Preventive Criminalization

PREVENTIVE CRIMINALIZATION

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The criminal laws of many states make increasing use of preventive offenses—offenses that aim to prevent a given type of harm by targeting conduct prior to the causation of that harm. Academic commentators have largely been skeptical about such offenses. Their most potent criticism is that many preventive offenses do not target culpable wrongdoing of a kind that warrants censure and punishment through the criminal law. This article responds to this argument. Its principal contention is that some preventive offenses may be rationalized as targeting regulatory or malum prohibitum *wrongs. Even if conduct does not yet cause or risk causing harm, it may warrant penalization as part of a regulatory scheme aimed at preventing that harm. This is shown to have significant implications for the legitimacy of some offenses targeted by the skeptics—in particular, offenses targeting the possession of weapons such as knives or firearms.*

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INTRODUCTION

A familiar tension exists between the preventive ambitions of the criminal law and its retributive character. This article explores this tension in the

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context of an increasingly significant family of offenses, which one might call *preventive offenses*. Like many other criminal offenses, these offenses aim to prevent a given type of harm—whether through deterrence or through the enforcement powers that they afford. Unlike more familiar offenses, however, they do not target conduct that directly causes the harm that they aim to prevent. Rather, they target conduct prior to the causation of that harm, thereby attempting to improve on the preventive potential of the law's traditional forms.

Although there is a sizeable literature addressing the place of preventive rationales within criminal justice generally, this issue has only recently been explored in the context of the substantive criminal law.[1] This article aims to build on this recent work in two ways. First, it clarifies and reconstructs one line of argument for skepticism about preventive offenses: *viz*, that many of them do not target culpable wrongdoing of a kind that warrants censure and punishment through the criminal law. Second, it responds to this argument. Its principal contention is that there are some kinds of preventive offense—specifically, preventive offenses that play a regulatory role, such as offenses of weapon possession—for which there is a stronger case than the skeptics have acknowledged.

The discussion proceeds as follows. Section I introduces some examples of preventive offenses, and explains why academic commentators have been skeptical about them. Section II then reconstructs one line of argument for such skepticism. This argument relies on the claim that criminal offenses may only target specific kinds of prelegal wrongdoing: in its most plausible rendition, those that impose risks of harm on others. Section III then argues that this claim is false, because of the existence of regulatory or *malum prohibitum* wrongs. One may do wrong by breaching a regulation aimed at preventing some harm, even when the conduct concerned does not risk causing that harm. Furthermore, at least some existing preventive

1. *See*, *e.g.*, Andrew Ashworth & Lucia Zedner, *Just Prevention: Preventive Rationales and the Limits of the Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 279 (R.A. Duff & S.P. Green eds., 2011); Andrew Ashworth & Lucia Zedner, *Prevention and Criminalization: Justifications and Limits*, 15 N. CRIM. L. REV. 542 (2012); DOUGLAS HUSAK, OVERCRIMINALIZATION, ch. 3 (2007); PETER RAMSAY, THE INSECURITY STATE (2012); A.P. SIMESTER & ANDREAS VON HIRSCH, CRIMES, HARMS AND WRONGS, chs. 4 & 5 (2011); SEEKING SECURITY: PRE-EMPTING THE COMMISSION OF CRIMINAL HARMS, esp. chs. 3–6 (G.R. Sullivan & Ian Dennis eds., 2012); Victor Tadros, *Crimes and Security*, 71 MOD. L. REV. 940 (2008).

offenses are plausibly justifiable in this manner. Finally, section IV argues that the criminal law can be a legitimate form of regulation in these cases, even though other kinds of legal response are available. Although we may lack strong reasons to censure the conduct targeted by the relevant offenses, we may have reasons to penalize it that justify our choice of criminalization over other regulatory tools.

I. INTRODUCING PREVENTIVE OFFENSES

What sorts of offenses should be classified as "preventive"? Given the notorious difficulties of determining legislative intent—and hence of determining which offenses actually have preventive aims—one might think that it would prove difficult to answer this question. In the literature, however, preventive offenses are commonly identified with *nonconsummate* or *nonconstitutive* offenses.[2] These are offenses whose commission does not entail culpably harming another. They are classified as preventive because they target conduct that is, by definition, prior to the causation of the harm that they aim to prevent. Thus defined, the category of preventive offenses is broad and includes many familiar types of crime. For example, it includes the general inchoate offenses of attempt, conspiracy, and incitement. It includes offenses of assisting and encouraging crime.[3] It also includes several familiar kinds of specific offense, for example, offenses of risk imposition, such as offenses of reckless endangerment or of dangerous or careless driving.

The growth of interest in this field, however, has mostly been prompted by more recent legislative innovations. Many criminal offenses now target conduct that is even more remote from any ultimate harm than the familiar offenses just listed. Perhaps the most familiar examples of such offenses are *preparatory* offenses. Preparatory offenses are offenses targeting conduct that is of itself harmless and noncriminal, but that is performed with the further intention or purpose of committing a complete offense. Typically, the function of such offenses is to catch conduct at earlier stages of criminal plots than traditional offenses of attempt. For a textbook example, consider

2. *See, e.g.*, Ashworth & Zedner, *Prevention and Criminalization*, *supra* note 1, at 546; HUSAK, OVERCRIMINALIZATION, *supra* note 1, at 160.

3. English law, for example, now includes general offenses of assisting and encouraging crime that are defined in the inchoate mode: Serious Crime Act 2007 §§ 44–46.

the Model Penal Code offense of possessing an instrument of crime. This offense is relatively general in character and is not aimed at any specific criminal threat: one commits it if one "possesses any instrument of crime with purpose to employ it criminally."[4]

Many other preparatory offenses, by contrast, have been responses to more specific preventive concerns. Again, many of these take the form of possession offenses; for instance, legislation might target the possession of counterfeiting equipment as a means of preventing forgery.[5] However, other ostensibly "innocent" action types may also be criminal when performed with a specific criminal intent. Consider, for example, the offenses created in a number of jurisdictions to deal with "grooming" of children for sexual purposes. These offenses criminalize such conduct as arranging meetings, communicating with children, or sharing their contact details, where this is performed for the purpose of committing a relevant sexual offense against a child.[6]

A further example is legislation designed to deal with the threat of terrorism. This has been the source of probably the greatest innovations in the contemporary development of preventive offenses. Many jurisdictions have widened the scope of criminal liability in relation to terrorism, expanding it far beyond the traditional boundaries of inchoate and accessorial liability.[7] Again, preparatory offenses have been one component of this expansion. Legislation in the United Kingdom, for instance, has introduced very broad offenses of preparing acts of terrorism,[8] of possessing articles for terrorist purposes,[9] and of possessing information of a kind likely to be useful for terrorist purposes.[10] But a wide range of other kinds of preventive offense have also been introduced in this context. For example,

4. Model Penal Code § 5.06(1).

5. *See*, *e.g.*, Forgery and Counterfeiting Act 1981 §§ 5, 17 (UK).

6. In U.K. law, *see*, *e.g.*, Sexual Offences Act 2003 § 15. In the U.S., *see*, *e.g.*, 18 U.S.C. §§ 2422(b), 2425.

7. The discussion here focuses on the law of the United States and the United Kingdom. For discussion of similar developments in other jurisdictions, see, e.g., Bernadette McSherry, *Expanding the Boundaries of Inchoate Crimes: the Growing Reliance on Preparatory Offenses*, *in* REGULATING DEVIANCE 141 (Bernadette McSherry et al, eds., 2009), discussing Australia; Kent Roach, *The New Terrorism Offences in Canadian Criminal Law*, *in* TERRORISM, LAW AND DEMOCRACY 113 (David Daubney et al. eds., 2002).

8. Terrorism Act 2006 § 5.

9. Terrorism Act 2000 § 57.

10. Terrorism Act 2000 § 58.

contribution to others' potential terrorist actions has been criminalized, including through offenses of encouraging and "glorifying" terrorism (in the U.K.)[11] and of providing "material support or resources" to prospective terrorists (in the U.S.).[12] Further offenses criminalize still less direct sorts of involvement, for example, membership in terrorist organizations[13] and involvement in financial arrangements that support terrorist activity.[14]

Several of these provisions will be explored in greater detail below. Here, just one further example will be mentioned—an example that is particularly notorious amongst scholars of U.K. criminal law. This is the offense of breaching a preventive order. Preventive orders are notionally civil injunctions that target unwelcome but not necessarily criminal conduct. They may typically contain any condition that a court deems necessary to prevent further instances of that conduct. Breach of those conditions is then criminalized. The seminal example of a preventive order is the Anti-Social Behaviour Order, or ASBO, which was introduced to deal with neighborhood nuisance and disorder.[15] However, the same basic model has since been adapted to deal with a variety of other perceived threats, among them, sexual predation, alcohol-related violence, and serious organized crime.[16]

The recent rise of offenses like these has met with almost overwhelming skepticism from academic commentators. There are many good reasons for this. For instance, one particularly urgent concern with preventive offenses is their impact on civil liberties and human rights. By extending the scope of criminal liability in relation to ultimate harms, these offenses afford increased security from those harms. But they also tend to decrease citizens' security from state coercion, and thereby to restrict their liberties. In a political climate where the pursuit of security is prioritized, much criminal legislation has probably failed to strike a satisfactory balance between these two concerns.

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11. Terrorism Act 2006 § 1. Closely related is the offense of disseminating terrorist publications: Terrorism Act 2006 § 2.

12. 18 U.S.C. § 2339A.

13. For discussion, see Liat Levanon, *Criminal Prohibitions on Membership in Terrorist Organizations*, 15 N. CRIM. L. REV. 224 (2010).

14. *See*, *e.g.*, Terrorism Act 2000 §§ 15–19 (UK); 18 U.S.C. § 2339C (US).

15. Crime and Disorder Act 1998 § 1.

16. For a comprehensive discussion, see Andrew Ashworth & Lucia Zedner, *Preventive Orders: a Problem of Under-Criminalization? in* THE BOUNDARIES OF THE CRIMINAL LAW 59 (R.A. Duff et al. eds., 2010).

For the most part, however, the skeptics have not relied primarily on this kind of argument.[17] Rather, they have a further objection that is potentially decisive against many preventive offenses: that these offenses target conduct that does not, as a matter of principle, warrant censure and punishment through the criminal law. Consider, for example, the work of Andrew Ashworth and Lucia Zedner, who have been perhaps the most vocal critics of the preventive turn in the criminal law.[18] For Ashworth and Zedner, prevention is both an important function of criminal justice and a legitimate ground for criminalization. They are concerned, however, that a focus on prevention distracts attention from the criminal law's censuring and punitive character. This concern does not arise in relation to traditional "core" offenses of directly and culpably harming others. Culpable harming, Ashworth and Zedner write,

> is assumed to be the paradigmatic form of the major criminal offenses, such as murder, rape and robbery . . . Although such offenses are clearly "responses" to wrongs, declaring such conduct to be criminal may also be seen as part of the state's general responsibility for the prevention of harm.[19]

One cannot say the same, by contrast, of the newer kinds of offense just considered. Beyond the paradigm case of culpable harming, justifications for criminalization are "predominantly preventive."[20] This does not necessarily render such offenses illegitimate: preventive offenses might yet be "responses to wrongs." But the focus on prevention is problematic, for it "sidelines normative questions about the degree of censure . . . justifiably imposed upon those who have yet to do any wrongful harm."[21]

Importantly, however, the culpable harm paradigm is not merely of heuristic significance for Ashworth and Zedner. In other passages, it acquires inherent, normative weight. For example:

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17. For a notable exception, see Tadros, *Crimes and Security*, *supra* note 1.

18. This article draws mainly on Ashworth & Zedner, *Just Prevention* and *Prevention and Criminalization*, both *supra* note 1. However, both authors have developed their views on this and related topics in many places and over several years. For the culmination of their recent, joint work in this area, see generally ANDREW ASHWORTH & LUCIA ZEDNER, PREVENTIVE JUSTICE (2014).

19. Ashworth & Zedner, *Prevention and Criminalization*, *supra* note 1, at 544.

20. *Id.* at 546.

21. *Id.* at 555.

> To acknowledge the desirability, even the necessity, of prevention is not tantamount to providing a sufficient ground for criminalization. Criminalizing such conduct [i.e., the conduct targeted by preventive offenses] should involve punishing people for wrongs—*wrongs done by threatening or risking harms*. Because criminalization entails the imposition of public censure and the infliction of the pains of punishment, it requires special, one might say stronger, justification.[22]

The words emphasized here suggest that remoteness of an ultimate harm from the conduct targeted by an offense is not merely *likely* to be problematic. It is *inherently* problematic, because criminal wrongs are fundamentally wrongs of harming—or at least, of risking harm.[23] Thus, Ashworth and Zedner write elsewhere that "the more remote the prohibited conduct is from the causation of the harm [i.e., the harm to be prevented], the weaker the argument for criminalization."[24]

Other commentators are similarly concerned about the retributive credentials of nonconsummate offenses. Doug Husak, for example, describes the criminal law's "increasing tendency to proscribe conduct that poses a risk of harm" as "morally problematic."[25] He is alarmed that "risk prevention" offenses frequently require "no culpability whatever with respect to the harm to be prevented."[26] For him,

> It is not enough that the performance of the proscribed conduct just happens to make the occurrence of the ultimate harm more likely . . . Persons who perform the proscribed act (e.g., lighting the match) should not be punished unless they are culpable for the ultimate harm (e.g., the fire) to be prevented.[27]

Still others take this line of thought even further. Larry Alexander and Kimberley Ferzan, for instance, argue that all of what they call "inchoate offenses" are unjustifiable.[28] By "inchoate offenses," they mean offenses

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22. *Id.* at 553, emphasis added.

23. As we will see, this concession turns out to be significant. See generally section II below.

24. Ashworth & Zedner, *Just Prevention*, *supra* note 1, at 292.

25. Douglas N. Husak, *Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction*, 23 LAW & PHIL. 437 (2004).

26. HUSAK, OVERCRIMINALIZATION, *supra* note 1, at 174.

27. *Id.* at 175.

28. LARRY ALEXANDER & KIMBERLEY KESSLER FERZAN, CRIME AND CULPABILITY, ch. 6 (2009); Larry Alexander & Kimberley Kessler Ferzan, *Risk and Inchoate Crimes:*

targeting conduct that does not yet impose any risk of harm. Again, Alexander and Ferzan do not deny that it may be legitimate to take some preventive action against those who have yet to "unleash" any risks. Their objection is rather that such actors have yet to perform any culpable action, and hence, to do anything that renders them deserving of criminal punishment. As Ferzan puts it, inchoate offenses have "nothing to do with retributive desert and everything to do with prevention."[29] Regardless of the validity of the preventive goals of these offenses, legislators thus ought not to pursue them through the criminal law.

II. RECONSTRUCTING THE SKEPTICAL ARGUMENT

Each of these authors ultimately suggests different substantive constraints on the creation of preventive offenses.[30] This article's focus, however, will be on a more basic normative commitment that they share. All are concerned that the pursuit of preventive goals has led to the creation of offenses that lack adequate retributive credentials. Moreover, all agree on approximately why this is so. Criminal wrongdoing—wrongdoing that warrants censure and punishment through the criminal law—requires culpably risking, even if not ultimately causing, harm to others. We should therefore be skeptical of at least some offenses that target conduct that is remote from the harm that they aim to prevent.

Does this line of argument provide a sound case for skepticism about preventive offenses? As may already be apparent, some clarification will be needed to answer this question. To begin with, we should separate two distinct kinds of retributive criticism that some of the remarks just quoted tend to elide. First, objections to preventive offenses are sometimes made in terms of the "grounds" for such offenses or the relative "strength" of their

Retribution or Prevention?, *in* SEEKING SECURITY 103 (Sullivan & Dennis eds.), *supra* note 1; Larry Alexander & Kimberley Kessler Ferzan, *Danger: The Ethics of Preemptive Action*, 9 OHIO ST. J. CRIM L. 637 (2012).

29. Kimberley Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, 96 MINN. L. REV. 141, 164 (2011). *See also* Kimberley Kessler Ferzan, *Inchoate Crimes at the Prevention/Punishment Divide*, 48 SAN DIEGO L. REV. 1273 (2011).

30. Ashworth & Zedner, *Prevention and Criminalization*, *supra* note 1, at 547–62; HUSAK, OVERCRIMINALIZATION, *supra* note 1, at ch. 3.III. As just mentioned, Alexander and Ferzan regard all inchoate offenses (in their sense) as illegitimate.

"justification." This language suggests a focus on the admissible *reasons* for criminalization. As we have seen, the skeptics regard the censuring character of the criminal law as normatively significant. One valid reason to criminalize conduct, one might think, is that it is wrongful and deserving of censure.[31] As the name suggests, however, the main reasons in favor of preventive offenses are not retributive but preventive: we may not have strong reason to censure the conduct that they target. Hence (the argument goes), the case for the creation of preventive offenses is relatively weak when compared to the case for the traditional core crimes of culpably harming others.

As we will see in section IV below, these claims give us some food for thought. Censure will not always be an important component of the positive case for nonconsummate offenses. Hence, one might wonder whether we should prefer a noncensuring response to the conduct that they target: for instance, preventive restrictions of liberty or some form of civil regulation. For the moment, however, we can leave this issue aside. The important point is that this is not necessarily a strong reason to doubt the legitimacy of preventive offenses. Facilitating the censure of wrongful conduct provides just *one* valid reason to criminalize: there may yet be others. In particular—and as the skeptics characteristically admit—prevention might also play a justificatory role. Thus, even if nonconsummate offenses carry an additional justificatory burden, preventive rationales might yet relieve this.

This suggests that talk of preventive "rationales" or "justifications" for criminalization actually tends to obscure the skeptics' true concerns. The normative weight of their view is rather carried by a second, distinct kind of retributive argument. This relates to the kinds of conduct that criminal offenses may target. Again, this argument proceeds from the observation that the criminal law is distinctly censuring and punitive in character. Since only culpable wrongdoers deserve to be censured and punished, the state ought only to criminalize culpable wrongdoing. The problem with nonconsummate offenses is that, due to the remoteness of the conduct that they target from the relevant ultimate harm, they may not always target culpable wrongdoing of the requisite kind. In Ashworth and Zedner's terms: the conduct targeted may not actually "threaten or risk" the

31. For discussion, see, e.g., R.A. Duff, *Towards a Modest Legal Moralism*, 8 CRIM. L. & PHIL. 217 (2014).

harm to be prevented. Hence (the argument goes), to criminalize such conduct may not be a legitimate means of pursuing legislators' preventive goals.

It will be helpful to be clear about the logic behind the final, key move of this argument. The conclusion of the argument is that conduct may legitimately be criminalized only if it has an appropriate kind of relationship to an ultimate harm, for example, that it "threatens or risks" that harm. This conclusion is to be derived from two premises. First, conduct may legitimately be criminalized only if it is wrongful. Second, conduct is wrongful only if it is appropriately related to an ultimate harm.[32]

This argument, if sound, constitutes a decisive objection to at least some preventive offenses. Since the conclusion of the argument follows from its premises, the question for us is whether these premises are true. For the sake of argument, this article will assume the truth of the first premise: that only wrongful conduct may be criminalized. This premise is the familiar thesis of "negative" legal moralism, and it is widely believed to follow simply from the criminal law's censuring character.[33] The focus of this section, therefore, will rather be on the second premise: that conduct is wrongful, in the sense required for criminalization, only if it is appropriately related to an ultimate harm. Our task will be to find a specific interpretation of this "appropriate relationship" that casts the skeptical argument in its strongest possible light. Ideally, of course, this means providing an interpretation that is independently plausible. But our interpretation should also be faithful to the skeptics' aim: to cast doubt on the legitimacy of existing preventive offenses. Can we interpret the skeptics' second premise in a way that satisfies both of these desiderata?

As we have seen, the skeptics tend to identify preventive offenses with nonconsummate offenses. One may therefore be led to think that the nonconsummate nature of these offenses is what is putatively problematic. Yet the skeptics do not suggest that we have reason to doubt the criminalization of any and all types of nonharmful conduct. For, as is familiar, it is by no means obvious why the criminal law should be interested in harming

32. This formulation is borrowed from Victor Tadros, *Harm, Sovereignty and Prohibition*, 17 LEGAL THEORY 35, 45 (2011). The formulation is deliberately vague; the purpose of this section is to consider how best to endow it with more specific content.

33. On "positive" and "negative" legal moralism, see Duff, *Towards a Modest Legal Moralism*, *supra* note 31; R.A. DUFF, ANSWERING FOR CRIME, ch, 4 (2007).

per se. It is easy to see why it should attend to *culpability*: surely the state ought not to censure a person unless her actions reflect badly on her. But as criminal lawyers well know, a person whose actions do not cause harm can be just as culpable as one whose actions do cause harm. For instance, the would-be assassin whose bullet is stopped by a passing bird is just as culpable as the assassin who succeeds. Even if there are good reasons to convict these actors of different offenses, and to punish them differently, their actions reflect on them (*qua* actors) equally badly.[34]

This shows us that censure may be due without harm—or indeed, without any kind of "objective" wrongdoing. It also shows us that criminal liability may be due: again, the skeptics surely do not mean to cast doubt on the offense of attempt.[35] Once one acknowledges this, however, certain other kinds of preventive offense no longer seem so difficult to justify. Consider, for instance, the category of preparatory offenses, mentioned above. A particularly broad-ranging example of such an offense is the U.K. offense of preparing acts of terrorism. One commits this offense if one "engages in any conduct in preparation for giving effect to" an intention to commit or assist an act of terrorism.[36] Although commission of this offense does not entail causing any harm associated with terrorism, the conduct that it catches is surely still culpable. All else being equal, it reflects badly on people if they act on intentions to commit terrorist acts. The state thus seems to have a *pro tanto* case for censuring such conduct.

The skeptics, however, will surely resist this conclusion. They might accept that preparatory acts are culpable; they will deny, though, that they display the specific *kind* of culpability that criminalization requires. They might proceed by invoking something like Antony Duff's view of attempts. Duff advocates the conduct requirement for attempts employed in English law: that the actor must have gone beyond mere preparations for executing

34. To be clear, this is not to say anything about the proper impact of outcomes on criminal liability. The point is simply that *culpability* is not sensitive to outcomes. Whether considerations beyond culpability should ultimately affect liability is a separate matter. For discussion, see Judith Jarvis Thomson, *Morality and Bad Luck*, 20 METAPHILOSOPHY 203 (1989).

35. Indeed, skeptics often lament the disparity in the criminal law's treatment of attempted and completed crimes. *See*, *e.g.*, Andrew Ashworth, *Taking the Consequences*, *in* ACTION AND VALUE IN CRIMINAL LAW 107 (Stephen Shute et al, eds., 1993); ALEXANDER & FERZAN, CRIME AND CULPABILITY, *supra* note 28, ch. 5.

36. Terrorism Act 2006 § 5(1).

her criminal intentions and embarked on "the crime proper."[37] Such a test has instrumental benefits; for example, it maximizes freedom and incentivizes desistance. For Duff, though, what is most important about this test is that it respects actors' autonomy.[38] Crimes of preparation fail to do this; they impose liability even when actors have not finally chosen to bring about the relevant ultimate harm.[39]

One might support this argument with an analogy. The objection to criminalizing preparatory acts is materially similar (one might argue) to the objection to criminalizing things like thoughts and status. Like preparatory acts, these things can be culpable: for instance, it can reflect badly on one that one holds a given opinion. Surely, though, this would not lead anyone to argue for the creation of thought crimes. Again, a principle prohibiting the creation of thought crimes will have instrumental benefits: it will help to preserve liberty and privacy. But more importantly, such a principle respects the status of human actors as responsible moral agents. As with preparatory acts, thoughts do not yet instantiate a choice to intervene in the objective world in a wrongful or harmful way.[40]

We should understand the skeptics, then, as endorsing a specific conception of the required relationship between wrongful conduct and ultimate harm. Conduct is wrongful, in the sense required for criminalization, only if it instantiates a culpable choice to intervene in the world in a potentially harmful way. However, this conception also requires refinement. To see why, consider again preparatory acts. As well as being culpable in their pursuit of wrongful goals, preparatory actions often increase the *risk* that those goals will be achieved. As actors carry out each stage of a criminal

37. R.A. Duff, Criminal Attempts 385–97 (1996). Identifying the point at which "mere preparation" becomes "the crime proper" is, of course, notoriously tricky. For an innovative recent discussion, see Gideon Yaffe, Attempts: in the Philosophy of Action and the Criminal Law, chs. 8 & 10 (2010).

38. Duff, Criminal Attempts, *supra* note 37, at 386–93.

39. Ashworth & Zedner, *Just Prevention*, *supra* note 1, at 285–86; Ashworth & Zedner, *Prevention and Criminalization*, *supra* note 1, at 556–57. Alexander and Ferzan also regard this concern as "decisive" against preparatory offenses: *see Danger*, *supra* note 28, at 655. Note, though, that Duff himself would now accept criminal liability for "mere preparation" under some conditions: see his *Risks, Culpability and Criminal Liability*, *in* Seeking Security 121 (Sullivan & Dennis eds.), *supra* note 1.

40. On this analogy, compare Douglas Husak, *Does Criminal Liability Require an Act?*, *in* The Philosophy of Criminal Law: Selected Essays 47–51 (2010) and Alan Brudner, Punishment and Freedom 114–17 (2009).

plan, they re-affirm their intentions, thereby increasing (often knowingly) the probability that their plans will come to fruition.[41] This is not yet, of course, a case for a general offense of preparing crime: the great costs of such an offense to liberty and privacy would probably tell against it in the final analysis. But we might still criminalize concretely defined, particularly risky preparatory acts. For example, using known patterns of offending as a guide, we could identify the last possible point of effective intervention by law enforcement agencies.[42] Because of its dangerous nature, it is at least arguable that offenses targeting such conduct would satisfy the requirement of potentially harmful intervention in the world.

To understand what is at stake here, we must pause briefly to clarify the precise sense in which preparatory actions can be dangerous. The argument just sketched holds that the risks attached to preparatory actions generally grow as actors come closer to realizing their criminal plans. This argument relies on the following conception of risk: there is a risk of a given harm occurring to the extent that it is probable that the harm will occur. Doubtless it is generally true that, according to the evidence available to observers, prospective offenders are more likely to succeed in realizing their criminal plans the further those plans progress. What is more, these prospective offenders are clearly responsible, in progressing with their plans, for the conditions that render this true. In this sense, preparatory actors can be responsible for increasing the probability that the relevant ultimate harm will occur. Hence, they create a risk of that harm occurring.[43]

If this is correct, then how can the skeptics continue to insist that we should doubt the legitimacy of preparatory offenses? Alexander and Ferzan provide an answer to this question: that actors who have executed only preparatory steps of their criminal plans have not yet, strictly speaking, imposed or "unleashed" a risk. Certainly, from the perspective of observers, the probability that an actor will cause harm increases as her plan

41. Daniel Ohana, *Desert and Punishment for Acts Preparatory to the Commission of a Crime*, 20 CANADIAN J.L. & JURISPRUDENCE 113, 117–20 (2007).

42. Daniel Ohana, *Responding to Acts Preparatory to the Commission of a Crime: Criminalization or Prevention?*, 25 CRIM. JUST. ETHICS 23, 27–31 (2006). *Compare* Shlomit Wallerstein, *Criminalizing Remote Harm and the Case of Anti-Democratic Activity*, 28 CARDOZO L. REV. 2697 (2007).

43. Some believe that this kind of relationship between act and potential consequence is itself sufficient to justify criminal prohibitions: see, e.g., Tadros, *Harm, Sovereignty and Prohibition*, *supra* note 32, at 45–46.

progresses. But (the argument goes) the criminal law should not be interested in observers' perspectives. From the actor's perspective, whether or not her plan will ultimately result in harm remains entirely contingent upon her future choices. Surely, then, we ought not to say that she has imposed a risk, even if she has evidence that she is likely to act on her own intentions in the future. Again, the actor has not yet engaged with the objective world in any way. Certainly, we may say that such an actor is "dangerous," or that she "poses a threat," or some such. But we may not say that she has imposed a risk of harm until her future choices are no longer decisive as to whether or not that harm will occur.[44]

Similar things might then be said about other kinds of preventive offense. For example, consider offenses prohibiting the possession of weapons such as knives or firearms. Common sense suggests that people who possess weapons are more likely to cause harm (or at least, to cause harm *using those weapons*) than people who do not. However, mere possession does not impose a risk of harm, since whether or not those weapons will be used to cause harm remains (all else being equal) entirely contingent upon the possessor's future choices.[45] Likewise, assuming that preventive orders target harmful conduct, or conduct that imposes a risk of harm, those who breach them can properly be seen as dangerous. But an actor does not actually impose the relevant risks until he engages in further instances of the conduct that the order targets.

Here, then, is a plausible way in which the skeptics might specify the retributive deficiency of some preventive offenses. Conduct is not wrongful, in the sense required for criminalization, unless it imposes a risk in the manner just described. That is to say: conduct is wrongful only if it has potential harmful consequences that are, from the actor's perspective, no longer entirely contingent upon his or her future choices. Again, let us assume here that the skeptics' first premise is true: that is, that conduct may be criminalized only if it is wrongful. We may thus derive the following conclusion: conduct may be criminalized only if it has potential harmful consequences that are, from the actor's perspective, no longer entirely

44. *See generally* Alexander & Ferzan, *Risk and Inchoate Crimes*; CRIME AND CULPABILITY, ch. 6, both *supra* note 28.

45. Some proceed on the basis that possession is *itself* a form of endangerment: see, e.g., Dennis J Baker, *Collective Criminalization and the Constitutional Right to Endanger Others*, 28 CRIM. JUST. ETHICS 168 (2009). This proves unhelpful, however, for reasons that will be discussed in section III below.

contingent upon his or her future choices. Since things such as preparation and possession do not necessarily impose risks in this sense, they ought not to be criminal in themselves. At the very least, offenses targeting such conduct must include additional *mens rea* requirements to ensure that they meet this criterion.[46] We have thus arrived at a plausible reconstruction of the skeptics' retributive argument.

Notice, however, the kind of further defense that this argument now requires. It is not enough for the skeptics to emphasize the unique *form* of the criminal law: in particular, its employment of censure and punishment. Rather, they must defend the *substantive* moral proposition contained in their second premise: that conduct is wrongful only if it imposes risks. As we have seen, this proposition is not self-evidently true. Indeed, it seems to exclude conduct that is culpable and worthy of censure from the category of "wrongdoing" for the purposes of the criminal law. We might therefore ask: is there any coherent sense of "wrongdoing" that includes risk imposition but excludes mere preparation, of the kind that this proposition imagines?

Answering this question lies beyond the scope of this article. Suffice it to say for now that there are at least some cases in which it seems unproblematic to impose criminal liability for acts short of risk imposition. Imagine, for instance, that security services have been tracking a person who has been preparing an act of terrorism, say, a city center bombing. Imagine further that this is the last chance for agents to intervene before it becomes impossible to stop the prospective bomber. Can it really be true that, as a matter of moral principle, the state may not censure or punish this actor? That at most, the state may restrict his liberty for as long as is necessary to avert the threat that he poses?[47] At least as a pretheoretical conclusion, it is difficult to imagine that many people will be willing to embrace this.[48] This suggests that there are limits at least to the intuitive appeal of the conception of wrongdoing on which the skeptics rely.

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46. *See*, *e.g.*, HUSAK, OVERCRIMINALIZATION, *supra* note 1, at 174–76.

47. Again, this is Alexander and Ferzan's view: *see generally* Alexander & Ferzan, *Danger*, *supra* note 28.

48. For an instructive example, consider the English Law Commission's recommendations on the scope of general liability for preparatory conduct. The Commission explicitly rejected the argument that anticipatory powers of arrest are an adequate substitute for a criminal conviction in cases like the one just imagined. *See* Law Commission, *Conspiracy and Attempts* 187 (Consultation Paper No 183, 2007).

This is beside the point, however. The aim of this section has not been to show that the skeptics' arguments are unsound; rather, its aim has been to elucidate these arguments. The skeptics' strongest suit lies in the idea that some preventive offenses do not target wrongdoing of a kind that may be censured and punished through the criminal law. Specifically, these offenses do not target conduct that risks harm to others. Thus understood, the key premise in the skeptics' argument is not a claim about the censuring and punitive form of the criminal law. It is a substantive moral claim about the kinds of conduct that the criminal law may censure and punish. If this claim cannot be defended, then the present objection to preventive offenses fails.

III. PREVENTIVE REGULATION

This section now turns to explain why the argument just discussed is unsound. It is unsound, it is argued, because it relies on a false premise: contrary to the skeptics' view, the proper scope of criminal wrongdoing extends beyond risk-imposing conduct. To demonstrate this, it is not necessary to defend an alternative paradigm of criminal wrongdoing.[49] It will suffice to provide a clear counter-example to the paradigm on which the skeptics rely. The counter-example that will be discussed is regulatory or *malum prohibitum* wrongdoing. In this case, the wrongness of conduct need not be contingent upon whether it imposes a risk of an ultimate harm. Indeed, it need not be contingent upon *any* particular form of prelegal culpability in relation to such a harm. It follows that these cannot be decisive factors in determining the legitimacy of preventive offenses.

A. Regulatory Wrongs

The idea that criminal wrongdoing can consist in breaching a regulation is not, of course, a novel one. Criminal jurisprudence has long recognized a distinction between *mala in se* and *mala prohibita* offenses. Simply put, this is the distinction between offenses targeting prelegal wrongdoing and offenses targeting conduct that is wrong *as a result of* its legal prohibition. For our purposes, it does not matter whether this distinction succeeds in

49. For some good reasons to be generally skeptical about appeals to paradigms in criminalization theory, see Lindsay Farmer, *Criminal Wrongs in Historical Perspective*, *in* THE BOUNDARIES OF THE CRIMINAL LAW 214 (R.A. Duff et al. eds., 2010).

drawing a bright line between types of offense. It probably does not; by definition, criminal offenses are never simply prelegal wrongs. Rather, this distinction is important because it highlights different sorts of wrongs that may warrant the creation of an offense. Even if the conduct targeted by a preventive offense is not prelegally wrongful, it may yet be wrongful as a result of its regulation through the criminal law.[50]

To illustrate this distinction, consider some of the different forms of preventive offense surveyed above. Although these create unfamiliar forms of criminal liability, several of them target conduct whose (putative) wrongness can readily be identified independently of the law. For instance, as we saw in the previous section, some offenses explicitly target prelegal wrongs of preparation: that is, of acting on an intention to commit some future harmful act. Other offenses, meanwhile, explicitly target wrongs of indirect contribution to others' harmful conduct. Consider, for instance, the U.S. federal code offense of providing material support to a terrorist, or the U.K. offense of encouraging terrorism. Again, these offenses are defined relative to (potential) ultimate harms: they require defendants to have *mens rea* in relation to their contribution to potential terrorist acts.[51]

Other preventive offenses target prelegal wrongs in less explicit ways. One common pattern involves targeting a particular form of conduct, from which a criminal purpose is then to be presumed. For instance, the Model Penal Code's "instruments of crime" offense creates a presumption of criminal purpose where the instrument possessed is a weapon.[52] A related device is to create an offense targeting a particular form of conduct, to which lack of a criminal purpose is then made a defense. Again, this device can be found in the Model Penal Code, for example, in the offense of possessing an offensive weapon. It is a defense under this section for the defendant to show, *inter alia*, that "he possessed or dealt with the weapon . . . under

50. The seminal study of *mala prohibita* offenses is Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997). *Mala prohibita* are historically associated with the so-called regulatory or public welfare model of criminal offenses. As Green points out, however, the two categories are analytically distinct. Just as public welfare offenses might target prelegally wrongful conduct, so might the "real" criminal law play a regulatory role.

51. In the case of the former offense, defendants must contribute intentionally or knowingly to the relevant (potential) harmful act: 18 U.S.C. § 2339A(a). For the latter offense, mere recklessness will suffice: Terrorism Act 2006 § 1(2).

52. Model Penal Code § 5.06(2).

circumstances . . . negativing any purpose or likelihood that the weapon would be used unlawfully."[53]

A more complex example of this latter device is the U.K. offense called "possession for terrorist purposes." What this offense in fact prohibits is possession of an article "in circumstances which give rise to a reasonable suspicion that [the] possession is for a purpose connected with . . . an act of terrorism."[54] It is then a defense for the defendant to show that his possession was not actually for any terrorist purpose.[55] Clearly there are potential objections to structuring offenses in this way. By targeting conduct that merely creates a presumption or "reasonable suspicion" of an underlying wrong, courts may be prevented from adjudicating on the underlying wrong itself.[56] Still, the relevant wrong underlying these offenses remains essentially a prelegal one. As with more explicitly preparatory offenses, what is significant is the specification of an ultimate harmful intent.

Some other preventive offenses, by contrast, cannot plausibly be characterized as targeting prelegal wrongs. The most notable examples are what one might call "mere" possession offenses: offenses that target possession of particular articles, regardless of whether the possessor intends to use those articles for harmful purposes. Such offenses are often used to target the threat of harm from weapons. In U.K. law, for instance, possession of uncertified firearms is criminal regardless of intention,[57] with some kinds of firearm being prohibited absolutely amongst civilians.[58] Even jurisdictions that do not criminalize "mere" firearm possession will often prohibit the mere possession of weapons of at least some kinds. For instance, it is a federal crime in the United States to possess chemical weapons,[59] or weapons "designed or intended to release radiation or radioactivity at a level dangerous to human life."[60]

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53. Model Penal Code § 5.07.

54. Terrorism Act 2000 § 57(1).

55. Terrorism Act 2000 § 57(2).

56. For a critique of offenses structured in this way, see James Edwards, *Justice Denied: The Criminal Law and the Ouster of the Courts*, 30 Oxford J. Legal Stud. 725 (2010).

57. Firearms Act 1968 § 1. A slightly more permissive parallel regime governs the possession of shotguns, which does not require a certificate for *each* such weapon: Firearms Act 1968 § 2.

58. Firearms Act 1968 §§ 5(1), 5(1A).

59. 18 U.S.C. § 229(a).

60. 18 U.S.C. § 2332H(a).

Offenses of mere possession are sometimes also used to target other articles that are less ostensibly dangerous than weapons. For a particularly dramatic example, consider the offense of collecting or possessing information of a kind likely to be useful to a terrorist, under section 58 of the United Kingdom's Terrorism Act 2000.[61] On the interpretation of U.K. courts, liability for this offense is in no way contingent upon any connection to a potential future terrorist act. Rather, it depends solely on the character of the information possessed.[62] The defenses that are available to a charge under section 58 reflect this. Defendants may offer a "reasonable excuse" for their possession.[63] But unlike some of the offenses previously examined, this is not implicitly an offense of preparation: the legislation targets the information itself, rather than potential uses of it. Therefore, lack of a terrorist purpose, in and of itself, does not provide a reasonable excuse for possessing information of the relevant kind.[64]

Perhaps tellingly, the skeptics face an analytical problem in dealing with offenses like these: that they are not defined in relation to any ultimate harm.[65] Since they do not specify the ultimate harm that they aim to prevent, how can one determine whether these offenses target conduct that wrongfully imposes a risk of that harm? Let us assume, however, that we can overcome this difficulty, at least in some particular cases. For instance, perhaps it is obvious enough that acts of terrorism are the ultimate harms that section 58 aims to prevent. Skeptics might think that the failure to specify this ultimate harm in the offense definition actually tends to highlight what is objectionable about such offenses.[66] Since merely possessing certain kinds of information does not obviously risk causing any ultimate harm, surely we should doubt that such conduct is wrongful.

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61. Terrorism Act 2000 § 58.

62. *R v. G* [2009] UKHL 13; [2010] 1 AC 43.

63. Terrorism Act 2000 § 58(3).

64. [2009] UKHL 13, ¶¶ [71]–[85]. On this point, the House of Lords overruled an earlier decision of the English Court of Appeal: *R v. K* [2008] EWCA Crim 185; [2008] QB 827.

65. For further reflection on the difficulties that criminal law theorists face in categorizing possession offenses, see Markus Dirk Dubber, *The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process*, *in* DEFINING CRIMES 91 (R.A. Duff & Stuart P. Green eds., 2005).

66. *See*, *e.g.*, HUSAK, OVERCRIMINALIZATION, *supra* note 1, at 164–68.

This thought, however, assumes the truth of the very proposition that the skeptics need to support. It assumes, that is, that the criminal law may only aim to prevent harm by targeting prelegal wrongs of risking that harm. But since *mala prohibita* offenses exist, we should question this assumption. It need not be decisive against preventive offenses that they do not target (a particular kind of) prelegal wrongdoing. Certainly, the ultimate aim of section 58 may be to prevent terrorist harms. But it does not follow that it must be conceptualized as a (putative) offense of risking such harms—or indeed, as one of preparing or otherwise contributing to such harms. Rather, the offense might aim to prevent terrorist harms simply by regulating information of the relevant kind.

The regulatory model also provides the most promising rationale for offenses of weapon possession. As several commentators have pointed out, such offenses are over-inclusive *qua* offenses of risk imposition.[67] But we need not rationalize them in this way. We could instead see them as regulatory provisions that aim to prevent weapon-related harm. By regulating weapons, the state can change the incentives that people have for possessing them. It can thereby reduce the risks of harm from such weapons by ensuring that (for instance) there are fewer of them in circulation in the first place. Again, it need not matter on this view that individual tokens of possession do not impose risks of the relevant harm. What is salient is rather the scope of the state's regulatory authority in relation to weapons, and the obligations that its enactments create.

B. Regulatory Authority

Skeptics will press this last point about the scope of the state's regulatory authority. While preventive *mala prohibita* are a theoretical possibility (the argument will go), this is not yet a case for the existence of any such offense. Making such a case involves showing at least two additional things. First, one must show that the state has the authority to regulate the relevant conduct. Second, one must show that its regulation would succeed in imposing obligations on citizens. If these conditions are not satisfied, then the resulting offense would not be a genuine *malum prohibitum*: it would

67. *See, e.g.*, Andrew Ashworth, *The Unfairness of Risk-Based Possession Offences*, 5 CRIM. L. & PHIL. 237 (2011); Dubber, *The Possession Paradigm*, *supra* note 65; Husak, *Guns and Drugs*, *supra* note 25.

not actually be wrong to commit it. Censure and punishment for the offense would therefore be unwarranted.

Opinions on the scope of the state's regulatory authority will depend on the particular political theory or ideology to which one subscribes. Given the scale of disagreement about such matters, this article does not attempt to settle them.[68] Rather, a more modest claim will be defended: it is likely that the state at least *sometimes* has the power to alter citizens' obligations by regulating their conduct for preventive ends. Admittedly, some criminal law theorists might regard even this claim as overly ambitious. Although some putative *mala prohibita* can be explained relatively easily, it has proved difficult to find any explanation that generalizes to a substantial proportion of that class.[69] Nevertheless, it is suggested that skepticism at least about *preventive mala prohibita* is difficult to reconcile with widely held beliefs about the scope of state authority. Anarchists and possibly libertarians aside, it is likely that most people should accept the authority of the state to enact at least some preventive regulations.

To demonstrate this, consider an analogy with taxation. Regulation and taxation are materially similar in at least the following respects. First, both coerce citizens into surrendering their interests. Second, they do so by threatening censure and punishment. Third, on at least some occasions, the aim of such coercion is preventive. Fourth, citizens' liabilities in either case are not contingent upon responsibility for the threats that the measure is designed to avert. Note that these features are mostly uncontroversial in the taxation context. One might well object that taxes are too high in practice; few, though, will object in principle to such preventive coercion. Indeed, perhaps even libertarians will endorse some such measures. We can expect widespread agreement on the use of taxation to fund, for instance, national security and emergency relief.[70]

The difference between taxation and regulation lies in the kind of interest that citizens are required to surrender. Whereas taxation schemes

68. Links between criminalization and issues of political authority and obligation are, regrettably, seldom drawn. For exceptions, *see*, *e.g.*, Stephen P Garvey, *Was Ellen Wronged?*, 7 CRIM. L. & PHIL. 185 (2013); Green, *Why It's a Crime*, *supra* note 50.

69. HUSAK, OVERCRIMINALIZATION, *supra* note 1, at 103–19.

70. Even the night-watchman state—limited to protecting its citizens against force, fraud, and theft—would presumably need to be funded through contributions that are (in some sense, at least) nonvoluntary. *See*, *e.g.*, ROBERT NOZICK, ANARCHY, STATE AND UTOPIA, part 1 (1974).

require us to surrender property, regulatory schemes require us to surrender liberty. By obliging citizens to refrain from engaging in a given kind of conduct (for example, possessing firearms), the state can advance legitimate preventive projects (decreasing the number of firearm-related deaths and injuries). Of course, as in the context of taxation, one might well object that the range of liberties restricted by a given regulation is unfairly broad. But it need not be fatal to such schemes that they prohibit conduct that does not by itself threaten wrongful harm to others. Sometimes, we permit the state to interfere with our interests as a means of preventing harm, even in the absence of such threats.

Similarly, it need not be fatal to regulatory schemes that they secure compliance by threatening and imposing criminal sanctions. Like preventive regulations, taxation schemes may give rise to criminal liability: one may be subject to censure and punishment if one fails to pay one's taxes.[71] Again, one might regard individual penalties for contraventions of such schemes as unfairly harsh or disproportionate. The state must certainly be prepared to justify such penalties, quite apart from the duties that the relevant schemes impose. The important point for now, though, is that we may say such things about both kinds of scheme. The simple fact that preventive regulation threatens censure and punishment does not, by itself, make it any more difficult to justify than taxation.

Why should we accept the authority of the state to interfere with our interests in order to prevent harms and risks for which we are not responsible? Although this question again raises complex issues, an approximate answer is not far to seek.[72] One of the main reasons in favor of the state's existence is its capacity to advance important public goods like security.[73] The state advances these goods partly through centralized collection and allocation of resources, that is, by taxing citizens to support public spending on security-advancing projects. But it can also advance security by using its

71. In U.K. law, *see*, *e.g.*, Taxes Management Act 1970 § 106A. Note, however, that this offense requires the tax evasion concerned to be "knowing" and "fraudulent." Perhaps it is a valid objection to some of the other offenses considered here that they are not constrained in comparable ways.

72. The issues are complex partly because one might well challenge the premises of the question. Our "interests" in liberty and property cannot necessarily be determined prelegally. *Compare* G.A. Cohen, *The Structure of Proletarian Unfreedom*, 12 PHIL. & PUB. AFF. 3 (1983); THOMAS NAGEL, EQUALITY AND PARTIALITY, ch. 13 (1991).

73. *See generally* IAN LOADER & NEIL WALKER, CIVILIZING SECURITY (2007).

authority to regulate behavior. By regulating behavior, the state can change the incentives that citizens have in ways that would not otherwise be possible. Although this enterprise has general liberty costs, these may be justifiable in light of the security benefits that each citizen can expect to receive as a result.

Moreover, we usually assume that we have at least *some* prelegal duties to promote one another's security. Many believe, for instance, that we have at least moral duties of easy rescue.[74] The legal enforcement of such duties may be controversial: one might think that this would impose unacceptably heavy burdens on the unlucky few who find themselves in positions to rescue. General preventive measures, however, improve on duties to rescue in precisely this respect. By enacting such measures, the state can allow citizens to promote one another's security at minimal cost to themselves. Effectively, citizens contribute a small amount to a collective, coordinated effort to achieve a preventive goal.[75] Thus, citizens may be obliged give up $1 each if this would provide enough resources to (say) rehouse the victims of a natural disaster. It is surely plausible that they may also be obliged to surrender a small amount of liberty for a comparable preventive end.

C. Justifying Particular Regulations

All of this might sound fine in theory. But one might worry about the practical consequences of embracing regulatory rationales for criminalization. Whatever its theoretical merits, the skeptics' view at least has clear strategic advantages. By appealing to a relatively narrow paradigm of criminal wrongdoing, it places a strong constraint on the content of the criminal law. In contrast, regulatory rationales seem to license a potentially limitless range of offenses. Highly over-inclusive provisions, such as the U.K.'s section 58, become potentially justifiable on this model. This result will perhaps seem sufficiently counter-intuitive to cast doubt on the arguments advanced thus far.

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74. *See, e.g.*, JOEL FEINBERG, HARM TO OTHERS, ch. 4 (1984). For a more radical perspective, see Peter Singer, *Famine, Affluence and Morality*, 1 PHIL. & PUB. AFF. 229 (1972).

75. This, indeed, is a strong reason to endorse such collective measures. They promote security without forcing individuals to bear large burdens on a regular basis. Ironically, this makes the imposition of individual duties to rescue in exceptional cases easier to justify as well: *see* FEINBERG, *id.* at 169–71.

Such doubts, however, are premature. Just because the state generally has the authority to enact preventive regulations, it does not follow that all such regulations are justifiable. Indeed, one may object to offenses like section 58 precisely on the grounds that they are not justifiable even *qua* regulatory provisions. To see why, consider what kinds of information might qualify as "useful" to (prospective) terrorists. *Prima facie*, this provision catches a great deal of information with many everyday uses: for instance, the information contained in train timetables and maps. Clearly, citizens would be very surprised to find that they require a reasonable excuse for possessing such articles. Courts have thus been forced to narrow the *actus reus* of this offense. However, even the interpretation of the statutory language that they have produced remains very broad. For example, crudely hand-drawn plans of government-owned buildings have been held to fall within the scope of this provision.[76]

The root of the courts' problem here has been that material that is useful for terrorist purposes—however that condition is ultimately defined—is also likely to be useful for many innocent or beneficial purposes.[77] Thus, this offense is inherently likely to have a much greater impact on citizens' liberties than an offense of possession *for* terrorist purposes. By contrast, its marginal security benefits over such an offense are small. Given the range of information caught by the offense and its ready availability, one may assume that suspicion of terrorist purposes will in practice remain a crucial criterion in enforcement. Hence, it is difficult to imagine that section 58 enables much preventive action that preparatory offenses would not also enable. Its considerable costs to citizens' liberties are thus likely to be decisive against it.

One can compare this to the balance struck by offenses of weapon possession. Again, one might worry that such offenses are over-inclusive. Can the regulation of mere weapon possession be justified, even in cases where there is no reason to believe that possessors have any criminal purpose?[78] To answer this question, note first of all that the marginal liberty costs of weapon offenses tend to be much lower than those of

76. *R v. G* [2009] UKHL 13; [2010] 1 AC 43. For further reflection on the *actus reus* of this offense, see Jacqueline Hodgson & Victor Tadros, *How to Make a Terrorist Out of Nothing*, 72 MOD. L. REV. 984, 987–90 (2009).

77. Hodgson & Tadros, *id*. at 987.

78. *See*, *e.g.*, Husak, *Guns and Drugs*, *supra* note 25.

section 58. Whereas the latter offense potentially includes widely used articles, the prohibition of many kinds of weapons will have no or minimal costs for most citizens. For instance, it is telling that offenses of "merely" possessing chemical or nuclear weapons are rarely a target for the skeptics. It is difficult to see how citizens lose anything whatsoever of value as a result of prohibitions like these.

Matters are more complex in relation to other types of weapon. Firearms offenses are a particularly contentious example. It is true that *some* citizens might have innocent or beneficial uses for firearms. Some people might use guns for professional purposes, for instance, or enjoy (harmless) shooting as a leisure activity. However, this is not necessarily a fatal objection to the regulation of (mere) firearm possession. Such regulation need not impose absolute prohibitions; citizens may be given a conditional permission to possess firearms of some kinds. This is the model adopted in U.K. law, where only the most dangerous kinds of firearms are absolutely prohibited.[79] Citizens may possess firearms of other kinds, on the condition that they obtain a certificate from their local police force.[80] Although this condition does restrict citizens' freedom to own firearms for innocent purposes, this is only a comparatively modest liberty cost. This may be justifiable if it yields sufficient preventive benefits, for example, by allowing the state to be relatively sure that those who possess firearms do so for innocent purposes.

Are such marginal security benefits sufficient, all things considered, to justify the relatively modest incursions on citizens' liberties that firearms offenses impose? Clearly, much will depend here on empirical evidence about the effectiveness of such regulation. But given the right background conditions, one can at least imagine a positive answer to this question. At least in societies like the United Kingdom, where levels of gun ownership and gun-related crime are relatively low, the rationale for such offenses need not rest solely on their potential to catch dangerous people. Rather, their preventive potential consists partly in the fact that they might help to

79. Or at least, so we may assume. Whether the legislation correctly identifies the most dangerous kinds of firearms is a question beyond the scope of this article.

80. Applicants must show that they have good reason for possessing the firearm in question; that they are fit to be trusted with it; and that possession will not pose any danger to public safety or the public peace. Certificates may also stipulate conditions for possession: Firearms Act 1968 § 27.

maintain the low-ownership *status quo*.[81] In this respect, firearms offenses are unlike section 58. The marginal preventive benefits of this latter offense—if indeed there are any—will not derive from control of the information that it targets. At most, the offense makes it easier for the state to restrict the liberty of those whom it already suspects of having terrorist intentions.

Other kinds of weapon will again raise different issues. Take the example of knives. The liberty costs of prohibiting knife possession will be considerably higher than those of prohibiting firearm possession. Unlike guns, we can imagine that most people will have legitimate uses for knives at some point in the course of at least their domestic lives. Again, though, this is not necessarily fatal to offenses of mere knife possession. Legal strategies are available that can help to minimize the liberty costs of such offenses. For instance, consider the provisions of the Model Penal Code as they apply to knives. As we saw, the Code makes it an offense to possess an offensive weapon; however, an article is not an "offensive weapon" to the extent that it serves a "common lawful purpose."[82] Similarly, to the extent that knives qualify as "weapons," their possession is potentially caught under the offense of possessing instruments of crime. But this is only so where the possessor has the weapon "on or about his person, in a vehicle occupied by him, or otherwise readily available for use."[83] Possession under certain conditions, including in the possessor's home, is explicitly excluded from the offense.[84]

Taken together, the effect of these provisions is similar to the effect of the U.K. regime governing knives. Under this regime, the possession of knives in private is not criminalized; only the liberty to carry a knife in

81. It is important to emphasize the significance of such contextual factors to the justifiability of preventive regulations. At least some of Husak's skepticism about firearms offenses, for instance, derives from the fact that the U.S. has high rates of gun ownership and gun-related violence. Against this background, generalized prohibitions of gun ownership would likely be counterproductive: Husak, *Guns and Drugs*, *supra* note 25, at 450–60. For a study of the situation in the U.K., which is largely supportive of legal controls as one element of a more comprehensive and contextualized strategy to prevent gun crime, see Gavin Hales, Chris Lewis, & Daniel Silverstone, Gun Crime: the Market in and Use of Illegal Firearms (2006), especially ch. 6.

82. Model Penal Code § 5.07. Note that "daggers" are explicitly listed as offensive weapons for the purposes of this provision, although knives *simpliciter* are not.

83. Model Penal Code § 5.06(2).

84. Model Penal Code § 5.06(2)(a).

public is restricted.[85] Again, however, even this restriction is not absolute: possession for certain reasons (such as work-related reasons) is explicitly excluded.[86] Even those who don't fall within the explicit exclusions have the chance to offer a reasonable excuse for their possession.[87] Thus, the effect of this offense is merely to demand that citizens refrain from carrying knives in public when they have no good reason to do so. To the extent that the existence of offenses like these actually prevents knife crime, this seems a fair enough price for citizens to pay.

IV. REGULATION AND CRIMINALIZATION

Preventive offenses aim to prevent ultimate harms by targeting conduct that does not directly cause or risk causing such harms. Skeptics argue that we have inherent reason to doubt the legitimacy of such offenses. Their argument, however, ignores the possibility that preventive offenses might play a regulatory role. Even if such offenses do not target prelegal wrongs of "unleashing risk," they may yet be a legitimate means of preventing ultimate harms. Indeed, we have good reason to suppose that the state's regulatory authority extends to the creation of at least some such offenses. Particularly in relation to things like weapon possession, regulation has the potential to achieve relatively large preventive benefits at a relatively small cost to citizens' liberties.

The skeptics might object, however, that the discussion thus far has been somewhat disingenuous. Perhaps it is true that there are some legitimate preventive *mala prohibita*. But even if so (the argument will go), such offenses lie some way beyond the criminal law's normative core. As we have already conceded, the state lacks strong reasons to censure those who commit these offenses compared to the kind that it has to censure (say) murderers or rapists. This thought might lead us to question whether the criminal law is really the most appropriate means by which to pursue our preventive goals in these cases. Does making the case for regulation entail making the case for criminalization? Or should we prefer alternative forms of preventive action?

85. Criminal Justice Act 1988 § 139.
86. Criminal Justice Act 1988 § 139(5).
87. Criminal Justice Act 1988 § 139(4).

A. Types of Preventive Action

In answering these questions, it will be useful to understand why legislators may sometimes prefer the criminal law to other forms of preventive action. One way to illustrate this is via the following thought experiment. Imagine that there is a type of harm that the state is concerned to prevent. Imagine further that you are charged with designing a legal scheme to reduce the incidence of that harm. For some reason, however, you may not take into account in the design of your scheme the prelegal wrongness of any conduct that might cause, risk, or otherwise contribute to that harm.[88] How, then, might you arrive at the decision that such conduct should be criminalized?

A likely starting point will be the familiar legislative conflict between *security interests* and *liberty interests*.[89] People generally have security interests: they have interests in being free from threats of harm. But they also generally have liberty interests: they have interests in being able to perform actions that might threaten harm, and in avoiding any legal liability that might attach to these. When does advancing the former class of interests justify setting back the latter? As is well known, this is a profound and difficult question. Although we should avoid the misleading impression that liberty and security exist in a "zero-sum" relationship, it is often true that advancing security interests entails setting back liberty interests.[90]

Some policies may immediately be ruled out as striking an unacceptable balance. For instance, consider preventive restrictions of liberty, such as preventive detention, house arrest, or curfews. A law providing for such responses to those who are judged to pose a threat of the relevant harm would doubtless enhance citizens' security from that harm. However,

88. The thought experiment is worthwhile partly because many political theorists would require the state to be blind to such considerations. Liberal neutrality may prevent appeals to substantive moral ideas in the justification of criminal justice policy. For discussion, *see* Matt Matravers, *Political Neutrality and Punishment*, 7 CRIM. L. & PHIL. 217 (2013).

89. This familiar terminology is not ideal, as it misleadingly suggests that security interests and liberty interests should be identified with our interests in security and liberty. In fact, an important set of one's liberty interests are interests in security from state coercion. So long as this is borne in mind, however, these terms remain analytically useful.

90. For a general case for caution about "balancing" metaphors in discussions of liberty and security, *see* JEREMY WALDRON, TORTURE, TERROR AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE, ch. 2 (2010). In the criminal justice context, *see* Andrew Ashworth, *Security, Terrorism and the Value of Human Rights*, *in* SECURITY AND HUMAN RIGHTS 203 (Benjamin J. Goold & Liora Lazarus eds., 2007).

modern states have not traditionally regarded the nonpunitive detention of responsible agents as justifiable.[91] Such detention unacceptably sets back citizens' liberty interests in at least two ways. First, under such a scheme, citizens lack adequate opportunities to make choices that will allow them to avoid liability.[92] Second, detention itself drastically reduces the range of options available to those subjected to it.

Detention is, of course, an extreme example. But any preventive restriction based on judgments of dangerousness will tend to have liberty costs of these sorts. An advantage of legal regulation, including criminalization, is that it allows the state to pursue its preventive goals without sacrificing citizens' liberty interests in these ways.[93] Of course, legal regulation by definition restricts *some* liberties. But it generally improves on restrictions based on dangerousness in the two respects just highlighted. First, regulation affords citizens the chance to avoid liability by choosing not to engage in the prohibited conduct. Second, even the most over-inclusive regulations will tend to leave open a greater range of options for citizens than restrictions like detention.[94]

Depending on the burdens that they impose, different types of regulation can also be more or less readily justifiable. Consider first the civil law. Civil law distributes citizens' liabilities by establishing a network of legally enforceable rights and duties.[95] Its impact on liberty interests is generally relatively modest, since its primary sanction is simply to ensure that those who breach their duties pay a fair price for doing so to those whose rights have been infringed. This is often achieved through private law relationships, in which those who breach their duties are liable to compensate directly those who are harmed by such breaches. But we can also imagine

91. Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113 (1996); *Neither Desert nor Disease*, 5 LEGAL THEORY 265 (1999). As Morse notes, however, this supposedly general rule is often honored in its breach.

92. On the value of choice in relation to liability, *see*, *e.g.*, H.L.A. HART, *Legal Responsibility and Excuses*, *in* PUNISHMENT AND RESPONSIBILITY 28 (1968); T.M. SCANLON, WHAT WE OWE TO EACH OTHER, chs. 6.2–6.3 (1998).

93. For discussion of reasons to choose such restrictions over legal regulation, *see*, *e.g.*, Ferzan, *Beyond Crime and Commitment* and *Inchoate Crimes at the Prevention/Punishment Divide*, both *supra* note 29. The point here is not that the latter is *always* preferable to the former. It is simply to show why this will *sometimes* be so.

94. Arthur Ripstein, *Prohibition and Pre-Emption*, 5 LEGAL THEORY 235, 260–63 (1999).

95. *Compare* Ripstein, *id.* at 239–41; *see also generally* his EQUALITY, RESPONSIBILITY AND THE LAW, chs. 1–4 (1999).

other schemes of civil regulation, employing different compensatory mechanisms. For instance, the state could attach fines to any breach of duty, regardless of harm caused, and then use the resulting funds to compensate victims. While possibly being less efficient than private law, this kind of scheme would help to spread the compensatory burden more widely.[96]

In either case, compensatory sanctions are the main way in which these schemes would aim to secure compliance. Thus, to the extent that the rights and duties established by these schemes are truly fair, they would impose (*ex hypothesi*) relatively modest burdens on citizens' liberty interests. Nevertheless, this feature of civil law might sometimes lead to allegations that it does not do enough to protect *security* interests. If all the law demands of actors is that they pay a fair price for breaching their duties, then there will be some cases in which they have incentives to do this. For a familiar illustration of this point, consider property rights. We can surely expect civil law schemes to prevent some cases of theft or property damage. But if such violations attract only civil sanctions, then actors may sometimes rationally prefer to compensate their victims than to avoid stealing or vandalizing in the first place.

One way to achieve stronger protection for security interests is through criminal punishment. Although civil courts sometimes award punitive damages that make defendants pay "over the odds" for their wrongdoing, this is exceptional: to prevent through punishment rather than mere compensation, we must normally turn to the criminal law.[97] As we have seen, though, the general availability of punishment is not the criminal law's only distinguishing feature. It also has an expressive, censuring capacity that civil law lacks. Indeed, the fact that a single institution performs both these punitive and censuring functions has led some to the view that punishment itself is inherently expressive.[98]

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96. To be clear, the discussion at this point is not about noncriminal or "quasicriminal" forms of regulation backed by sanctions going beyond compensation. On such schemes, see section IV.B below. On the choice between criminalization and regulation backed by cost-spreading, compensatory sanctions, see Victor Tadros, *Criminalization and Regulation*, *in* The Boundaries of the Criminal Law 163 (R.A. Duff et al. eds., 2010).

97. On the relationship between the compensation/punishment distinction and the civil/criminal distinction, *see* Andrew Ashworth, *Punishment and Compensation: Victims, Offenders and the State*, 6 Oxford J. Legal Stud. 86 (1986).

98. *See*, most famously, Joel Feinberg, *The Expressive Function of Punishment*, *in* Doing and Deserving 95 (1970).

For the sake of both conceptual and normative clarity, however, we should differentiate these two functions. It may be true that the word "punishment" typically denotes expressive sanctions. But even if so, it is possible to separate conceptually the censuring aspects of these sanctions from their "hard treatment" aspects. To emphasize this, let us refer to the imposition of sanctions going beyond mere compensation as "penalization." In theory at least, censure and penalization are independent: the state could penalize conduct without also censuring it, and *vice versa*.[99] We can therefore separate aptness for penalization from aptness for censure (and thus, from aptness for punishment *qua* form of censure).

These points are unfortunately obscured by the fact that a single institution currently performs both of these unique functions.[100] One might speculate, indeed, that the skeptics' view suffers from precisely this conflation of censure and penalization. Perhaps culpable risk imposition is the paradigm of a prelegal, censure-worthy wrong. But as we can now see, criminal offenses need not target either prelegal wrongs or wrongs that are *especially* worthy of censure. The state may have reason to create a regulation that prohibits a given type of conduct, on the basis that this conduct is particularly apt for penalization. Once again, these reasons will not necessarily track the relationship of such conduct to any ultimate harm or risk.

This again helps to shed light on offenses of weapon possession. As we saw, the case for these offenses need not be made on the basis that possession of weapons is itself risky. It may be enough that the preventive goals of these offenses justify the use of the state's regulatory authority. Similarly, the case for regulating weapon possession *through the criminal law* need not be made on the basis that our response to such conduct should involve censure. Our reasons for penalization may instead be salient. Overall, incentivizing people against weapon possession—at least under certain conditions—may strike a fairer balance between liberty and security than other preventive options.

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99. Civil injunctions arguably embody this distinction by threatening noncriminal "punishment" for contempt of court: *see* Ripstein, *Prohibition and Pre-Emption*, *supra* note 94, at 250–52.

100. Compare Tadros, who argues that, since the conditions for the legitimate application of penalties and censure are materially similar, it makes sense that a single institution performs both of these functions: *Criminalization and Regulation*, *supra* note 96, at 184.

B. Penalization and Criminalization

Admittedly, however, distinguishing between censure and penalization might also be seen to tell *against* the creation of preventive offenses. Certainly, under our current institutional arrangements, reasons to penalize are reasons to criminalize. But perhaps this is best understood as the beginning of an argument against these institutional arrangements. Ideally, one might think, we would have an institutional distinction between censure and penalization that tracked the conceptual distinction. For example, perhaps the noncriminal, "administrative" model of regulation found in some jurisdictions could be adopted universally. This model allows for penalization without the accompanying censure of criminal conviction. It would therefore be well suited to deal with breaches of preventive regulations, where reasons for censure and reasons for penalization are likely to come apart.[101]

In considering this line of argument, note first of all that it is not *decisive* against "truly" criminal offenses of the regulatory kind. It was suggested above that the state plausibly has some regulatory authority, such that preventive regulations can impose genuine obligations on citizens. If this is correct, then it follows that breaches of such regulations may warrant at least *some* measure of censure. Granted, they may not warrant the level of censure that attaches to the most serious "core" crimes. But this is equally true of less serious tokens of the core crimes themselves. For instance, few would argue that theft of small amounts of property should be decriminalized simply because it is less worthy of censure than (say) the typical armed robbery.

Still, perhaps the argument for treating regulatory breaches as noncriminal at least rests on a sound *generalization*. Perhaps, that is, regulatory breaches *tend* not to warrant the kind of censuring response that acts of direct harming and risking do. If this is correct, then it may generate compelling reasons for an institutional separation between regulation and

101. It should be noted that this model of regulation is often characterized by other features besides its eschewal of criminal conviction and stigmatic punishments. For example, it may also be characterized by weaker procedural protections and an increased willingness to accept strict liability offenses. This section imagines a scheme that is noncriminal only in the sense that it does not impose criminal sanctions. One may doubt whether we should advocate the creation of a separate "administrative" scheme if it were to have these other features. For discussion, *see*, *e.g.*, R.A. Duff Et Al., The Trial on Trial. Vol. 3, Towards A Normative Theory of the Criminal Trial 189–98 (2007).

criminalization. For instance, perhaps routinely using the criminal law for regulatory ends tends to weaken its moral credibility.[102] Conversely, perhaps this use of the criminal law will tend to lead to the conflation of regulatory crime with "real" crime. If regulatory breaches are criminal, that is, perhaps people will tend to treat them as worthy of a strong censuring response even when they are not. Either way, there would be a compelling case for developing institutions that allow the state to penalize conduct for preventive ends, without also censuring it.

These arguments rest on empirical speculations. Thus, their success depends ultimately on the empirical truth of those speculations. Since there is insufficient space here to address this issue, let us simply assume for the moment that they are sound. Due to our poor range of institutional options, should the state refrain from criminalizing breaches of preventive regulations? In the absence of an optimal solution, must (say) offenses of weapon possession be abolished? It is doubtful that they must. Ideally, one might prefer a noncensuring response to such conduct. But this ideal option is not necessarily the only *permissible* option. Under nonideal institutional conditions, criminalization might be acceptable as a nonideal solution. Indeed, the only material difference between criminal and noncriminal forms of preventive regulation, as they have been conceptualized here, is the former's use of censuring sanctions. And as we have seen, at least some measure of censure may be an appropriate response to regulatory breaches.

All of this suggests that there is no clear-cut case for the view that the criminal law should never be used as a tool of preventive regulation. This is not to say, however, that we do not have reasons for caution in deploying regulatory rationales for criminalization. Such rationales will often depend on fine judgments about the appropriate balance between liberty and security. And it is possible to conflate the culpability of causing or risking harm with the culpability of breaching a regulation aimed at preventing that harm. These, indeed, are the salient objections to some of the provisions analyzed above. It might not be decisive against section 58, for example, that it targets conduct that does not directly risk any terrorist harm. But as we saw, this is nevertheless an egregious offense, the small marginal security benefits of which come at a great cost to citizens' liberties. In

102. *See*, *e.g.*, PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT, ch. 9 (2013).

recognizing regulatory rationales, scholars must simply become more attuned to criticisms of this latter kind.

CONCLUSIONS

The criminal law's preventive ambitions are not always easily reconciled with its retributive character. Although criminal offenses may aim to prevent harm, legislators must not lose sight of the fact that criminalization entails liability to censure and punishment. According to skeptical commentators, it follows that we should doubt the legitimacy of offenses that aim to prevent harm by targeting conduct that does not directly cause or risk causing that harm. This article has argued, however, that the skeptics' view is unsound. Prelegal wrongs—including wrongs of risking—are not the only sorts of wrongs that properly interest the criminal law. Rather, we should conceive of at least some preventive offenses as (putative) *mala prohibita*, that is, as exercises of the state's regulatory authority, aimed at preventive goals that could not otherwise be achieved at an acceptable cost.

Skeptics might respond that the state lacks strong reasons to censure the conduct targeted by such offenses through the criminal law. Even if this is true, however, it is not decisive against such offenses. The criminal law is unique in its punitive capacity, as well as its censuring capacity. In the absence of any noncriminal form of regulation, aptness for penalization thus entails aptness for criminalization. Of course, it does not follow from this that we generally lack reasons for caution about preventive offenses. The recent trend for such offenses has doubtless led to many provisions that fail to strike an appropriate balance between liberty and security. This article has hopefully shown, however, that at least some offenses potentially emerge unscathed from the skeptics' critique. For example, although possessing weapons does not yet impose risks of their use, there remains a sound case to be made for the criminalization of such conduct. Breaching preventive regulations of this sort may, all things considered, warrant both censure and penalization through the criminal law.