

# Preventive Justice

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# 1

## Introduction: The State and Coercive Preventive Measures

### 1.1 The Study

This book is the product of a three-year study of what we chose to call ‘preventive justice’. The principal objective is to develop an account of the principles and values that should guide and limit the state’s use of preventive techniques that involve coercion. Although there is an extensive literature on the rationales for and limitations on state punishment, there has been relatively little systematic exploration or analysis of the corresponding rationales, scope, and principled limits of coercive preventive techniques. Preventive endeavours are ubiquitous, but they have yet to be mapped, analysed, or rationalized. Our aim in this book is to reassess the foundations for the range of coercive measures that states now take in the name of prevention. The focus of the study is on the law of England and Wales, under the European Convention on Human Rights (ECHR), but comparisons with other jurisdictions (for example, the United States, Germany, Sweden, and Australia) are made from time to time. Rather than adopting an explicitly comparative approach, we have used comparative materials in order to assist our examination of the principled limits of coercive preventive measures.

We begin, in Section 1.2, with a brief survey of the terrain of the study. The range of coercive preventive measures is wide, and we have selected for analysis a number of measures that are conspicuous and contentious, and which also give an impression of the variety of situations in which state coercion may be used for ostensibly preventive ends. Different spheres of prevention could have been examined—for example, environmental policy or financial regulation—but we decided to focus mainly on the core issue of preventing physical harm to individuals, especially where deprivation of liberty is used for this purpose. We then turn, in Section 1.3, to examine the role of the state in preventing harm: this takes the discussion into the realms of political philosophy, and into engagement with the so-called right to security. On the basis of this groundwork, Section 1.4 examines the concept of preventive justice, and also the concept of coercion. Section 1.5 discusses the historical context for the study.

This leads into two definitional sections of this opening chapter. Section 1.6 examines the definition of a punitive measure, the rationales for punishment, and

the reasons for ensuring that certain safeguards and procedural protections are in place. These features of punitive measures having been explored, Section 1.7 then examines the same features of coercive preventive measures—how should such a measure be defined, what rationales support such measures, and are there convincing reasons for insisting that certain procedural protections and safeguards should be in place? The concluding Section 1.8 charts the course of the chapters that follow.

## 1.2 The Terrain

Preventive measures taken by the state in order to reduce risks to harm are legion. Many of them, such as those involving situational crime prevention, social crime prevention, and even the most common forms of surveillance, do not involve (direct) coercion and therefore lie beyond the scope of the present study. Our concern lies with preventive measures that involve some element of coercion or loss of liberty, whether minor or substantial.<sup>1</sup> Even confining our study to coercive preventive measures, there is a wide range of possible topics to be examined. In order to orientate the theoretical discussion that follows, we outline the seven forms of coercive preventive measure that are to be our focus, all potentially involving loss of liberty:

- (1) preventive powers in policing and criminal procedure;
- (2) civil preventive orders;
- (3) preventive criminal offences;
- (4) preventive sentences;
- (5) preventive counterterrorism measures;
- (6) preventive aspects of public health law; and
- (7) preventive aspects of immigration law.

Later chapters explore the justification for these preventive powers and the appropriate limits on their form and extent. In the paragraphs that follow here, we briefly describe those coercive measures so as to provide a context for the discussion in the remainder of this chapter.

(1) *Preventive powers in policing and criminal procedure*: we focus on three controversial types of coercive police power. First, there is the power to stop and search people on the street. Second, the power of arrest is sometimes exercised for preventive purposes. And third, the power of the police to contain or ‘kettle’ people for several hours in order to prevent major disorder has proved a contentious tactic, and we seek to raise questions about its justification and limits. We then go on to examine a

<sup>1</sup> The concept of coercion, so obviously important in this connection, is discussed in Section 1.3.

much-used coercive power in criminal procedure, that of pre-trial detention. The ECHR (like many similar documents internationally) declares the right to liberty of the person, but allows for exceptions, one of which is the detention pending trial of persons charged with an offence. We examine the various reasons that have been accepted as providing a justification for this deprivation of liberty—preventing the defendant from absconding, preventing interference with witnesses, preventing harm to the defendant, and (most controversially) preventing the commission of offences. In Chapter 3 we discuss whether, and to what extent, each of these reasons should be capable of outweighing the presumption of innocence and the general right to liberty of the person.

(2) *Civil preventive orders*: the law of England and Wales has a long history of preventive orders, going back to before 1361 in respect of the power to bind a person over to keep the peace.<sup>2</sup> Since the mid-1990s, it has seen the rapid development of a legal form known as the civil preventive order. These are essentially two-step orders: the first step is the making of a preventive order according to civil procedure, prohibiting a person from doing certain acts or going to certain places; the second step is that a person who breaches any of the conditions of such an order without reasonable excuse commits a serious criminal offence, usually punishable by up to five years' imprisonment. More than a dozen types of civil preventive order have been created in England and Wales, ranging from the well-known Anti-Social Behaviour Order (ASBO) to Serious Crime Prevention Orders, Risk of Sexual Harm Orders and Terrorism Prevention and Investigation Measures (TPIMs). In Chapter 4 we scrutinize the justifications for such measures, and propose limitations to which they should be subjected.

(3) *Preventive criminal offences*: prevention forms part of the rationale for most criminal offences,<sup>3</sup> but there are some groups of offences for which the preventive rationale is heightened. We focus on four forms of criminal offence: *inchoate offences*, particularly the crimes of attempt and conspiracy; *substantive offences defined in an inchoate mode*, in respect of which the form of definition prohibits not the causing of a prohibited harm but the doing of acts with intent to cause such a harm, thereby criminalizing conduct at a similar stage to an inchoate offence; *preparatory or pre-inchoate offences*, which include crimes of possession and of membership of a prohibited organization, which may be criminalized without the need for proof of an intent to cause harm; and offences of *risk-creation*, which might include offences such as drunk-driving and speeding, as well as offences involving the breach of health and

<sup>2</sup> In this year the Justices of the Peace Act 1361 put some of the common law powers in statutory form: see Law Commission of England and Wales, 'Binding Over', *Law Com No. 222* (1994).

<sup>3</sup> As Nils Jareborg has observed: 'It comes in on the level of criminalization. The very point of threatening with punishment would be lost if one did not presuppose that the threat has some preventive effect.' N Jareborg, *Essays in Criminal Law*, ed. (Sweden: Iustus Forlag, 1988).

safety regulations. In Chapter 5 we demonstrate the respects in which these offences depart from standard criminal law doctrines, explore the justifications for these departures, and propose a principled approach to limitations on such uses of the criminal law.

(4) *Preventive sentences*: as with criminal offences, prevention forms part of the rationale for most sentences. However, there are some forms of sentence which are explicitly conceived as preventive measures involving deprivation of liberty. The most conspicuous are mandatory or mandatory minimum sentences and extended determinate sentences for those who commit certain offences persistently, and the indeterminate preventive detention of so-called ‘dangerous’ offenders, although there has been an abiding difficulty in defining and identifying such offenders. In Chapter 7 we examine the justifications for measures of this kind, and propose a principled approach to the problems they are designed to tackle.

(5) *Preventive counterterrorism measures*: perhaps the most draconian and burgeoning preventive laws are those presented as countering the potentially catastrophic harms inflicted by terrorist attack. Within the criminal law these include specific terrorism offences of possession, preparatory offences, crimes of publication and dissemination of inflammatory material, and offences of association with and support for terrorist organizations. Counterterrorist procedural powers include special powers of stop and search and of detention in a police station. Outside the criminal process, the development of counterterrorist civil preventive orders—notably Control Orders and their replacement TPIMs—the use of security-cleared special advocates and closed material proceedings together constitute substantial departures from ordinary procedures and established norms. The justifications for these and related powers will be explored in Chapter 8, and suggestions made for the imposition of principled restraints on their use.

(6) *Preventive aspects of public health law*: among the various compulsory measures in public health law are three that involve deprivation of liberty. First, there are powers to impose isolation or quarantine on persons who have or might have a contagious disease. Second, there are powers to detain mentally disordered persons as civil patients. And third, there are powers to detain convicted offenders who are mentally disordered. The justifications for these powers are scrutinized in Chapter 9.

(7) *Preventive aspects of immigration law*: compulsory powers to detain people are also a prominent feature of the law relating to immigration and asylum. There are, for example, powers to detain those whose application for asylum has been rejected and other intending or illegal immigrants. Other important aspects of immigration control include the policing of entry at, and often well beyond, the border; the enactment of immigration offences; the detention of foreign national prisoners in prison beyond the term of their sentence with a view to deportation; and the provision of short-term holding cells, immigration removal centres, and pre-departure accommodation. These measures are designed to identify illegal immigrants and failed asylum seekers in order to prevent their entry into the UK or to secure

their removal and return to their country of origin. In Chapter 10 we examine the preventive justifications offered for these measures and propose principled restrictions on their use.

### 1.3 'Preventive Justice' and 'Coercive Preventive Measures'

Before going much further, we should reflect on the key terms used in the study—'preventive' and 'justice', as combined in the concept of 'preventive justice' and 'coercive preventive measures'. In their common usage the terms 'preventive' and 'prevention' rarely bear the apparently uncompromising meaning of totally eliminating harmful behaviour. It would be rare indeed for anyone advocating a preventive measure to believe, or to be understood as claiming, that the realistic objective of the measure was to prevent *all* harms of a particular kind. The more accurate term 'reductivism' has been coined,<sup>4</sup> in recognition of the fact that 'prevention' ought strictly to be confined to the meaning of 'preventing all instances of *x*'. However, reductivism is an ugly term that has not passed into common usage; we will, therefore, persist with the more normal term 'prevention', while recognizing that it bears an attenuated meaning such as *the significant reduction of (potentially) harmful behaviour*, or *the reduction of (potentially) harmful behaviour to a tolerable level*. Whichever of those attenuated meanings is chosen, we are left with the problem of determining what degree of reduction of harms is required, which must depend on what are thought to be socially acceptable levels of risk. Such calculations, weighing the predicted level of harmful outcomes against the curtailment of liberty involved in the preventive measure, are illustrated by decisions about the appropriate speed limits for particular roads. There is no set form of calculus for such decisions, and when Bentham stated confidently that any punishment greater or lesser than that indicated by the principle of utility would be 'so much misery run to waste', he was assuming far greater precision than is attainable in practice.<sup>5</sup> For the present, we can say that the terms 'preventive' and 'prevention' are uncertain in respect of the degree of reduction of harm envisaged, and that this uncertainty must be kept firmly in view in discussions below. The same analysis applies to a range of other terms that are often used as synonyms for, or close approximations to, prevention. Thus,

<sup>4</sup> By Nigel Walker in his many writings (eg N Walker, *Sentencing in a Rational Society* (Harmondsworth: Allen Lane, 1972), 18).

<sup>5</sup> J Bentham, *The Works of Jeremy Bentham*, ed. J Bowring (Edinburgh: William Tait, 1838–43), vol. 1 *Principles of Penal Law*, part ii, Ch. V; see also J Bentham, *An Introduction to Principles of Morals and Legislation* (Oxford: Blackwell, 1967; 1789), Ch. XV, 2: 'if the punishment be less than what is suitable to that degree, it will be *inefficacious*; it will be so much thrown away: if it be more, as far as the difference extends, it will be *needless*; it will therefore be thrown away also in that case'.

security, public safety, public protection, and social defence—to take but four of the prominent synonyms in contemporary debate—all share the element of uncertainty just identified in the concept of prevention. When applied to particular strategies or policy proposals, it will be rare that they can truly be interpreted as calling for the total elimination of harm from a given source. Usually, they are calling for a reduction in harm; a reduction of an unspecified degree.

As for the term ‘justice’, it is used here in two senses. The first is a formal sense, bearing the same general meaning as in the phrases ‘criminal justice system’ and ‘civil justice system’, to convey that it is part of an official framework of measures aimed at dealing with certain issues. Unlike criminal justice or civil justice, of course, preventive justice does not refer to an established system or even an acknowledged, coherent domain of legal enterprise. So, in part, recourse to the term preventive justice seeks to draw attention to the extent and nature of preventive endeavour, whether it takes place within the criminal justice system or within adjacent fields such as security, public health, and immigration. The second sense is substantive. We do not claim that preventive justice is part of a wider theory of social justice, enabling its general aims and limiting principles to be deduced from a master theory. We are cautious about the claims of grand theory, divorced from specific laws and substantive practices, measures, and institutions. Rather, the chapters of the book work towards the articulation of a set of values capable of generating both justifications for preventive measures and limiting principles that might be applied to concrete matters of lawmaking, policy, and practice. This set of values recognizes the state’s duty to protect (discussed in Section 1.4), but also the state’s duty to respect individuals as autonomous beings—which means, among other things, respect for rights, the maintenance of rule-of-law values, the avoidance of arbitrariness, and kindred principles. We argue the case for these principles in the various chapters, and then bring them together in Chapter 11.

The book is concerned with preventive measures that are coercive: non-coercive preventive measures, such as situational crime prevention, social crime prevention, rehabilitation, and a whole range of medical measures, are left in the background. But why do we place the emphasis on coercion, and wherein resides the element of coercion? The law uses coercion when it prescribes a sanction that is intended to impose sufficient pressure on a person to force or make that person act in a certain way.<sup>6</sup> The use of coercion stands contrary to a basic respect for the autonomy of individuals—whether it involves physical coercion, for example detention, or merely amounts to rational compulsion (a threat to bring about some other significant disadvantage to the person if compliance is not forthcoming).<sup>7</sup> These forms of coercion therefore involve the authorized deprivation of basic rights, and are consequently in need of moral and political justification. The roots of this

<sup>6</sup> G Lamond, ‘The Coerciveness of Law’, *Oxford Journal of Legal Studies* 20 (2000), 39.

<sup>7</sup> Lamond, ‘The Coerciveness of Law’ (n 6), 49.



justification may be found in the harm that the coercion is designed to avert or minimize, but, as we shall see in later chapters, there may be different ways in which one can justify particular coercive preventive measures. However, it is important to point out that coercion, rather like security, can be viewed from a subjective or objective point of view. There may be situations in which an individual feels coerced (ie feels that his or her options are so few and unattractive that a particular course of action must be taken) and where it was not the law's intention to coerce the individual. Our focus here is on purposively coercive measures, while bearing in mind the reality that coercive effects may be experienced in other situations.

## 1.4 The State's Duty to Prevent Harm

Before we can begin the task of trying to formulate a conceptual framework for preventive justice, we need to address the prior question of what founds the state's duty to prevent harm. The duty of the state to punish crime has been much explored, and the case for its exclusive right to do so has been stoutly defended.<sup>8</sup> The role of the state in preventing harm and ensuring security is more complex because it is neither exclusive nor so well defined. Understanding what underpins the state's preventive function requires close attention to fundamental questions about the relationship between state and citizen, the role and remit of the state, and the obligations of citizens.

Classical liberal conceptions of the relationship between state and citizen focus upon the obligations owed to the state by citizens and to citizens by the state. The citizen's obligation to obey the law is explained variously by reference to tacit consent to its authority; fair play to other citizens; submitting to reciprocal burdens when accepting the benefit of the services and protection provided by the state; or the consequentialist ground that, absent obedience to the law, the result would be chaos or a return to a Hobbesian state of nature.<sup>9</sup> What the state owes to citizens in return is less well defined, but seems always to include a duty to provide protection from the hazards and threats that they would otherwise face.<sup>10</sup> Thus, in exchange for the promise of the security of their persons and property, citizens agree to

<sup>8</sup> A Harel, 'Why Only the State May Inflict Criminal Sanctions: The Case against Privately Inflicted Sanctions', *Legal Theory* 14 (2008), 113–33; M Thorburn, 'Reinventing the Nightwatchman State', *University of Toronto Law Journal* 60 (2010), 425–43.

<sup>9</sup> For further analysis, see, eg, D Knowles, *Political Obligation: A Critical Introduction* (Abingdon: Routledge, 2010).

<sup>10</sup> A Ryan, 'Hobbes' Political Philosophy', in T Sorell (ed.), *The Cambridge Companion to Hobbes* (Cambridge: Cambridge University Press, 2011), 208–45; 228–99. See also K Günther, 'Responsibility to Protect and Preventive Justice', in A Ashworth, L Zedner, and P Tomlin (eds.), *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013), 69–90.

renounce the right to self-government and to submit to the state's coercive force. As Hobbes observed in *Leviathan*: 'The very end for which this renouncing, and transferring of right is introduced, is nothing else but the security of a man's person.'<sup>11</sup> It follows that the state's primary task and indeed its very *raison d'être* is to secure for its citizens the conditions of order and security that are prerequisites of freedom. Accordingly, Hobbes characterized the duty of the state as follows: 'The office of the Sovereign, (be it a Monarch, or an Assembly,) consists in the end, for which he was trusted with Sovereign Power, namely the procuration of the *safety of the people*.'<sup>12</sup> Several things follow from this characterization of the state's primary function. First, the protective or preventive function is written into the very fabric of state authority and imposes upon the state a duty to promulgate laws and pursue policies in order to provide security for its citizens. Second, citizens owe a *prima facie* duty to the state and to one another to abide by law and to accept state coercion as the necessary price of peace and good order. Third, the state retains the prerogative of exercising executive powers in conditions of emergency outside the normal legal and constitutional limits placed on it.<sup>13</sup> The absolute necessity of the prerogative is a central theme in classical political theory (found in the writings of Locke, Montesquieu, Hume, Rousseau, and Adam Smith among others) and it points to the centrality of security to the liberal conception of the state.

Unsurprisingly, this prerogative power has been much debated in recent years, not least because it underpins executive action in situations of emergency and permits the exercise of extraordinary powers in the name of security.<sup>14</sup> If the duty to protect is not to give the state a *carte blanche* to exercise coercive powers in pursuit of its preventive function, closer consideration needs to be given to the question of what limits should apply, irrespective of the imminence or magnitude of the risk faced. In matters of everyday prevention, some limits are to be found in constitutional requirements of a liberal state first suggested by Locke, such as the system of checks and balances furnished by the separation of legislature, executive, and judiciary.<sup>15</sup> Other central requirements are the universal fair application of laws

<sup>11</sup> T Hobbes, *Leviathan* (Oxford: Oxford University Press, 2008;1651), Ch. XIII.

<sup>12</sup> Hobbes, *Leviathan* (n 11), Ch. XXX 'Of the Office of the Sovereign Representative'.

<sup>13</sup> J Dunn, *The Political Thought of John Locke* (Cambridge: Cambridge University Press, 1969), 150.

<sup>14</sup> D Dyzenhaus, 'The Permanence of the Temporary: Can Emergency Powers Be Normalized?', in R Daniels, P Macklem, and K Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: Toronto University Press, 2001), 21–37; B Ackerman, 'The Emergency Constitution', *Yale Law Journal* 113(5) (2004), 1029–91; L Tribe and P Gudridge, 'The Anti-Emergency Constitution', *Yale Law Journal* 113(8), 1801–70; D Cole, 'The Priority of Morality: The Emergency Constitution's Blind Spot', *Yale Law Journal* 113(8), 1753–800; O Gross and F Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006); M Neocleous, *Critique of Security* (Edinburgh: Edinburgh University Press, 2008), 39–75.

<sup>15</sup> J Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988;1690), Ch. IX 'Of the Ends of Political Society and Government'.

that are clear, intelligible, widely and well publicized; implemented by an impartial and independent judiciary; and backed up by powers of enforcement that are no more extensive than those required to secure order and prevent crime. It is in conditions of emergency, where exceptional powers are sought by governments, that the question of what limiting requirements should apply is most fiercely contested, as we shall see in Chapter 8. But our concern is also with those preventive measures that are widespread in non-emergency conditions, and with their justifications and proper limits.

The core duty to protect sets its own limit on the proper role and scope of the state in those liberal theories that espouse a minimalist or laissez-faire conception of government. In such accounts, the scope of legitimate state authority barely extends beyond the provision of security. Adam Smith, for example, in the first of his *Lectures on Jurisprudence*, argued that: the 'security of the people... that is, the preventing all crimes and disturbances which may interrupt the intercourse or destroy the peace of the society by any violent attacks' is best achieved through the implementation and enforcement of laws—as he went on to expound: 'the best means of bringing about this desirable end is the rigorous, severe, and exemplary execution of laws properly formed for the prevention of crimes and establishing the peace of the state'.<sup>16</sup> In Smith's account, a central element of the legal system is thus its preventive function. Indeed, the provision of security was among the few core functions that Smith acknowledged were more appropriately performed by the state than by the market. As we shall see, later libertarians like Robert Nozick read this to mean that the proper role of the state should be limited to that of 'night-watchman' or provider of security, and be no more extensive than this preventive function.<sup>17</sup> On this reading, the goal of prevention becomes not only an authorization for, and but also a limit on, the state's exercise of coercive powers.

Bolder claims have also been made for prevention. Thus, Sir William Blackstone wrote that 'preventive justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to punishing justice'.<sup>18</sup> Henry Fielding somewhat extravagantly claimed that 'it is better to prevent even one man from being a rogue than apprehending and bringing forty to justice'.<sup>19</sup> A much broader social notion of prevention was central to the agenda of nineteenth-century

<sup>16</sup> A Smith, *Lectures on Jurisprudence* (Oxford: Oxford University Press, 1978; 1763), 331; see also F Schauer, 'The Ubiquity of Prevention', in A Ashworth, L Zedner, and P Tomlin (eds.), *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013), 10–22.

<sup>17</sup> R Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974).

<sup>18</sup> W Blackstone, *Commentaries on the Laws of England in Four Books* (London: Routledge, 2001; 1753), Book IV, Ch. XVIII, 251.

<sup>19</sup> For this quotation and related discussion, see L Zedner, 'Policing before and after the Police: The Historical Antecedents of Contemporary Crime Control', *British Journal of Criminology* 46(1) (2006), 78–96; 85–6.

reformers such as Sir Edwin Chadwick, who saw the essence of preventive work in alleviating and regulating the conditions of the poor, and regarded this as a precondition of the imposition of strong punishments.<sup>20</sup> More will be said in Chapter 2 about how and in what ways developing conceptions of the state's preventive function informed the development of early policing and criminal justice. This is by no means only a matter of historical interest. The place of preventive endeavour among the very foundations of state authority is one of the key questions of contemporary political theory. It is also central to contemporary legal theory, in that we cannot properly understand what obligations citizens owe to each other and to the state until we establish what the role of the state itself entails. Even if there were agreement that the state has a fundamental duty to prevent harm and ensure security, there remain questions about the extent of that duty (as we saw in Section 1.3, when discussing the concept of prevention), and about the measures it may properly use in furtherance of that duty. Thus, a major theme here is the search for principled limits on the state's discharge of its duty to protect people from harm resulting from human actions. We will suggest that these limits derive from the state's duty of justice and its duty to respect the autonomy of those to whom its laws apply.

## 1.5 The Rise of the Preventive State?

It has been variously claimed that recent years have seen a 'preventive turn',<sup>21</sup> that this is part of a 'new penology',<sup>22</sup> or, more broadly, of the 'risk society',<sup>23</sup> now taking the form of an overriding concern for the management of uncertainty.<sup>24</sup> Others argue that the paradigm of governmental social control has shifted from solving and punishing crimes that have been committed, to identifying 'dangerous' people and depriving them of their liberty before they can do harm.<sup>25</sup> Some

<sup>20</sup> E Chadwick, 'Preventive Police', *London Review* 1 (1829), 252–308.

<sup>21</sup> G Hughes, *Understanding Crime Prevention: Social Control, Risk and Late Modernity* (Buckingham: Open University Press, 1998); A Edwards and G Hughes, 'The Preventive Turn and the Promotion of Safer Communities in England and Wales', in A Crawford (ed.), *Crime Prevention Policies in Comparative Perspective* (Cullompton: Willan Publishing, 2009), 62–85.

<sup>22</sup> M Feeley and J Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications', *Criminology* 30(4) (1992), 449–74; although see J Simon, 'Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice', *Annual Review of Law and Social Science* 1 (2005), 397–421.

<sup>23</sup> U Beck, *The Risk Society; Towards a New Modernity* (London: Sage Publications, 1992).

<sup>24</sup> R Ericson, *Crime in an Insecure World* (Cambridge: Polity, 2007), Ch. 6.

<sup>25</sup> E Janus, 'The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence', *Criminal Law Bulletin* 40 (2004), 576; 576. See also J McCulloch and B Carlton, 'Pre-empting Justice: Suppression of Financing of Terrorism and the "War on Terror"', *Current Issues in Criminal Justice* 17(3) (2006), 397–412.

commentators suggest that there has been a significant break with the past in terms of governmental concerns and policies, and that a new social and conceptual framework is needed to understand and to interpret changing phenomena.<sup>26</sup> In Chapter 2 we show that governmental concern about the prevention of harm is certainly not a new phenomenon; on the contrary, prevention motivated the very founding of the modern criminal justice system. To determine whether the discontinuities now outstrip the continuities is not the objective: our claim is solely that prevention is a major feature of contemporary social policies in many Western countries and that, because of its prominence and its implications for liberty, its foundations and manifestations call for close normative study.

Although we are not seeking to make a historical claim, we take seriously the observation made by Steiker, in her trailblazing 1998 article 'The Limits of the Preventive State', that the preventive powers of the state demand closer attention. Whereas the limits of the 'punitive state' have been explored extensively, Steiker observes:

Courts and commentators have had much less to say about the related topic of the limits of the state not as punisher (and thus necessarily as investigator and adjudicator of criminal acts) but rather as preventer of crime and disorder generally. Indeed, courts and commentators have not yet even recognized this topic as a distinct phenomenon either doctrinally or conceptually. Of course, one way to prevent crime is to punish criminals, thereby incapacitating (and perhaps even rehabilitating) them during the period of their incarceration, deterring the specific individuals involved from further criminality, and deterring others by example. But punishment is not the only, the most common, or the most effective means of crime prevention. The state can also attempt to identify and neutralize dangerous individuals before they commit crimes by restricting their liberty in various ways. In pursuing this goal, the state often will expand the functions of the institutions primarily involved in the criminal justice system – namely, the police and the prison. But other analogous institutions, such as the juvenile justice system and the civil commitment process, are also sometimes tools of, to coin another phrase, 'the preventive state'.<sup>27</sup>

Where supposedly preventive measures are found to be punitive, the usual 'criminal justice' protections should apply. The greater difficulty arises in respect of preventive measures that are not found to be punitive. These tend to be regarded as 'merely' preventive and as less in need of justification or limiting principles, despite the fact that such measures may impose heavy burdens. In Steiker's view, the tendency to downplay preventive measures arises also because courts and commentators 'do not tend to see the various preventive policies and practices . . . as part of a unified

<sup>26</sup> M Feeley and J Simon, 'Actuarial Justice: The Emerging New Criminal Law', in D Nelken (ed.), *The Futures of Criminology* (London: Sage, 1994), 173–201.

<sup>27</sup> C Steiker, 'The Limits of the Preventive State', *Journal of Criminal Law and Criminology* 88 (1998), 771–808; 774.

problem'.<sup>28</sup> The failure to draw connections among preventive endeavours has the consequence that 'each individual preventive practice has been treated *sui generis* rather than as a facet of a larger question in need of a more general conceptual framework'.<sup>29</sup> Our enumeration of some of the preventive endeavours now in use (see Section 1.2) underlines the importance of this observation. Recognizing the similarities and connections between these diverse measures would enable parallels to be drawn and similar principles to be deployed; the dangers known to attend one measure might be avoided; and appropriate limits might be set in the formulation of new measures. The tracing of similarities and correspondences need not be confined to explicitly preventive orders: it can productively be extended to identify and target other manifestations of the preventive state irrespective of the labels formally used. In short, the task ahead is to identify instances of coercive power exercised by the state in the name of prevention and to identify when, where, and how the exercise of those powers should be subject to limiting principles or otherwise constrained. The challenges thrown up by Steiker have been the subject of a small but growing literature on the jurisprudence of the 'preventive state'.<sup>30</sup> Others have called for a 'jurisprudence of dangerousness' or 'jurisprudence of security',<sup>31</sup> which likewise identifies the need to address the justifications for and limits to preventive endeavour. Some scholars have taken up the challenge to engage in more extended analysis of particular measures or discrete substantive domains: notable work has been undertaken on self-evidently preventive endeavours such as the extension of inchoate criminal liability,<sup>32</sup> civil preventive orders,<sup>33</sup> and

<sup>28</sup> Steiker, 'The Limits of the Preventive State' (n 27), 778.

<sup>29</sup> Steiker, 'The Limits of the Preventive State', 778.

<sup>30</sup> See, for example, E Janus, 'The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence', *Criminal Law Bulletin* 40, 576; E Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Ithaca: Cornell University Press, 2006); S Krasmann, 'The Enemy on the Border: Critique of a Programme in Favour of a Preventive State', *Punishment and Society* 9(3) (2007), 301–18; T Tulich, 'A View inside the Preventive State: Reflections on a Decade of Anti-Terror Law', *Griffith Law Review* 21(1) (2012), 209.

<sup>31</sup> For example, C Slobogin, 'A Jurisprudence of Dangerousness', *Northwestern University Law Review* 98 (2003), 1–62 and L Farmer, 'The Jurisprudence of Security: The Police Power and the Criminal Law' in MD Dubber and M Valverde (eds.), *The New Police Science: the Police Power in Domestic and International Perspective* (Stanford CA: Stanford University Press, 2006), 145–67.

<sup>32</sup> For example, L Alexander and KK Ferzan, 'Danger: The Ethics of Preemptive Action', *Ohio State Journal of Criminal Law* 9(2) (2012), 637–67; KK Ferzan, 'Inchoate Crimes at the Prevention/Punishment Divide', *San Diego Law Review* 48(4) (2011), 1273–97; AP Simester, 'Prophylactic Crimes', in GR Sullivan and I Dennis (eds.), *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (Oxford: Hart Publishing, 2012), 59–78; P Ramsay, 'Democratic Limits to Preventive Criminal Law', in A Ashworth, L Zedner, and P Tomlin (eds.), *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013), 214–34.

<sup>33</sup> For example, A Ashworth and L Zedner, 'Preventive Orders: A Problem of Under-Criminalization?', in RA Duff et al. (eds.), *The Boundaries of the Criminal Law* (Oxford: Oxford University Press, 2010); AP Simester and A von Hirsch, 'Regulating Offensive Conduct

preventive detention.<sup>34</sup> What is as yet missing is any sustained and systematic analysis of the gamut of preventive endeavours of the sort that we undertake in this book. We make no claim that our exercise is exhaustive; rather we hope that by mapping out and examining the broad array of preventive endeavour it will be possible to see the connections and commonalities that might underpin a larger articulation of preventive justice.

In what follows, we engage critically with a wide variety of preventive endeavours that have become prominent in recent years—three examples are civil preventive orders (Chapter 4), counterterrorist measures (Chapter 8), and immigration laws (Chapter 10)—as well as with more long-standing sites of preventive measures such as policing and criminal procedure (Chapter 3), public health law (Chapter 9), and the preventive detention of the dangerous (Chapter 7). We will argue that the preventive endeavour is manifest and problematic in its two broad forms—its use as a rationale for extending the boundaries of the criminal law, and its use as a rationale for developing various coercive measures designed to sit outside or alongside the criminal process and thereby to avoid the procedural safeguards attached to that process. One obvious point is that the politics of the preventive has a strong element of irresistibility built into it, since it generally appears perverse to argue against a preventive measure. Who could be against the prevention of harm? The political force behind terms such as prevention, security, public protection, and public safety is practically very powerful, not least because the critics of any such measure can be portrayed as courting insecurity and jeopardizing public safety. In Section 1.7 and in subsequent chapters, we set out to provide some more stable indicators of what should, and what should not, be taken as justifications for coercive preventive measures involving deprivation of liberty.

## 1.6 Punitive Measures: Rationales and Safeguards

One of the motivating thoughts behind our work is the contrast between the extensive research and writing on ‘theories of punishment’ and the virtual absence of equivalent normative debate about preventive measures. Theories of punishment

through Two-Step Prohibitions’, in A von Hirsch and AP Simester (eds.), *Incivilities: Regulating Offensive Behaviour* (Oxford: Hart Publishing, 2006), 173–94; P Ramsay, ‘The Theory of Vulnerable Autonomy and the Legitimacy of Civil Preventative Orders’, in B McSherry, A Norrie, and S Bronitt (eds.), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Oxford: Hart Publishing, 2009), 109–39.

<sup>34</sup> For example, RL Lippke, ‘No Easy Way Out: Dangerous Offenders and Preventive Detention’, *Law and Philosophy* 27(4) (2008), 383–414; D Husak, ‘Lifting the Cloak: Preventive Detention as Punishment’, *San Diego Law Review* 48 (2011), 1173–204; A Walen, ‘A Punitive Precondition for Preventive Detention: Lost Status as a Foundation for a Lost Immunity’, *San Diego Law Review* 48 (2011), 1229–72.

have generated much discussion through the centuries, and it is possible to identify a prevailing approach to the definition of punishment, a set of rationales for punishment, a standard set of procedural rights available to persons charged with offences that can lead to conviction and punishment, statistics about the imposition of punishment in given jurisdictions, research into the impacts of punishment on offenders and others, and so forth. But when we turn to preventive measures, most of these features are missing. Little has been written about the definition of, or rationales for, preventive measures; no standard set of procedural rights available to persons subjected to coercive preventive measures exists; statistics are not gathered routinely on all such measures; and research is also patchy. In this section of the chapter we examine the relevant contours of normative theorizing about punitive measures, and in Section 1.7 we go on to demonstrate the problems involved in constructing a corresponding theoretical framework for coercive preventive measures.

The discussion here will focus on three aspects: (1) the definition of a punitive measure; (2) rationales for imposing punitive measures; and (3) the procedural safeguards that ought to be available to persons charged with criminal offences and thus liable to punishment. In criminal law, and in human rights law, there is a close interaction between (3) and (1), in the sense that definitional conclusions under (1) determine the applicability of the safeguards under (3) and may therefore be influenced by these practical consequences. Some examples from European human rights law will therefore be cited in the discussion that follows, but the focus will be on identifying theoretically sound accounts of (1), (2), and (3).

(1) *Definition of a punitive measure*: the two key elements that mark out a measure as punitive are (a) the censure of an offender for an offence, and (b) the intentional imposition of hard treatment on the offender for the offence. The first element insists that punishment is a censuring institution, a point not brought out in some definitions or quasi-definitions.<sup>35</sup> It is the offender who is being censured, but inherent in this exercise is the communication of that censure to the victim (if any) and to the public at large. The second element specifies that a punitive measure must involve some coercive response rather than a mere verbal reprimand,<sup>36</sup> and the term 'hard treatment' is intended to convey that the response must be coercive but need not involve physical pain.<sup>37</sup>

<sup>35</sup> HLA Hart's five-part definition is probably the best known, HLA Hart, *Punishment and Responsibility*, ed. J Gardner (Oxford: Oxford University Press, 2008), 4–5, but it does not mention censure or any equivalent concept in relation to (a). Cf. A von Hirsch and A Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005), 17.

<sup>36</sup> For the meaning of 'coercion' in this context, see the discussion in Section 1.3.

<sup>37</sup> Cf. Hart, who referred to 'pain or other consequences normally considered unpleasant': Hart, *Punishment and Responsibility* (n 35), 4; and RA Duff, who states that 'punishment is, typically, something intended to be burdensome or painful, imposed on a (supposed)



It is evident that some preventive measures might satisfy a definition of punishment with these two elements. One example would be the crime of attempts, and other inchoate or pre-inchoate offences. Some would argue that such offences are primarily preventive. Even if that were so (see Chapter 5), they result in conviction and hard treatment, and therefore should also be classified as punitive measures. Since they are criminal offences, this hardly seems controversial. A more intricate example might be an order for the confiscation of assets. Most legal systems have some such provisions, either for drug-trafficking offenders or more generally, and they are often rationalized on preventive grounds—reducing the risk of the offenders returning to their illegal activities, and deterring others by taking away the profits of crime.<sup>38</sup> In order to examine the justifications for and proper limitations on preventive measures, we first need to settle the definitional question of what distinguishes predominantly preventive measures from punitive measures. How should the confiscation order be classified? In the leading case of *Welch v United Kingdom*,<sup>39</sup> the applicant challenged an order confiscating his assets under the Drug Trafficking Act 1986, an order that was retrospective because the legislation permitted that. He claimed that it was a penalty and therefore argued that to give it retrospective application would violate Article 7 of the ECHR, which prohibits retrospective increases in punishment. The government argued that the order was not a penalty, since it was partly confiscatory (to remove illegal profits) and partly preventive (by preventing the future use of the money in the drug trade), and that since it was a preventive rather than a punitive measure there was nothing to impede it from operating retrospectively. The Court reviewed all the elements of the order—including the discretion of the judge to take account of the culpability of the offender in fixing the amount, the ‘sweeping’ statutory assumptions about the illegal provenance of the money, and the judge’s specification of a period of imprisonment for default—and concluded that ‘when considered together [they] provide a strong indication of *inter alia* a regime of punishment’.<sup>40</sup> Thus, the Court regarded its task as one of determining the substance rather than the form of the measure. It considered what the government stated to be the measure’s purpose (prevention) but held that, even if that was its purpose, its substance and

offender for a (supposed) offence by someone who (supposedly) has authority to do so’ and is ‘typically intended to express or communicate censure’: RA Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001), xiv–xv; J Tasioulas, ‘Punishment and Repentance’, *Philosophy* 81 (2006), 279; 284, referring to ‘hard treatment’ that is ‘intended to communicate to the wrong-doer justified censure for their wrong-doing’.

<sup>38</sup> There is, of course, the independent rationale of depriving an offender of the profits of offending, since and insofar as those profits derive from wrongdoing.

<sup>39</sup> (1995) 20 EHRR 247.

<sup>40</sup> (1995) 20 EHRR 247, para. 33. See further B Emmerson, A Ashworth, and A Macdonald, *Human Rights and Criminal Justice* 3rd edn (London: Sweet & Maxwell, 2012), Ch. 16.

effects were punitive to a significant extent. So, since the measure had these characteristics, it should be classified as a penalty and could not be allowed to operate retrospectively.<sup>41</sup>

This was a determination within a given legal regime. If we were instead to apply the two definitional elements of a punitive measure set out above, we might also conclude that the confiscation order did impose censure on the offender for the offence, and that it did constitute hard treatment—both based on the element of fault involved, the significant sums confiscated, and the term of imprisonment specified in default. However, we should note two further features of the European Court’s approach to this case. First and foremost, the Court implicitly denies that the crucial argument is whether a measure is preventive or not. Even if there is a distinction between punitive and preventive measures, it is not relevant here. Thus, there are measures (such as the confiscation order) that are preventive in purpose but substantially punitive in nature or effect, which we may term punitive-preventive measures. Then there are measures that are preventive in purpose and not significantly punitive in nature and effect, and they may be classified as predominantly preventive measures. The key question is whether the measure is punitive: it may also be preventive in its purpose, but the classification (in order to determine what safeguards are applicable) depends on whether it is punitive in substance. This leads into the second point about the Court’s judgment: it seemed to be accepted on all sides that, if a measure is classified as predominantly preventive, it can operate retrospectively. None of the extra safeguards applicable to criminal charges and punishments would apply if the measure were held to be predominantly preventive, as distinct from punitive-preventive. We will return, in Section 1.7, to the question of safeguards attaching to predominantly preventive coercive measures.

One further example may be helpful. What if a legal system were to create a form of preventive detention, to take effect after an offender has served a prison sentence for the offence and to authorize further indefinite detention on grounds of dangerousness? This was similar to the position in Germany until a few years ago. The German courts held that this was a preventive measure, not a form of punishment, and therefore that it could be applied retrospectively. In *M v Germany*<sup>42</sup> the European Court of Human Rights (ECtHR) reached the opposite conclusion. The argument of the German government was that the measure was preventive in purpose. The conclusion of the Court was that, accepting that this was its purpose, the reality of the measure was punitive—the detention took place within ordinary prisons (albeit in separate wings), the regime differed only in minor respects from a sentence of imprisonment, and special psychological treatment of a kind

<sup>41</sup> This should not be taken to indicate that all forms of confiscation are punitive. The confiscation of explosives, guns, or counterfeit money may not have the features described above, and may be predominantly preventive.

<sup>42</sup> (2010) 51 EHRR 976.

required for persons held indefinitely for preventive reasons was not provided.<sup>43</sup> Both this judgment and that in *Welch*, referred to above, show the European Court adopting what it calls an ‘autonomous meaning’ of a key concept—here ‘penalty’ or punishment—as a way of preventing the subversion of the ECHR. If the Convention provides safeguards for persons subjected to measures that are punitive, it would be subversive of the Convention if states were able to avoid those safeguards simply by labelling a measure as preventive.

(2) *Rationales for imposing punitive measures*: punishment involves both censure and hard treatment, as we have seen. The latter entails a deprivation of rights that people normally have (right to property, right to freedom of movement, right to liberty), and therefore requires justification. The first line of justification must be for the criminal law itself: certain wrongs are so serious that they should be condemned as criminal and should be able to result in punishment. This is not the place to attempt a full theory of criminalization, but in general it may be said that, to warrant criminalization, the conduct should amount to a moral wrong, should be (potentially) harmful and should be brought about culpably, and that there must not be strong countervailing considerations such as the creation of unwelcome social consequences, the curtailment of important rights, and so forth.<sup>44</sup> Assuming that a given criminal offence is justifiable (and, as we will see in later chapters, notably Chapter 5, many current offences do not satisfy the standard criteria for criminalization), we move to the second line of justification—the justification for punishment.

Many of the familiar rationales for punishment are preventive.<sup>45</sup> Deterrence is one prominent rationale, which may take the form of general deterrence (detering others from future offences) or of individual or special deterrence (detering this offender from future offences). The distinctive method of deterrence is to induce fear through the threat of punishment; its aim is to prevent offences from being committed. Incapacitation is another prominent rationale, which takes the form of measures designed to remove a person’s capability or opportunity for committing offences (for example, by removal of a driving licence, by curfew, or by imprisonment). The distinctive method of incapacitation is the removal of capacity or opportunity for offending; its aim is to prevent offences from being committed. A third rationale is rehabilitation, taking the form of programmes designed to persuade offenders that offending is wrong or to tackle the perceived causes of offending behaviour, for example through alcohol- or drug-treatment programmes. The distinctive method of rehabilitation is to alter an offender’s value-system or at least to alter an offender’s response to certain types of situation or stimulus; its aim is

<sup>43</sup> (2010) 51 EHRR 976 at [127]–[129].

<sup>44</sup> A Simester and A von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalization* (Oxford: Hart Publishing, 2011), Chs 2 and 11; D Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2008), Chs 2 and 3.

<sup>45</sup> Schauer, ‘The Ubiquity of Prevention’ (n 16), 12–15.

to prevent offences from being committed. Each of these three rationales, therefore, has the objective of prevention. The differences lie in their methods of trying to achieve the objective.

What about the retributive rationale for punishment? There are some purists who argue that punishment is the appropriate social response to crimes, and that there is no need to seek any further justification. Wrongdoers deserve to suffer.<sup>46</sup> More common among contemporary ‘desert’ theorists, however, is a position that recognizes desert as an integral part of everyday judgments of praise and blame, transfers that to the institution of punishment as a form of official censure of offenders, but rests the justification for hard treatment on the need for underlying deterrence.<sup>47</sup> In other words, contemporary desert theory has retributive roots and requires punishments to be proportionate, but nevertheless insists that without the element of hard treatment (rather than, simply, the solemn condemnation of wrongdoers) there would inevitably be too much crime. Thus, prevention underpins most forms of modern desert theory,<sup>48</sup> just as it is the animating purpose of deterrent, incapacitative, and rehabilitative rationales.

There appears to be broad acceptance, even among those who are not wholly wedded to retributivism or desert theory, that in principle the punishment for an offence should not be disproportionate to the seriousness of the crime(s) committed (in terms of culpability and wrongdoing).<sup>49</sup> But where a measure is preventive, a rather different logic seems to be entailed—that the type and quantum of the measure imposed must be those judged necessary to bring about a significant reduction in the risk of future harm, irrespective of whether those measures are proportionate to any past or present conduct of the subject. This logic creates a tension when applied to the preventive rationales for punishment: if rehabilitation is the chosen rationale, the logic indicates that the restrictions imposed on the subject must be sufficient in intensity and duration to enable the rehabilitative treatment to be concluded successfully; if deterrence is the chosen rationale, the restrictions must be sufficient to deter the subject from causing harm (individual deterrence) or to deter others from following his bad example (general deterrence); and if incapacitation is the chosen rationale, the measures taken against the subject must be kept in place for so long as is necessary for the protection of the public. In retributive or

<sup>46</sup> eg MS Moore, ‘The Moral Worth of Retribution’, in A von Hirsch, A Ashworth, and J Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy* 3rd edn (Oxford: Hart Publishing, 2009), 110–14.

<sup>47</sup> eg Von Hirsch and Ashworth, *Proportionate Sentencing: Exploring the Principles* (n 35).

<sup>48</sup> For a different view, which cannot be discussed here, see Tasioulas, ‘Punishment and Repentance’, (n 26).

<sup>49</sup> For non-retributive theories making a similar point, see N Lacey, *State Punishment: Political Principles and Community Values* (London: Routledge, 1988), 194; J Braithwaite and P Pettit, *Not Just Deserts: A Republican Theory of Justice* (Oxford: Oxford University Press, 1990), Ch. 6, 9.

desert theory the hard treatment and deprivations must be proportionate to past offending, out of respect for the subject as a responsible agent, and the role of prevention is merely to supply an underlying deterrence. Thus there is a distinct tension between preventive logic, according to which the hard treatment and deprivations must be sufficient to bring about a significant reduction in the anticipated risk of future harm (which means concluding a course of treatment or a detention thought necessary for public protection even if that goes beyond the proportionate sentence), and the principle of proportionality of sentence. This tension is increased when a concept of proportionality is invoked as part of the preventive logic, eg by prescribing that preventive measures must be proportionate to the risk (taking account of the magnitude of the risk and the seriousness of the harm-to-be-avoided).<sup>50</sup> That usage will not be adopted here, since the central concept of proportionality relates punishment to the seriousness of the offending; a rather different relationship. So, to summarize: where the rationale is desert, the punishment must censure the subject in a way and to an extent that respects his or her responsible agency, and the role of prevention is to supply underlying deterrence whereas the choice or quantum of the sanction should be governed by proportionality considerations. Where prevention is the rationale its logic applies without respect for whether the subject is a responsible agent or not, since the purpose is to obtain the optimal preventive outcome.

(3) *Procedural safeguards*: the imposition of censure and hard treatment is so significant that it should not take place unless the individual involved has had the benefit of various safeguards and protections. Censure and hard treatment not only involve the state depriving an individual of what are normally regarded as fundamental rights, but they do so within the framework of proceedings that are public and condemnatory. For these reasons it is normal for declarations of human rights and constitutional rights to provide additional safeguards, over and above those available for civil proceedings, for any person charged with a criminal offence. In the ECHR, for example, these rights include the presumption of innocence, the prohibition of retrospective criminal laws and retrospective increases in penalties, the right to legal representation, the right to confrontation of witnesses, and the right to an interpreter. As was apparent from (1) above, a large part of the significance of the definition of ‘penalty’ or ‘punishment’ resides in its implication for consequential rights. Thus, the cases of *Welch v United Kingdom*<sup>51</sup> and *M v Germany*<sup>52</sup> were fought so hard because of the respective governments’ desire that the measures should have retrospective application. The finding that both measures

<sup>50</sup> See, eg, C Steiker, ‘Proportionality as a Limit on Preventive Justice: Promises and Pitfalls’, in A Ashworth, L Zedner, and P Tomlin (eds.), *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013), 194–213.

<sup>51</sup> *Ericson*, *Crime in an Insecure World* (n 24).

<sup>52</sup> *M v Germany* (2010) 51 EHRR 976 (n 42).

fell within the definition of punishment ruled that out, because the principle of non-retrospectivity applies to punitive measures. However, the cluster of additional rights applicable to persons charged with a criminal offence and/or subjected to a penalty is so powerful that governments may be tempted to devise measures falling just outside the relevant definitions. As noted above, the ECtHR has developed its doctrine of the ‘autonomous meaning’ of key terms in order to ensure that there is no unfair manipulation of the boundaries, and that if a measure has the substance of a criminal charge or of a penalty it will be treated as such, despite a different domestic classification or label. In effect, this gives institutional expression to the definition of a punitive measure with which this section began.

## 1.7 Preventive Measures: Rationales and Safeguards

In an attempt to follow an approximately parallel structure to the discussion of punitive measures in Section 1.6, we deal here with (1) the definition of a coercive preventive measure; (2) rationales for imposing coercive punitive measures; and (3) the procedural safeguards that ought to be available to persons liable to be subjected to, or actually subjected to, coercive preventive measures. The paths are much less well trodden, and many of the arguments will be developed further in later chapters of the book.

(1) *The definition of a coercive preventive measure:* a measure is preventive if it is created in order to avert, or reduce the frequency or impact of, behaviour that is believed to present an unacceptable risk of harm. It is coercive if it involves state-imposed restrictions on liberty of action, backed by a coercive response, or the threat of a coercive response, to the restricted individual.<sup>53</sup> This fairly simple definition of a coercive preventive measure can be adapted easily to measures of public safety, public protection, security, social defence, and other broadly synonymous purposes. As noted in Section 1.2, prevention and these related purposes can also be pursued by methods not involving this kind of direct coercion of the individual, such as situational crime prevention (through the design of buildings, transport systems, and other public facilities in such a way as to reduce the risk of crime and/or harm) and social crime prevention (through schemes aimed at engaging people in recreational or community-orientated activities intended to turn them away from committing crimes and/or causing harm). Neither situational nor social crime prevention typically involves the coercion of individuals, whereas our focus here is on preventive measures that involve coercion.

<sup>53</sup> For the concept of coercion, see the discussion in Section 1.3.

It will be evident that most criminal offences satisfy the definition of a coercive preventive measure, as already suggested. Indeed, the element of prevention is integral to the justification for the criminal law, as we have argued elsewhere:<sup>54</sup> ‘the “backward-looking” justification for making these wrongs punishable must imply a “forward-looking” concern that fewer such wrongs should occur in the future’. In Section 1.2, four groups of specifically preventive crimes were identified—inchoate offences, substantive offences defined in an inchoate mode, preparatory or pre-inchoate offences, and offences of risk-creation. These, clearly, are coercive preventive measures that also satisfy the definition of a punitive measure offered in Section 1.6. However, there is also a wide range of coercive preventive measures that do not, or at least do not always or uncontentiously, qualify as punitive measures too. For example, the quarantining or isolation of people with contagious diseases, the revocation of the driving licence of a person suffering from a particular illness, and the hospitalization of some mentally disordered persons are all coercive preventive measures but not punitive. On the other hand, pre-trial detention, immigration detention, and civil preventive orders are all coercive preventive measures that lie on, or close to, the boundaries of punitive measures. Their categorization, and its implications, will be the subject of further discussion in the relevant chapters below.

(2) *Rationales for imposing coercive preventive measures*: the general rationale for imposing a coercive preventive measure is the prevention of harm (or, as approximate synonyms, the enhancement of security, public safety, or public protection), and not the censure of the person subjected to the measure. In terms of justifications for measures that restrict an individual’s rights, however, a much stronger rationale is required for a preventive measure that is coercive than for one that imposes no coercion. If the coercion takes the form of a restriction on liberty this may involve an incursion into freedom of movement. More significantly, if the coercive measure involves detention, this strikes at a basic human right (the right to liberty of the person)—albeit one with exceptions, in all systems of rights<sup>55</sup>—and therefore calls for a strong and convincing justification.

In Section 1.4 we argued that the state has a general duty to seek to protect its citizens from harm, but we must now begin to develop the details of this proposition. In order to prevent what types or levels of harm might it be justifiable to impose *coercive* measures on certain people? What degree of risk of harm should be

<sup>54</sup> A Ashworth and L Zedner, ‘Just Prevention and the Limits of the Criminal Law’, in RA Duff and SP Green (eds.), *Philosophical Foundations of the Criminal Law* (Oxford: Oxford University Press, 2011), 279–303; 281.

<sup>55</sup> eg ECHR, Article 5, which declares the right to liberty of the person and then enumerates six categories of exception; and the International Covenant on Civil and Political Rights, Article 9, which declares the right to liberty but provides for (unspecified) exceptions established by law.

required before coercive measures can be justified? The most persuasive answer to the first question would be that, in principle, the use of coercive measures should be restricted to the prevention of serious physical (violent or sexual) harms, since those are the most serious harms,<sup>56</sup> and particularly where the coercive measures involve a deprivation of liberty. Thus, if the proposal is for the detention of persons with contagious diseases or for the detention of mentally disordered persons, the harm to be prevented must be a major physical harm rather than a minor disease or, say, the risk of financial misdealings.

Turning to the second question, it should surely be necessary to show that the serious harm is more likely than not to occur, if it is being sought to justify a deprivation of liberty. Research continues to show that predictions of serious harm are more frequently wrong than right.<sup>57</sup> The fallibility of these predictions is so well established that even the current British coalition government admitted, in relation to the former sentence of imprisonment for public protection (IPP), that ‘the limitations of our ability to predict future serious offending... [call] into question the whole basis on which many offenders are sentenced to IPPs’.<sup>58</sup> Now it is true that the qualifying conditions for the IPP sentence were much broader than those for some other forms of preventive or protective sentences, including the sentences that have now replaced IPP in English law.<sup>59</sup> However, the general sentiment of the British government’s statement would be widely shared by many of those conversant with the research on the prediction of seriously harmful incidents. Continuing controversy over the reliability of Actuarial Risk Assessment Instruments raises serious questions about the justifiability of basing extended, and particularly indefinite, detention on data derived from risk-assessment tools. However, some of the harms done by these people are likely to be at a highly serious level (eg homicide), raising the question whether a low probability of a very serious harm should be accepted as an adequate rationale. That question will be discussed further in Chapters 6 and 7.

One further step must be taken here, and that is to consider a narrowing of the group of risk-bearing people eligible for a form of preventive detention. It can be argued that, once a person has committed a serious sexual or violent offence, that person has lost the right to be treated as ‘free from harmful intentions’. Thus, Floud

<sup>56</sup> A von Hirsch and N Jareborg, ‘Gauging Criminal Harm: A Living-Standard Analysis’, *Oxford Journal of Legal Studies* 11 (1991), 1–38; 1.

<sup>57</sup> See, eg, Simon, ‘Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice’ (n 22); B Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (Chicago: University of Chicago Press, 2007); J Skeem and J Monahan, ‘Current Directions in Violence Risk Assessment’, *Current Directions in Psychological Science* 21(1) (2011), 38–42.

<sup>58</sup> Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offender Cm 7972* (London: Ministry of Justice, 2010), para. 186.

<sup>59</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, introducing a revised ‘extended sentence’ and an ‘automatic life sentence’ for qualifying offenders.



and Young argued for a 'just redistribution of risk' between people who have demonstrated their capacity to perpetrate serious wrongs, and their potential future victims.<sup>60</sup> While other members of society should be presumed harmless, unless and until it is proved otherwise,<sup>61</sup> those who have previously committed such a serious crime can properly be made subject to restrictions, so as to reduce the risks to potential victims.<sup>62</sup> This approach assigns less weight to the proposed detainee's right to liberty of the person and right to be presumed innocent than to the possible victim's rights to security of the person, and it does so on the basis of a prior conviction for a serious offence. Taking a less expansive view, Bottoms and Brownsword have argued that such an incursion into individual liberty can only be justified by evidence that the offender presents a 'vivid danger' of further serious offending,<sup>63</sup> and von Hirsch and Ashworth have argued that such a departure from the principle of proportionality can only be justified if maintaining that principle would inevitably result in evil consequences of such exceptional magnitude as to warrant deviating from the normal constraint.<sup>64</sup> It is doubtful whether the potential victim's right not to be injured should be allowed to defeat the offender's right not to be punished more than is proportionate to the crime(s) committed: the victim does indeed have a right against a potential attacker not to be subjected to an infringement of personal security, but the degree to which that should affect the state's responsibility towards the offender not to impose a disproportionate sentence remains debatable.<sup>65</sup> Moreover, it is not clear whether the same or similar reasoning would apply to a person who has previously perpetrated a serious harm which did not result in a criminal conviction, perhaps because the perpetrator was mentally disordered or because the harm derived from the communication of a contagious disease.

(3) *Procedural safeguards*: in Section 1.6(3) above we saw that measures that satisfy the definition of punishment (because they involve the censure of an offender for an offence and the imposition of hard treatment) bring in their train a cluster of extra safeguards, which are thought appropriate in order to protect innocent persons from

<sup>60</sup> J Floud and W Young, *Dangerousness and Criminal Justice* (London: Heinemann, 1981).

<sup>61</sup> Controversial in this respect are those measures in English law that treat people as dangerous before or without conviction, such as TPIMs, sexual offences prevention orders, and other preventive orders. For discussion, particularly of the question how the presumption of freedom from harmful intentions can be rebutted, see Ch. 4.

<sup>62</sup> Somewhat similar arguments can be found in RA Duff, 'Dangerousness and Citizenship', in A Ashworth and M Wasik (eds.), *Fundamentals of Sentencing Theory* (Oxford: Clarendon, 1998), 141–64 and in Walen, 'A Punitive Precondition for Preventive Detention: Lost Status as a Foundation for a Lost Immunity' (n 34).

<sup>63</sup> AE Bottoms and R Brownsword, 'Dangerousness and Rights', in JW Hinton (ed.), *Dangerousness: Problems of Assessment and Prediction* (London: George Allen and Unwin, 1983), 233–7.

<sup>64</sup> A von Hirsch and A Ashworth, *Proportionate Sentencing* (n 35), 52–3.

<sup>65</sup> See further von Hirsch and Ashworth, *Proportionate Sentencing* (n 35), 51–61, and the discussion in Ch. 7.

the public censure and punitive response. We now move to the question of the safeguards available where a coercive preventive measure does not satisfy the definition of a punishment. Do these ‘predominantly preventive’ measures fall into a black hole, with no presumption of innocence, no principle of non-retrospectivity, no right to confront witnesses, and so on? Or do other, different arguments support the invocation of all or some of these safeguards? One possible approach starts from the fact that most of the coercive measures mentioned in Section 1.7(1) involve a deprivation of one of the most basic rights, ie the right to personal liberty. It can be argued that no person should be liable to lose that basic right without special safeguards being in place. The process whereby the right to liberty is taken away as a preventive measure is not at all like ordinary civil processes, since they can only result in an order to pay damages or an order of specific performance, and cannot of themselves lead to loss of personal liberty. So, the question is whether the possibility of being deprived of the fundamental right to personal liberty should be regarded as sufficient to call for greater safeguards than are applicable to ordinary civil proceedings.

Such a course of reasoning is familiar in the law. Thus, in a leading civil case the Court of Appeal held that ‘the very elements of gravity [arising in the particular case] become a part of the whole range of circumstances that have to be weighed in the scale when deciding as to the balance of probabilities’.<sup>66</sup> More explicitly, in a case in the House of Lords, Lord Steyn held that what he termed ‘the heightened civil standard of proof’ ought to be applied in view of ‘the seriousness of the matters involved’, and Lord Hope added that the ‘serious consequences for the person’ indicated that a standard close to that in criminal cases would be appropriate.<sup>67</sup> These statements suggest that the potential consequences of a particular civil decision may be such that, although the proceedings remain civil and therefore the criminal law safeguards do not apply, the ordinary civil procedures should be adapted in response to the seriousness of the special consequences. This is fairly straightforward where the key issue is the standard of proof to be attained, since a heightened civil standard (close to that in criminal cases) is simply an appropriate development of an existing doctrine. What this line of argument does not address is whether all or any of the other safeguards applicable in criminal cases ought to apply here. One example is the privilege against self-incrimination and its companion, the so-called right of silence. These are often said to derive from the presumption of innocence,<sup>68</sup> and so some may wish to argue that insofar as the presumption of

<sup>66</sup> Per Morris LJ in *Hornal v Neuberger Products* [1957] 1 QB 247, at 266.

<sup>67</sup> *Clingham v Royal Borough of Kensington and Chelsea*; *R. v Crown Court at Manchester, ex parte McCann* [2002] UKHL 39, at [37] per Lord Steyn and at [84] per Lord Hope. For discussion of the authorities, see Cross and Tapper’s *Law of Evidence*, 12th edn by C Tapper (Oxford: Oxford University Press, 2010), 154–61.

<sup>68</sup> For discussion, see A Ashworth and M Redmayne, *The Criminal Process* 4th edn (Oxford: Oxford University Press, 2010), 145–55; JD Jackson and SJ Summers, *The Internationalisation of Criminal Evidence* (Cambridge: Cambridge University Press, 2012), Ch. 8.

innocence applies to coercive preventive measures affecting liberty, these allied doctrines should also apply. Rather different would be the prohibition of retrospective criminal laws and retrospective increases in sentence. This has nothing to do with the presumption of innocence, and everything to do with the law as a guide to conduct. As Fuller observed half a century ago:

Taken by itself. . . a retroactive law is truly a monstrosity. Law has to do with the governance of human conduct by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose. . . . The reason the retrospective criminal statute is so universally condemned does not arise merely from the fact that in criminal litigation the stakes are high. It arises also—and chiefly—because of all branches of law, the criminal law is the most obviously and directly concerned with shaping and controlling human conduct.<sup>69</sup>

Fuller was certainly right to single out the criminal law for its role of controlling conduct, although he might have given greater emphasis to the techniques of censure and punishment and their intended effect on the individuals subjected to them. But some coercive preventive measures are also intended to control conduct—a clear example would be civil preventive orders (Chapter 4)—and they are cases in which ‘the stakes are high’ too: thus, there are two reasons in favour of prohibiting some coercive preventive measures from operating retrospectively.<sup>70</sup> A similar argument might apply in favour of allowing legal representation and indeed requiring public funding for some such representation, and for some other defence rights.<sup>71</sup> These arguments will be followed through in the relevant chapters. The importance of the present discussion is to establish that there is a separate stream of justification for procedural safeguards, apart from that depending on the criminal law, and that this flows from the fundamental nature of the rights at stake when the imposition of some coercive preventive orders is being proposed, most especially the right to liberty of the person.

## 1.8 Conclusions

In this opening chapter our objective has been to establish the terminology that will be used throughout the book, to discuss the justifications for the state’s duty to protect citizens and to provide security through preventive measures, and to explore

<sup>69</sup> LL Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), 53–9.

<sup>70</sup> For a case in which different and less satisfactory reasons were held not to prevent a civil preventive order from operating retrospectively, see the decision of the English Court of Appeal in *Field and Young* [2003] 1 WLR 882.

<sup>71</sup> For discussion of whether the presumption of innocence should apply to preventive measures, see KK Ferzan, ‘Preventive Justice and the Presumption of Innocence’, *Criminal Law and Philosophy* (forthcoming).

the differences between measures that are punitive and measures that are predominantly preventive. In developing those ideas we have begun to confront the question of appropriate safeguards for persons subjected to preventive measures. We will continue to develop these ideas throughout the book, and will also begin to build the foundations for a set of principles to restrain the pursuit of prevention through coercive state measures, particularly those involving loss of liberty.

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