacted would include these traits----the properties or characteristics of the persons we want to detain on which our predictions of future dangerousness are based.²⁸ Concrete examples of these offenses must await the social science. Admittedly, depending on their content, many complaints could be brought against such statutes.²⁹ Most notably, they might amount to "status crimes" in violation of the supposed "act requirement" of criminal law.³⁰ This admission is important, and I will return to it in Section III. For now, I simply point out that the state could resolve whatever problems are associated with the principle of legality by creating new statutes that would be

²³ I am aware of the supposed contrast between actuarial and clinical bases for predicting dangerousness that has been a staple of the literature since the publication by Paul Meehl: Clinical Versus Statistical Prediction: A Theoretical Analysis and a Review of the Evidence (Minneapolis: University of Minnesota Press, 1954). Even clinical predictions, however, must be based on generalizations derived from previous observations.

²⁴ Much of this research focuses on adolescents. For example, see David P. Farrington and Brandon C. Welsh: Saving Children From A Life Of Crime (Oxford: Oxford University Press, 2007).

²⁵ See, for example, the Violence Risk Appraisal Guide (VARG) discussed in John Monahan: "A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients," 92 *University of Virginia Law Review* 291 (2006).

²⁶ For reasons to believe that none of the available instruments predicts violence significantly better than the others, see Jennifer L. Skeem and John Monahan: "Current Directions in Violence Risk Assessment," in *Current Directions in Psychological Science* (forthcoming, 2011).

²⁷ In particular, the traits that predict a willingness to engage in acts of terrorism may be quite unlike those that predict dangerousness generally. Suicide bombers, for example, deviate from the profile of persons at risk of suicide for non-ideological reasons. See Skeem and Monahan: *Id.*

²⁸ Although I will not attempt to formulate any such offenses, it is likely that some such traits *already* appear as elements of existing crimes. For example, the Supreme Court has recently upheld the constitutionality of laws prohibiting the giving of material aid to designated foreign terrorist groups in *Holder v. Humanitarian Law Project*, 561 U.S. ___ (2010).

²⁹ If they include political speech or religious affiliation as material elements, for example, these statutes would encounter obvious First Amendment problems.

³⁰ See *Robinson v. California*, 370 U.S. 660 (1962); and *Powell v. Texas* 392 U.S. 514 (1968).

violated by the persons we propose to detain preventively. If the absence of positive law is the problem, the enactment of positive law is the solution.

If the state were to draft new statutes that are violated by the persons we propose to detain preventively, a second formalistic attempt to show why preventive detention is not punishment would also fail. Whether a sanction qualifies as punitive, it might be thought, depends partly on the *procedures* that must be observed in order to inflict it. Many of these procedures are constitutional in stature. For example, no one may be punished in the absence of a trial that includes several well-known safeguards---such as the right to confront witnesses. But few persons who are preventively detained are tried and afforded the protections that famously surround the criminal process. As we have seen, some commentators go so far as to *define* the practice of preventive detention to dispense with a trial or charge.³¹

Again, only a handful of theorists are likely to contend *both* that preventive detention is punishment *and* that the many constitutional protections routinely afforded to criminal defendants may be ignored. This combination of recommendations would fly in the face of numerous well-settled principles of constitutional law. Like its predecessor, however, this purported difference between punishment and preventive detention is easily remedied. We need only mandate that appropriate procedures be observed whenever persons are preventively detained. Of course, many commentators would vehemently resist or even ridicule this recommendation.³² Officials worry that the need to charge and try individuals---or to read them their *Miranda* rights---would undermine most or all of the supposed practical advantages of preventive detention.³³ Much has been written both for and against this allegation; I will not comment on whether it is true. My point is that we *could* extend all of the procedural protections currently available to criminal defendants to those persons we want to preventively detain.

³¹ See Elias: *Op.Cit.* Note 1.

³² Some purport to find the very idea difficult to imagine. See Stephen J. Schulhofer: "Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws," 7 *Journal of Contemporary Legal Problems* 69 (1995),

³³ Some of the procedural difficulties of prosecuting terrorists in criminal court are discussed by Matthew Waxman: "Administrative Detention," 3 *Journal of National Security Law & Policy* 1 (2009).

Neither of these two formalistic answers gets to the heart of the matter. One would not suspect that the problem of conceptualizing preventive detention as punishment could be solved so easily---by enlarging the scope of procedural protections or by enacting new offenses. The next two difficulties, however, are potentially more serious, and cannot be overcome by a few alterations in positive law. The third possible answer is as follows. Many theorists contend that preventive detention cannot be punishment, and that the rules that authorize it cannot be part of the state's criminal law, because persons *can* only be punished *for* past behavior. According to this train of thought, punishment for future dangerousness is incoherent. As Robinson expresses the point, "it is impossible to 'punish dangerousness.' To 'punish' is 'to cause (a person) to undergo pain, loss, or suffering *for a crime or wrongdoing*'---therefore, punishment can only exist in relation to a past wrong."³⁴ Solobogin is even more succinct: "Indeed, the concept of 'punishment' for some future act is incoherent."³⁵

How much credibility should be given to this third answer? Among other difficulties, it purports to resolve the ancient debate between retributivists and consequentialists by invoking a definition. If persons *can* only be punished *for* what they have done in the past, it is hard to see how punishment could possibly be justified by its tendency to attain a future good. Although I have already indicated that consequentialist theories of punishment should be rejected, the argument under consideration would dispense with them much too easily. The deficiencies of consequentialist justifications of punishment must be demonstrated on normative grounds rather than through conceptual analysis. In other words, no account of what punishment allegedly *is* can refute consequentialist rationales. The "definitional stops" on which this answer depends have a dubious legacy in philosophical controversies about punishment.³⁶

In order to respond to this third argument (as well as to provide a fair assessment of the ancient debate between consequentialists and retributivists), it is crucial to recognize an important ambiguity in understanding what some response is done *for*.³⁷

³⁴ Robinson, *Op.Cit.* Note 16, p.1432.

³⁵ Solobogin: *Op.Cit.* Note 21, p.13.

³⁶ See Hart: *Op.Cit.* Note 18, p.5.

³⁷ For a preliminary discussion of ambiguities in the "for" relation, see George Fletcher: "What Is Punishment Imposed For?" 5 *Journal of Contemporary Legal Issues* 101 (1994).

In asking what punishment is imposed for, we may want to know either (1) in virtue of what is punishment inflicted; or (2) what is the purpose for which punishment is inflicted?³⁸ These questions are different, and a failure to contrast them has led to enormous confusion about punishment generally and systems of preventive detention in particular. Richard L. Lippke, for example, writes "the more worrisome feature of preventive detention, in my view, is that it punishes individuals *for* crimes they will commit rather than for ones they have committed."³⁹ If Lippke is correct, preventive detention must be conceptualized as an instance of what has come to be known as "pre-punishment."⁴⁰ I hope to avoid the controversy that surrounds pre-punishment, since I believe that preventive detention need not be understood in this way. I admit that the answer to question (1) necessarily looks backwards. In this sense, any punishment under a system of preventive detention is imposed *for* or *in virtue of* possession of the characteristics x, y & z. Even though these characteristics are made into elements of offenses because they predict future dangerousness, the persons to be punished already possess them; the future is immaterial to their liability. It does not follow, however, that the answer to question (2) must look backwards as well. As consequentialists recognize, it is perfectly coherent to impose punishment *for* or *for the purpose of* attaining a future good. A system of preventive detention is an excellent illustration; it imposes punishment for traits already possessed in order to avert subsequent harm.

Moreover, the generalizations about the criminal law on which this third answer depends should be rejected. In the first place, as Stephen Morse describes in impressive detail, many current well-established doctrines and practices in our criminal justice system already reflect a preventive rationale.⁴¹ To cite just one of several examples, all

³⁸ On a related point, see the insightful discussion of the contrast between the *conditions* and the *objects* of responsibility in R.A. Duff: *Answering for Crime* (Oxford: Hart Pub. Co., 2007), pp.82-89.

³⁹ Richard L. Lippke: "Dangerous Offenders and Preventive Detention," 27 *Law and Philosophy* 383 (2008) (emphasis added).

⁴⁰ Recent discussion of pre-punishment has been enormous. For an important contribution, see Saul Smilansky: "A Time to Punish," 54 *Analysis* 50 (1994). For an application of this perspective to preventive detention, see Lucia Zedner: "Pre-crime and post-criminology?" 11 *Theoretical Criminology* 261 (2007).

⁴¹ See Stephen J. Morse: "Neither Desert Nor Disease," 5 *Legal Theory* 265 (1999). See also Ronald J. Allen and Larry Laudan: "Deadly Dilemmas III: Some Kind Words for Preventive Detention," (forthcoming).

jurisdictions punish recidivists more harshly than first-time offenders.⁴² More to the point, many existing substantive offenses that have created only minimal controversy among penal theorists are best construed to prevent future harm. Numerous statutes enacted in every state do not require the defendant to have caused harm. The state would have little need to create *anticipatory* or *inchoate* offenses, such as attempt, conspiracy and solicitation, unless the prevention of future harm is a legitimate objective of the penal law. I trust that no one would say that the statutes that proscribe attempts are not part of the criminal law or that the sanctions imposed on persons who violate these statutes are something other than punishments. And the list of crimes designed to prevent future harm is not confined to this familiar triad. Many offenses that are not typically regarded as inchoate punish conduct that creates a risk of harm rather than harm itself. For example, the bulk of traffic offenses, such as speeding and drunk driving, share this rationale. So too do drug offenses, which account for hundreds of thousands of persons behind bars.⁴³ Finally, scores of possession offenses---to be considered in greater detail below---must be added to the list.⁴⁴ Although criminal theorists have a variety of ingenious devices to dispute my contention, the fact remains that a large number of penal statutes are designed to prevent harms before they occur. Thus the laws enacted under a scheme of preventive detention need not be different in kind from many existing criminal offenses. Statutes designed to prevent future harm are neither unusual nor deviant.

How likely must the risk of future harm be in order to enact a crime of risk-prevention? I raised this issue in connection with possession offenses---such as the possession of brass knuckles. The culpable states of recklessness and negligence both require defendants to create a *substantial* and *unjustifiable* risk before liability may be imposed, and I believe that similar standards should apply to all crimes of risk-prevention.⁴⁵ Still, commentators have identified no quantifiable threshold beyond

⁴² The rationale for this familiar practice is bitterly contested. See the several essays in Julian V. Roberts and Andrew von Hirsch, eds.: *Punishing Persistent Offenders* (Oxford: Oxford University Press, 2008).

⁴³ The rationale for these offenses is criticized in Douglas Husak: *Legalize This!* (London: Verso, 2002).

⁴⁴ See Part III *infra*.

⁴⁵ See Husak: *Op.Cit.* Note 9, pp.159-177.

which a given risk qualifies as substantial.⁴⁶ Although no formula governs the answer, I am sure that many existing crimes of risk-prevention fail to meet this demanding standard.⁴⁷ Criminal laws designed to prevent risk have been allowed to grow "in an unprincipled manner" and violate many of the principles of criminalization we should preserve.⁴⁸ By the same token, however, many crimes of risk-prevention satisfy this standard.

I conclude that none of these three answers is adequate to explain why preventive detention cannot be construed as punishment. The fourth and most plausible reason, I submit, begins by noticing that a characterization of punishment that includes only deprivation and stigma is incomplete. My analysis of the nature of punishment must be supplemented. In order to qualify as a punishment, it must also be true that each of these two features is brought about intentionally. In other words, state sanctions do not qualify as punishments because they *happen* to impose deprivations and stigmatize their recipients. The very *purpose* of a punitive state sanction is to inflict a stigmatizing deprivation on the offender.⁴⁹ To be sure, the state may have ulterior motives in punishing. A punitive response to behavior may be the most effective way to deter future crimes, promote social cohesion, protect the rights of law-abiding citizens, vindicate the sacrifices of the law-abiding, and the like. But the existence of these ulterior motives does not undermine my claim that a sanction is not a punishment without a purpose to deprive and censure. No other state institution is quite comparable in this respect. Many state sanctions impose hardships and several others stigmatize. Some state practices, like involuntary confinement of the dangerous mentally ill, do both simultaneously.⁵⁰ But these sanctions differ from punishments because they lack a punitive intention. Although they *knowingly* cause a stigmatizing deprivation, that is not their point or purpose.

⁴⁶ For empirical evidence that this standard is not met by statutes that punish HIV-positive persons who risk transmission of infection by engaging in sexual activities, see Margo Kaplan: Restoring Reason to HIV-Exposure Laws," *Indiana Law Review* (forthcoming).

⁴⁷ I argue that the large number of offenses designed to prevent the risk of harm rather than harm itself is a major cause of our current predicament of overcriminalization in Husak: *Op. Cit.* Note 9.

⁴⁸ See Andrew Ashworth and Lucia Zedner: "Just Prevention: Preventive Rationales and the Limits of the Criminal Law," in R.A. Duff and Stuart P. Green, eds.: Philosophical Foundations of Criminal Law (Oxford: Oxford University Press, 2011), p.279. 303.

⁴⁹ See R.A. Duff: Punishment, Communication and Community (New York: Oxford University Press), pp.96-97.

⁵⁰ The stigmatizing effect of civil commitment is conceded in *Addington v. Texas*, 441 U.S. 418 (1979).

If I am correct about the nature of punishment, we must examine the intentions of those state actors who authorize preventive deprivations of liberty in order to decide whether the sanctions they impose qualify as punishments.⁵¹ What *is* the intention of the state in imposing preventive detention? Again, different systems of preventive detention are supported by different rationales; no single answer will suffice in all cases. When the state preventively detains mentally abnormal sexual predators who have completed their original sentences, for example, it is plausible to suppose that it lacks an intention to punish.⁵² Although it is notoriously difficult to identify the content of intentions---especially when a collective entity like the state is involved---it is not hard to imagine that state actors would prefer to adopt some other means to protect victims of mentally abnormal violent offenders if they could do so without imposing a stigmatizing deprivation on the unfortunate individuals we reluctantly confine.⁵³ If so, no suitable rationale for *punishing* these individuals can be developed within a retributivist framework. If it is restructured along the lines I propose, preventive justice is an acceptable response only for those persons who deserve punishment.

But whatever may be the case with mentally abnormal violent sexual offenders, it is hard to believe that persons who pose dangers of mega-terrorism are similar in this regard. Surely the state *has* a punitive intention in preventively detaining these individuals. Few of us would be receptive to a device to prevent mega-terrorists from causing enormous destruction that spares them from both deprivation and stigma. Hence this final means to show that preventive detention is not punishment, and that the rules that authorize it are not part of the criminal law, must be rejected---at least for *some* categories of persons who are preventively detained.

⁵¹ Supreme Court jurisprudence on the issue of whether a sanction qualifies as punishment rests heavily on the intentions of the state authorities who impose the stigmatizing deprivation. For a critical discussion, see Martin R. Gardner: "Rethinking *Robinson v. California* in the Wake of *Jones v. Los Angeles*: Avoiding 'The Demise of the Criminal Law' by Attending to 'Punishment'" 98 *Journal of Criminal Law & Criminology* 429 (2008).

⁵² Involuntary commitment of persons who have served their sentence for a crime under the Sexually Violent Predator Act has been held not to constitute a punishment. The alleged absence of an intent to punish allows the characterization of this proceeding as civil. See *Kansas v. Hendricks*, 521 U.S. 346 (1997).

⁵³ One commentator maintains that "with civil detention institutions there is no reason in principle why... they cannot be made pleasant and agreeable places." David Wood: "Reductivism, Retributivism, and Civil Detention," 9 *Utilitas* 131, 137 (1997).

The supplemented account of punishment that includes a punitive intention on the part of those who impose it provides a partial explanation of why punishment has proved so difficult to justify. It plays a similar role in a normative assessment of preventive detention. How can we hope to justify an institution that not only happens to stigmatize and deprive, but whose very purpose is to do so? It is a gross understatement to say that these practices treat persons in a manner that typically is wrongful. More to the point, they treat persons in a manner that implicates their moral rights.⁵⁴ In addition, retributivists agree that ordinary utilitarian gains do not provide an adequate justification for imposing these sanctions. If these claims are correct, I believe that we should countenance a *right not to be punished*.⁵⁵ Since I have found no principled reason to differentiate (some) systems of preventive detention from punishment, we have an equally good ground to countenance a *right not to be preventively detained*. It does not follow, of course, that neither practice can be justified. According to the view I tend to favor, rights are *infringed* when an action implicates rights justifiably; rights are *violated* when an action implicates rights *un*justifiably.⁵⁶ Thus infringements, no less than violations, implicate rights.⁵⁷ The very same considerations that show an instance of punishment or preventive detention to be justified show our right not to be punished or preventively detained to be infringed rather than violated. The ultimate normative challenge for a theory of preventive detention---as for a theory of punishment---is to identify the conditions under which the rights it implicates may be overridden rather than violated.

I conclude that a system of preventive detention *can* be conceptualized as punishment. The pressing question is whether it can be *justified* as such. I now move from conceptual to normative considerations---where the problems are even more formidable than those already encountered.

⁵⁴ No standard terminology about rights has taken hold. Actions *implicate* a right when they are contrary to that right. I intend this term to be neutral about whether those actions infringe or violate a right, that is, whether they are permissible or impermissible.

⁵⁵ I admit this claim to be controversial. For a challenge, see Miri Gur-Ayre: "Comments on Douglas Husak's Overcriminalization," 1 *Jerusalem Review of Legal Studies* 21 (2010).

⁵⁶ The distinction between rights-infringements and rights-violations was first drawn in Judith Thomson: "Some Ruminations on Rights," 19 *Arizona Law Review* 45 (1977).

⁵⁷ For a challenge to my use of the distinction between infringements and violations of rights, see John Oberdiek: "Lost in Moral Space: On the Infringing/Violating Distinction and its Place in the Theory of Rights," 23 *Law and Philosophy* 325 (2004).

III: Can Persons *Deserve* to be Preventively Detained?

To this point I have neglected to mention what may be the most crucial factor in attempts to differentiate the rules that authorize preventive detention from those that impose state punishment. Retributivists hold that *desert* plays a central role in explaining why punishment, when justified, infringes rather than violates our right not to be punished. But it may seem unlikely that desert can play a parallel role in justifying preventive detention---that is, in explaining why our right not to be preventively detained is infringed rather than violated. The reason is simple---deceptively so. As I have already mentioned, desert is thought to be necessarily backwards-looking, and the rationale for preventive detention looks forward. Thus even if preventive detention *can* be punishment, it cannot be *justified as* punishment. Some commentators appear to believe that nothing more needs to be said to explain why our thoughts about the justification of punishment have little significance for our thoughts about the morality of preventive detention.⁵⁸ Don Schied contends "in theory, if not always in practice, a sharp distinction is made between *punishment* for past wrongs and *detention* to prevent future wrongs. The rationales for the two are very different. Criminal *desert* arises from past wrongdoing, whereas *dangerousness* is estimated future wrongdoing."⁵⁹

An analysis of desert is needed to assess this claim. As virtually all theorists recognize, desert is a tripartite relationship between (1) *who* is deserving (2) *what* is deserved, and (3) *why* it is deserved. In other words, all desert claims are of the form "A deserves Ω in virtue of p."⁶⁰ The issue to be assessed is whether the properties that warrant preventive detention (that is, characteristics x, y & z) might form a basis for desert---more particularly, a basis for deserved punishment. If desert claims necessarily look backwards, and the rationale for preventive detention necessarily looks forward, it would seem that no one can deserve to be punished for the reasons that lead the state to detain him preventively. Thus any justification of preventive detention cannot be grounded in desert. Since desert is central to the correct (that is, to a retributivist)

⁵⁸ "Dangerousness and desert are distinct criteria that commonly diverge. Desert arises from a past wrong, whereas dangerousness arises from the prediction of a future wrong." Robinson: *Op.Cit.* Note 16, p.1438.

⁵⁹ Scheid: *Op.Cit.* Note 13, p.14 (emphasis in original).

⁶⁰ See John Kleinig: *Punishment and Desert* (The Hague: Martinus Nijhoff, 1973).

defense of punishment, it follows that punishment is not justified for the reasons that warrant preventive detention.

Often this position is advanced as a part of a grand theory. According to Michael Moore, for example, "Anglo-American criminal law is largely a formalistic description of the requirements of retributive justice."⁶¹ In order to serve retributive justice, he continues, "criminal law must punish all and only those who are morally culpable in the doing of some morally wrongful action."⁶² Moore contends that those who lack virtue, but do not exhibit it through bad actions, do not deserve punishment because "they have done no wrong."⁶³ Since persons the state proposes to detain preventively need not have performed a wrongful action, it follows that their punishments cannot be deserved and thus are unjustified. Should we endorse the grand theory on which this argument rests? Of course, Moore is correct that persons who have not performed a "bad action" have *done* no wrong. Since they have not acted, they cannot have engaged in *wrongdoing*. But does it follow that they cannot deserve to be punished?

Many criminal theorists would agree with several of Moore's claims. Morse, for example, concurs: "Desert requires *wrongdoing*."⁶⁴ But why? Are only *doings* a desert base? Or are they the only desert base for *punishment* in particular? And why should we think that the criminal law has a single function---to exact retribution for past wrongdoing, for example? Most laypersons would be astonished to learn that leading philosophers of law believe that crime prevention is somehow antithetical to criminal justice. Special deterrence is typically listed among the respectable objectives of punishment. No less than in other domains of law, I believe we should accept pluralistic accounts of the bases of desert and of the purposes of the criminal sanction.

I am skeptical of the claims of Moore and Morse despite reaffirming my allegiance to retributivism. Of course, I agree that criminal liability in the absence of desert is objectionable. If we are confident, however, that persons satisfy whatever (accurate) criteria we devise to determine that they pose a substantial danger of serious future harm, why should we conclude that they cannot be deserving of punishment? In this Section I will explore the question of whether the rationale for preventive detention

⁶¹ Michael Moore: *Placing Blame* (Oxford: Clarendon Press, 1997), p.20.

⁶² *Id.*, p.35.

⁶³ Michael Moore: *Act and Crime* (Oxford: Clarendon Press, 1993), p.53.

⁶⁴ Morse: *Op.Cit.* Note 41, p.270 (emphasis in original).

might be given a basis in desert. My support for an affirmative answer draws from my retort to the first formalistic answer to the conceptual challenge of construing preventive detention as punishment. As I indicated, predictions of future dangerousness are based on characteristics x, y & z of the person to be detained. I contend that these properties *can* ground a judgment that punishment is deserved. After all, persons may merit condemnation or stigma for having these properties; why can't it be *wrongful* to possess whatever properties predict future dangerousness and comprise the elements of newly enacted penal statutes?⁶⁵ Thus even if Schied is correct to suppose that penal desert arises from something in the past, we need not construe punishment to be *for* (that is, in virtue of) future dangerousness even when we resort to preventive detention. Instead, punishment can be imposed *for* (in virtue of) the possession of whatever characteristics predict future dangerousness.⁶⁶

What might be said against my analysis? As far as I can see, at least three reasons might be advanced to deny that persons can be deserving of punishment in virtue of possessing the characteristics that predict future dangerousness. I alluded to one such reason in responding to the first formalistic answer I described in Section II: any supposed desert base that is invoked to support preventive detention could well amount to a *status offense* that would violate the supposed *act requirement* of the criminal law. Most theorists concur with Moore and subscribe to the act requirement, and thus believe that desert requires a past act.⁶⁷ Earlier I contended that many inchoate offenses such as attempt and possession are designed to prevent future harm. Even if I am correct, the persons who commit these offenses are typically regarded as

⁶⁵ Many theorists offer answers to this question that differs from my own. According to one commentator, “the difference between punishment and civil or regulatory deprivation of liberty is that the former reflects moral blameworthiness deserving condemnation whereas civil law provides protection through non-condemnatory confinement or supervision of potentially dangerous people.” Denise Meyerson: “Rights, Risks, Statistics and Compulsory Measures,” 31 *Sydney Law Review* 507, 522 (2009). Another commentator alleges “under the prediction/incapacitation model we do not punish people for wrongs they did, but we make them suffer for possessing certain traits or belonging to certain groups. This is wrong from a moral point of view.” Yoav Sapir: “Against Prevention? A Response to Harcourt’s *Against Prediction* on Actuarial and Clinical Predictions and the Faults of Incapacitation,” 33 *Law & Social Inquiry* 253, 260 (2008). I maintain that these claims are false insofar as they suggest that possessing the characteristics that accurately predict future dangerousness cannot be morally wrongful.

⁶⁶ Since I propose to find a desert base for preventive detention, I am unsure whether my proposals amount to a form of what Morse calls *pure* prevention. See Morse: *Op.Cit.* Note 41.

⁶⁷ But see R.A. Duff, who proposes to replace the act requirement with an action presumption. *Op.Cit.* Note 38, Chapter Five.

deserving of punishment because the act requirement is said to be preserved by the statutes they violate. A defendant who commits a criminal attempt, for example, acts wrongly by taking a “substantial step” toward his illegal objective.⁶⁸ This step is thought to render him eligible for a deserved punishment.

If it is true that the act requirement explains why many theorists believe that persons cannot deserve to be preventively detained despite possessing properties x, y & z, their degree of confidence in the proposition that no one can deserve to be preventively detained should be no higher than their degree of confidence in the act requirement itself. If we reject the act requirement, we no longer could cite this principle to conclude that no one can deserve to be preventively detained. Elsewhere, I have mounted a sustained critique of the act requirement.⁶⁹ I have argued that what theorists typically regard as the act requirement in criminal law is better construed as a distinct but related set of normative principles designed to ensure that persons have *control* over any state of affairs for which they are punished.⁷⁰ No one should be punished for what is beyond their control, and an effort to treat preventive detention as punishment must preserve this fundamental requirement. As long as the possession of the characteristics x, y & z are under the control of persons the state preventively detains---as I would insist---punishment would be compatible with the principle I propose to substitute for the act requirement.⁷¹

The control requirement would rule out a great many candidates for penal offenses that might accurately predict harm. Race, gender, or age, for example, could not be among the elements of these crimes, notwithstanding their predictive power. Punishments for the offenses that satisfy this requirement need not be objectionable; they would not violate any of the foundational ideas theorists hold sacrosanct. They would not treat us as though we lack free will or exhibit disrespect for our status as

⁶⁸ This criterion differentiates preparation from attempt in *Model Penal Code*, Sec. 5.01(1)(c).

⁶⁹ See my “Does Criminal Responsibility Require an Act?” in R.A. Duff, ed: Philosophy and the Criminal Law (Cambridge: Cambridge University Press, 1998), p.60; “Rethinking the Act Requirement,” 28 *Cardozo Law Review* 2437 (2007); and “The Alleged Act Requirement in Criminal Law,” in John Deigh and David Dolinko, eds.: Oxford Handbook of the Philosophy of Criminal Law (New York: Oxford University Press, forthcoming, 2011).

⁷⁰ I defend this claim in each of the articles in *Id.*

⁷¹ Apparently Lippke is skeptical about whether the properties of defendants that warrant their preventive detention ever *are* under their control. See *Op.Cit.* Note 39.

autonomous, rational agents, for example.⁷² Thus even if the offenses I propose to enact to achieve the objectives of preventive detention qualify as status crimes, nothing need be normatively suspicious about them.⁷³ But I will not rehearse these controversial arguments here. In what follows, I will briefly question why theorists seem so certain that the offenses we tend to accept in our penal codes preserve the act requirement.

Although I suspect that the problem I will describe can be generalized to many inchoate offenses, I will illustrate it by reference to possession offenses. State penal codes include over one hundred possession offenses, ranging from minor violations to the most serious category of felony punishable by life imprisonment. These include possession of a toy gun, graffiti instruments, public benefit cards, credit card embossing machines, gambling records, usurious loan records, obscene materials, eavesdropping devices, noxious materials, and a host of others.⁷⁴ Several of these offenses, of course, are enormously controversial and should be repealed.⁷⁵ Still, many crimes of possession---such as that proscribing the private possession of weapons of mass destruction---are clearly justifiable.⁷⁶ In other words, these offenses are a legitimate use of the penal sanction.⁷⁷ But no one should say that the state of possessing something---like the weapons in my garage---*is* an act. Possession is better construed as a state of affairs than as an act. If criminal liability ever is imposed *for* (that is, in virtue of) the state of possession---as seems clear---it follows that criminal liability is not always imposed for an act. If the act requirement should be construed to hold that only acts are

⁷² Thus my general framework of responsibility is compatible with that invoked by Walen in *Op.Cit.* Note 15.

⁷³ The inclusion of status crimes in a penal code would raise many new normative issues. For example, would character evidence become more salient? See Ted Sampsell-Jones: "Preventive Detention, Character Evidence, and the New Criminal Law," 2010 *Utah Law Review* 723 (2010).

⁷⁴ See Markus Dirk Dubber: "The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process," in Antony Duff and Stuart Green, eds.: Defining Crimes: Essays on the Special Part of the Criminal Law (Oxford: Oxford University Press, 2005), p.91, 96-97.

⁷⁵ Drug offenses are perhaps the most controversial examples. See Douglas Husak: Drugs and Rights (Cambridge: Cambridge University Press, 1992).

⁷⁶ "Theorists agree that criminal responsibility for possession should not be ruled out in principle." Duff: *Op.Cit.* Note 38, p.106.

⁷⁷ Andrew Ashworth, by contrast, believes that the use of possession offenses to challenge the act requirement "looks like backwards reasoning: it more or less concedes that stretching is required." Andrew Ashworth: "The Unfairness of Risk-Based Possession Offences," *Criminal Law & Philosophy* (forthcoming, 2011). Although Ashworth raises a host of persuasive objections to the justifiability of many possession offenses, I do not believe that their incompatibility with the supposed act requirement is among them. In any event, he does not hold *all* possession offenses to be unjustifiable.

and ought to be the objects of penal liability, it is false both descriptively and normatively.⁷⁸

Of course, orthodox thought in criminal law rejects my claim that possession offenses are counterexamples to the act requirement. The Model Penal Code, for example, stipulates that “possession is an act... if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.”⁷⁹ Taken literally, however, this provision is nonsense, and seeks to preserve the act requirement by fiat. The state of affairs in which I possess a weapon is not an act, and this state of affairs is not magically transformed into an act simply because I am “aware of [my] control thereof for a sufficient period.” I have not been performing continuing acts of possessing each of the shirts in my closet since the moment I knowingly acquired them several years ago. No state of mind or passage of time can perform the alchemy needed to convert non-acts into acts. I conclude that the foregoing provision from the Model Penal Code should not be interpreted to specify the conditions under which the state of possession *is* or *becomes* an act.

Before proceeding further, I need to deflect a possible objection at the outset. Suppose that my grounds for rejecting the act requirement are misguided, and orthodox liberal theorists have been correct to insist that penal liability must contain an act. Suppose also that possession offenses preserve the act requirement. It is important to notice that these suppositions would not require a major revision in my efforts to make preventive detention acceptable to retributivists. We need only stipulate that the properties or characteristics x, y & z must contain an act. Just as the content of penal statutes must not abridge important values such as freedom of speech or religion, the content of the penal statutes enacted to punish such persons as mega-terrorists must include an act. Or so it might be contended.

I now turn to a second possible reason to deny that persons can be deserving of punishment in virtue of presently possessing the characteristics that predict future dangerousness. This reason derives from the principle of proportionality. According to

⁷⁸ The act requirement must be given a different formulation if it is to be preserved. For a discussion, see Husak: "The Alleged Act Requirement in Criminal Law," *Op.Cit.* Note 69.

⁷⁹ §2.01(4).

this train of thought, even if those persons we propose to preventively detain are deserving of punishment, the goals of preventive detention assess the *extent* of their punishments incorrectly. Proportionality typically is construed to require the severity of punishment to be a function of the seriousness of the crime.⁸⁰ If the state enacts crimes to punish persons we want to detain preventively, proportionality entails that their sentence should be a function of their desert. But the objective of preventive detention necessitates that these persons be confined until they no longer are dangerous. How, then, is preventive detention compatible with a retributive theory of punishment that awards a prominent place to desert and proportionality?

I regard this second problem as the most worrisome of those entertained thus far. I offer two responses, each of which concedes that a retributive justification of punishment must preserve proportionality. First, note that it is not always clear *how* to preserve proportionality; its demands are notoriously difficult to identify.⁸¹ Who can say what sentence persons deserve for committing the newly enacted crimes containing elements x, y & z? Fortunately, this difficulty is not so overwhelming in the present context. Consider possible views about the seriousness of the newly enacted crimes committed by persons the state proposes to detain preventively. The seriousness of a crime is (mostly) a function of the severity of its harm and the culpability of its perpetrator.⁸² Since I have already presupposed that only severe harms could warrant preventive detention, it follows that the crimes these defendants commit would be extremely serious as long as offenders possess a high degree of culpability. And they do; no one will balk at saying that the culpability of mega-terrorists, for example, is great. Thus the newly enacted crimes these defendants would commit would tend to be incredibly serious, making perpetrators eligible for lengthy periods of confinement. As a result, we need not worry that the objectives of preventive detention will authorize long terms of incarceration in violation of proportionality. Although these sentences will

⁸⁰ No canonical formulation of the principle of proportionality can be found. But see Andrew von Hirsch and Andrew Ashworth: *Proportionate Sentencing* (Oxford: Oxford University Press, 2005).

⁸¹ Many theorists believe that the difficulties of satisfying the demands of cardinal proportionality are sufficient to warrant the rejection of retributive theories. See, for example, Greg Roebuck and David Wood: "Censure Without Sanction: A Retributive Argument Against Punishment," 5 *Criminal Law and Philosophy* 73 (2011). See also Adam Kolber: (forthcoming).

⁸² See Andrew von Hirsch and Nils Jareborg: "Gauging Criminal Harm: A Living-Standard Analysis," 11 *Oxford Journal of Legal Studies* 1 (1991).

indeed be lengthy, it is doubtful that violations of proportionality will occur. The sentences allowed by proportionality and those required for preventive purposes are likely to come apart only if the new crimes we enact are not serious.

I hazard a second response to this problem that may apply even to less serious crimes, although my thoughts on this score are more tentative. One way to argue that the demands of proportionality can be satisfied by preventive detention construes the crimes that trigger this sanction as inchoate. Once again, consider the example of possession statutes.⁸³ These crimes are *continuous* in the sense that they are committed over and over again as long as persons remain in possession of whatever item is proscribed. The ongoing nature of these offenses may extend even after a defendant is convicted. A person who is punished the appropriate amount for illegal weapon possession, for example, would presumably be eligible for an additional punishment if he persists in possessing the illegal weapon as soon as he completes his sentence. Theorists need not regard the additional sentence as disproportionate; its rationale would be identical to and no less justifiable than the term initially imposed. Similarly, a defendant who continues to exhibit characteristics x, y & z---and thus is eligible for preventive detention---remains deserving of punishment as long as he possesses these properties. We need not construe any part of his sentence as an added punishment for the original crime that implicates the Double Jeopardy Clause of the Fifth Amendment. Instead, we might regard him as perpetrating a new offense each moment he remains dangerous. The desert base for his punishment is continuous; it survives as long as he exhibits the characteristics that predict future harm. Of course, like the defendant who divests himself of the illegal weapon, the state loses its reason to detain him preventively when he no longer exhibits the properties x, y & z. As long as we ensure that the defendant has control over these characteristics, he need not worry that he could not possibly lose the status that rendered him eligible for liability in the first place.

A third and final reason to deny that preventive detention can be conceptualized as deserved punishment is quite unlike the foregoing two. It begins by asking exactly *how* desert is thought to figure so prominently in an explanation of why justified

⁸³ Of course, analogies with possession offenses can be used for justificatory purposes only if these offenses are legitimate uses of the penal sanction. For serious reservations about many possession offenses, see Ashworth: *Op.Cit.* Note 77.

punishments infringe rather than violate our right not to be punished. In other words, we need to inquire how desert is *relevant* or *significant* to a retributive justification of punishment. A complete answer to this question could consume an entire treatise. Some retributivists apparently think that desert is the *only* consideration to which we may appeal in constructing a justification of punishment. According to purists like Moore, for example, "it is a sufficient reason for us to have punishment institutions (i.e., the criminal law)---and for us to use those institutions to mete out a particular punishment to a particular person on a particular occasion---that the person deserve to be punished."⁸⁴ Consequentialist considerations play no role in this determination; "the moral desert of an offender is a *sufficient* reason to punish him."⁸⁵ Moore holds that value of inflicting deserved punishments derives not from its consequences but solely from the value of implementing a principle of retributive justice. He writes "punishing the guilty achieves something good---namely, justice---and... reference to any other good consequences is simply beside the point."⁸⁶

If this account of the significance of desert to a retributive philosophy of punishment were correct, it would succeed in distinguishing preventive detention from punishment. Future consequences *are* relevant to the justification of preventive detention; the practice exists for the purpose of preventing subsequent harm. But I do not accept a purist account of the role played by desert in an adequate theory of punishment, and the grounds for rejecting it should make retributivists more sympathetic to preventive detention. Unlike Moore, I do not believe that the institutions of criminal law and punishment can be justified solely as a means to implement a principle of retributive justice---even though I share the basic controversial intuition that the state of affairs in which culpable wrongdoers are punished is no worse than and may even be better than the state of affairs in which they are not. Even so, consequentialist considerations must be included in a justification of punishment. Moore has told only part of the story---indeed, a very important part. To complete the account, however, one must also show that the benefits of state punishment are worth its costs in the real world. Moore describes one of these benefits in impressive detail:

⁸⁴ Moore: *Blame*, *Op.Cit.* Note 61, p.104.

⁸⁵ *Id.*, p.88 (emphasis in original).

⁸⁶ *Id.*, p.111.

punishment is a means to implement retributive justice by giving culpable wrongdoers their just deserts. But what of the staggering costs of punishment? Elsewhere, I have referred to three of these costs as the *drawbacks* of punishment.⁸⁷ First, the expense of our system of criminal justice is astronomical.⁸⁸ Our penal institutions cost huge sums of money that might be used to achieve any number of other valuable goods taxpayers might prefer: education, transportation, funding for the arts, and the like. Second, our system of punishment is susceptible to grave error. Despite the best of intentions, punishment is bound to be imposed incorrectly, at least occasionally.⁸⁹ Third, the power created by an institution of punishment is certain to be abused. Officials can and do exceed the limits of their authority, intentionally or inadvertently.⁹⁰ As administered by the state rather than by a deity, citizens should be reluctant to create an institution of criminal justice because of these three drawbacks. In combination, these drawbacks render state punishment extraordinarily difficult to justify.

Sensitivity to the drawbacks of punishment undermines the thesis that desert suffices to justify penal sanctions. Some retributivists seemingly suppose that their task is complete when they show that the punishment of culpable wrongdoers increases (or at least does not decrease) the amount of intrinsic value in the world, even if no gain in utility is produced when criminals receive their just deserts. I understand why retributivists tend to dwell on this crucial point, inasmuch as consequentialists are unwilling to concede it. But this demonstration does not suffice to justify an institution of punishment. Retributivists must show not only that giving culpable wrongdoers what they deserve is intrinsically good, but that the *amount* of the value that punishment produces is sufficient to offset the drawbacks that inevitably result when an institution of criminal justice is created. Perhaps the value of realizing a principle of retributive justice would justify punishment in a possible world in which none of the foregoing drawbacks obtained. In a divine realm, for example, no expenses are incurred to exact

⁸⁷ For earlier thoughts, see Douglas Husak: "Why Punish the Deserving?" in Douglas Husak: *The Philosophy of Criminal Law: Selected Essays* (Oxford: Oxford University Press, 2010), p.393.

⁸⁸ See U.S. Department of Justice: *Sourcebook of Criminal Justice Statistics*, Table 1.1 (2006).

⁸⁹ See The Innocence Project: "Causes and Remedies of Wrongful Convictions," <http://www.innocenceproject.com/causes/index.php>. See also "Symposium: The Faces of Wrongful Conviction," 37 *Golden Gate University Law Review* 1- 217 (2006).

⁹⁰ See, for example, Anthony V. Bouza: *Police Unbound: Corruption, Abuse, and Heroism by the Boys in Blue* (Amherst, N.Y: Prometheus Books, 2001).

retribution, the innocent never are punished, and corruption and abuse are nonexistent. Unfortunately, this possible world differs from the world we inhabit. We understand why citizens balk when asked to fund an institution that has the sole objective of realizing retributive justice. Persons might reasonably prefer to use their tax dollars for any number of other worthy purposes.⁹¹ I conclude that the value of realizing retributive justice, by itself, is insufficient to justify the creation of an institution of criminal justice with the formidable drawbacks I have described. Something else needs to be said on behalf of criminal law and punishment.

What is needed to solve the problem I have posed---to show why the state is justified in imposing deserved punishments which infringe rather than violate our rights---is some additional value that punishment can be expected to promote. This good, when added to the value of attaining retributive justice, will justify the creation of an institution of criminal law and punishment. Many candidates for this value might be proposed; systems of penal justice serve a multiplicity of important objectives. But the most plausible of these candidates, I submit, is crime prevention. Means that directly further substantial state interests, like the prevention of future harm, clearly are worthy of tax resources. We must accept the risks of abuse and corruption unless we can find a better way to achieve this important end. The furtherance of this objective (hopefully) offsets the drawbacks of punishment and gives citizens ample reason to create a system of criminal justice.⁹² If I am correct, the prevention of future harm plays an indispensable role in the justification of punishment.

Obviously, consequentialist considerations also play an indispensable role in the justification of preventive detention. If I am right that they also play this role in a justification of punishment---even a justification that is broadly retributivist---we need not recognize a sharp divide between these practices. I conclude that the punishments imposed pursuant to a system of preventive detention need not disregard desert or the normative factors that apply to penal justice. In sum, no good reason has been given to

⁹¹ The difficulty of showing that the amount of the value that punishment produces is sufficient to offset the drawbacks that inevitably result when an institution of criminal justice is created can be solved only by locating part of the justification of criminal law and punishment within political philosophy rather than moral philosophy. See Husak: "Punish," *Op.Cit.* Note 87.

⁹² For a challenge to whether good consequences suffice to offset the drawbacks of punishment, see David Wood: "Retribution, Crime Reduction and the Justification of Punishment," 22 *Oxford Journal of Legal Studies* 301 (2002).

think that preventive detention cannot be deserved punishment or that the statutes that authorize it cannot be a legitimate part of the criminal law.

Conclusion

I have argued that no serious barrier of principle shows that preventive detention cannot be conceptualized as punishment or defended as justified punishment. If I am correct, the rules that authorize it can be treated as part of the state's criminal law. Although several considerations are alleged to show that preventive detention *cannot* be deserved punishment, I have given reason to believe that each should be rejected. Some of these obstacles are more formidable than others, and my response has been tentative at times. At a minimum, I purport to have shown that these practices are not nearly as distinct as many theorists suppose.

I have said little, however, about whether either or both of these practices *is* ultimately defensible. Despite the skepticism among a handful of commentators about whether punishment is justified---skepticism that is more prevalent in Europe but has begun to spread to the United States⁹³---I assume that some suitable rationale for criminal law and punishment can be found. If preventive detention can be structured to *be* punishment and the rules that authorize it can become part of the state's criminal law, it might be supposed that the rationale of preventive detention is comparable. For the most part, I believe this supposition is correct. The task, then, is to defend a theory of criminal law and punishment to which preventive detention can be assimilated. Elsewhere I have taken steps toward defending a theory of criminalization---a set of normative principles that purport to show whether particular criminal laws are justified. The problems in justifying offenses of risk-prevention are sufficiently acute to require a special section of that effort.⁹⁴ Rather than repeat my arguments here, I simply claim that whatever normative standards justify the enactment of crimes of risk-prevention should also be applied to justify statutes allowing preventive detention. The need to conform to these constraints provides further restrictions on the kinds of new crimes

⁹³ Abolitionism, once almost exclusively confined to Europe, has recently become more popular in the United States. See Deirdre Golash: *The Case Against Punishment* (New York: New York University Press, 2005); David Boonin: *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008); and Michael J. Zimmerman: *The Immorality of Punishment* (Ontario: Broadview Press, 2011).

⁹⁴ See Husak: *Op. Cit.* Note 9, pp.159-177.

that may be enacted. Even if my own principles of criminalization turn out to be mistaken, I propose that whatever constraints are deemed acceptable should also be employed to assess the penal laws that authorize preventive detention. We have no strong reasons of principle to resist statutes that authorize preventive deprivations of liberty if we preserve the stringent conditions that allow states to punish.

In fact, however, the case for preventive detention might be even stronger than my arguments suggest. Contrary to the suspicions of most legal philosophers, it should be *easier* to justify preventive detention than to justify punishment for harms already caused. Surely preventing future harms is a legitimate function of the state---even through its institutions of criminal justice. As I have indicated, anticipatory offenses such as attempt, solicitation, conspiracy and possession share this rationale. Most of us should agree that it would be preferable (*ceteris paribus*) to prevent harms before they occur than to punish persons after they have caused harm.⁹⁵ Clearly, we should be eager to implement means to prevent future harms if we are able to do so without infringing rights more valuable than those typically infringed by punishment. But I have not relied on this point in my discussion of preventive detention. My more modest claim is that preventive detention can be conceptualized and justified as state punishment so that the rationales for the two practices can be made to be comparable.

If we are confident about the justifiability of punishing persons who commit anticipatory or inchoate offenses to prevent future harms, why are so many penal theorists skeptical of preventive detention in principle? Frankly, I am unsure, and my critics will be able to speak for themselves. A few are not persuaded that anticipatory or inchoate crimes rest upon a secure rationale, and thus are not impressed by my efforts to compare them to offenses that authorize preventive detention. This battle must be fought another day. Some will complain that I have created a straw man and that the most cogent objections to preventive detention are practical rather than principled. My own survey of the literature surrounding this practice indicates that both kinds of difficulties are raised with equal frequency. Others will reject the controversial claims I have made about criminal law and punishment. Admittedly, some of my views about the act requirement, status criminality, desert, control and proportionality are outside

⁹⁵ See Arthur Ripstein: "Prohibition and Preemption," 5 *Legal Theory* 235 (1999).

the mainstream of orthodox thought. Without a defense of conventional wisdom, however, the mere fact of discrepancy is not a good reason to reject my positions. Some may want to detain a broader range of dangerous persons than my strategy is likely to allow. I concede the likelihood that only small numbers of dangerous persons will be justifiably detained as criminals by the line of thought I have developed. Still others will equate preventive detention in general with a particular system with which they are familiar. Most or perhaps all of these existing systems of preventive detention are draconian, and I join those theorists who reject them categorically. But I have encouraged us to think more broadly, even though this perspective is bound to undercut much of what makes political officials inclined to resort to preventive detention in the real world. And still others will persist in supposing that any system of preventive detention that operates within the criminal justice system is problematic because it is necessarily disguised. This latter problem is the easiest to rectify. I propose to lift the cloak that allegedly conceals this practice and to evaluate it by the same criteria we apply to the rest of the substantive criminal law. If my arguments are sound, preventive detention need not be *disguised* as criminal justice. In fact, the *principled* case against the morality of the practice does not succeed without jeopardizing the case for punishment. To reject preventive detention while retaining state punishment requires theorists to accept controversial positions on some of the deepest and divisive issues in the philosophy of criminal law.