

The Civilization of the Criminal Law

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I. Introduction: Punishment v. Prevention

The boundaries of the criminal justice system are eroding. A huge amount of relatively innocuous behavior is now criminalized.² The line between criminal penalties and administrative sanctions is dissolving, as criminal law relaxes its mens rea requirements and government bureaucracies aggressively pursue regulatory violations.³ Distinctions between criminal and civil forfeiture, contempt and deportation proceedings have been vanishingly subtle for some time.⁴

Perhaps the most serious assault on the integrity of today's criminal justice system, however, is the increasing prominence of the "dangerousness criterion" as justification for confinement by the government. Governmental deprivations of liberty have usually been the province of "criminal law," which is generally defined by a commitment to *punishing* individuals for their *past* acts based on the principle of *just deserts*.⁵ Constraints on liberty based on

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² See William Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 506, 511 (2001) (describing laws that penalize, inter alia, cheating at cards and making homosexual propositions); Ronald Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. Rev. 45, 74 (1998) (describing federal laws that penalize, inter alia, disturbing mud in a cave and selling different mixtures of turpentine). Paul H. Robinson, *Moral Credibility and Crime*, Atl. Monthly, Mar. 1995, at 72, 77 ("(C)riminal law is increasingly used against purely regulatory offenses, such as those involving the activities permitted in public parks, the maintenance procedures at warehouses, and the foodstuffs that may be imported into a state.").

³See Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act*, 2001 U.Ill.L.Rev. 1025 (describing the proliferation of "hybrid" regulatory statutes that allow their provisions to be enforced through either criminal prosecutions or civil suits).

⁴Sandra Guerra Thompson, *Civil Forfeiture: Punishing Criminals Yet Protecting Property Owners*, 14 Fed. Sentencing Rep. 71 (2001) (describing how civil forfeiture has become a tool for fighting crime and terrorism); Gino F. Ercolino, *United Mine Workers v. Bagwell: Further Clarification of Civil and Criminal Contempts*, 22 New Eng. J. Crim. & Civ. Confinement 291, 292 (1996) ("It has never been easy for courts to classify a contempt as either civil or criminal."); Michelle Rae Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. Int'l L. Rev. 29 (2003) (arguing that civil deportation proceedings are criminal in nature).

⁵Sanford H. Kadish, *Why Substantive Criminal Law—A Dialogue*, 29 Clev. St. L. Rev. 1, 10 (1980) ("It is deeply rooted in our moral sense of fitness that punishment entails blame and that, therefore, punishment may not justly be imposed where the person is not blameworthy."); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 404-06 (1958) (stating that criminal law is distinguished from civil law in its power of

dangerousness, in contrast, focus on the individual's *future* actions.⁶ These latter types of interventions contemplate neither punishment nor an assessment of blameworthiness for previous conduct, and thus directly flout the traditional premises of criminal justice.

This article contends that the criminal law ought to embrace the dangerousness criterion, with the significant caveat that it do so wholeheartedly rather than in the halting manner it has exhibited to date. The punishment model of criminal justice that views desert, general deterrence, or inculcation of good character (or some combination of these three) as the primary objective of criminal justice should be discarded. Individual prevention should become the predominant goal of the criminal justice system.

The individual prevention rationale has long played a *secondary* role in justifying confinement by the government, of course. Pretrial detention, based on a prediction that an arrestee will commit crime if released, is one obvious example of a setting in which dangerousness determinations are the dominant consideration in determining whether a deprivation of liberty should occur.⁷ Involuntary hospitalization of people with mental illness is another illustration of that phenomenon.⁸ Indeterminate sentencing systems that base sentence length on fitness for discharge into society is still another.⁹

But all of these practices are consistent with the traditional punishment model of liberty deprivation represented by our current criminal justice system. Pretrial detention is time-limited by the criminal trial, at which a decision about whether to punish is made.¹⁰ Traditional civil commitment is indeterminate, but applies only to persons for whom punishment is inappropriate under a just desert analysis. Society is entitled to protect itself from severely mentally ill people, classic theory states, because they are unconvictable and undeterrable.¹¹ And the indeterminate

moral condemnation).

⁶See generally Christopher Slobogin, *Dangerousness as a Criterion in the Criminal Process*, in Law, Mental Health, and Mental Disorder 360, 36-63 (1996)(Bruce D. Sales & Daniel W. Shuman, eds.).

⁷See, e.g., Federal Bail Reform Act of 1984, 18 U.S.C.A. § 3142(e) (authorizing preventive detention if necessary to “assure . . . the safety of any other person and the community”).

⁸Addington v. Texas, 441 U.S. 418, 426 (1979) (“the state . . . has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.”).

⁹Morrissey v. Brewer, 408 U.S. 471, 477-78 (1972) (describing jurisdictions in which “parole is granted by the discretionary action of a board, which evaluates an array of information about a prisoner and makes a prediction whether he is ready to reintegrate into society”).

¹⁰United States v. Salerno, 481 U.S. 739 (1987) (holding that pretrial prevention detention under the Federal Bail Reform Act is not punishment, in part because the length of detention is limited by the Speedy Trial Act).

¹¹See Note, *Civil Commitment of the Mentally Ill: Developments in the Law*, 87 Harv. L. Rev. 1190, 1233 (1974) (The group composed of the dangerous criminally insane “contains individuals whose mental condition

sentences popular in the mid-twentieth century and still in place in many states today, although imposed on people who are not mentally ill, immediately follow conviction for a fault-defined antisocial act. Such sentences also usually require a minimum term in prison that represents a retributive penance, and often fix a maximum term as well, again signifying a desert-based rationale.¹² Although a few statutes enacted in the early to mid-twentieth century permitted “commitment” of “defective delinquents,” “sex psychopaths,” or “mentally disordered sex offenders” in the absence of conviction,¹³ until recently most jurisdictions rejected this approach—instead requiring either a serious mental illness or a conviction for an offense and a sentence range informed by desert principles—before dangerousness could be considered a justification for indeterminate confinement.

Today, however, we are witnessing the widespread promulgation of new incapacitation regimes that fall outside these traditional confines. Exhibit One is the so-called sexual predator scheme, upheld against constitutional challenge by the Supreme Court in *Kansas v. Hendricks* in 1997.¹⁴ These statutes, now law in close to twenty jurisdictions—with fifteen of them enacted since 1990¹⁵—permit long-term post-sentence confinement based on a finding of dangerousness. In a possible bow to the classic mental illness limitation on indeterminate commitment, these statutes require that the dangerousness result from “mental abnormality” that affects volitional or emotional capacities and “predisposes” the person to sexual offending.¹⁶ But, as applied, this language merely ensures that the person is unusually dangerous.¹⁷ It does not require the kind of

excludes them from the operation of the traditional punishment-deterrence system, because they are both unable to make autonomous decisions about their antisocial behavior and unaffected by the prospect of punishment.”).

¹²U.S. Dep’t Justice, Bureau of Justice Assistance, National Assessment of Structured Sentencing (1996) (describing as the “traditional form” of indeterminate sentencing a system where “the judge specifies a maximum and minimum duration that is set by statute” and a second form in which “the judge specifies only the maximum sentence length; the associated minimum duration is automatically implied but is not within the judge’s discretion”).

¹³See George E. Dix, *Special Dispositional Alternatives for Abnormal Offenders: Developments in the Law*, in *Mentally Disordered Offenders: Perspectives from Law and Social Science* 133, 134-40 (1983)(John Monahan & Henry Steadman, eds.) (describing laws in 16 states and the District of Columbia).

¹⁴521 U.S. 346 (1997).

¹⁵W. Lawrence Fitch & Debra A. Hammen, *The New Generation of Sex Offender Commitment Laws: Which States Have Them and How Do They Work?*, in *Protecting Society from Sexually Dangerous Offenders* 27, 33 (Bruce J. Winick & John Q. LaFond eds., 2003) (table showing 16 states with sexual predator laws). Although passage of such laws has slowed in the past five years, Pennsylvania recently enacted a sexual predator law, bringing the number of such laws to 17. 42 Pa.Stat. § 6402 (2003). Several other states authorize indeterminate, potentially lifelong, sentences for sex offenders. Fitch & Hammen, *supra*, at 36.

¹⁶See, e.g., Kan. Stat. § 59-29a02(b) (defining “mental abnormality” as a “congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.”).

¹⁷See Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use*, 8 Stan. L. & Pol’y Rev. 71, 81 (1997) (survey of Minnesota sex offender cases finding that the courts’ “utter

incapacity-to-be-responsible showing that triggers traditional civil commitment; for instance, Leroy Hendricks, whose indeterminate commitment—after he had served his sentence for child molestation—was upheld by the Court, clearly was not insane under any of the traditional formulations.¹⁸

Akin to indeterminate sentencing schemes, the sexual predator statutes usually apply only to people who have already committed a sexual offense. But that offense may have taken place years prior to the commitment; as *Hendricks* illustrates, most sexual predator detentions occur after the person has served his sentence for the sex offense.¹⁹ Most importantly, there is no minimum or maximum “sentence” for the sexual predator; release is based entirely on demonstration that it will be safe to do so.²⁰

Although the sexual predator craze is the most conspicuous proof that the dangerousness criterion is on the loose, plenty of other evidence exists. In 1986, California enacted a statute which permits post-sentence confinement of *any* offender—not just one convicted of sex crimes—who is considered dangerous because of “mental disorder.”²¹ Use of the word “disorder” is significant because, in contrast to the “mental illness” that is the predicate for traditional civil commitment, mental disorder could apply to any of the 300-plus diagnoses found in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders.²² At the least, any prisoner with a personality disorder could easily fit in this category, which means at least half of all offenders might be eligible for preventive detention under this type of statute.²³

lack of power to control” test has no “justificatory power” and, in application, “becomes a legal fiction, an element of proof that must be invoked, but that does not do any substantive work in the litigation.”).

¹⁸Hendricks was never found insane despite multiple criminal trials for molestation, *Hendricks*, 521 U.S. at 353-55, and his prevalent diagnosis was pedophilia, a non-psychotic impulse disorder that rarely if ever forms the basis for a successful insanity defense. Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 Psychol. Pub. Pol’y & L. 505, 529-30 (1998) (describing why sex offenders should not be found insane).

¹⁹*Hendricks*, 521 U.S. at 369 (affirming Hendricks’ post-sentence commitment). See generally, Fitch & Hammen, *supra* note 14, at 28-30 (describing laws that permit “postsentence civil commitment of sex offenders”). Moreover, nothing in the Court’s opinion in *Hendricks* requires proof of any particular violation of the criminal code; so long as there is proof that the person is, to use the Court’s cryptic phrase, “dangerous beyond [his] control,” 521 U.S. at 358, commitment is justified under that opinion.

²⁰*Id.* at 363 (noting that the duration of confinement under sexual predator statutes is “linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others.”).

²¹Cal. Pen. Code § 2962 et seq.

²²American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders—Text Revised* xxx-xxxi (4th ed., 2000) (defining “mental disorder”).

²³Robert D. Hare, *Diagnosis of Antisocial Personality Disorder in Two Prison Populations*, 140 Am. J. Psychiatry 887, 888 (1983) (reporting 39% prevalence of antisocial personality disorder alone).

At least one other state is considering similar legislation,²⁴ and Canada and the United Kingdom have passed dangerous offender laws.²⁵

Unshackled from the traditional mental illness and sentence-range limitations, the emergence of the dangerousness criterion as a basis for confinement by the government could spell the end of the criminal justice system as we know it. As one commentator stated, “the logic of the predator commitment law can be applied to people who drive while under the influence of alcohol, who assault their domestic partners or children, who use crack cocaine, or who commit whatever the new ‘crime-of-the-month’ happens to be.”²⁶ Perhaps Justice Stevens put it best in his dissent in *Allen v. Illinois*²⁷ when he noted that such laws presaged the development of a “shadow” criminal code that permits the state, after nabbing a perpetrator, to choose between punishment for a crime or incapacitation based on danger.²⁸

Most commentators have, along with Justice Stevens, bemoaned this development.²⁹ In a previous article, I have joined this group, arguing that the two-track regime described by Justice Stevens is repugnant to our society’s most fundamental premises, precisely because it consists of two tracks.³⁰ Such a system strongly fosters the perception—a perception that can become a self-fulfilling prophecy—that those who are shunted off the punishment track to the commitment track are less than human. Under this type of system, those relegated to commitment are treated, not as autonomous actors who deserve to be punished for their choices, but as harmful, uncontrollable animals who must be caged under a special detention law, an image the “sexual predator” label captures perfectly.

²⁴The Michigan legislature is evaluating a similar statute. Fitch & Hammen, *supra* note 14, at 38. See also, *Tabor v. State*, 2004 WL 32657 (4th D.C.A. 2004) (predicate offense for sexual predator commitment need not be a sexual offense).

²⁵See Canada Federal Criminal Code § 753 (authorizing indeterminate confinement for a “dangerous offender,” defined as a perpetrator of a serious crime against person who “constitutes a threat to the life, safety or physical or mental well-being of other persons”); United Kingdom Stat. Chap. 44 § 226 (authorizing imposition of life sentence or indeterminate sentence on an offender for whom “there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.”).

²⁶John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. Puget Sound L. Rev. 655, 698-99 (1992).

²⁷478 U.S. 364 (1986).

²⁸*Id.* at 380 (Stevens, J., dissenting).

²⁹See Dawn J. Post, *Preventative Victimization: Assessing Future Dangerousness in Sexual Predators for Purposes of Indeterminate Civil Commitment*, 21 Hamline J. Pub. L. & Pol’y 177, 180 (1999) (stating that over 150 articles have been published opposing sexual predator legislation).

³⁰Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 Nw. U. L. Rev. 1, 28-31 (2003).

By this logic, however, the dehumanization objection would not obtain if intervention based on dangerousness were the government's *only* liberty-depriving response to antisocial behavior. Then invidious comparisons with a second, "autonomous" group worthy of blame cannot occur. A system of liberty deprivation that takes the dangerousness criterion as the sole predicate for intervention would not shadow the criminal code but instead constitute it.

This article explores the jurisprudential and practical feasibility of such a system, what I will call a "preventive" regime of justice. More specifically, this article examines an updated version of the type of government intervention espoused four decades ago by thinkers such as Barbara Wootton,³¹ Sheldon Glueck,³² and Karl Menninger.³³ These individuals, the first a criminologist, the latter two mental health professionals, envisioned a system that is triggered by an antisocial act but that pays no attention to desert, or even to general deterrence. Rather, like sexual predator regimes, the sole goal of the system they proposed is individual prevention through assessments of dangerousness and the provision of treatment designed to reduce it. However, unlike the sexual predator scheme at issue in *Hendricks*, a preventive regime would not countenance a two-track system involving "punishment" and "commitment"; the intervention would take place immediately after the antisocial act, rather than after completion of a criminal sentence. A preventive regime is also different from indeterminate sentencing, because it considers gradations of culpability irrelevant at the threshold of intervention as well as at the dispositional stage. As Lady Wootton imagined it, once the "obsession with the punitive [is] dispelled, the courts could be free to deal with every lawbreaker in whatever way, consonant with the moral standards of the community, seemed best calculated to discourage future lawbreaking. Their eyes would on the future, not on the past."³⁴

Some modern modifications of Lady Wootton's proposal, mostly semantic, need to be made. Today, social scientists talk about risk assessment, not predicting dangerousness, to connote the idea that the potential for violence is not something that resides solely in the individual, but rather stems from the interaction of biological, psychological, and social variables.³⁵ A clinician evaluating someone in a prevention regime would look for "risk factors" that correlate with antisocial behavior, some of which are static, such as age, gender and prior antisocial history, and some of which are dynamic or changeable, such as rage reactions,

³¹Barbara Wootton, *Crime and the Criminal Law* chs. 2-3 (1963).

³²Sheldon Glueck, *Law and Psychiatry*, ch. 4 (1963).

³³Karl Menninger, *The Crime of Punishment* ch. 8 (1966). For perhaps the earliest work advocating this approach, see Enrico Ferri, *Criminal Sociology* (1917). See also G.H. Mead, *The Psychology of Punitive Justice*, 23 *Am. J. Sociology* 577 (1918).

³⁴Barbara Wootton, *Book Review of A. Goldstein, The Insanity Defense*, 77 *Yale L.J.* 1019, 1030 (1968).

³⁵See generally, Kirk Heilbrun, *Prediction versus Management Models Relevant to Risk Assessment: The Importance of Legal Decision-Making Context*, 21 *Law & Hum Behav.* 347, 351-53 (1997).

substance abuse, family and peer dynamics, and the proximity of certain people.³⁶ As detailed later in this article,³⁷ risk assessment techniques, long lambasted for their inaccuracy, have improved substantially in recent years.

Social scientists also talk about “risk management,” not incapacitation or control, which gets across the notion that the best disposition is the one that manages the dynamic, or changeable, risk factors.³⁸ The ultimate goals of risk management, in terms that a student of the criminal law would understand, are specific deterrence, rehabilitation and incapacitation. Incapacitative interventions under a risk management approach need not occur in a confined space, but rather can take place in the community—albeit sometimes under strict monitoring—and in any event are ongoing and flexible rather than set at the front-end.³⁹ The permissible dispositions are legion. In addition to formal rehabilitation programs and prison, they can include restitution, fines and forfeitures, community service, contempt-backed peace orders and other probationary conditions, as long as the focus remains individual prevention. Thus, the system examined in this article is one that rejects culpability assessments, and instead looks at whether an offender’s risk factors indicate a potential for harm to others, in which case appropriate management in the community or, if necessary, through incapacitation in an institution, occurs. The contours of this prevention system will be fleshed out in subsequent pages.

The ultimate objective of this article is to present a defense of a prevention system as a replacement for, rather than in addition to, our current criminal justice system. The Supreme Court upheld the sexual predator scheme in *Hendricks*, despite its forward-looking nature, because it deemed the scheme “civil” rather than “criminal.”⁴⁰ Assuming some significant modifications of the model the Court sanctioned, a preventive system may indeed be a more civil method of dealing with antisocial conduct than the current desert-based approach, a notion captured by Karl Menninger’s famous title, *The Crime of Punishment*.⁴¹

Such a defense of a purely preventive regime has been rare in the legal literature since the 1960s, when just deserts philosophy became popular and preventive approaches fell into

³⁶For a current treatment of risk assessment, see John Monahan, *Rethinking Risk Assessment* chs. 3-6 (2001) (discussing “criminological” risk factors, “clinical” risk factors, and methods of customizing risk assessment).

³⁷*See infra* text accompanying notes 109-112.

³⁸Heilbrun, *supra* note 34, at 352-53.

³⁹*See infra* text accompanying notes 126-143.

⁴⁰521 U.S. at 368-69 (holding the Kansas sexual predator law to be “civil in nature”).

⁴¹*See supra* note 32.

disrepute.⁴² Since then, a number of conceptual and empirical advances have made the issue even more complex. The case for a preventive regime nonetheless deserves serious consideration in the twenty-first century, as an increasing number of jurisdictions adopt harsh determinate sentencing based on desert principles,⁴³ and in the wake of the American Law Institute's recent announcement that its planned revision of the Model Penal Code will forego the original Code's focus on reform of prisoners and instead endorse a just deserts approach to sentencing.⁴⁴

Part II of the article looks at jurisprudential objections to a prevention regime, which all center on its perceived failure to do "justice." It contends that such a regime would neither slight human dignity nor undermine the general deterrence and character-shaping goals of the criminal law. Part III examines concerns about the feasibility of a preventive system, including questions about the accuracy of predictions, the efficacy of treatment, and the costs of a reform-oriented justice system. It concludes that these concerns are overstated, and in any event are less serious than the practical problems that afflict the punishment model. Finally, Part IV describes one further reason for favoring prevention over traditional punishment: a preventive regime is much better at assimilating the proliferation of scientific findings that call into question humans' ability to control their actions, which is the central premise of a punishment system based on desert.

The view taken in this article is exploratory, however. For a number of reasons, legal and sociological, one might be ambivalent about instituting a full-blown preventive regime, at least in the immediate future. Accordingly, the conclusion to the article, Part V, suggests a transitional compromise, which maintains culpability as the threshold for government intervention, and reserves application of the preventive model for disposition, in what amounts to a modern version of indeterminate sentencing.

⁴²M.F. Plattner, *The Rehabilitation of Punishment*, 44 *The Public Interest* 104 (1976) (describing the attacks on rehabilitation-oriented imprisonment in the early 1970s and the emergence of the just deserts movement among liberals and conservatives).

⁴³See Todd R. Clear, *Harm in American Penology: Offenders, Victims, and their Communities* xiv (1994) (describing the current penal era as "a time period of the most extreme increases in penal harm in our history"). Andrew Von Hirsch, one of the leading proponents of just deserts philosophy, proposed a five-year maximum for homicide and a maximum of three years for all other crimes. Andrew Von Hirsch, *Censure and Sanctions* 36-46 (1993). In contrast, in 1998 under the determinate sentencing policies extant in federal courts, five years was the average sentence for *all* offenses (including immigration, fraud, and prostitution, which constituted over 25% of the total cases), and the average sentence for murder was over 20 years, the average sentence for kidnapping was 13 years, and the average sentence for robbery was just under ten years. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Table 5.38* (2000). The Supreme Court's recent decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), which requires that any aggravating factor that enhances sentence be decided by a jury, may call for substantial revision of the procedures associated with determinate sentencing regimes, but is unlikely to lead to their disappearance. See Stephanos Bibas, *Blakely's Federal Aftermath*, 16 *Federal Sentencing Reporter* 331 (2004).

⁴⁴Kevin R. Reitz, *Model Penal Code: Sentencing, Plan for Revision* 16-28 (2002).

II. Jurisprudential Objections to Preventive Intervention

The most fundamental argument against a prevention regime is simply that it goes against everything we stand for. This argument has several versions, deontological, quasi-consequentialist and straightforwardly consequentialist. Here it is subdivided into contentions made by retributivists (those who view punishment of offenders as morally obligatory), rule utilitarians (those who subscribe to general deterrence theories), and virtue ethicists (those who believe punishment is justified because it inculcates virtue).

A. Retributivist Objections

Michael Moore puts the deontological case most forcefully with his arguments in favor of noninstrumental retributivism. He arrives at his position in favor of backward-looking desert-driven intervention primarily through thought experiments, one of which explicitly contrasts a preventive regime with a retributive one. Imagine, he hypothesizes, that a psychiatrist discovers that a particular patient has extremely dangerous propensities.⁴⁵ The patient also happens to be the accused in a criminal trial but, it turns out, is completely innocent and has never committed any crime. Under utilitarian theory, Moore notes, as long as the judge is the only one who knows about both the psychiatrist's opinion and the patient's innocence, and as long as the prediction is reliable and the harm predicted is sufficiently serious, the person should be punished.⁴⁶ Yet Moore conjectures that most of us would consider that conclusion inappropriate, because it would involve punishing an innocent person.⁴⁷

Moore is probably right that even many adamant utilitarians would not want to punish an innocent person who is merely predicted to be harmful, except perhaps when the utility of doing so is tremendous. But he skews the issue by using the word "punish." By definition, we *cannot* punish someone unless he has committed a crime, or at least we say he has committed one.⁴⁸ That does not mean that we are unwilling to authorize coercive government intervention against an innocent person. Consider a more realistic thought experiment, involving an individual who has molested children on several occasions and has been convicted for those crimes. The term of his last sentence, based on desert, is just about to expire. Psychiatrists believe that if released he will molest again, and indeed the person himself says that the only way he will stop abusing

⁴⁵Michael S. Moore, *Law and Psychiatry: Rethinking the Relationship* 238-39 (1984).

⁴⁶*Id.*

⁴⁷*Id.* at 239 He concludes: "Such thought experiments . . . show almost all of us that we are not pure utilitarians about punishment." *Id.*

⁴⁸Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 Harv. L. Rev. 1429, 1432 (2001) ("[I]t is impossible to 'punish dangerousness.' . . . [P]unishment can only exist in relation to a past wrong.").

children is “to die.” These are the facts of *Hendricks*,⁴⁹ and many of us would vote enthusiastically for a stringent risk management program in his case even if he were innocent of any unpunished crime.

Of course, under the prevention regime examined in this article, Hendricks’ child molestation would have subjected him to risk management *immediately*. Although Hendricks would not be “innocent” under this scenario (for he has not yet served a sentence for his crime), Moore and many retributivists would still object to any intervention based on a prediction of danger. To them, this type of “non-punitive” disposition would violate Hendricks’ *right* to be punished or at least breach society’s *obligation* to punish. Moore’s murky case for this requirement of punishment is based on an assessment of our emotional reaction to crime,⁵⁰ a topic discussed below.⁵¹ The more widely cited explanation for this stance comes from other commentators, using a somewhat more instrumental set of arguments than Moore. For instance, Herbert Morris would insist on desert-based punishment because it is necessary to affirm the dignity of the offender through recognition of him as a responsible human actor,⁵² while Jean Hampton argues that punishment is required as a societal affirmation of the victim’s worth in the face of the criminal’s demeaning attack.⁵³

Neither the dignity of offenders or of victims is dependent upon desert-based punishment, however. Risk management, properly conducted, explores the causes of antisocial behavior and continuously stresses the offender’s ability to change that behavior through cognitive restructuring, avoidance of risky behavior (such as drinking or fraternizing with gang members), and adjusting relationships.⁵⁴ As modern rehabilitative efforts routinely demonstrate, a regime based on prediction does not have to insult the notion that past choices have consequences and that the offender is responsible and held accountable for them.⁵⁵ There *is* a difference in

⁴⁹*Hendricks*, 521 U.S. at 354-55.

⁵⁰See generally Michael S. Moore, *The Moral Worth of Retribution*, in Responsibility, Character and Emotions 214 (Ferdinand Schoeman, ed., 1987) (arguing that feelings of guilt “engender the judgment that we deserve punishment . . . that we *ought* to be punished”).

⁵¹See *infra* text accompanying notes 78-82.

⁵²Herbert Morris, *On Guilt and Innocence* 46 (1976) (arguing that the difference between a punishment system and a therapy system can be expressed “in terms of the one system treating one as a person and the other not”).

⁵³Jean Hampton, in Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* 125 (1988) (arguing that punishment is not for the sake of the criminal but to affirm the worth of the victim because, imposed proportionate to the seriousness of the criminal’s wrongdoing, it “symbolizes the correct relative value of wrongdoer and victim”).

⁵⁴For a description of one very effective risk management program that uses these types of methods (called Multisystemic Therapy), see Curt R. Bartol, *Criminal Behavior: A Psychosocial Approach* 400-01 (1999).

⁵⁵Consider this standard statement about treatment, in connection with sex offenders:

message, however. The punishment model says to the offender: “You have done something bad, for which you must pay.” The prevention model says: “You have done something harmful, which you must not let happen again.” In terms of how they treat their children, many parents would probably prefer the latter message to the former; arguably government officials in charge of responding to antisocial behavior should as well.⁵⁶

The message that the offender has caused harm should also affirm the worth of the person he has harmed. Indeed, restorative justice programs designed to facilitate reintegration of the offender into the community transmit this message much more concretely than the traditional punishment model ever could, by organizing group conferences at which both offender and victim are present. A primary goal of such conferences, in the words of one proponent, is “to give offenders a sense of the consequences of their actions and an understanding of how victims feel” in an effort to humanize and dignify both offender and victim⁵⁷ (which in turn has been found to reduce recidivism by increasing remorse, reconciliation and self-esteem⁵⁸).

For a subset of victims, the message a prevention regime sends is even more complex, in a way that is, again, probably preferable to the message a punishment regime communicates. The punishment model often sets up a false dichotomy between the victim and the offender by suggesting that the offender deserves blame, while the victim is, well, innocent. In fact, much crime is intrafamilial or results from other types of prolonged interaction between offender and

We have now recognized that as with other kinds of craving disorders (e.g., alcoholism, substance abuse, and compulsive gambling), it is not a person’s fault that he or she suffers from the problem. It is that person’s responsibility, however, to seek help, and one way to begin that process is with the person’s admission of a lack of adequate self-control and a need for proper assistance.

Fred S. Berlin, *The Etiology and Treatment of Sexual Offending*, in *The Science, Treatment, and Prevention of Antisocial Behaviors: Application to the Criminal Justice System* 21-8 (Diane H. Fishbein, ed., 2000). See also, Scott M. Solkoff, *Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs*, 17 Nova L. Rev. 1441, 1485 (1993) (“numerous therapy professionals . . . have found acceptance of responsibility not to be a preference, but to be required in order for meaningful change to occur.”).

⁵⁶Cf. John Griffiths, *Ideology in Criminal Procedure, or a Third “Model” of the Criminal Process*, 79 Yale L.J. 359, 367, 371 (1970)(proposing a “Family Model” of criminal justice that derives “from a genuine acceptance of the idea that criminals are just people who are deemed to have offended—that we are all of us both actual and potential criminals—that ‘criminals’ are not a special kind and class of people with a unique relation to the state.”)

⁵⁷Gabrielle Maxwell & Allison Morris, *The Role of Shame, Guilt, and Remorse in Restorative Justice Processes for Young People*, in *Restorative Justice: Theoretical Foundations* 279 (Elmar G.M. Weitekamp & Hans-Jurgen Kerner, eds., 2002).

⁵⁸*Id.* at 280. It should also be noted that the notion that punishment is necessary to bring emotional closure for the victim is suspect at best. See Deborah Morris, *Forgiving the Dead Man Walking* (2000)(describing a victim’s search for solace after execution of her assailant, and concluding “justice did nothing for me, forgiveness did.”).

victim.⁵⁹ In some of these situations, a risk management approach might involve the “victim” as well as the offender, and both would have to accept proportionate responsibility for their actions.⁶⁰ In other words, the prevention model treats crime in context, not as an isolated event or the result solely of one individual’s actions. To social scientists that is a much more accurate perspective on our “crime problem” and one which therefore ought to be communicated.⁶¹

This discussion of offenders and victims does gloss over some important tensions triggered by the prevention model, however. First, most of the time the victim truly is innocent and the offender clearly is the only harming actor, yet on some of these occasions the offender will not be considered a risk. If the government avoided intervention in such cases, as the prevention model counsels, then no government affirmation either of the offender’s responsibility or of the victim’s worth occurs. Conversely, some offenders, because they are dangerous, would be subject to intervention under a prevention regime even though they lack the relevant mental state or were justified in their actions. As in Moore’s unlikely but nonetheless possible hypothetical, a person might also be considered dangerous even though he has *never* committed an antisocial act.

In these situations, the moral message communicated by a prevention system would admittedly be ambiguous. Using these kinds of examples, Paul Robinson has posited that a system that ignores the human urge to gauge blame—to condemn or withhold condemnation based on assessments of culpability—would lack “moral credibility” with the public.⁶² Dissatisfaction with the law and with authorities who intervene (or fail to intervene) in ways the public perceives as unjust might, in turn, lead to less willingness to comply with rules set by those authorities.⁶³ These are plausible speculations. But there is simply not enough

⁵⁹As two researchers concluded after study of violence amount people with disorder, it is “a mistake. . . to conceptualize violence as a characteristic of a person without giving equal attention to the underlying or concurrent interpersonal and clinical processes and contexts.” Sue E. Estroff & Catherine Zimmer, *Social Networks, Social Support, and Violence Among Persons with Severe, Persistent Mental Illness*, in *Violence and Mental Disorder: Developments in Risk Assessment* 259 (John Monahan & Henry Steadman eds., 1994).

⁶⁰This is, of course, a common premise in marital and other types of dyadic therapy.

⁶¹See generally Urie Bronfenbrenner, *The Ecology of Human Development: Experiments by Nature and Design* 3-42 (1979)(arguing that efforts to understand and change human behavior must taken into consideration the interrelated social contexts in which behavior occurs).

⁶²Robinson, *supra* note 47, at 1434 et seq. (2001)(“[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.”).

⁶³Id. at 1444 (“As criminal liability is increasingly disconnected from moral blameworthiness, the criminal law can exercise less moral authority to change norms or to cause the internalization of norms. In the long run, . . . using the criminal justice system as a mechanism for preventive detention may undercut the very crime prevention goal that is offered to justify such use.”); see also Paul Robinson & John Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 451, 457 (1997) (“The extent of the criminal law's effectiveness in . . . facilitating and communicating societal consensus on what is and is not condemnable, and in gaining compliance in borderline cases through deference to its

information about how people think about crime to say much more than that.

Take first the claim that preventive detention is repugnant to the typical layperson. Evidence for that assertion is slim. Even the current two-track system that accentuates the difference between a desert-based regime and a preventive one does not seem to have caused much public concern. The electorate has fervently endorsed sexual predator laws that explicitly eschew assessments of blameworthiness and recidivist statutes that implicitly do so.⁶⁴ Nor is it likely that a public obsessed with its safety, as ours is,⁶⁵ would be very upset by elimination of defenses based on excuse and elimination of subtle gradations of mens rea. As it is, many people had a hard time understanding why John Hinckley was “acquitted,”⁶⁶ and do not seem to be bothered by significant sentences based on negligent actions, as Robinson’s own empirical work demonstrates.⁶⁷

That being said, modification of the prevention regime to take into account some of the stronger intuitions of the public might be wise. For instance, one could supplement the act threshold required by Wooton⁶⁸ by limiting intervention to those who have committed a harmful or potentially harmful act that is both non-accidental and unjustified. As an empirical matter, a person who has not done (or tried) anything harmful or whose harmful act is inadvertent or justifiable is unlikely to be considered a risk in any event, and a person who does meet these conditions is likely to pose some risk. Regardless of empirical considerations, however, limiting intervention to those who commit or attempt harm and lack objective justification for doing so might be warranted as a method of minimizing the public dissatisfaction Robinson hypothesizes.

moral authority . . . is to a great extent dependent on the degree of moral credibility that the criminal law has achieved in the minds of the citizens governed by it.”).

⁶⁴On the popularity of legislation regarding sexual predators, *see supra* text accompanying notes 13-15. A good illustration of the public’s reaction to three-time loser laws comes from California, where public outrage over the legislature’s failure to pass such a statute resulted in Proposition 184, “one of the fastest qualifying propositions in state history,” which passed with 72% of the vote. Nathan H. Seltzer, *When the Tail Wags the Dog: The Collision Course Between Recidivism Statutes and the Double Jeopardy Clause*, 83 B.U. L. Rev. 921, 922 (2003).

⁶⁵Even citizens in countries with lower crimes rates share this obsession. *See generally* Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales, <http://www.homeoffice.gov.uk/docs/halliday.html>, App. 5, at 107 (July 2001) (“The general public are very clear about what they want sentencing to achieve: a reduction in crime.”). *See also infra* note 76.

⁶⁶Michael Perlin, *The Jurisprudence of the Insanity Defense* 13 (1994) (“The public’s outrage over a jurisprudential system that could allow a defendant who shot an American president on national television to plead ‘not guilty’ (for *any* reason) became a ‘river of fury’ after the jury’s verdict was announced.”).

⁶⁷Paul H. Robinson & John M. Darley, *Justice Liability and Blame: Community Views and the Criminal Law* 169-81 (1995) (study finding subjects willing to impose murder conviction on person who negligently kills during a felony); *id.* at 84-96 (study finding subjects willing to impose punishment for negligent actions outside the homicide context).

⁶⁸*See* Wooton, *supra* note 33, at 1029 (“the purpose of the trial would be to establish responsibility in a purely physical sense for the actus reus without reference to the presence, or absence, of malicious intent”).

It is also more congruent with the principle of legality.⁶⁹

This type of “shallow” prohibition is probably as far as one needs to go to address Robinson’s concerns about preventive detention, however. Indeed, this approach is not inconsistent with Robinson’s own suggestion that the best method of informing the public about criminal law norms is through what he calls “rules of conduct,” which state in simple language the criminal law’s prohibitions.⁷⁰ Under Robinson’s scheme, more complex “adjudication rules,” which would incorporate the gradations required by desert, would govern prosecutions of offenders, but only conduct rules would constitute the criminal law as far as the rest of the public is concerned.⁷¹ And, as Robinson notes, “most mental elements are culpability mental elements, which function as principles of adjudication,”⁷² not rules of conduct. Thus, Robinson’s conduct rules would simply stipulate that people should not kill, rape or steal, or try to kill, rape, or steal, without the finetuned mens rea terms currently found in criminal codes.⁷³ That is precisely what a code in a preventive regime would look like.

With these adjustments, public discontent with a government that refuses to play the blame game is most likely to arise, not from confinement of the “non-culpable,” but from failure to treat harshly enough those perceived to be “culpable.” Here again, however, we must speculate, and what little evidence we have suggests that outrage over “lenient” treatment of serious offenders would not be extensive. The current criminal justice system routinely dismisses charges or reduces sentences on lack-of-danger grounds without significant social disgruntlement.⁷⁴ Death penalty research consistently finds that even the decision to forego imposition of the ultimate punishment rests on assessments of relative dangerousness more than

⁶⁹See Slobogin, *supra* note 29, at 20-26.

⁷⁰Paul Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U.Chi.L.Rev. 729 (1990).

⁷¹*Id.* at 731 (“The rules of conduct function gives the general population ex ante direction as to what they can, must, and must not do. The principles of adjudication function gives decisionmakers (i.e., prosecutors, juries, and judges) guidance in assessing ex post the blameworthiness of an individual’s violation of the rules.”). Robinson notes at another point: “Wide dissemination of the principles of adjudication is not necessary either to condemn violation of or to gain compliance with the rules of conduct.” *Id.* at 770.

⁷²*Id.* at 743.

⁷³Here are examples of conduct rules that Robinson proposes: “No person shall engage in conduct that creates a risk of death to another person”; “No person shall engage in intercourse or make sexual contact with or expose his genitals to another person without such other person’s consent”; “No person shall take, exercise control over, or transfer property of another without consent of the owner”. *Id.* at 760.

⁷⁴Wayne R. LaFave et al., *Criminal Procedure* 102-03 (2d. Ed. 1999)(noting that the proportion of pretrial diversions to rehabilitation programs may “come close to equaling the number convicted of the crime” and also noting that diversion of those charged with felonies can range from 5 to 20%, depending on the jurisdiction); *id.* at 145(noting that as a result of parole and good time credits prisoners only serve between 40 and 60% of the mean maximum sentence).

any other factor.⁷⁵

None of this is meant to deny that desert analysis often plays a prominent role in lay evaluation of the appropriate disposition of individual cases.⁷⁶ But surveys suggest that, when asked to view dispositional issues in the abstract, the American public believes that specific deterrence and crime reduction is at least as important as giving offenders what they deserve.⁷⁷ At best, it is unresolved whether a system explicitly devoted to the former goal would undermine public confidence in the criminal justice system, much less its willingness to comply with the law, especially given the close relationship of dangerousness and moral culpability.⁷⁸

Furthermore, we should ask whether the government ought to be complicit in endorsing retributive notions, however universal they may be, given their proximity to the coarse emotions of vengeance and hatred.⁷⁹ Instead, perhaps, the government's treatment of antisocial behavior,

⁷⁵For research on capital jury decision-making that comes to this conclusion, see Aletha Clausseen et al., *Attitudes, Evidence, Jury Instructions, and Offender Dangerousness: Which Paths Point to Death?* (forthcoming); Sally Costanzo & Mark Costanzo, *Life or Death Decision: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 L. & Hum Beh. 151 (1994); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L.J. 1161, 1178-79 (tbls. 5, 6) (1995). The general public's reasons for supporting the death penalty are less clear. Compare Wayne Logan, *Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium*, 100 Mich. L. Rev. 1336, 1338 n.19 (2002) (citing polling research indicating that the most common reason for support of the death penalty is the "eye for an eye" rationale) with Michael L. Radelet, *More Trends Toward Moratoria on Executions*, 33 Conn. L. Rev. 845, 856 (2001) (noting that support for the death penalty drops "precipitously" when life-without-parole is provided as an alternative).

⁷⁶See, e.g., John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 L. & Hum. Beh. 659, 676 (2000) (summarizing studies which suggest that subjects' "standard sentencing motive was based more in just deserts than in incapacitation.").

⁷⁷Francis T. Cullen et al., *Public Opinion about Punishment and Corrections*, 27 Crime & Just. 1, 34 (2000) (reporting research finding that while "offense seriousness explained the largest amount of variation in sentencing preferences" exhibited by those surveyed, "when respondents were asked in a separate question what was the purpose of the sentence they assigned to the offender in the vignette, the goal of just deserts ranked fourth behind special deterrence, boundary setting, and rehabilitation as a 'very important' reason for choosing the sentence"); J.V. Roberts, *Public Opinion, Criminal Record, and the Sentencing Process*, 39 Am. Beh. Sci. 488 (1996) (finding that, for low or moderately serious crimes, people are willing to abandon the retributive principle that punishment should be proportional to the gravity of the crime).

⁷⁸See Gary Watson, *Two Faces of Responsibility*, 24 Philosophical Topics 227 (1996) (noting that we tend to condemn most severely that conduct which is seen as characteristic, i.e., conduct committed by the dangerous person); Robinson & Darley, *supra* note 66, at 14-28 (1995) (finding that lay people treat offenders who show remorse more leniently, which could be due to an assessment that such offenders are less blameworthy or to the conclusion that they are less dangerous).

⁷⁹Retributivists recognize this problem. See, e.g., Moore, *supra* note 49, at 212-13 (trying to distinguish rage at wrongdoers from the more "virtuous" emotion of guilt feelings as a basis for establishing the moral worth of retribution); Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 Mich. L. Rev. 1448, 1451-53 (1990) (expressing discomfort with the "hate-the-criminal" justification for retributivism).

ought to educate the citizenry about the extent to which human behavior is a function of social as well as personal factors, many of which may be beyond the immediate control or awareness of the individual at the time of an offense.⁸⁰ Less willingness to look to internal phenomena in apportioning blame may in turn result in a reduced perceptions of injustice, anger arousal, and the desire to punish or inflict harm, not just on “criminals” but on any person who is viewed as in the “wrong.”⁸¹ As Neil Vidmar has suggested, punitive reactions may beget punitive reactions, initiating a cycle of recrimination and violence.⁸² The fact that everyone has these emotions does not mean we should privilege them.⁸³

B. Deterrence-Based Objections

Retributivists are not the only group uncomfortable with the preventive model of criminal justice. Henry Hart lodged a number of objections to it, all centered around the goal of general deterrence. His first concern was that the preventive approach would tend to undermine deterrence because, given its forward-looking focus on the dangerousness and treatability of individuals, it underemphasizes general formulations of prohibited conduct.⁸⁴ But a government invested in prevention could easily generate a code which straightforwardly sets out the harms

⁸⁰Cf. Mark R. Fondacaro, *Toward an Ecological Jurisprudence Rooted in Concepts of Justice and Empirical Research*, 69 UMKC L. Rev. 179, 192 (noting research “demonstrating the powerful influences that situational factors have on guiding and directing individual behavior” and arguing that “the legal system’s near exclusive focus on the individual in attempting to understand and analyze human nature is analogous to trying to understand and analyze the nature of water by focusing exclusively on hydrogen atoms.”).

⁸¹Research has established that most of us routinely attribute to individual choice actions that are more likely the result of situational variables, a heuristic known as fundamental attribution error. See Lee Ross et al., *Social Roles, Social Control, and Biases in Social-Perception Processes*, 35 J. Personality Soc. Psychol. 485 (1977)(summarizing studies that find observers significantly exaggerate the causal power of personality). A system which de-emphasizes the importance of individual choice would tend to counteract this type of error, which is less prevalent in societies with less punitive criminal regimes. See Neal Feigensen, *Legal Blame: How Jurors Think and Talk about Accidents* 58 n.15 (2000).

⁸²Neil Vidmar, *Retribution and Revenge*, in *Handbook of Justice Research in Law* 27, 54 (Joseph Sanders and V. Lee Hamilton eds., 2002) (hypothesizing that “punishment of the offender might actually increase anger and cognitions of harm [by validating] the perception of harm or remov[ing] any ambiguity about the motivation or character of the offender,” although noting there is no research on this issue). See also Menninger, *supra* note 32, at 214 (arguing that vengeance evokes vengeance, “in and out of the courtroom”).

⁸³Cf. F. De Waal, *Good Natured: The Origins of Right and Wrong in Humans and Other Animals* 210 (1996) (theorizing, based on research with chimpanzees, that “many of the sentiments and cognitive abilities underlying human morality antedate the appearance of our species on this planet,” and suggesting that assignments of blame may be a consequence of genetically predisposed rage reactions).

⁸⁴Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 407-08 (1958) (“a curative rehabilitative theory of criminal justice tends always to depreciate, if not to deny the significance of . . . [the law’s commands] The danger to society is that the effectiveness of the general commands of the criminal law as instruments for influencing behavior so as to avoid the necessity for enforcement proceedings will be weakened.”).

that, if committed non-accidentally and unjustifiably, would be the subject of intervention. That list of harms could be based on the same sort of societal assessment of human and property values that goes into drafting today's codes and, as noted above, probably would look little different from today's criminal statutory framework, except that most mens rea terms and the excuses would be absent.

Hart's second deterrence-related objection to a prevention regime is more powerful. He wondered if the "public interest" would be adequately protected "if the legislature is allowed only to say to people, 'If you do not comply with any of these commands, you will merely be considered to be sick and subjected to officially-imposed rehabilitative treatment in an effort to cure you' [or, as a variation,] 'your own personal need for cure and rehabilitation will be the predominant factor in determining what happens to you.'"⁸⁵ An effective deterrent, he suggested, is only likely to exist if the legislature is enabled to say "If you violate any of these laws and the violation is culpable, your conduct will receive the formal and solemn condemnation of the community as morally blameworthy, and you will be subjected to whatever punishment, or treatment, is appropriate to vindicate the law and to further its various purposes."⁸⁶

Hart failed to consider a fourth option that comes closer to the legislative pronouncement that would occur in a preventive regime: "If you do not comply with these commands, you will be subject to intervention designed to prevent you from violating them again, which may consist of restrictions on liberty as well as treatment designed to ensure protection of the public." Because disposition is individualized, the would-be first-time offender cannot know how the government will react if he is caught, which may maximize deterrence.⁸⁷ Multiple offenders, in contrast, will probably guess (often correctly) that the government's response will be relatively tough if they are caught recidivating. If three-strikes laws have had any crime-reducing effect at all, it is because two-time offenders are well-aware of the consequences of a third strike.⁸⁸

Deterrence is an overrated rationale for punishment in any event. With the exception of a short periods in the 1990s and at the present time, crime rates in the United States have been in an upward surge since the mid-1960s, apparently unaffected by either indeterminate or

⁸⁵*Id.* at 408.

⁸⁶*Id.*

⁸⁷See Dan M. Kahan, *Ignorance of Law is an Excuse-but Only for the Virtuous*, 96 Mich. L. Rev. 127, 137-41 (1997) (discussing "prudent obfuscation" and vague terminology as a means of fostering law-abiding behavior). Note also that all well-informed putative criminals will know that excuse defenses no longer exist under a preventive regime.

⁸⁸Michael Vitiello, *Book Review of Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises*, 90 Cal. L. Rev. 257, 268-70 (2002) (discussing the possible deterrent effect of such laws and reporting that one district attorney who teaches inmates about Three Strikes stated, "There is no other topic of conversation within the institutions other than the impact of [Three Strikes].").

determinate sentencing approaches.⁸⁹ Numerous authors have questioned the fundamental premises of deterrent theory, especially with respect to its assumptions that incremental changes in punishment affect behavior and that we can figure out how much deterrence we want.⁹⁰ Empirical research is equally unresponsive to nuanced deterrence theory. Tom Tyler's studies indicate that most law-abiding people avoid crime not because of fear of punishment, but because of their respect for the law and the authorities who promulgate it,⁹¹ a finding that perhaps argues for the sorts of community-sensitive modifications in the prevention model that have already been discussed, but also suggests that deterrence should not be the centerpiece of a crime prevention system. And a considerable amount of research indicates that those people who tend *not* to be law-abiding pay virtually no attention to the criminal law.⁹² A recent contribution to this literature by David Anderson is particularly potent because it relies on interviews of prisoners themselves. Anderson found that the vast majority of the 278 criminals he sampled "either perceive no risk of apprehension or have no thought about the likely punishments for their crimes" and that virtually all "are undeterred by harsher punishments because drugs, psychosis, ego, revenge, or fight-or-flight impulses inhibit the desired responses to traditional prevention methods."⁹³ Only 11% of the violent criminals and only 24% of the entire sample seemed responsive to the prohibitions of the criminal law.⁹⁴

⁸⁹David Garland, *The Culture of Control* 106-107 (2001).

⁹⁰Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 Geo. L.J. 949, 951 (2003) (the "effectiveness [of deterrence] rests on a set of assumptions that on examination cannot be sustained"); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413, 427 (1999) ("Deterrence, in short, presupposes a consequentialist theory of value. Yet nothing intrinsic to the deterrence theory supplies one."); Neil Kumar Katyal, *Deterrence's Difficulty*, 95 Mich. L. Rev. 2385, 2475 (1997) (suggesting that criminal penalties may actually increase certain types of crime due to substitution, norming and other effects, and suggesting that, if the difficulty of determining whether and when deterrence works is borne out, "other nondeterrent-based approaches to criminal punishment should be explored.");

⁹¹Tom R. Tyler, *Why People Obey the Law* 168-69 (1990) (summarizing empirical findings by concluding that "[i]n trying to understand why people follow the law . . . we should not assume that behavior responds primarily to reward and punishment (as do traditional theories of deterrence) [but i]nstead should recognize that behavior is affected by the legitimacy of legal authorities and the morality of the law.").

⁹²See, e.g., Steven D. Levitt, *Why Do Increased Arrest Rates Appear to Reduce Crime?: Deterrence, Incapacitation or Measurement Error?* 36 Economic Inquiry 353 (1998); Peter W. Greenwood, *Controlling the Crime Rate through Imprisonment*, in *Crime and Policy* (James Q. Wilson ed., 1984); Robinson & Darley, *supra* note 62, at 461 (noting, based on research, that "[m]any, if not most, offenders" underestimate the probability of being caught, and that "just as people notoriously place high discounts on rewards that exist far in the future, so also do they on punishments.").

⁹³David A. Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, 4 Am. Law & Econ. Rev. 1, 20-21 (Fall, 2002).

⁹⁴*Id.*

In other words, most criminals are not the rational actors favored by economic models.⁹⁵ Thus, even if a preventive regime is, in theory, a less effective deterrent than the current system, in practice it may well be no worse. Furthermore, as discussed below,⁹⁶ its behavior-shaping effects on third parties (rational or not) may be augmented by its relatively greater impact in social influence terms. In the meantime, risk management aimed at dealing with individual substance abuse, mental disorder, and antisocial behavior patterns are much more likely than a punishment model to prevent further crime by the types of individuals Anderson describes.

Note that, by eschewing general deterrence as a rationale for government intervention, the preventive regime also avoids one of the main complaints about typical utilitarian approaches to punishment. Government intervention meant to be an incentive for *others* to avoid crime can result in “using” offenders, sometimes in a manner disproportionate to either their culpability or dangerousness.⁹⁷ A preventive regime, in contrast, is not justified by its effects on third parties. Preventive intervention may have a general deterrent effect, but its focus is on reducing a specific offender’s propensity to commit crime.

C. Objections Derived from Virtue Ethics

Hart was aware of the “imperfect” nature of the punishment model as a deterrent; to him, a concern “more serious by far” than the objection that a preventive regime might defeat deterrence was that it “would undermine the foundation of a free society’s effort to build up each individual’s sense of responsibility as a guide and a stimulus to the constructive development of his capacity for effectual and fruitful decision.”⁹⁸ This line of reasoning is consistent with virtue ethics theory, which views punishment as a demand that each person develop and exhibit good character traits, and thus is critical not only of the prevention model but also of classical retributivists.⁹⁹

⁹⁵Although note that even people whom we would regard as relatively “rational” do not seem to be deterred by criminal sanctions. See Sally S. Simpson, *Corporate Crime, Law, and Social Control* (2002)(describing a study concluding that on balance deterrence does not work for corporations or their managers). Furthermore, to the extent deterrence does work with such individuals, the potential for prosecution, by itself, may be sufficient. Cf. Steven G. Bene, *Why Not Fine Attorneys? An Economic Approach to Lawyer Disciplinary Sanctions*, 43 *Stanford L. Rev.* 864, 925 (1991) (arguing that attorneys ought to be deterrable simply by the prospect of fines because they want to preserve the investment in their careers and stand to lose much if caught committing a crime).

⁹⁶See *infra* text accompanying notes 146-51.

⁹⁷Andrew Ashworth, *Sentencing and Criminal Justice* 60 (1995)(noting that deterrence theory “could justify [both] the punishment of an innocent person if that were certain to deter several others [and] the imposition of a disproportionately harsh sentence on one offender in order to deter several others from committing a similar offence”).

⁹⁸Hart, *supra* note 83, at 410.

⁹⁹In addition to Huigens, whose work is described below, Dan Kahan’s expressive theory of punishment might fit in this category, although only tenuously so. See Kyron Huigens, *The Dead End of Deterrence, and*

To use an example proffered by Kyron Huigens,¹⁰⁰ a proponent of virtue ethics would punish a person for rape even if the person honestly thought, because of his drunkenness and the fact that the victim's husband had told him she would be aroused by forcible intercourse, that the protestations of the victim were feigned. A retributivist interested in culpability might have trouble with this position because of the lack of culpable intent.¹⁰¹ But Huigens also considers relevant to the analysis the defendant's "severe voluntary intoxication, his poor choice of friends, his ability to make himself believe whatever he finds it convenient to believe and a general moral obtuseness, as evidenced by his failure to perceive not only a woman's genuine resistance to forced sexual intercourse, but also the fact that even a simulated rape is an act degrading to human dignity."¹⁰² Such a person should be punished both because he is at fault for having "inadequate and flawed practical judgement" and because "the justifying purpose of the criminal law is the inculcation of sound practical judgment—a quality which is also known as virtue."¹⁰³

This latter point, which echoes Hart, greatly exaggerates the importance of and need for the criminal law in shaping character. Family, peers, schools, churches, and various other institutions are likely to be much more effective at achieving that aim.¹⁰⁴ That is not to say that the government should not attempt to inculcate sound practical judgment in the public at large or in individuals who cause harm. But a generic jury verdict is unlikely to get the message across to the public. And telling the "rapist" his punishment is warranted not only because of his conduct but because of his various character traits seems like a relatively blunt instrument for changing the latter. An individualized prevention regime, focused on the types of risk factors that Huigens identifies, would be much better at developing good judgment.

Beyond, 41 Wm. & Mary L. Rev. 943, 944 (2000) (arguing that virtue ethics "picks up where Kahan's work leaves off").

¹⁰⁰The example appears in Huigens, *supra* note 98, at 968 n.116, as well as in Kyron Huigens, *Nietzsche and Aretaic Legal Theory*, 34 Cardozo L. Rev. 543, 569 n.27 (2003), and Kyron Huigens, *Rethinking the Penalty Phase*, 32 Ariz. St. L.J. 1195, 1232 n.150 (2000).

¹⁰¹*See, e.g.*, 1 Paul H. Robinson, Criminal Law Defenses § 62(c)(2), at 253 & n.23 (listing and criticizing reasonable mistake provisions).

¹⁰²*See supra* note 99 .

¹⁰³Huigens, *Rethinking the Penalty Phase*, *supra* note 98, at 1237-38.

¹⁰⁴*See, e.g.*, Raymond Paternoster & Lee Ann Iovanni, *The Deterrent Effect of Perceived Severity: A Reexamination*, 64 Social Forces 751, 769 (1986) (reporting research suggesting that "the greatest effects on delinquent involvement are those from informal forces of social control."); Robert Meir & Weldon Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 Am. Soc. Rev. 292, 302 (1977) ("despite contemporary predisposition toward the importance of legal sanction, our findings are . . . consistent with the accumulated literature concerning the primacy of interpersonal influence [over legal sanction]."); Tyler, *supra* note , at 23-24 ("In focusing on peer group pressures [it has been shown] that law breaking is strongly related to people's judgments about the sanctions or rewards their behavior elicits from members of their social groups.").

As to whether punishment is nonetheless mandated when a person fails to develop a capacity for such judgment on his own, that question threatens to plunge us into the middle of the determinism-free will debate, which is taken up in Part IV. It will suffice to say at this point that behavioral scientists who promote the prevention model find difficult enough the retributivist claim that intentions are the principal causes of behavior (a recent symposium issue of *American Psychologist* was entitled “Behavior—It’s Involuntary”¹⁰⁵). They would find even more problematic assertions that a person who commits crime is responsible, *ex ante*, for his moral obtuseness or his acquaintances. Rather than condemn him for these traits, it makes more sense to them, both from the crime prevention and human dignity perspectives, to confront the morally bankrupt, relationship-poor individual and help him structure his life in a more satisfactory manner.¹⁰⁶ If antisocial behavior persists, then prolonged incapacitation might be necessary, not as a matter of desert (which is ambiguous at best) or in an effort to teach others (who either aren’t listening or already know better), but as a preventive measure.

III. Implementation Objections to the Preventive Model

This discussion leads to the major practical objection to the prevention model: it simply isn’t feasible. We do not have the tools of prediction, nor have we developed the methods of rehabilitation, to implement an effective risk management system and, even if we did, it would be far too expensive. These objections are plausible, but are not particularly persuasive when ranged against analogous problems associated with the punishment model.

A. Inaccuracy and Its Consequences

Ever since the Supreme Court said it twenty-one years ago—quoting the “leading” researcher on violence prediction, John Monahan—the standard statement about our ability to predict dangerousness is that at least two out of every three individuals the experts label “dangerous” will *not* commit a violent act.¹⁰⁷ But within a year of the Court’s statement, Monahan himself had suggested that, in light of new research using more sophisticated methodology, predictions of dangerousness made by mental health professionals are accurate

¹⁰⁵See Denise Park, *Acts of Will?*, 54 Am. Psychol. 461 (1999)(summarizing four research articles as suggesting “that we perceive ourselves to have far more control over our everyday behavior than we actually do” and that “the source of behavioral control comes not from active awareness but from subtle cues in the environment and from thought processes and information not readily accessible to consciousness.”). See also *infra* text accompanying notes 173-77.

¹⁰⁶See *supra* text accompanying notes 53-55.

¹⁰⁷*Barefoot v. Estelle*, 463 U.S. 880, 901 n.7 (citing John Monahan, *The Clinical Prediction of Violent Behavior* 47-49 (1981)).

closer to fifty percent of the time.¹⁰⁸ He has also noted that any estimates of predictive accuracy are likely to be skewed downward by the fact that the research on which they are based almost always uses samples of people who are immediately institutionalized after a positive prediction, thus making impossible observation of their actions had they been left alone, which is the true test of the prediction.¹⁰⁹

In any event, prediction science has improved immensely since 1983. The MacArthur Research Network, of which Monahan is a member, has done outstanding recent work on risk assessment. Using “iterative classification trees” (akin to an actuarial flow chart), experts can now identify groups of individuals with recidivism rates of 76%, 52% and so on, down to a group that has a 1% chance of recidivism.¹¹⁰ The classifications depend on factors that are relatively easily to calibrate, such as age, psychopathy (measured on a highly reliable instrument), prior arrests, serious child abuse, alcohol or drug use, violent fantasies, and legal status.¹¹¹ Developers of an instrument called the Psychopathy Checklist-Revised can identify a group that has a 77% chance of recidivism over a three-year period.¹¹² Various other researchers claim their predictive methods are similarly accurate with a wide array of criminal populations.¹¹³

Opponents of a preventive regime will note, however, that these developments in prediction technology, as impressive as they are, still do not amount to proof beyond a reasonable doubt.¹¹⁴ Thus, the argument goes, any regime which relies on prediction, at least when that prediction results in incarceration, is illegitimate. There are several responses to this oft repeated observation.

¹⁰⁸John Monahan, *The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy*, 141 Am. J. Psychiatry 10, 11 (1984).

¹⁰⁹Id. See also, Christopher Slobogin, *Dangerousness and Expertise*, 133 U. Pa. L. Rev. 97, 114-17 (1984) (recounting methodological problems with the studies).

¹¹⁰John Monahan, *Rethinking Risk Assessment* ch. 5 (2001).

¹¹¹See *id.* at 100-101.

¹¹²Marnie E. Rice et al., *An Evaluation of a Maximum Security Therapeutic Community for Psychopaths and Other Mentally Disordered Offenders*, 16 Law & Hum. Beh. 399 (1992).

¹¹³See generally Slobogin, *supra* note 29, at 9-10 nn. 32 & 35.

¹¹⁴See, e.g., John Q. LaFond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. Puget Sound L. Rev. 655, 698-99 (1992) (stating that permitting preventive detention on a lesser showing transforms “the fundamental assumption of American criminal justice that is ‘is far worse to convict an innocent man than to let a guilty man go free’ . . . into a first principle worthy of George Orwell’s 1984.”)

First, as I have developed in detail elsewhere,¹¹⁵ many of the current system's threshold determinations are at least as flawed as the predictions that would need to be made in a preventive regime. To begin with, as any criminal law expert knows, huge disagreement exists over the types of mental states that merit punishment, even for serious crimes such as homicide.¹¹⁶ Putting those unresolvable conundrums aside, experience and research demonstrate that judicial and jury conclusions about core culpability concepts such as premeditation, recklessness, and insanity differ significantly across individuals and across juries.¹¹⁷ Given this unreliability, many of these conclusions about blameworthiness cannot possibly achieve the 90 to 95% degree of accuracy normally associated with the reasonable doubt standard. That should not be surprising, given the ill-defined scope of legal mental states,¹¹⁸ and the difficulty of investigating subjective beliefs and desires.¹¹⁹ But it is disturbing: these unreliable assessments can spell the difference between a conviction for manslaughter and eligibility for the death penalty, or between a prison term and indeterminate institutionalization in a mental hospital.

For many crimes—say taking someone's purse, where the doing of the act often permits confident assessments of mental state—inaccuracy of this sort is generally not a problem. But even for these types of crimes, arriving at a consensus on the appropriate sentence, whether the metric is just deserts, deterrence, or practical reasoning skills, is similarly impossible.¹²⁰ The

¹¹⁵Slobogin, *supra* note 29, at 7-8.

¹¹⁶David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 Harv. J. L. & Pub. Pol'y 359, 361-63 (1985) (describing arguments for and against imposition of murder liability for accidental and negligent deaths caused during a felony); J.F. Stephen, *A History of the Criminal Law of England* 94 (1883) (arguing that sudden, "wanton" killing ought to be considered as culpable as killing committed with "malice aforethought"). Debate flourishes in virtually every arena, however, not just with respect to homicide. See, e.g., Glanville Williams, *Criminal Law: The General Part* 122-24 (2d ed. 1961) (describing retributive and deterrence arguments for and against liability on negligence grounds); Robert Weisberg, *Reappraising Complicity*, 4 Buff. Crim. L. Rev. 217, 236 (2000) ("[f]or decades, the American courts and legislatures have debated whether knowledge or 'true purpose' should be the required mens rea for accomplice liability.").

¹¹⁷Slobogin, *supra* note 29, at 7-8 n.21 (describing research).

¹¹⁸See Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?* 1 Ohio St. J. Crim. L. 179, 204 (2003) (noting that even though the Model Penal Code's mens rea provisions are "a dramatic improvement over prior law . . . courts have encountered difficulty with numerous concepts [in the Code,] including mistake of law, recklessness, willful blindness and extreme indifference.").

¹¹⁹See generally Christopher Slobogin, *Doubts About Daubert: Psychiatric Anecdotes as a Case Study*, 57 Wash. & Lee L. Rev. 919, 924-30 (2000) (describing the difficulty of producing scientific information about past mental states).

¹²⁰David A. Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. Rev. 1623, 1640 (1992) (stating that most retributivists are unconcerned about the possible unjustness of their culpability judgments and that others who have tried to be more principled "fail to provide any method for determining the amount of punishment that a particular crime or criminal deserves."); Ezzat A. Fattach, *From Philosophical Abstraction to Restorative Action, from Senseless Retribution to Meaningful Restitution: Just Deserts and Restorative Justice Revisited*, in *Restorative Justice: Theoretical Foundations*, *supra* note 50, at 315 ("It is possible to grade various criminal offences according

vagaries in scientific investigation that bedevil the risk management approach are trivial compared to the calibration chores that afflict a retributivist regime bent on ascertaining degree of culpability, a deterrence-based system that purports to modulate the penalty based on cost-benefit analysis, or a virtue ethics scheme that tries to measure fault for character.¹²¹

Another type of inaccuracy associated with the punishment model has to do with the form, rather than the length, of disposition. Imprisonment, which is the most common type of punishment, is in a deep sense not commensurate with blame; depriving someone of virtually all of his freedom because he raped, robbed or assaulted someone is a gigantic moral nonsequitur. If we are really interested in retributive punishment, the Biblical eye-for-an-eye shibboleth comes much closer to getting it right, and if we are really interested in repaying society or the victim then, as restorative justice advocates argue,¹²² reparation is more appropriate. Yet the first response is rightly viewed with repugnance, and the second response, most desert theorists would say, is insufficiently punitive.¹²³ The result is that most dispositions under a desert-based punishment model bear only a tenuous relationship to their rationale.¹²⁴

Risk management, on the other hand, is structured to achieve the precise aims of the prevention model. Each intervention is individualized, based on the need to deal with specific risk factors. Institutionalization makes perfect sense on this view (although, as noted below, only if no other less restrictive intervention will prevent the perceived harm¹²⁵). Restitution to and communicating with the victim also is consistent with the prevention premise, at least to the extent it helps the offender restructure his behavior by gaining an understanding of the true harm

to their objective and/or perceived seriousness [but] to come up with a prison term equivalent to theft or robbery, to assault or rape, is inevitably arbitrary, capricious and despotic.”); Katyal, *supra* note 89, at 2389 (discussing “the complexity of the deterrence question” and stating that “a simple and elegant answer to the deterrence question has not yet been found.”).

¹²¹Michael H. Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 Am. J. Crim. L. 135, 146 n.44 (2003) (“It makes no sense to deride the [prediction required by dangerous offender statutes] when the default we defend is overwhelmingly less informed, less careful, less analytical, and routinely productive of astoundingly high recidivism rates.”).

¹²²Martin Wright, *Restoring Respect for Justice* chs. 5-6 (1999).

¹²³Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 Mich. L. Rev. 2477, 2494 (1997) (noting that, given the value of liberty in our culture, imprisonment is needed to convey society’s denunciation of wrongdoers, while “[f]ines . . . are a politically unacceptable alternative to imprisonment for expressive reasons: they seem to say that society is pricing rather than condemning the wrongdoer’s conduct.”).

¹²⁴Edward Rubin has recently made this point at length. Edward Rubin, *Just Say No to Retribution*, 7 Buff. Crim. L. Rev. 17, 28 (2004) (“[I]mprisonment bears very little relationship to the concept of repayment . . . [I]t seems odd to express symbolic disapproval [based on desert] by locking the criminal away in an isolated institution.”).

¹²⁵See *infra* text accompanying notes 126-33.

caused by his act.¹²⁶

A third response to the inaccuracy point is that the *cost* of a mistake in a risk management regime is likely to be much lower than the cost of a mistake under the punishment model. Under the latter model, once culpability is assessed, the fix is in; the degree of blame determines the type and the length, or at least the range, of liberty deprivation. Under a prevention regime, in contrast, risk is constantly monitored and, if considered low enough, release occurs; such periodic review is probably constitutionally required.¹²⁷ Furthermore, as just noted, the dispositional emphasis is on community-based programs, which are a viable alternative even for some violent offenders.¹²⁸ Indeed, community dispositions are both legally and pragmatically necessary to a preventive regime. As a constitutional matter, the degree of liberty deprivation should be limited to that necessary to achieve the government's prevention aims.¹²⁹ As a practical matter, it is almost impossible to predict or change behavior in the community when a

¹²⁶See *supra* text accompanying notes 56-57.

¹²⁷See *Conn. Dep't of Public Safety v. Doe*, 538 U.S. 1, 7-8 (2003) (strongly suggesting that a hearing is required when dangerousness is relevant under the pertinent statute); *Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997) (emphasizing that Kansas law required periodic review).

¹²⁸Consider this assessment by the authors of several studies that look closely at the risk assessment and risk management challenges posed by dangerous offenders.

Almost all of the treatments suggested for use with offenders and mentally disordered offenders could be provided in the community. In fact some of the treatments (e.g., social skills training, life skills training, relapse prevention programs) actually might be more successful in a community setting. With the exception of high scorers on Management Problems and Aggression (toward self as well as other) and Active Psychotic Symptoms scales, . . . it is difficult to argue that institutionalization is necessary, or even desirable, for treatment. Rather, in most cases the only reason for institutionalization is to protect the public. . . . For the highest risk offenders . . . permanent institutionalization should be implemented. For low-risk individuals treatment for criminogenic ends could be provided under modest supervision in the community. For higher risk clients, treatment for criminogenic factors could occur within the institution, or at least begin in the institution, and continue under aggressive community supervision. Noncriminogenic factors for these persons could be treated entirely in the community.

Vernon L. Quinsey et al., *Violent Offenders: Appraising and Managing Risk* 214-15 (1998). Research also suggests that imprisonment is criminogenic. See, e.g., Jeffrey Fagan et al., *Be Careful What You Wish For: The Comparative Impacts of Juvenile versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders* (December 2003), available at Columbia Law School, Pub. Law Res. Paper No. 03-61, <http://ssrn.com/abstract=491202> (reporting a study finding that prosecution of broad classes of juveniles as adults and non-individualized harsh treatment of juveniles in juvenile court increases recidivism and is "ineffective at specific deterrence of serious crime.").

¹²⁹For development of this argument, see Christopher Slobogin et al., *A Prevention Model of Juvenile Justice: The Promise of Kansas v. Hendricks for Children*, 199 Wisc. L. Rev. 185, 213; Eric S. Janus & Wayne A. Logan, *Substantive Due Process and Involuntary Confinement of Sexually Violent Predators*, 35 Conn. L. Rev. 319, 358-59 (2003). See also *United States v. Juvenile*, 347 F.3d 778, 785-867 (9th Cir. 2003) (holding that the requirement that juveniles be sentenced to the least restrictive environment is implicit in the structure and purpose of the Juvenile Delinquency Act, which focuses on rehabilitation).

person is sitting in a prison.¹³⁰

Those familiar with the sexual predator programs—which routinely incarcerate and rarely release¹³¹—may be skeptical of these latter claims. But, as their post-sentence focus indicates, the sexual predator programs of today are really appendages of a punishment regime, not a bona fide implementation of the prevention model. Under the old sex psychopath programs of the mid-twentieth century, which operated in *lieu* of a sentence, release and conditional release were quite common.¹³² The better illustration of the risk management approach is the drug court, which uses incarceration as a last resort. As Professors Dorf and Sabel note, these courts are truly “experimentalist,” in the sense that they constantly modify dispositions to maximize behavior change in the offender.¹³³ In contrast to a punishment model, where the concept of experimentation is incoherent (since the crime definitively establishes the sanction received), the flexible nature of a risk management makes confinement just one of many options, relied upon only when necessary to achieve specific deterrence or prevent harm. Further protection against indeterminate confinement can be guaranteed if, as I have argued, government’s authority to prolong incapacitation is conditioned on increasingly more convincing showings of serious danger. This requirement would place practical limitations on the duration of liberty deprivation for all offenders, and especially for petty and relatively low-risk criminals.¹³⁴

¹³⁰See *supra* note 127.

¹³¹See Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 Ind. L.J. 157, 206 (1996)(indicating that only six sex offenders were released from secure confinement under Minnesota’s program since 1975).

¹³²Eric S. Janus, *Minnesota’s Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy Be More Effective?* 29 Wm. Mitchell L. Rev. 1083, 1088 (2003) (noting that Minnesota’s sex psychopath law, passed in the late 1930s, “was initially used extensively for relatively brief institutionalization of low-level sexual offenders”); Lawrence T. Burick, *An Analysis of the Illinois Sexually Dangerous Persons Act*, 59 J. Crim. L. Criminol. & Police Sci. 254, 261 n.73 (1968) (discussing release data from sex psychopath programs from 1938 to 1952 indicating that up to 50% were released within a relatively short time frame). Even these programs, however, were not really prevention-oriented. See Estelle Freedman, *Uncontrolled Desires: The Response to the Sexual Psychopath*, 1920-60, 74 J. Am. Hist. 83 (1987).

¹³³Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 Vand. L. Rev. 831, 834, 839 (2000)(“drug courts are able to determine which programs can effectively monitor the progress of individual clients, and which clients are able to take advantage of capable programs [by mandating] that service providers continually inform the court about the progress (or lack thereof) of each client [and] monitoring the treatment providers themselves.”).

¹³⁴Slobogin, *supra* note 29, at 50-53 (arguing that a proportionality principle, which ties the duration of preventive detention to the degree of dangerousness, should apply to all government interventions based on dangerousness). I also proposed adoption of a consistency principle, which mandates that the degree of danger required to criminalize inchoate and anticipatory conduct be consonant with the degree of danger required for commitment (i.e., clear and convincing evidence), a position which could lead to a significant degree of decriminalization. See *id.* at 53-62.

More will be said about model risk management programs below. For now, the important points are that, compared to a punishment regime, mistakes under such a program are probably no more likely, and in any event visit less deprivation of liberty and are more easily corrected.

B. Efficacy Issues

A second major source of discomfort about a preventive regime stems from the belief that, no matter how much verbal allegiance we give to the least drastic penalty notion, the default disposition will be long-term confinement, given our ignorance about how to manage risk in any other way. Although written over twenty years ago as a review of rehabilitative efforts up to that time, Francis Allen's book, *The Decline of the Rehabilitative Ideal*, is still one of the best statements of this view. First, Allen noted, efforts at establishing reformation-oriented systems "have tended to inflict larger deprivations of liberty and volition on its subjects than is sometimes exacted from prisoners in more overtly punitive programs" and have ended up looking little different than the prison regimes they sought to replace.¹³⁵ Second, these systems have usually given release decision-making authority to non-legally trained parole boards and mental health professionals with no clear criteria for release or accountability, leading to unequal treatment, demoralization and cynicism among offenders.¹³⁶ Third, in Allen's straightforward words, "we do not know how to prevent criminal recidivism through rehabilitative effort."¹³⁷ That these are not simply historical observations is borne out by the current experience with sexual predator statutes which, as just noted, routinely result in long-term institutionalization, often with little or no treatment and subject only to periodic review based on vague standards.

The experience with sexual predator laws, however, should not obscure the fact that risk management techniques, like risk assessment methods, have improved immensely over the past decades.¹³⁸ In general, researchers have found that programs based on fear, punishment, or psychotherapy—the bread and butter of older rehabilitation programs—are much less likely to reduce recidivism than programs "that are highly structured and behavioral or cognitive-behavioral, that are run in the community rather than an institution, that are run with integrity and enthusiasm, that target higher-risk rather than lower-risk offenders, and that are intensive in terms of number of hours and overall length of program."¹³⁹ For instance, "multisystemic

¹³⁵Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* 49 (1981).

¹³⁶*Id.* at 52, 72-73.

¹³⁷*Id.* at 57.

¹³⁸See generally Santiago Redondo et al., *The Influence of Treatment Programs on the Recidivism of Juveniles and Adult Offenders: An European Meta-Analytic Review*, 5 *Psychology, Crime, and Law* 251 (1999); D. A. Andrews et al., *Does Treatment Work? A Clinically Relevant and Psychologically Informed Meta-analysis*, 28 *Criminology* 369 (1990).

¹³⁹Grant T. Harris & Marnie E. Rice, *Mentally Disordered Offenders: What Research Says about Effective*

therapy,” which involves intense family, school and peer-based interventions over a four-month period, can reduce recidivism among violent juveniles by as much as 75% compared to matched control groups that receive no treatment or traditional treatment in prisons.¹⁴⁰ The same type of intensive, ecological treatment works well with many adult offenders.¹⁴¹ Thus, drug treatment courts that closely monitor the offender’s performance in the program, as well as of the program itself, typically cut drug use-related recidivism in half.¹⁴² Even treatment of child molesters modeled on these principles can work, although not as dramatically. Research conducted in the past ten years indicates that cognitive therapy may reduce their recidivism rates by up to 25%.¹⁴³ Among all offenders involved in rehabilitation programs that meet the above criteria, the average reduction in recidivism is between 20 and 40%.¹⁴⁴

In short, the sentencing reform mantra of the seventies and eighties that “nothing works” is not true.¹⁴⁵ Indeed, the author of the meta-review from which that famous phrase derives

Service, in *Impulsivity: Theory Assessment and Treatment* 361, 374 (1997). See also David A. Andrews, *The Psychology of Criminal Conduct and Effective Treatment*, in *What Works: Reducing Reoffending* 35 (James McGuire, ed. 1998).

¹⁴⁰Scott W. Henggeler et al., *Family Preservation Using Multisystemic Treatment: Long-Term Followup to a Clinical Trial with Serious Juvenile Offenders*, 2 *Child & Fam. Stud.* 283 (1993).

¹⁴¹Paul Gendreau et al., *Intensive Rehabilitation Supervision, The Next Generation in Community Corrections?* in *Contemporary Corrections: Probation, Parole and Intermediate Sanctions* 252 (Joan Petersilia, ed., 1997).

¹⁴²See, e.g., D.Banks & D. Gottfredson, *The Effects of Drug Treatment and Supervision on Time to Rearrest among Drug Treatment Court Participants*, J. Drug Issues (2003) (finding 40% recidivism rate among drug court offenders and 80% rate among control group); Daniel Eisman, *Drug Courts: Changing People’s Lives*, 46 *Advocate* 16, 17-18 (finding a reduction from 42% to 18% for drug-related offenses and from 63% to 38% for all offenses). See also Eric Blumenson, *Recovering from Drugs and the Drug War: An Achievable Public Health Alternative* 6 J. Gender, Race & Justice 225, 235 (2002) (describing studies of drug treatment programs that “reported a dramatic decrease in criminal activity among participants”).

¹⁴³M. Alexander, *Sex Offender Treatment: Does It Work?*, cited in Leroy L. Kondo, *The Tangled Web—Complexities, Fallacies and Misconceptions Regarding the Decision to Release Treated Sexual Offenders From Civil Commitment into Society*, 23 N. Ill. L. Rev. 195, 199 n.14 (2003) (finding a 10% difference—14.4% v. 25.8%—between treated and untreated child molesters); W.L. Marshall & H.E. Barbaree, *Long Term Evaluation of the Behavioral Treatment Program for Child Molesters*, 26 *Behav. Res. & Therapy* 499, 508 (1988) (finding a 25% difference—32% v. 57%—in recidivism between treated and untreated sex offenders).

¹⁴⁴M. W. Lipsey & D.B. Wilson, *The Efficacy of Psychological, Education, and Behavioral Treatment*, 48 *Am. Psychol.* 1181 (1993).

¹⁴⁵The phrase derives from Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 *The Public Interest* 22 (1974), in which Martinson concluded “[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.” *Id.* at 25. The article had an “immediate and widespread impact.” Allen, *supra* note 134, at 57.

disavowed it within five years of its publication.¹⁴⁶ These findings significantly undermine one of the primary motivations behind policymakers' rejection of a reform-oriented system.

The preventive model of justice may also be relatively effective at encouraging law-abiding behavior in those who are *not* the subject of government intervention. This is not an argument from classical deterrence, which earlier discussion suggested is a weak justification for such intervention. Rather it is based on social influence theory, which claims that people tend to behave consistently with their surroundings.¹⁴⁷ One might think that removing criminals from the community, the usual result of punishment, would be the best method of stemming negative social influence. But there is good reason to believe that the modern criminal justice system's reaction to crime may actually increase influences toward antisocial behavior, by causing resentment toward authority, unwillingness to cooperate with law enforcement, and the dismantlement of families and other institutions that act as a break on crime.

This is the argument of Darryl Brown, who contrasts the current punitive approach to street crime with our predominantly preventive approach toward white collar, and in particular corporate, crime.¹⁴⁸ Brown notes that, rather than routinely resorting to imprisonment, prosecutors working white collar cases often rely on "civil" remedies such as restitution, enforcement of compliance programs, and other attempts to restructure the corporate culture.¹⁴⁹ In doing so, they implicitly recognize the force of social influence on would-be wrongdoers, as well as the unnecessary damage a punitive approach would wreak on employees and shareholders. Brown contends that the government's response to street crime could follow the same "preventive, compliance-oriented" path it takes with respect to corporate crime: "It could take advantage of, rather than ignore and contradict, knowledge about social influence: it could more fully assess and minimize the social costs of punishment."¹⁵⁰ His examples of how this social influence approach would work are the same types of risk management programs

¹⁴⁶Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 Hofstra L. Rev. 243, 254 (1979).

¹⁴⁷See generally Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349, 352-61 (1997) ("individuals are much more likely to commit crimes when they perceive that criminal activity is widespread [because] they are likely to infer that the risk of being caught for a crime is low[,] conclude that relatively little stigma or reputational cost attaches to being a criminal [, and] view such activity as status enhancing [and they also] are less likely to form moral aversions to criminality.").

¹⁴⁸Darryl K. Brown, *Street, Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. Pa. L. Rev. 1295 (2001).

¹⁴⁹*Id.* at 1311-16. Treatment of corporate criminality is to be distinguished from treatment of individual corporate criminals which, consistent with the general trends in backward-looking criminal jurisprudence, have become increasingly—and many would argue irrationally—punitive, at least at the federal level. See Frank O. Bowman, III, *The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendment that Followed*, 1 Ohio St. J. Crim. Law 373 (2004),

¹⁵⁰*Id.* at 1345.

described above—drug treatment courts, victim-offender mediation, and “survivor-centered” domestic violence policies—which together target “a broad slice of the criminal justice system”—drug offenders, property offenses among neighbors, and violence among intimates.¹⁵¹ Brown’s work suggests that an individual-centered preventive system has a better cost-benefit ratio than a punitive one even when crime-related costs and benefits are defined broadly, to include interests beyond those associated with reducing the recidivism of the individual criminal.¹⁵²

Risk management programs probably cannot eliminate the abuses of discretion, the disparity in dispositions, and the demoralization effects that Francis Allen rightly associates with the rehabilitative agenda. But, again, comparison with the punishment model suggests that a modern preventive regime might well be an improvement on all three counts.

Abuse of discretion occurs in any system. In a preventive regime it is most likely to occur during disposition, while under the punishment model it occurs during the charging stage. Given the discretion granted prosecutors, the latter process can produce wildly irrational results, whether viewed from a desert or a deterrence perspective.¹⁵³ It is also notoriously difficult to monitor.¹⁵⁴ In contrast, risk management decisions are much more transparent, not only because a public hearing is held periodically, but because risk assessment will usually be based on statistically-derived factors that result from peer-reviewed research (and therefore can more easily police for use of illegitimate factors such as race).

As to disparity, that is in the eye of the beholder. To some, treating all armed robbers alike makes sense.¹⁵⁵ But, in fact, the “desert” visited by a particular term of imprisonment

¹⁵¹*Id.* at 1351-57.

¹⁵²See also Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 Calif. L. Rev. 323 (2004) (arguing that a true assessment of the costs of the punitive approach might lead to adoption of more “problem-solving” and “community” courts).

¹⁵³*Cf.* *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (upholding mandatory life sentence imposed on an offender who was prosecuted as an habitual offender after turning down a plea offer pursuant to which the prosecutor would have recommended a five-year sentence); *Tate v. State*, 2003 WL 22900994 (4th D.C.A. 2003) (involving a life sentence imposed on 12 year-old prosecuted as an adult after he turned down a plea offer of three years in juvenile detention and 10 years probation).

¹⁵⁴See, e.g., Norman Abrams, *Prosecution: Prosecutorial Discretion*, in 3 *Encyclopedia of Crime & Justice* 1272, 1275 (Sanford H. Kadish ed., 1983) (“[T]he American prosecutor has complete discretion with respect to the selection of the charge.”). See also Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 Iowa L. Rev. 393, 413 (2001) (“Despite the ABA standards, prosecutors frequently charge more and greater offenses than they can prove beyond a reasonable doubt.”); Anthony V. Alfieri, *Prosecuting Race*, 48 Duke L.J. 1157, 1204-05 (1999) (“Attributable in part to the dynamics of the adversarial system, prosecutorial discretion may rapidly breach the restraints and responsibilities of ethics rules.”).

¹⁵⁵The classic statements on this score comes from Andrew von Hirsch, *Doing Justice: The Choice of Punishments* 49-55 (1976) (rejecting the rehabilitative ideal as unworkable and unjust, and concluding that the length of an offender's sentence should reflect the seriousness of the offender's crime).

varies from robber to robber, depending on the conditions of imprisonment and the nature of the offender.¹⁵⁶ Thus, a system that stresses consistency of treatment for those who represent similar risks may be more equitable. The intense judicial resistance to the desert-based federal sentencing guidelines seems to indicate that many judges favor the latter form of equality.¹⁵⁷

Risk management approaches are most susceptible to the demoralization claim when they require indeterminate, potentially life-long confinement to be effective at prevention (and there certainly would be such cases).¹⁵⁸ But here too the claim can be exaggerated. Offenders subjected to this type of confinement, although not always told a time certain when they will cease being a managee, *are* given specific goals they must achieve (such as completion of vocational programs, or satisfactory behavioral control during a conditional release).¹⁵⁹ Compared to waiting out a period which bears no necessary relationship to their ability to function in a law-abiding manner, that approach may be psychologically less demanding. It is also more likely to enhance individual responsibility; time of release in a preventive regime is to a significant extent controlled by the offender, which should not only enhance rehabilitative success, but energize those with the potential to be law-abiding.¹⁶⁰

¹⁵⁶Consider these remarks:

It is neither fair nor equitable to give those found guilty of identical or similar crimes identical prison sentences. The same prison term does not entail the same amount of pain and suffering, does not involve identical deprivations, and does not carry with it the same consequences to different offenders. The pains and consequences of imprisonment are far different even when offenders are kept in the same institution, in similar conditions, for the same length of time.

Fattah, *supra* note 119, at 316. See also Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 Fed. Sent. Rep. 76, 81 n. 7 (2003) (consistency “is largely accomplished only by adamant refusal to acknowledge differences so that we can claim that we are treating like offenders alike.”)

¹⁵⁷Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission's "Mandatory Guidelines"*, 4 Fed. Sentencing Rep. 129, 132 & 133 n.12 (1991) (citing the Report of the Federal Courts Study Committee 23, 37-38 (1990), that describes a survey finding that a common complaint of district court judges about the Federal Sentencing Guidelines was the elimination of judicial discretion).

¹⁵⁸Plattner, *supra* note 41, at 110 (describing Jessica Mitford's book, *Kind and Usual Punishment*, as having as a “constant refrain . . . the hatred felt by prisoners for the indeterminate-sentencing system, which they feel forces them to play a ‘treatment game’ they do not believe in, subjects their lives to the arbitrary whims of correctional authorities, and produces unjustifiable disparities in the amount of time served for similar crimes”).

¹⁵⁹For instance, “staged” treatment is an well-accepted modality even for sex offenders. See, e.g., W.L. Marshall et al., *A Three-Tiered Approach to the Rehabilitation of Incarcerated Sex Offenders*, 11 Behav. Sci. & L. 441 (1993) (describing programs during a six-month confinement in a maximum security institution which, if successfully completed, are followed by several months in a minimum security facility, followed by outpatient monitoring).

¹⁶⁰Research suggests that setting an achievable treatment goal, one agreed upon by the offender, may be indispensable to change and fosters motivation and effective functioning. Albert Bandura, *Social Foundations of Thought and Action: A Social Cognitive Theory* 338, 467-79 (1986); Edward L. Deci, *The Psychology of Self-*

C. Costs

A third pragmatic objection to preventive regimes is their fiscal impact. As Francis Allen put it, advocates of penal reform have often displayed “a splendid disregard for the fact of scarce resources.”¹⁶¹ Again, the sexual predator experience suggests Allen’s observation is still true today. The state of Illinois estimated that initiation of a sex offender program in that state would cost one billion dollars over ten years.¹⁶²

Again, however, the modern sexual predator program is the wrong paradigm for many types of offenders. Multisystemic therapy, described above, costs \$29,000 less per juvenile than boot camp, and far less still than traditional detention.¹⁶³ Drug court dispositions are significantly less expensive than prison terms for small-time drug dealers and addicts.¹⁶⁴ For many other types of offenders, halfway houses, day programs, furloughs and other types of community arrangements are cheaper than more secure dispositions, as well as more effective at reducing recidivism.¹⁶⁵

None of this should suggest that a preventive regime would be inexpensive. Secure confinement would need to be maintained as an option at the same time more intermediate and community programs would need to be developed. But it should also be recognized that, under a preventive regime that is focused on prevention rather than punishment or deterrence, the demand for secure confinement would be reduced. *Selective* incapacitation, which is the focus of individualized risk management, will always be less costly than the *general* incapacitation which results from the punishment model’s focus on culpability. The most conspicuous example of general incapacitation—the “three strikes and you’re out” statutes—is a serious burden on the fiscal

Determination 208-10 (1980).

¹⁶¹Allen, *supra* note 134, at 54-55.

¹⁶²John Q. LaFond, *The Costs of Enacting A Sexual Predator Law*, 4 Psychol. Pub. Pol’y 468, 500 (1998).

¹⁶³See Slobogin et al, *supra* note 128, at 224 n. 122 (citing study). See also, S. Aos et al., *The Comparative Costs and Benefits to Reduce Crime: A Review of National Research Findings* (1999) (indicating that cost of MST was one-fifth that of institutionalization, and estimating costs savings of \$30,000 to \$131,000 per juvenile based on prevention of subsequent incidents, or \$8.38 for every dollar spent on MST).

¹⁶⁴See, e.g., Jeff Tauber & C. West Huddleston, *Rentry Drug Courts* 19 (1999)(reporting an Oregon study estimating over \$10 million in savings, or \$10 saved for every \$1 spent on drug court); Blumenson, *supra* note 141, at 237-238 (recounting studies finding that drug treatment programs are at least seven times more cost-effective than law enforcement strategies).

¹⁶⁵Kristin Parsons Winokur, et al., *What Works in Juvenile Justice Outcome Measurement—A Comparison of Predicted Success to Observed Performance*, 66 Fed. Probation 50, 53 (2002) (using a sophisticated methodology to evaluate range of treatment programs, finding that “community-based approach offers not only the greatest effectiveness when controlling for youths’ individual risk factors, but also does it at minimal cost.”).

integrity of many state correctional systems.¹⁶⁶ Yet if proof of past crime is the gravamen of intervention, three-strikes laws are an unsurprising, if not inevitable, reaction to rising crimes rates. A preventive regime, on the other hand, can limit costly confinement to those with three strikes (or two or four) who are the most dangerous.¹⁶⁷

When one expands the notion of cost to include the harm to others incurred as a result of preventable crime, and the need to prosecute it, the prevention regime should do even better by comparison to the current system, for reasons already suggested. The sole goal of a preventive regime is to reduce crime. By definition, that is not the only goal of a regime based on just deserts.

IV. The Impending Lessons of Science

To this point, this article has proceeded largely by defending the preventive model against criticisms that have been leveled at it. Along the way, however, it has noted several positive aspects of the model, including its treatment of the offender as an individual worthy of respect, its potential for self-correction, and its efficacy at crime reduction. At least one other benefit of a preventive regime deserves special attention: the ease with which it can assimilate new scientific discoveries about human behavior. This capacity may be its single most important advantage in achieving criminal “justice.”

A. The Implications of Hard Determinism

The increasing accuracy of prediction based on demographic and situational factors, described earlier,¹⁶⁸ is one of many pieces of evidence that behavioral scientists rely on in arguing that all human behavior is determined by biology, upbringing and the current environment. There is a significant amount of evidence more directly supporting this proposition. Very briefly described here, it suggests that our actions are wholly caused by factors over which we have no control (hard determinism), or at least that we are strongly predisposed to act in certain ways (soft determinism).

A number of studies indicate that genes, organic processes, and early childhood

¹⁶⁶See generally Nkechi Taifa, “Three-Strikes-And-You’re-Out”–Mandatory Life Imprisonment for Third Time Felons, 20 U. Dayton L. Rev. 717, 722 (1995) (describing costs).

¹⁶⁷For instance, roughly 5-8% of chronic offenders commit over 50% of juvenile crime. David P. Farrington et al., Understanding and Controlling Crime 50-51 (1986); Michael Schumacher & Gwen A. Kurz, The 8% Solution: Preventing Serious, Repeat Juvenile Crime 4-5 (2001) (reporting a study finding that 8% of juvenile offenders committed 55% of repeat offenses, and that over half of these offenders continued crime as an adult). See also Franklin E. Zimring & Gordon Hawkins, Incapacitation 97 (1995) (making the point in the text, although concluding that we do not have the ability to identify “persistent high-rate offenders,” a conclusion contested in this article).

¹⁶⁸See *supra* text accompanying notes 109-112.

experiences play a very influential role in criminal behavior. Research on animals has found that the presence or absence of particular genes and hormones has a significant impact on levels of aggression.¹⁶⁹ Twin and adoption studies point to heredity as a major determinant in the development of criminal behavior, which environmental factors can exacerbate.¹⁷⁰ Low serotonin levels and variations in dopamine receptors have been associated with increased aggressive and impulsive behavior.¹⁷¹ When the chemical imbalance is combined with abuse as a child, antisocial behavior is even more likely.¹⁷² Although no one gene or biological trait is going to explain violent or other antisocial behavior, some scientists believe that a mixture of such factors, triggered by environmental stimuli, may well do so.¹⁷³

Social and cognitive psychology research has also produced insights into the linkage (or lack thereof) between thought process and behavior. Unconscious, automatic processes dominate human cognition, from the initial perception of events to responses to them¹⁷⁴ (which is

¹⁶⁹Randy J. Nelson et al., *Behavioral Abnormalities in Male Mice Lacking Neuronal Nitric Oxide Synthase*, 378 Nature 383 (1995); F. Saudou, *Enhanced Aggressive Behavior in Mice Lacking 5-HT1b Receptor*, 265 Science 1875 (1994).

¹⁷⁰Hill Goldsmith & Irving I. Gottesman, *Heritable Variability and Variable Heritability in Developmental Psychopathology*, in *Frontiers in Developmental Psychopathology* 5 (M. Lenzenweger & J. Haugaard, eds., 1996) (reviewing twin studies suggesting that adult criminal behaviors are moderately heritable and only slightly influenced by environmental factors); Remi J. Cadoret et al., *Genetic-Environmental Interaction in the Genesis of Aggressivity and Conduct Disorders*, 52 Arch. Gen. Psychiat. 916 (1995) (finding that adoptees who have a genetic predisposition toward criminal activity exhibit high aggression, and are even more aggressive if reared by a parent with substance abuse and legal problems, but are not abnormally aggressive if there is no genetic predisposition, whether or not reared in an adverse home environment).

¹⁷¹Evan Balaban et al., *Mean Genes and the Biology of Human Aggression: A Critical Review of Recent Animal and Human Research*, 11 J. Neurogenetics 1 (1996) (noting that over 50 studies have shown a relationship between serotonin and antisocial behavior, but criticizing their methodology and conclusions). See generally Peter McGuffin & Anita Thapar, *Genetics and Antisocial Personality Disorder*, in *Psychopathy: Antisocial, Criminal and Violent Behavior* 215 (Theodore Millon et al., eds., 1998).

¹⁷²Caspi Avshalom et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*, 297 Science 851 (2002) (finding that 85% of sample with low MAOA neurotransmitter levels and who were abused as children committed crimes against persons by age twenty-six). Also of interest is research correlating psychopathy with abnormal neurological symptoms. See generally, Bartol, *supra* note 53, at 92-105 (summarizing EEG research on psychopathy).

¹⁷³See, e.g., Katherine I. Morley & Wayne D. Hall, *Is There a Genetic Susceptibility to Engage in Criminal Acts?* Trends & Issues in Crime & Crim. Just. (October 2003) (arguing that, rather than a single gene cause of antisocial behavior, "it is much more likely that a large number of genetic variants will be identified that, in the presence of the necessary environmental factors, will increase the likelihood that some individuals develop behavioural traits that will make them more likely to engage in criminal activities.").

¹⁷⁴See generally John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 Am. Psych. 462 (1999); Irving Kirsch & Steven J. Lynn, *Automaticity in Clinical Psychology*, 54 Am. Psychol. 504 (1999).

not surprising, given the degree of reflexive behavior in animals). More specifically, phenomena such as personality-type, heuristic ways of thinking, and neural pathways that develop in response to external stimuli determine the information or events we notice and the way we interpret them.¹⁷⁵ Moreover, we frequently are not aware of these bases for judgment,¹⁷⁶ and often are wrong in our explanation for our choices and behaviors.¹⁷⁷ Research also suggests that the “reasons” for a particular action may well follow, rather than precede, the unconscious processes that produce the behavior, and sometimes may even follow the action itself, acting as an unconscious rationalization of it.¹⁷⁸ In other words, our intentions and motivations are not only often caused by processes of which we are not aware but may not even be the direct impetus for our actions.

As many have pointed out,¹⁷⁹ if the full implications of this research turn out to be true of human behavior, the premises of a desert or general-deterrence model of government intervention become much more tenuous, if not unsupportable. If our acts result from phenomena over which we have no control, the claim that we “deserve” to be punished for our antisocial conduct or can be deterred from it by general proscriptions of conduct becomes more difficult to sustain, even if the conduct is “intentional.” Compatibilists (those who think that the free will paradigm and determinism can be reconciled) argue that, even if determinism is true,

¹⁷⁵On the effect of personality on information processing, see Brendan P. Bradley et al., *Selective Processing of Negative Information: Effects of Clinical Anxiety, Concurrent Depression, and Awareness*, 104 J. Abnormal Psych. 532 (1995) and Karin Mogg et al., *Subliminal Processing of Emotional Information in Anxiety and Depression*, 102 J. Abnormal Psych. 304 (1993). On the development of neural pathways that control access to stimuli, see Joseph LeDoux, *The Emotional Brain: The Mysterious Underpinnings of Emotional Life* (1996). On the effects of heuristic thinking, see Daniel Kahneman & Amos Tversky, *On the Reality of Cognitive Illusions*, 103 Psychological Rev. 582 (1996) (responding to suggestions that heuristic thinking usually results in accurate judgments).

¹⁷⁶See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Science 1124, 1125 (1974)(describing the unconscious nature of heuristic thinking).

¹⁷⁷Richard E. Nisbett & T.D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 Psychological Rev. 231 (1977) (reviewing studies finding that people are frequently wrong about their explanations for choices and behaviors, even when confident about them).

¹⁷⁸See I. Keller & H. Heckhausen, *Readiness Potentials Preceding Spontaneous Motor Acts: Voluntary v. Involuntary Control*, 76 Electroencephalography & Clinical Neurophysiology 351 (1990).

¹⁷⁹See, e.g., Richard Lowell Nygaard, *Free Will, Determinism, Penology and the Human Genom: Where's A New Leibniz, When We Really Need Him?*, 3 U. Chi. Sch. Roundtable 417, 421-22, 430 (1996) (arguing that if genes are definitively linked to violent behavior “[w]e must prepare ourselves for the ‘real shock’ of where this . . . leads, . . . to new fundamental scientific, social, civil, and criminal laws.”); Steven I. Friedland, *The Criminal Law Implications of the Human Genome Project: Reimagining a Genetically Oriented Criminal Justice System*, 86 Ky. L.J. 303, 333 (1998) (“This shift in paradigm from free will to some form of determinism—either a ‘weak’ determinism, in which genes play only a factor in behavior, or a ‘strong’ determinism, in which genes are a causal agent of behavior—would create pressure to reinvent the current understanding of criminal responsibility.”).

people can still be held responsible for actions that are caused by intact practical reasoning.¹⁸⁰ But, without regurgitating the full debate or trying to resolve the ultimate issue, it is easy to see why many have concluded their logic is faulty: Even assuming that reasons do cause behavior, determinism (which compatibilists accept *arguendo*) dictates that reasons are determined as well. Nor can we easily say, as virtue ethics theorists posit,¹⁸¹ that we are responsible for our character, if the way we perceive and respond to the world depends on our character. In addition to this serious chicken-and-egg conundrum, these theorists have to deal with the extensive research literature indicating that most character formation occurs in the developmental years leading up to age 14, when the person can hardly be held responsible for how he or she turns out.¹⁸²

B. The Implications of Soft Determinism

The determinist hypothesis has not yet been proven, and may never be; certainly, many of us intuitively reject it, based on our daily experience, and the academic debate has, to date, resulted in a stalemate.¹⁸³ But one does not have to subscribe to hard determinism to recognize that discoveries about the causes of antisocial conduct can (and should) create substantial stress within the criminal justice system. Serious arguments have been made in favor of defenses based on chromosomal abnormalities, psychopathy, rotten social background, cultural differences, black rage, TV “intoxication,” battered women syndrome, and a host of other genetic and situational phenomena, a list ultimately limited only by the imagination.¹⁸⁴ Some of

¹⁸⁰See, e.g., Dan W. Brock & Allen E. Buchanan, *The Genetics of Behavior and Concepts of Free Will and Determinism*, in *Genetics and Criminality* 67 (J.R. Botkin et al., eds., 1999).

¹⁸¹See *supra* text accompanying notes 99-102.

¹⁸²This is a well-documented aspect of human development. See Jean Piaget, *The Moral Judgment of the Child* (Marjorie Gabain trans., 1965); Lawrence Kohlberg, *The Philosophy of Moral Development: Moral Stages and the Idea of Justice* (1981) (arguing, based on research, that ideas of moral obligation originate in early childhood but evolve as youths mature into adulthood). As to the development of a “criminal” character, see Terrie Moffit, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Development Taxonomy*, 100 *Psychological Rev.* 674, 679 (1993) (describing life-course-persistent offenders who “exhibit changing manifestations of antisocial behavior: biting and hitting at age four, shoplifting and truancy at age ten, selling drugs and stealing cars at age sixteen, robbery and rape at age twenty-two, and fraud and child abuse at age thirty.”). For a discussion (by a retributivist) of the moral arbitrariness inherent in the molding influences of both nature and nurture, see Wojciech Sadurski, *Natural and Social Lottery, and Concepts of the Self*, 9 *Law & Phil.* 157 (1990).

¹⁸³Compare Hilary Bok, *Freedom and Responsibility* (1998) (compatibilist account) & John Martin Fischer & Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (1998) (same) with Derk Pereboom, *Living Without Free Will* (2001) (hard determinist account) and Saul Smilansky, *Free Will and Illusion* (2000) (same).

¹⁸⁴For arguments on behalf of these types of claims, see David L. Bazelon, *The Morality of the Criminal Law*, 49 *S. Cal. L. Rev.* 385 (1976) (poverty); Richard Delgado, “*Rotten Social Background*”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?* 3 *L. & Inequality* 9, 12-23 (1985); David Skeen, *The Genetically Defective Offender*, 9 *Wm. Mitchell. L. Rev.* 217 (1983) (chromosomal defects); Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis*,

these defenses are based on very weak empirical evidence, but all have some logic and science to them.¹⁸⁵ At the least, these various assertions suggest that many people who commit crime find avoiding it very difficult.

A system based on desert ought to take this fact into account, but our current criminal justice system, perhaps due to fear of psychiatric minefields or perhaps simply out of moral blindness,¹⁸⁶ is very reluctant to do so. The insanity defense is limited to an extremely narrow set of offenders, typically recognizing an exculpatory claim only in cases involving a psychotic-like cognitive impairment.¹⁸⁷ And, in a large number of jurisdictions, the rest of the criminal code continues to adhere to objective “reasonable person” tests for mistake and affirmative defenses that contemplate little or no mitigation for behavioral deficiencies.¹⁸⁸ The Model Penal Code’s attempt to define mens rea is even more revealing, because the Code represents one of the most rigorous efforts to subjectify the blameworthiness inquiry.¹⁸⁹ In its definitions of the provocation defense, duress, and recklessness (the latter of which is also relevant, in some circumstances, to the scope of defenses such as self-defense), the Code speaks in terms of what a

Television Intoxication, and Black Rage, 74 N.C. L. Rev. 731 (1996); Alison D. Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. Cal. Rev. Law & Women's Studies 437 (1993); Peter Arenella, *Convicting the Morally Blameless*, 39 UCLA 1511 (1992)(psychopathy); Jennifer L. Grossman, *Postpartum Psychosis--A Defense to Criminal Responsibility or Just Another Gimmick?*, 67 U. Det. L. Rev. 311, 313 (1990); Lenore E. A. Walker, *Battered Women Syndrome and Self-Defense*, 6 Notre Dame J.L. Ethics & Pub. Pol'y 321 (1992).

¹⁸⁵See articles cited *supra* note 182. For a description of the scientific basis of a number of other defenses of this sort (including epilepsy, hypoglycemic syndrome, dissociative states, posttraumatic stress disorder, and genetic aberrations), see Gary P. Melton et al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* 218-225 (2d ed. 1997).

¹⁸⁶Consider these comments from David Dolinko:

[T]he retributivist mind-set encourages legal actors to brush aside qualms about whether the wretched economic, social, and psychological background of many criminals somehow undercuts our right to inflict condign punishment. For if to credit such qualms is to question the criminal's status as a fully responsible individual, then respect for the criminal's very personhood counsels us to reject those qualms and to affirm our deep respect for the offender by refusing to mitigate his punishment no matter how "deprived" his background.

Dolinko, *supra* note 119, at 1647.

¹⁸⁷See Perlin, *supra* note 65, at 120-28 (1994).

¹⁸⁸See Wayne LaFare, *Criminal Law* 434 (3d ed. 2000) (noting the courts’ “uncritical acceptance of the general statement that the mistake must be reasonable”); *id.* at 493-94 (noting that the law generally requires that the defendant’s belief in the necessity of using force to harm to himself be a reasonable one”).

¹⁸⁹Richard J. Bonnie et al., *Criminal Law* 360 (1997) (“The Model Code treatment of mistaken belief in the existence of justificatory facts is an essential feature of its general commitment to the proposition that criminal punishment should be proportional to the culpability manifested by the defendant”).

person in the actor's "situation" would have perceived or experienced.¹⁹⁰ The term is intentionally left undefined in the black letter of the Code, so that it could, on its face, include virtually any aspect of the individual's personality or environment, including impairments due to genetics, psychopathy, trauma, and any of the other factors that behaviorists think contribute to behavior. Yet, with the possible exception of the provocation defense (which in any event only applies to homicide),¹⁹¹ the Code's commentary on these provisions states that the interpretation of "situation" in these contexts should only allow consideration of "[s]tark, tangible factors" such as "size, strength, age or health," not "[m]atters of temperament."¹⁹² Elsewhere, the commentary indicates that "heredity" and "intelligence" are also not to be encompassed within the actor's "situation" in appraising these mental states.¹⁹³

The Code's unwillingness to contemplate "internal" factors, particularly in assessing recklessness, which is the Code's default mens rea for both offenses and defenses,¹⁹⁴ contradicts its commitment to blameworthiness based on subjective desert. It may be easier to discern size and age as compared to intelligence or temperament, but there is no culpability-based reason for the kinds of distinctions the Code makes. As a theoretical matter the line-drawing exemplified in the Code is arbitrary; it evades, rather than faces, the logical consequences of a desert-based system.¹⁹⁵

¹⁹⁰See Model Penal Code § 210.3(1)(b) (providing that an intentional killing is manslaughter if "committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse [as] determined from the viewpoint of a person in the actor's situation"); § 2.09 (recognizing duress as a defense when an offense is coerced by force or a threat of force "which a person of reasonable firmness in his situation would have been unable to resist"); § 2.02(2)(c) (defining recklessness as a conscious disregard of a substantial risk involving "a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation"); § 3.09(2) (explaining that "[w]hen the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification . . . but the actor is reckless or negligence in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded . . . is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability");

¹⁹¹The commentary to the Code notes that, in this provision, "[t]he term 'situation' . . . is designedly ambiguous and is plainly flexible enough to allow the law to grow in the direction of taking account of mental abnormalities that have been recognized in the developing law of diminished responsibility." Model Penal Code and Commentaries 72 (1980). However, the commentary later states, "[l]ike temperament or unusual excitability . . . there are surely other forms of abnormality that should not be taken into account for this purpose." Id. at 73.

¹⁹²Id. at 375 (equating definition of situation in connection with duress with the definition of situation in appraising recklessness and negligence).

¹⁹³Id. at 242 & n. 27 (indicating that these factors "would not be held material in judging negligence" and then stating the recklessness provision "requires the same discriminations demanded by the standard of negligence.").

¹⁹⁴Model Penal Code § 2.02(3).

¹⁹⁵In his famous comments about the criminal law, Justice Holmes addressed this quandary with similar

The contention is sometimes made that any culpability-mitigating circumstances not considered at trial can be given due weight at sentencing.¹⁹⁶ But this gambit admits that culpability is only of secondary importance in defining crime, prevents juries from playing the role they are best suited to fill in a desert-based system and, given the low visibility of sentencing, hides the core decisions about punishment from the public.¹⁹⁷ If sentencing statutes could make clear the extent to which various mitigating factors affected disposition, at least the implications of desert-based punishment would be clarified. But, as already noted,¹⁹⁸ there are no clear criteria for making these types of distinctions, whether they take place at trial or at sentencing.

In a recent article, Stephen Morse, a leading retributivist, concedes as much. Morse agrees both that current criminal law takes insufficient account of diminished responsibility due to mental and behavioral impairments, and that the jury, rather than the sentencing judge, ought to decide whether responsibility is diminished.¹⁹⁹ But because “we have only the limited ability to make the fine-grained responsibility judgments that are possible in theory,”²⁰⁰ he eschews any attempt to grade culpability in a nuanced fashion. Instead he proposes a generic “guilty but partially responsible” defense that would reduce sentence by the same amount for every defendant whose “substantially diminished rationality . . . substantially affected [the] criminal conduct.”²⁰¹ As he states, “[t]his proposal would lump together for the same degree of reduction defendants convicted of the same crime but who have disparately impaired rationality and

reasoning: “[An] individual may be morally without stain, because he has less than ordinary intelligence or prudence. But he is required to have those qualities at his peril. If he has them, he will not, as a general rule, incur liability without blameworthiness.” Oliver Wendell Holmes, *The Common Law* 55 (1881). If the individual is one of the many who lacks ordinary intelligence or prudence, however, then, according to Holmes, he may incur liability despite being blameless. The reason, Holmes stated, is that the “chief and only universal purpose of punishment” is “prevention” of criminal conduct, a purpose which trumps the goal of punishing only blameworthy acts. *Id.* at 56. As this article argues, prevention of criminal conduct can be achieved without relying on or distorting the blameworthiness concept.

¹⁹⁶Perhaps the most blatant example of this type of reasoning is found in the Montana Supreme Court’s decision in *State v. Korrell*, 213 Mont. 316, 331, 690 P.2d 992, 1000 (1984), which upheld a legislative decision to abolish the insanity defense because evidence of mental disorder could still be heard at sentencing.

¹⁹⁷This is still true after the Supreme Court’s recent decision in *Blakley v. Washington*, 124 S.Ct. 2531 (2004), which only requires factors in *aggravation* to be decided by juries.

¹⁹⁸*See supra* text accompanying notes 114-120.

¹⁹⁹Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 Ohio State J. Crim. L. 289, 294-298 (2003)(arguing that “[p]resent law is unfair because it does not sufficiently permit mitigating claims” and jury trial determinations are better than judicial sentencing determinations on this score because sentencing judges might abuse their discretion, are less acquainted with “community norms,” and operate at a less “visible” stage).

²⁰⁰*Id.* at 302.

²⁰¹*Id.* at 300 (emphasis deleted).

consequently different responsibility.”²⁰² Although he admits that “[t]his may seem a denial of equal justice,” the “failure to provide perfect justice in this imperfect world is not a decisive, or even weighty, objection in this instance.”²⁰³ Evaluations of weightiness aside, Morse’s admissions that the present desert-based system largely ignores the mitigating impact of biology and situation, and that even his reform requires significant compromise, suggests that the punishment model literally cannot do justice to the variety of human motivation for crime.²⁰⁴

A preventive regime, in contrast, neither ignores the biological and situational causes of crime nor arbitrarily limits their relevance. Rather, its individualized dispositions explicitly experiment with means of reducing their impact. As scientific knowledge about crime advances, a desert regime will either have to abandon its own premises or resort to clumsy adjustments, while a preventive regime is well situated, both in theory and in practice, to integrate new information into the intervention calculus.

V. Conclusion

The punishment model of the criminal law is currently threatened by the newly popular prevention model of intervention, a model of intervention based on predictions of risk uncabined by culpability assessments. This article has argued that this trend is not necessarily a bad thing; it may be time to swing the pendulum back toward a preventive model, albeit with some modifications. A preventive regime that is limited to interventions after non-accidental, unjustified harmful acts, and that engages in competent risk assessment and risk management, might well be superior to the current system of criminal justice, or to any system of criminal justice based primarily on desert, deterrence, or ethical philosophy. Such a preventive regime would be more effective at preventing crime and assimilating new scientific information about human behavior, and probably would be no more inaccurate or costly than the punishment model of criminal justice. A by-product of this shift would be the elimination of the many artificial distinctions between civil and criminal dispositions described at the beginning of this article.²⁰⁵ Deportation, forfeiture and administrative penalties, as well as imprisonment, would all be aimed at prevention of prohibited conduct in an effort to protect the public.

²⁰²*Id.* at 304.

²⁰³*Id.*

²⁰⁴Morse does countenance one variation on his generic guilty but partially responsible defense. The discount for diminished responsibility could vary inversely with the seriousness of the crime, he states, because defendants who commit more serious crimes are “more dangerous” and thus should be confined for longer periods. *Id.* at 303. Leaving aside the fact that those who commit serious crimes are not necessarily more dangerous than those who commit less serious ones, this concession to public safety raises the question this entire article has addressed: Why shouldn’t dangerousness *replace* blame as the core consideration of the criminal law?

²⁰⁵*See supra* text accompanying notes 1-3.

Of course, there may be serious constitutional problems with a preventive model of criminal justice. Although *Hendricks* upheld the sexual predator regime, it did so on condition that the state prove that a “mental abnormality” causes the dangerousness underlying the commitment.²⁰⁶ As noted earlier,²⁰⁷ that phrase is virtually meaningless as a limitation on commitment. But by no stretch is it ambiguous enough to cover every person who commits an antisocial act. Another possible constitutional obstacle to a preventive regime is its nonchalance toward mens rea. In *Morrisette v. United States*, for instance, the Court stated that “[t]he contention that an injury can amount to a crime only when inflicted by intention . . . is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”²⁰⁸ Procedure-related obstacles to a preventive regime might also arise under the Constitution. In particular, a system that depends on expert assessment of risk and treatability could diminish the role of jury decision-making, which the Sixth Amendment requires for all “criminal prosecutions.”²⁰⁹

The latter two objections probably do not pose unsurmountable obstacles to a preventive regime. *Morrisette* notwithstanding, the Supreme Court has been quite ambivalent about requiring particular mental states as a matter of due process;²¹⁰ in any event the regime proposed

²⁰⁶521 U.S. at 358 (“A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality.’”).

²⁰⁷See *supra* text accompanying notes 15-17.

²⁰⁸342 U.S. 246, 250 (1952). The Court also noted Blackstone’s statement in the 18th century that crime requires a “vicious will.” *Id.* at 251.

²⁰⁹U.S. Const. amend VI. This language has been construed to require jury trials for any crime that can lead to “punishment” of six months or longer, *Baldwin v. New York*, 399 U.S. 66 (1970), so, as a technical matter, a preventive regime relying on periodic review every six months might elude the Sixth Amendment’s jury trial constraints (although the due process clause would still apply).

²¹⁰The Court’s language in *Morrisette* was dictum and in any event was merely in aid of interpreting a federal statute, not framed as a constitutional requirement. In earlier cases, the Court had stated that “in the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide ‘that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.’” *United States v. Balint*, 258 U.S. 250, 252 (1922) (quoting *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 70 (1910)). More recently, in *Egelhoff v. Montana*, 518 U.S. 37 (1996), the Court held that Montana’s elimination of the intoxication defense did not violate due process, in large part because the defense is “of recent vintage.” Most other mens rea concepts are relatively recent developments as well. See Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Past and Present*, 1993 Utah L. Rev. 635, 664 (suggesting that, before the nineteenth century, the law posited that “the accused acts intentionally unless she can show that commission of the actus reus was accidental [or] unless she raises one of the recognized defenses,” i.e., self-defense—defined in terms of reasonableness—and infancy and insanity—defined narrowly); Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 Hastings L.J. 815, 844-45 (1989) (noting that even into the nineteenth century, English courts did not often conduct serious investigations of subjective mental state). Finally,

here would not permit intervention for non-negligent or justified acts. And although a preventive system would rely heavily on experts, it would not have to derogate the roles of juries and judges, contrary to the claims of some of its opponents.²¹¹ Juries should be instrumental in determining whether a person committed a non-accidental, unjustified harm and judges should be involved in monitoring risk assessment and risk management, as occurs in drug courts. Ultimately, the degree of risk necessary to authorize intervention, and the restraint on liberty and intrusiveness of treatment legitimated by a given degree of risk, are moral/legal questions that laypeople and legal experts, not clinical ones, should decide.²¹²

On the other hand, the decision in *Hendricks* that confinement based on dangerousness may take place only when linked to abnormality—recently affirmed by the Court in *Kansas v. Crane*²¹³—is not so easily finessed. If that decision stands, implementation of a preventive regime may not be possible. Added to this constitutional impasse are the related psycho-social concerns that were discounted but not dismissed in the foregoing pages. First, it is possible, as Robinson suggests, that an abrupt end to blaming practices would undermine the criminal law's legitimacy.²¹⁴ And second, even if determinism is true, a criminal law that appears to endorse the notion that people cannot control their fate might have a significant debilitating impact.²¹⁵ Although this article contended that a preventive regime should not have these effects (and that, in any event, the criminal law is only one among many behavior-shaping institutions in society), as of yet we do not know enough to evaluate these claims.

Thus, even if one agrees with the general thrust of the arguments made here, legal and sociological considerations may counsel that some aspects of the punishment model be

there is the interesting statement in *Powell v. Texas*, 392 U.S. 514 (1968) (plurality opinion): "The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Id.* at 535-536 .

²¹¹C.S. Lewis objected that a preventive regime could "be criticized only by fellow experts on technical grounds, never by men as men and on grounds of justice." C.S. Lewis, *The Humanitarian Theory of Punishment*, Res Judicatae 224, 229 VI (June 1953).

²¹²See Christopher Slobogin, *The "Ultimate Issue" Issue*, 7 Behav. Sci. & L. 259, 260-61 (1989) (arguing against permitting experts to address ultimate issues such as culpability and whether intervention may occur based on dangerousness, because "[m]ental health professionals are not trained, as are judges, nor institutionally qualified, as are juries, to reach legal or moral conclusions").

²¹³434 U.S. 407, 411-13 (2002).

²¹⁴Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. Rev. 201, 207 (1996) (arguing that the reason the distinction between civil and criminal systems persists is that "the human desire to make moral judgements is universal").

²¹⁵See Herbert Packer, *The Limits of the Criminal Sanction* 75 ("The idea of free will in relation to conduct is not, in the legal system, a statement of fact, but rather a value preference having very little to do with the metaphysics of determinism and free will.").

maintained, at least for a transitional period. Specifically, culpability determinations might remain a fixture at the trial stage; their retention as a liability predicate probably satisfies *Hendricks*,²¹⁶ and their visibility would assure the public that the criminal justice system still takes blame seriously. However, once conviction occurs, disposition should be based on risk management principles; no minimum or maximum terms would be imposed. Routine risk assessment, periodic review, community placements and rehabilitation efforts would be the focus of the post-conviction process. That version of indeterminate sentencing, although not a pure preventive model, might be a significant first step toward civilizing the criminal law.

²¹⁶In finding that commitment under the sexual predator statute at issue in *Hendricks* was not punishment, the Court emphasized both the absence of a requirement that the offender be found criminally responsible for the act and the lack of a “scienter requirement.” 521 U.S. at 362-63. Conversely, if both are required, post-conviction disposition would probably be considered sufficiently punitive to satisfy due process. *Cf.* Penn. ex rel. Sullivan v. Ash, 302 U.S. 51, 61 (1937) (“[The state] may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes. . . . [The offender’s] past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him.”).