Introduction

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This book arises from a three-year study of Preventive Justice, generously funded by the Arts and Humanities Research Council. The project's main objective is to develop an account of the principles and values that should guide and limit the state's use of coercive preventive techniques. Central to the project is an interdisciplinary and cross-jurisdictional approach, developed with the collaboration of scholars from a variety of disciplinary backgrounds, jurisdictions, and legal cultures. This book is the product of two seminars held at All Souls College, Oxford, at which 14 leading international scholars in the fields of criminal law, public law, legal theory, criminology, philosophy, and political theory presented and discussed early drafts of what were to become the chapters collected in this volume. Each draft paper was subject to detailed commentary by a designated respondent and then subject to searching analysis by the invited seminar participants. Their collective contributions advanced the debate and undoubtedly enriched the final chapters in this volume. The contributing authors are all world-renowned scholars in their respective fields. They include leading academics from the US, Canada, Australia, South Africa, the UK, and continental Europe.

Understood simply, the criminal law is a backward-looking institution. Whatever its overarching rationale or justification, in its implementation the core of the criminal law punishes persons for their past behaviour. However, this simple backward-looking story has never fully captured what the criminal law is or seeks to achieve, and increasingly states use the criminal law or criminal law-like tools to try to prevent or reduce the risk of (anticipated) future harm. Such measures include the criminalization of ordinarily harmless and seemingly innocent behaviour in order to allow authorities to intervene at an early stage; the incapacitation of suspected future wrongdoers; and extended sentences for past wrongdoers on the basis of their predicted future conduct.

There are good reasons to justify state use of coercion to protect the public from harm. And yet, although the rationales for and justifications of state punishment have been explored extensively, the scope, limits, and principles of what we term preventive justice—the use of the criminal law and related coercive measures in a directly preventive way—have attracted little doctrinal or conceptual analysis (save in respect of counterterrorist measures). The chapters in this book seek to reassess the foundations for the range of coercive measures that states now take in the name

of prevention and public protection. Among the recent legal developments discussed below are the extension of criminal liability to merely preparatory and preinchoate acts, technologies of prevention relating to road traffic offences, specially restrictive measures against suspected terrorists, restraining measures that make use of civil procedures, expanding pre-trial detention, preventive detention of 'dangerous' offenders, and so on. In this Introduction, we outline the main contributions made by each chapter, and then explore some core themes.

The first five chapters examine the nature and historical antecedents of preventive justice and its relationship with criminal law and punishment. In the first chapter, **Schauer** questions the dichotomy assumed to exist between *ex ante* and *ex post* punishment. He argues that all judgements of guilt and all punishments have a probabilistic component and that, by accepting proof beyond reasonable doubt rather than requiring certainty, we place a probabilistic assessment at the heart of criminal justice. Given that we accept an error rate in respect of conviction, objections to preventive measures arise only if the error rate in respect of prediction of future crimes is higher. What is different about, and wrong with, preventive measures is less that they are preventive, than that they are often based on lower probabilities than the criminal law would demand. There are also non-probabilistic differences between *ex ante* and *ex post* measures. However, to the extent that they are relevant, Schauer argues, there may be a greater wrong in restricting someone on account of doing something they did not in fact do, than in denying someone who will probably offend in the future the chance to do wrong. His message is that preventive justice and probabilistic assessments are all around us, and when we object to them we must be precise about the nature of our objection.

Asp identifies a general trend toward 'preventionism', by which he means the criminalization of nonconsummate offences. Asp recognizes that prevention and criminalization are closely linked conceptually but argues that prevention poses difficulties for the distribution of punishment because it departs from the ordinary requirements and limits of deservedness. His particular concern is with the risks associated with preventionism and, in particular, in respect of complex nonconsummate offences, namely those that require ulterior intent. Although Husak has argued that a high culpability requirement helps justify criminalization of nonconsummate offences,[1] Asp regards this requirement as problematic because it holds the actor 'partially responsible for something that he or she has not done yet' and, in so doing, alters the scope and gravity of the offence for which an offender will face punishment.

Dubber's chapter contends that much contemporary scholarship on preventive justice pays insufficient heed to the historical antecedents of preventive endeavour and consequently overplays the novelty of present developments. It follows, he argues, that scholars are misguided in attempting to evaluate preventive endeavours by reference to the principles of penal justice without first seeking to understand the historical origins of the penal state. Dubber's argument builds upon the contention,

[1] D Husak, 'The Nature and Justifiability of Nonconsummate Offences' (1995) 37 Arizona Law Review 151–83; D Husak, *Overcriminalization. The Limits of the Criminal Law* (2008) 159 ff.

developed in his earlier works (most notably *The Police Power*)[2] that the ideal of the *Rechsstaat* or 'law state' must be set against the historical exercise of the police power, which, insofar as it is concerned with the maintenance of peace and good order, is largely synonymous with prevention. From the perspective of the police power, ideas of justice and legitimacy have no purchase, argues Dubber, because the exercise of the police power is unconstrained by principles of any kind. He concludes that measures of preventive justice are less departures or deviations from justice, rather they result from a distinction 'between law and police as basic modes of governance'. Dubber thus offers an intriguing historical explanation for the relative ease with which states have developed preventive measures in a seemingly untrammelled manner.

Günther, building on the work of David Garland,[3] among others, claims that there has been a 'paradigm change' in criminal justice. Governments are increasingly focused on the protection of innocent citizens, who see such protection as a right, whereas constitutional and human rights documents traditionally seek to limit the state's power to punish by protecting the rights of suspected, accused, and convicted offenders. In investigating the significance of this shift, Günther explores the relationship between the Responsibility to Protect (RTP), an influential norm in international public law, and preventive justice. He takes RTP out of its international context and uses it, instead, as a lens through which to explore the preventive state. He traces the normative foundations of RTP to the contractualist justifications of the state found in Hobbes and Locke. In such theories, citizens give up their duty of self-protection to the state, which must then protect them, but, Günther argues, in democratic societies, this responsibility is passed back to the citizens. One danger of the preventive state is that, in tension with a democratically founded RTP, it encourages us to view ourselves as the 'good' in need of protection from the 'dangerous' and to seize human rights as a tool with which to do so. This responsibility to protect the majority against the minority of criminal offenders, argues Günther, 'changes the anti-majoritarian meaning and direction of human rights into a majoritarian right to protection'.

In his contribution, **Dyzenhaus** explores the implications of preventive justice for the larger 'rule-of-law project', namely the attempt to ensure that the decisions of public officials comply with values and principles that should be exhibited by a legal order. Key to his analysis is an insistence that legitimacy is achieved not merely by meeting formal or procedural conditions but that it also requires compliance with substantive or moral conditions. Dyzenhaus argues that legitimacy is attained when legislatures determine appropriate legal resolutions to contemporary problems and officials implement those resolutions according to law and principles of legality. There is, says Dyzenhaus, a 'surplus value created by the conversion of public policy into law'. He goes on, however, to identify a series of hazards particularly germane to preventive endeavours that range from the creation of legal black holes, such as Guantanamo Bay; legal 'grey' holes that give the appearance

[2] MD Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005).
[3] D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001).

of legality but mask substantive black holes and are, therefore, even more dangerous; and, perhaps most dangerous, the 'veneer of legality' that conceals questionable executive decision-making. Avoiding these hazards requires a high degree of vigilance by the legislature, judiciary, and other public officials if the 'virtuous cycle of legality' is to be maintained even in the most security-sensitive cases.

The next three chapters focus upon particular exemplars of preventive endeavour. **Duff**'s chapter examines the pre-trial detention of those denied bail, a long-existing facet of the criminal justice system that has received little attention from normative theorists. Pre-trial detention is problematic, argues Duff, because it treats the defendant as guilty ahead of trial, fails to treat the individual as a responsible agent, and seems to be inconsistent with the presumption of innocence. Duff regards the neglect of this category as odd, observing 'why should the detention of those suspected of involvement in something as seriously threatening as terrorism provoke so much louder protest than the far more frequent detention of those charged with, but not convicted of, far less serious crimes?' His chapter examines the 'instrumental, consequentialist rationale' for pre-trial detention; it explores whether it is possible to provide principled justifications; and, in particular, whether it is possible to reconcile pre-trial detention with the presumption of innocence. While acknowledging that becoming a defendant in the criminal process attracts 'certain new duties or responsibilities' that, in turn, justify different kinds of restriction of which detention is only the most onerous, Duff concludes that pre-trial detention is morally problematic in ways we rarely acknowledge.

In **Tadros**' chapter the related issues of preventive detention and the justification of intervention on grounds of risk coalesce around the problem of Control Orders, now Terrorism Prevention and Investigation Measures (TPIMs), used to detain those suspected terrorists deemed to pose a risk to national security. Tadros contends that there has been insufficient 'systematic evaluation of the moral significance of risk' and that the consequentialist approach to risk, which underpins these measures, has not been countered by a sufficient non-consequentialist account. Tadros demonstrates persuasively that risk underpins the Control Order/TPIM regime, yet the level of risk required is poorly specified and the requirement that the order be 'necessary' is ambiguous. He goes on to explore questions relating to the 'moral significance of risk prevention', positing that a distinction between 'open' and 'closed' risks may be able to explain why we should be more troubled by harmful preventive measures which eliminate a very small risk of a great harm than those that prevent a certain small harm. Like many other contributors to this volume, Tadros concludes that the philosophical groundwork for evaluating preventive measures is underdeveloped.

Nickel's chapter offers a critical examination of the features of restraining orders and their growing use particularly in the USA and the UK. It explores the concept of restraint, its impact on the liberty of the individual, and the sorts of procedural protections that ought to apply. His analysis spans the most coercive exemplars, such as quarantine orders, through to less invasive examples such as domestic and workplace restraining orders. It considers their impact on liberty, deploying Pettit's

conception of freedom as nondomination[4] to tease out the variety and degree of coercion entailed. Nickel goes on to explore the compatibility of restraining orders with human rights protections and concludes that not only do rights violations occur only rarely but that, at best, such orders 'redistribute freedom from the restrainee to the protectee(s) in ways that can increase freedom overall'.

The chapters by Husak and Steiker each address in different ways questions of how preventive measures should be conceived, justified, and restrained. Against those who have robustly objected to the 'cloaking' of preventive detention as punishment,[5] **Husak** has challenged the idea that preventive detention is conceptually distinct. Rather, he has argued that detention for preventive ends should be understood as punishment and the conduct or traits of persons that lead to detention should be constructed as crimes. By bringing preventive detention within criminal law and criminal justice, Husak claims, it can be justified as retributive punishment and be subject to the principled constraints that apply to such punishment.[6] In his chapter, Husak is primarily concerned to explore the conceptual and normative obstacles to doing this. By exploring and seeking to overcome these obstacles, Husak seeks to show that preventive detention can be both conceived of and justified as punishment. The most difficult element is that preventive logic requires the punishment to be tailored to danger, not desert. However, given the seriousness of crimes in view, Husak argues that in practice the proportional sentence and that required for preventive purposes are unlikely to differ.

Steiker's focus is on the concept of proportionality, developed in respect of punishment. She explores the possibility that proportionality might be adapted for use in respect of prevention by focusing on the seriousness of the harm to be averted and the probability of its occurrence in the absence of prevention. Steiker contends that proportionality is not a justificatory theory of prevention any more than it is a justificatory theory of punishment but that it may have a role to play as a constraint. Thus conceived, proportionality might go some way to resolving questions of duration, conditions of confinement, discriminatory operation, and perhaps questions of procedural form. Steiker also recognizes that there are limits to its reach and its ability to provide clear guidance as to what may justly be done in the name of prevention. She recognizes also that there are obvious pitfalls—not least, how to measure the probability of future harm and, in particular, how to calibrate proportionality in the case of low probability but high harm risks; resort to the precautionary principle and its problems; the hazards of pretextual uses of preventive measures (for example the use of immigration detention and 'material witness' statutes in the USA immediately after 9/11); and the possibility of perverse interactions with the criminal law. Steiker reveals herself to be sceptical about the

[4] P Pettit, *Republicanism: A Theory of Freedom and Government* (1997).

[5] PH Robinson, 'Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice' (2001) 114 Harvard Law Review 1429–55.

[6] D Husak, 'Lifting the Cloak: Preventive Detention as Punishment' (2011) 48 San Diego Law Review 1173.

uses of proportionality in respect of punishment and she concludes that proportionality is unlikely to function as a robust constraint in respect of preventive measures.

The remaining chapters address very different aspects of the politics of preventive endeavour. Critiques of the expansion of the scope of the criminal law beyond the core of harmful behaviour, or behaviour closely related to harm, typically seek to show them to be inconsistent with liberalism. Instead, **Ramsay** seeks to develop an alternative political theory of preventive criminal law by exploring the extent to which pre-inchoate criminal laws can be rendered consistent with representative democracy. His chapter examines the grounds for and legal features of pre-inchoate offences and it examines the application of liberal principles, and in particular the harm principle, as a legitimating ground for pre-inchoate laws. Ramsay suggests that the articulation of a 'richer account of democracy', which includes 'a concept of political self-government' and respect for 'the institutions of formal trust among citizens', might more effectively inform and limit the scope of the criminal law.

Matravers' chapter provides a normative account of preventive justice that seeks to overcome the assumed antinomy between prevention and justice. It does so not by adopting a consequentialist account of prevention but by addressing the questions what is due to people and on what conditions can prevention be justified? Following Scanlon, he articulates an account in which, rather than thinking of prevention as a goal that must be constrained by concern for individual liberty or justice, it should rather be regarded as both motivated by *and* properly pursued through policies that respect the status of persons. Such an account places heavy normative weight on seeing individuals as agents who make choices in accordance with reasons. However, Matravers also contends that we are in the midst of a 'crisis in our understanding of agency' in which we are more and more aware of 'the degree to which our fates are not fully our own or determined by our choices'. Viewed from this perspective, Matravers argues, preventive policies may be seen in a different light: instead of regarding preventive justice as a means of protecting the public from those who threaten, it might better be thought of as protecting us all from ourselves in circumstances that risk harm.

Harcourt's chapter identifies the origins of contemporary preventive endeavour in the work of the RAND Corporation in America, which developed highly technical studies of crime prevention based upon systems analysis. Harcourt suggests that RAND promoted a decidedly punitive style of prevention based upon policing and punishment that is replicated in modern 'punitive preventive measures'. Harcourt subjects these measures to searching criticism, focusing on the perils they pose and the weakness of their empirical foundations. Most worryingly, for Harcourt, these measures typically claim an apolitical, neutral emphasis on efficiency that fails to engage with the political values underlying them. In so doing, it tends to displace much needed political debate about their justifiability.

O'Malley's chapter builds upon his extensive writings on risk and its management to examine the domain of traffic regulation, one in which, O'Malley observes, 'preventive justice has made rapid and far-reaching advances'. His chapter addresses the ways in which emerging technologies of prevention, risk assessment, and risk-based laws relating to traffic offences form the basis for what he calls 'mass

preventive justice'. The scale and volume of mass regulation requires a shift away from individual defendants to 'coded identifiers' and 'risk pools' and away from individualized punishment to fixed monetized sanctions. O'Malley's contention is that 'the rise of mass preventive justice is part of the monetization of justice more generally': money sanctions make possible what O'Malley terms 'massification' and the revenues derived are drivers of expansion. O'Malley explores forms of resistance to mass preventive justice, including challenges to its claim to prevent harm and concerns about the invasion of privacy entailed by new technologies of surveillance. His chapter reveals the pervasive spread of preventive technologies; their 'embeddedness in everyday life'; and how little opposition they have provoked.

As can be seen from these summaries, the chapters discuss a wide range of preventive measures from a variety of theoretical perspectives. A volume of this kind cannot present an integrated theoretical framework, but what it can do is to raise and explore a number of central issues. Thus several themes emerge strongly from this collection, themes that must be taken seriously by those wishing to advance the study of preventive justice.

First, there is no doubt among the contributors that the state has a duty to protect people from harm, a duty that may provide the justification for a wide range of preventive measures (eg Matravers, Nickel, Günther). The precise contours of the duty to protect are contestable, both in terms of what risks should be protected against and in terms of what measures may properly be taken (Günther). In particular, this raises further questions of two kinds—whether there are intelligible distinctions between punishment and prevention, and what limits might properly be placed on the pursuit of prevention.

The definitional question of how preventive measures can be distinguished from punitive measures underlies several contributions. A preliminary task is that of identifying how much prevention there is within conventional criminal law and criminal justice and how far, therefore, preventive endeavours can be said to constitute a departure from the norm (Schauer, Dubber). Related to this is the question of how far prevention informs the substantive criminal law (Asp, Ramsay), and whether and to what extent 'preventionism' is altering the scope of the criminal law. The reverse question is how much punishment there is within measures formally labelled preventive (Harcourt). These enquiries are essential if the definitional question is to be placed in its full context. Indeed, they lead to a reconsideration of whether prevention and punishment are really distinguishable at all, particularly in respect of those measures at the most coercive end of the spectrum such as preventive detention of the 'dangerous' (Husak). In view of the contemporary prevalence of preventive rationales for compulsory measures (Asp, Schauer), are there convincing reasons for keeping the concepts separate?

The criminal law and punishment are certainly the paradigm forms of compulsory measure, and they typically carry with them a number of substantive limitations and procedural safeguards, some deriving from human rights instruments. Those particular limitations and safeguards tend not to apply to preventive measures outside the criminal law and yet such measures also impose significant detriments on those subject to them. This raises the question whether the legitimacy

of preventive endeavour is principally a question of procedure, a substantive issue, or a matter of democratic mandate (Dyzenhaus). One concept that does duty as a restraining principle in punishment theory is proportionality and Steiker's contribution assesses the extent to which it can be mobilized to perform the same function effectively for preventive measures. There may be other restraining principles, such as requiring a preventive measure to be properly tailored to its objective (Dyzenhaus) and to be the least restrictive of the appropriate alternatives. Nonetheless, the difficulty of identifying restraining principles may result from the different logic of prevention, which in its pure form insists that measures are selected for their preventive efficacy rather than by any other metric, thereby focusing the choice of measure purely on empirical questions rather than normative ones (Asp, Harcourt). Indeed, some contributors identify the difficulties of constructing realistic limits (Duff, Tadros), although others suggest that within existing human rights parameters certain forms of preventive measure may be supported in a largely unmodified form (Nickel). These are important lines of enquiry: the predominant critique has consisted of liberal reservations about coercive preventive measures in and outside the criminal law, whereas there may be situations in which reasonable preventive endeavours are bound to reduce liberty if they are to exist at all.

To the extent that preventive measures can be justified, they will often depend on a form of risk assessment and often on an estimation of probability (Schauer). Dealing with probabilities is not alien to the criminal law—after all, a verdict of guilty requires not certainty but proof 'beyond reasonable doubt'—but the important questions concern the degree of probability required for the imposition of a particular preventive measure, the robustness of the supporting evidence, and whether or not it is consistent with the standards of the criminal process (Duff). The general evidence in favour of the reductive effect of some 'preventive' strategies in the road traffic sphere is doubtful (O'Malley), and the fragility of the evidential basis for strategies such as 'broken windows' theory, profiling, and selective and mass incarceration can be demonstrated (Harcourt). If the evidential foundations are unconvincing, the case for preventive measures is weakened.

This gives good grounds for reconsidering the preventive uses of the criminal law itself. It is accepted that many offences now impose criminal liability at an earlier stage than the law of attempts, for conduct that is remote from the harm-to-be-prevented. One argument is that this can be justified in view of the known frailty of human nature and imperfect resistance to temptation: by imposing liability well before harm is done (as in offences of possession, or the offence of 'engaging in any conduct in preparation for' giving effect to an intention to commit an act of terrorism), the law not only protects the general public but also protects defendants from the 'catastrophic consequences of their own behaviour' (Matravers). This is an argument that goes against the prevailing liberal theory and conception of the person as an autonomous agent, which objects to the criminal law holding someone liable for something that he or she has not done yet (Asp). But then it should not be assumed that we are confined to or by the liberal critique. Ramsay urges us to look beyond liberalism to other political theories, notably to the concept of representative democracy, arguing that the concept of the citizen found therein

clashes with the way that some preventive measures require the state to see us, and us to see each other, and therefore offers a platform for resisting certain aspects of preventionism. Matravers, meanwhile, welcomes a questioning of the liberal view of the person as a fully responsible autonomous chooser. Thus, as many of the contributions suggest, the challenges posed by preventive justice are not to be found on the fringes of legal or political theory but rather go to the very core of the role of the state and the proper conception of the citizen.