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Limits on the Perfect Preventive State

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Limits on the Perfect Preventive State

MICHAEL L. RICH

Traditional methods of crime prevention—the punishment of the culpable and the preventive restraint of the dangerous—are slowly being supplemented and supplanted by technologies that seek to perfectly prevent crime. For instance, the federal government is developing in-car technology that would prevent vehicle operation when a driver has a blood alcohol level in excess of the legal limit. Less directly, the anti-circumvention provisions of the Digital Millennium Copyright Act of 1998 try to prevent copyright infringement by eliminating technologies that enable such infringement. Such structural regulation of private conduct is not new, but few scholars have focused on its use to prevent crime, and fewer still have examined how structural methods to fight crime fit within legal theory. This Article begins that discussion with three aims. First, I argue that perfect prevention—the use of technology by the State to make criminal conduct practically impossible—is a novel approach to crime prevention that requires separate scrutiny from punishment and prevention. Second, I identify concerns with the use of perfect prevention and propose limitations on the perfect preventive state that are responsive to those concerns. Specifically, I address the impact of perfect prevention on individual autonomy, concerns raised by the blanket application of perfect prevention on all people, and the question of whether and when perfect prevention should be the preferred approach for preventing certain criminal conduct. Third, I highlight areas for future discussion of perfect prevention by scholars.

ARTICLE CONTENTS

I. INTRODUCTION	885
II. CONCEPTUALIZING THE PERFECT PREVENTIVE STATE.....	893
A. DEFINING PERFECT PREVENTION	893
B. ONE DISCLAIMER AND TWO ADDITIONAL OBSERVATIONS	897
III. THE PERFECT PREVENTIVE STATE IS DIFFERENT	899
A. PERFECT PREVENTION IS NOT PUNISHMENT	900
B. PERFECT PREVENTION IS NOT PREVENTION	901
C. PREDECESSORS OF PERFECT PREVENTION	904
IV. LIMITS ON THE PERFECT PREVENTIVE STATE	907
A. THE AUTONOMY CONCERN.....	907
B. THE PROBLEM OF EQUALITY	924
C. THE ORDERING OF CRIME PREVENTING MEASURES.....	930
V. CONCLUSION AND AREAS FOR FUTURE INQUIRY	933



Limits on the Perfect Preventive State

MICHAEL L. RICH*

“If one could wave a wand and make it impossible for people to kill each other, there might seem little reason to hesitate.”¹

“But we should not pretend that [overcriminalization] is the worst affliction that can ever befall a state; we could come to utilize modes of social control that would make the criminal law seem benign by comparison.”²

I. INTRODUCTION

A “gap”³ exists between punishment and prevention, the twin traditional approaches to addressing crime.⁴ Within that gap, crime appears inevitable. The punitive state enforces criminal laws by levying punishment for their violation.⁵ The reach of punishment is limited by the requirements that the State punish only after a crime has been committed⁶ and only in proportion to the seriousness of the offense.⁷ The preventive

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¹ JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET: AND HOW TO STOP IT* 110 (2008).

² Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 215 (2004).

³ See Kimberly Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, 96 MINN. L. REV. 141, 142 (2011) (“This choice between crime and commitment leaves a gap.”); see also Stephen J. Morse, *Preventive Confinement of Dangerous Offenders*, 32 J.L. MED. & ETHICS 56, 58 (2004) (illustrating the gap using an example).

⁴ See LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 4–5 (2009) (discussing the possible disconnect when using punishment as prevention); Morse, *supra* note 3, at 56–58 (explaining how the gap allows some dangerous offenders to remain free); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429–31 (2001) (suggesting a shift from punishment to prevention and its impact on dangerous offenders); Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 774, 776 (1998) (contrasting prevention and punishment and the problems related to that distinction).

⁵ See Steiker, *supra* note 4, at 771–73 (highlighting constitutional implementations of punishment and explorations of its limitations).

⁶ Morse, *supra* note 3, at 58.

⁷ See *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (“[T]he Eighth Amendment’s protection against cruel and unusual punishment flows from the basic precept of justice that punishment for [a]

state, meanwhile, “attempt[s] to identify and neutralize dangerous individuals before they commit crimes by restricting their liberty in a variety of ways.”⁸ Only those dangerous individuals who are not responsible for their actions, like the mentally ill, or who otherwise cannot be deterred by the threat of punishment may be subject to preemptive liberty restrictions.⁹ Because of these limitations on punishment and prevention, responsible people who are committed to their criminal goals remain “free to pursue their projects until they actually offend, even if their future wrongdoing is quite certain.”¹⁰

Understandably, this is an unsatisfactory state of affairs for those whose job it is to protect the public, and they have responded by expanding the scope of both the punitive and preventive states in the hope that the two might eventually overlap. So lawmakers criminalize conduct thought to be predictive of later criminal behavior, like gang membership, loitering, or “material support” of possible terrorist organizations, in order to permit punishment of the dangerous before they can cause actual harm.¹¹ They also make it easier to civilly commit people considered particularly

crime should be graduated and proportioned to the offense.” (alterations in original) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

⁸ Steiker, *supra* note 4, at 774.

⁹ See David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 697 (2009) (identifying that “civil commitment of mentally disabled persons who pose a danger to the community but lack the requisite intent to conform their conduct to the law is justified”); Morse, *supra* note 3, at 58 (stating that “pre-emptive precautions” are taken, “including broad preventive detention, with non-responsible agents based on an estimate of risk they present” and “the medical/psychological systems of behavior control” justify “extraordinary liberty infringements”); Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 70 (1996) (stating that “states have statutes permitting the indefinite civil commitment of persons who are mentally ill and dangerous”).

¹⁰ Morse, *supra* note 3, at 58; see also Ferzan, *supra* note 3, at 142 (indicating that there is “no justification for substantial intervention against responsible agents prior to when they have committed a criminal offense”). Of course, some crime also occurs because the punitive and preventive states are not perfect. Criminals evade punishment for crimes they commit for a variety of reasons, including mistakes made by police or prosecutors, wrong decisions reached by juries, and evidentiary issues that make conviction impossible. These criminals remain free and can commit more crime. Such imperfections also diminish the deterrence value of punishment, as potential criminals hold out hope that they might be able to “get away with it.” The preventive state also inevitably fails as dangerousness is difficult to predict. See Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 145 (2005) (noting that even with improvements in risk assessment, recidivism predictions still cannot “prove future crimes . . . by clear and convincing evidence”).

¹¹ See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 2, 11 (2005) (defining “material support” to include lethal items, “provision[s] of safe houses, transportation, communication, funds, false identification, and training,” and indicating that “the material support charge functions as a basis for preventive charging against a potential sleeper”); Robinson, *supra* note 4, at 1430 (“Gang membership and recruitment are now punished.”); Steiker, *supra* note 4, at 774–75 (indicating that some localities provide “police broader preventive authority by enacting new substantive offenses such as ‘drug loitering’ or ‘gang loitering’”).

dangerous, such as sex offenders or suspected terrorists.¹² Meanwhile, prosecutors push to expand the reach of existing inchoate crimes to allow police to intervene earlier in potentially dangerous activities.¹³ Scholars too are concerned with the gap between punishment and prevention and have proposed to bridge it in a variety of ways, while still utilizing the tools of prevention and punishment.¹⁴

Yet some technological tools are already available that can supplement, and even supplant, punishment and prevention by rendering criminal conduct practically impossible, and more are on the horizon.¹⁵ These tools, of what I call herein the “perfect preventive state,”¹⁶ enable the State to target social problems caused by crime that punishment and prevention have proven unable to reach. They do not depend on the “detratability” of potential criminals; rather, they seek to frustrate any

¹² See ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE* 3 (2006) (noting that “[predator] laws impose a restraint on sex offenders before a new crime is committed” by using civil commitment); Morse, *supra* note 3, at 61, 65 (stating that “the Supreme Court [recently] upheld the constitutionality of a new form of indefinite involuntary civil commitment that applies to . . . mentally abnormal sexually violent predators” and that mental health professionals may easily “[adjust] their expert testimony to support the conclusion that virtually any sexually violent predator meets the lack of control standard”); Alec D. Walen, *Crossing a Moral Line: Long-Term Preventive Detention in the War on Terror*, 28 PHIL. & PUB. POL’Y Q. 15, 15–18 (2008) (indicating that “sexual predators [may] be detained even after they have served their sentences if the case is made that they lack the normal ability to control their impulses” and that suspected terrorists may be held in a “long-term preventative detention” even though the detainee has not been convicted of a crime).

¹³ See Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 456–59 (2007) (discussing the use of conspiracy charges in preventive prosecution of suspected terrorists).

¹⁴ See, e.g., Ferzan, *supra* note 3, at 167–69 (arguing that responsible individuals may be subject to preventive liberty deprivations if they have the intent to cause or risk causing harm and engage in some act in furtherance of that intent); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 42 (arguing that preventive detention should be permitted if an individual “wants to commit serious crime so badly that he is willing to be deprived of liberty or suffer similarly serious consequences for it”).

¹⁵ Cf. ALEXANDER & FERZAN, *supra* note 4, at 4 (recognizing that potential victims often seek to prevent crime by making it impossible); Stephen J. Morse, *Protecting Liberty and Autonomy: Desert/Disease Jurisprudence*, 48 SAN DIEGO L. REV. 1077, 1125 (2011) (“The best hope for the future is that we discover preventive, nonintrusive techniques that will lower the risk of violent offenses for everyone . . .”).

¹⁶ My use of the terms “perfect prevention” and “perfect preventive state” is inspired by Jonathan Zittrain’s discussion of using tethered appliances to accomplish “perfect enforcement” of the law, see ZITTRAIN, *supra* note 1, at 107–10, and Carol Steiker’s demarcation of the punitive and preventive states, see Steiker, *supra* note 4, at 773–74. Like Zittrain, I use the adjective “perfect” to describe the goal of the technology in question rather than its ultimate *effectiveness* in accomplishing that goal. See *infra* notes 80–85 and accompanying text. Perfect prevention is a form of what Zittrain calls “preemption,” which involves “designing against undesirable conduct before it happens.” ZITTRAIN, *supra* note 1, at 108. And like Steiker, my use of the word “state” refers not to one of the fifty states in our federal system, but more generally to any sovereign governmental power. Steiker, *supra* note 4, at 773 n.19.

attempt to engage in the prohibited conduct.¹⁷ They do not require the State to make the empirically challenging determination of who is dangerous and irresponsible and therefore subject to special liberty deprivation;¹⁸ instead, they target criminal conduct and aim to prevent *anyone* from engaging in it.

Take the “epidemic” of gun violence, for example.¹⁹ More than 10,000 people are victims of homicides committed with a firearm each year, and despite the efforts of law enforcement and legislatures, the rate of gun fatalities has remained essentially constant over the last decade.²⁰ Moreover, over four times that number suffer non-fatal injuries each year as a result of intentional assaults with a firearm.²¹

This violence persists despite traditional efforts at deterrence through punishment.²² Criminals who use or possess firearms face substantial sentencing enhancements.²³ Those who traffic in drugs or commit crimes of violence and use, brandish, or discharge a firearm face onerous mandatory minimum sentences.²⁴ Even mere possession of a firearm by a felon is a felony.²⁵ Yet enhanced punishments are at best of marginal

¹⁷ See ALEXANDER & FERZAN, *supra* note 4, at 4 (discussing strategies designed to increase the difficulty of causing harm as a way to prevent harm).

¹⁸ See Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1337–38 (2012) (discussing the unreliability of the predictions of future dangerousness and violence).

¹⁹ *Printz v. United States*, 521 U.S. 898, 940 (1997) (Stevens, J., dissenting). I use “gun violence” here to mean the intentional use of a firearm to harm another person. Thus, the phrase excludes suicide and accidental shootings, which caused nearly two-thirds of firearm fatalities in 2010. *WISQARS Fatal Injury Reports, National and Regional, 1999–2010*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_us.html (last updated Feb. 19, 2013) (select All Intents; then select Firearm; then select 2010 to 2010; then submit request; then repeat previous steps after first selecting Homicide and Legal Intervention; compare results). For the reasons explained below, however, this Article focuses only on criminal conduct. See *infra* notes 75–77 and accompanying text.

²⁰ *WISQARS Fatal Injury Reports, National and Regional, 1999–2010*, *supra* note 19 (select Homicide and Legal Intervention; then select Firearm; then select 1999 to 1999; then submit request; then repeat for every year from 1999 to 2010).

²¹ *WISQARS Nonfatal Injury Reports, 2001–2012*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html> (last updated Mar. 28, 2013) (select Violence-Related; then select Firearm; then select 2001 to 2001; then submit request; then repeat for every year from 2001 to 2011).

²² See Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1641 (2002) (stating that Congress has repeatedly raised the penalties for illegal gun possession).

²³ See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2) (2013) (increasing the base offense level for robbery where a firearm was used); see also DAVID M. KENNEDY, *DETERRENCE AND CRIME PREVENTION: RECONSIDERING THE PROSPECT OF SANCTION* 10, 13 (2009) (discussing state laws enhancing punishment for felony offenses committed while using or brandishing a firearm).

²⁴ 18 U.S.C. § 924(c)(1)(A) (2012); see also Beale, *supra* note 22, at 1670 (calling § 924(c) “a kind of super-enhancement statute”).

²⁵ 18 U.S.C. § 922(g).

benefit in deterring gun use,²⁶ a fact confirmed by the sizable number of criminals who continue to possess or use guns in the course of their criminal activity.²⁷

Similarly, preventive efforts that preemptively restrict the liberty of dangerous, irresponsible individuals have not reduced gun violence to an acceptable level. All jurisdictions provide mechanisms by which the State can preventively detain mentally ill people who present a danger to themselves or others before they can cause harm.²⁸ Federal law prohibits people who have been “‘adjudicated as mentally defective’ or previously ‘committed to a mental institution’” from purchasing a firearm.²⁹ Such individuals continue to commit gun violence, however.³⁰ And though the ineffectiveness of efforts to keep guns out of the hands of the dangerous mentally ill may be due in part to inadequacies in their implementation,³¹ such measures would do little to stem the violence because the mentally ill are responsible for only a small percentage of the violent crime in the United States.³²

Perfect prevention may succeed, however, where the punitive and preventive states have failed by aiming to prevent the criminal conduct underlying the violence.³³ For instance, many perpetrators of gun violence use guns that they do not legally possess.³⁴ Some are stolen,³⁵ while others are obtained through “straw man” purchases where a person legally

²⁶ See Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41, 43–45 (2000) (providing examples of how mandatory firearm sentence enhancements have little or no impact on decreasing gun violence); Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL L. STUD. 223, 227–28, 260 (2007) (analyzing the efficacy of gun violence deterrence programs).

²⁷ See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, FIREARM USE BY OFFENDERS 1 (2002) [hereinafter FIREARM USE BY OFFENDERS] (reporting that approximately one-third of violent offenders carried or used a firearm).

²⁸ Dora W. Klein, *When Coercion Lacks Care: Competency to Make Medical Treatment Decisions and Parens Patriae Civil Commitments*, 45 U. MICH. J.L. REFORM 561, 561 (2012).

²⁹ James B. Jacobs & Jennifer Jones, *Keeping Firearms Out of the Hands of the Dangerously Mentally Ill*, 47 CRIM. L. BULL. 388, 390 (2011) (quoting 18 U.S.C. § 922(g)(4) (2006 & Supp. II)).

³⁰ See *id.* at 400–01, 405–07 (describing the mental health history of perpetrators of large-scale killings with firearms).

³¹ See *id.* at 395–98 (arguing that the national database of those who are disqualified from buying firearms due to mental illness is inadequate).

³² Richard A. Friedman, *In Gun Debate, a Misguided Focus on Mental Illness*, N.Y. TIMES, Dec. 17, 2012, at D5.

³³ Of course, one can also imagine fantastic technologies that would make gun violence impossible, like smart bullets that break apart harmlessly before hitting a person. I will attempt, however, to limit my discussion herein to technologies that are at least plausible.

³⁴ See NAT'L RES. COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 76 (Charles F. Wellford et al. eds., 2005) (suggesting that research demonstrates that offenders “buy, borrow, sell, and otherwise exchange guns quite frequently”).

³⁵ *Id.* at 78.

permitted to buy a firearm does so and passes it on to a person, such as a felon, not lawfully entitled to own the weapon.³⁶ The implementation of so-called “smart gun” technologies, which make a gun capable of being fired only by its lawful owner, could make it so that many violent criminals would be unable to obtain a usable firearm.³⁷ Similarly, technology exists that could disable guns in public places where gun possession is illegal, like schools, universities, and commercial establishments.³⁸ If properly implemented, this technology could prevent gun violence in those locations, again by targeting underlying criminal conduct.

This is not to say that this technology could solve the gun violence problem on its own. Only gun violence committed in certain places or with illegally-obtained weapons would be curtailed. Additional legislative steps, including closing loopholes in the licensing and sale process, would still be needed.³⁹ Older weapons lacking these technologies would need to be removed from circulation or updated.⁴⁰ And opponents of gun control would certainly oppose the implementation of these new technologies.⁴¹ But the point remains that perfect prevention—technology aimed at making criminal conduct practically impossible—could reduce instances of gun violence that have resisted traditional prevention strategies.⁴²

Some perfect prevention regimes are already in place. For example, the anti-circumvention provisions of the Digital Millennium Copyright Act

³⁶ *Id.*

³⁷ See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 595–96 (2009) (describing the shift in political arguments around gun control); Nick Bilton, *Smart Guns Can't Kill in the Wrong Hands*, N.Y. TIMES, Jan. 7, 2013, at B6 (discussing biometric and grip detection technologies). Though such placement is not typically an indication of feasibility, a version of this technology was featured in the most recent James Bond film, *Skyfall*. Joe Pappalardo, *Fact vs. Fiction: The Truth About Skyfall's Weapons*, POPULAR MECHANICS (Nov. 7, 2012), <http://www.popularmechanics.com/technology/digital/fact-vs-fiction/fact-vs-fiction-the-truth-about-skyfalls-weapons-14544466>.

³⁸ See Bilton, *supra* note 37 (discussing technologies that limit gun violence).

³⁹ See David Kairys, *Self-Defense and Gun Regulation for All*, 45 CONN. L. REV. 1669, 1676–77 (2013) (outlining the “gun-show loophole” that allows buyers who are not licensed dealers to legally resell a firearm without doing a background check).

⁴⁰ See Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837, 884–85 (2008) (raising the issue of retrofitting older guns with new gun safety technology).

⁴¹ See Bilton, *supra* note 37 (describing gun manufacturer opposition to safety technologies); Steve Friess, *NRA: Smart Guns Are Plain Stupid*, WIRED (Apr. 30, 2002), <http://www.wired.com/politics/law/news/2002/04/52178> (same).

⁴² Efforts to reduce gun violence also face unique constitutional and political hurdles. The Supreme Court invalidated a ban on handgun possession in the home, thereby recognizing an expanded individual Second Amendment right to possess a firearm. *District of Columbia v. Heller*, 554 U.S. 570, 594, 628–29, 635 (2008); see also *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (holding that the Second Amendment right to keep and bear arms is incorporated against the states by the Fourteenth Amendment). More recently, the Seventh Circuit held that the Second Amendment prevented Illinois from banning the carrying of guns in public. *Moore v. Madigan*, 702 F.3d 933, 940–42 (7th Cir. 2012).

(DMCA) of 1998 make it illegal to develop technology that could be used to circumvent technological protections on copyrighted material.⁴³ By causing such technologies to be unavailable, the DMCA aims to make many kinds of copyright infringement practically impossible for the average person.⁴⁴ Other perfect prevention technologies are under development.⁴⁵ The Driver Alcohol Detection System for Safety, for instance, is a joint project between the federal government and private industry that would place technology in new vehicles to prevent their operation when the driver is intoxicated.⁴⁶

Though its feasibility has increased as technology has advanced and become more central to criminal conduct, the idea of the State preventing criminal conduct by making it essentially impossible is not a novel concept. For more than three decades, the Situational Crime Prevention (SCP) movement has advocated for crime prevention measures that make crime more costly to commit.⁴⁷ More recently, Neal Kumar Katyal has discussed the use of architecture to prevent crime in spaces both real⁴⁸ and digital,⁴⁹ and Edward Cheng has argued that in some circumstances structure may be a better crime prevention tool than legislative fiat.⁵⁰

Technologists have joined the party, too.⁵¹ Joel Reidenberg recognized that the Internet created an opportunity for ex ante enforcement of legal rules.⁵² Lawrence Lessig's famous claim that "[c]ode is law"

⁴³ 17 U.S.C. §1201(a)(2)(A) (2012).

⁴⁴ See Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L.J. 1, 9–11 (2006) (analyzing cases involving technological infringement and the impact of those decisions on copyright law).

⁴⁵ See, e.g., *Rutgers Engineers Design Cell Phone App to Reduce Distracted Driving*, RUTGERS TODAY (July 29, 2012), <http://news.rutgers.edu/medrel/research/rh-2012/rutgers-engineers-de-20120726> (discussing smartphone apps that help to reduce driver distraction).

⁴⁶ See Michael L. Rich, *Should We Make Crime Impossible?*, 36 HARV. J.L. & PUB. POL'Y 795, 828–29 (2013) (discussing in detail the Driver Alcohol Detection System for Safety).

⁴⁷ See Ronald V. Clarke, *Situational Crime Prevention*, 19 CRIME & JUST. 91, 110–11 (1995) (discussing “target hardening” and “access control” measures to prevent crime).

⁴⁸ Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1138–39 (2002).

⁴⁹ Neal Kumar Katyal, *Digital Architecture as Crime Control*, 112 YALE L.J. 2261, 2263–64 (2003).

⁵⁰ Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 664–65 (2006).

⁵¹ In addition to those discussed in the text, a number of other legal scholars have recognized the unique opportunities that technology presents to regulate private conduct. See, e.g., JULIE COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 218 (2012) (“The geographies and architectures of networked space establish the material field for processes of self-constitution.”); R. Polk Wagner, *On Software Regulation*, 78 S. CAL. L. REV. 457, 493, 513 (2005) (“[T]he law-software equilibrium for a particular regulatory condition is generally determined by private decisionmaking related to the costs and benefits of each regulatory effect (law and software).”).

⁵² Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 581 (1998); see also Joel R. Reidenberg, *Technology and Internet*

acknowledged that the structure of the Internet can be used by powerful interests to prevent unsavory conduct.⁵³ Jonathan Zittrain warned that the proliferation of “tethered appliances”—essentially computers connected to networks that control and limit their operation—opens the door to the “perfect enforcement” of legal rules.⁵⁴

These scholars have recognized the (relatively untapped) potential of technology to impose powerful, and sometimes unseen, restrictions on conduct.⁵⁵ They have also delineated some potential practical and legal concerns with the implementation of such restrictions.⁵⁶ But scholars thus far have failed to situate the emergence of perfect preventive technologies within relevant legal theories.⁵⁷ Doing so is crucial. The political pressure to prevent crime is enormous,⁵⁸ and similar pressure can be expected in support of using technology to prevent criminal conduct.⁵⁹ In the context of punishment and preventive detention, courts and scholars have discussed exhaustively, if not conclusively, the balancing of these concerns and the proper limitations on government authority that result.⁶⁰ Examining the emerging perfect preventive state in the light of this experience is necessary to identify limits on the use of perfect prevention

Jurisdiction, 153 U. PA. L. REV. 1951, 1966 (2005) [hereinafter Reidenberg, *Technology and Internet Jurisdiction*] (further exploring the potential and limits of technological enforcement).

⁵³ LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 6 (1999) (emphasis omitted); *see id.* at 6–7 (demonstrating the significance of substantive value choices in constituting cyberspace).

⁵⁴ ZITTRAIN, *supra* note 1, at 104–10.

⁵⁵ *See* COHEN, *supra* note 51, at 156 (“Architectures of control are emerging gradually, in a piecemeal, uncoordinated fashion, at points where the interests of powerful institutional actors align.”).

⁵⁶ These concerns can be substantial and involve, inter alia, the monetary cost of such technology, fairness issues arising from the distribution of these costs, and procedural due process concerns. *See* Rich, *supra* note 46, at 843 (engaging in an economic analysis of perfect preventive technology); *see also* Reidenberg, *Technology and Internet Jurisdiction*, *supra* note 52, at 1965 (noting that technological rule enforcement must comply with constitutional due process requirements).

⁵⁷ *See infra* Part III.C.

⁵⁸ *See* David Michael Jaros, *Perfecting Criminal Markets*, 112 COLUM. L. REV. 1947, 1985–86 (2012) (explaining that some scholars blame the “unremitting expansion” of criminal law on a “legislative process that exaggerates the temporary passions of the electorate”); Robinson, *supra* note 4, at 1433–34 (discussing current crime rates such as violent crime, aggravated assault, and juvenile crime to show that “political forces inevitably will press for protective measures if a perception of public vulnerability exists,” and noting that “it is understandable that today’s citizens are demanding greater protection and that legislators are seeking new ways to provide it”).

⁵⁹ *See* Jack M. Balkin, *Room for Maneuver: Julie Cohen’s Theory of Freedom in the Information State*, 6 JERUSALEM REV. L. STUD. 79, 94–95 (2012) (arguing that governments and businesses seek to use technology to preserve their own interests, like intellectual property rights and data collection, but these same governments and businesses want to keep “digital enforcement” moving toward “the construction of a great two way mirror in which ordinary people’s lives are increasingly transparent to powerful public and private entities that are not transparent to the people they view”).

⁶⁰ *See* Steiker, *supra* note 4, at 773–74, 776–77 (noting some of the limits placed on the punitive state, such as procedural protections in criminal proceedings, burden of proof requirements, and the Fourth Amendment in contrast to the yet-to-be-defined and not-fully-examined limits on the preventive state).

before it becomes institutionalized.

This Article has three specific aims. First, it argues that perfect prevention is a novel approach to crime prevention, different from punishment and prevention in important ways that impact the proper limits on its use. Second, it identifies potential concerns with the use of perfect prevention and proposes limitations on the perfect preventive state that respond to those concerns. Third, it identifies areas for future consideration of the perfect preventive state by scholars.

Part II defines the perfect preventive state and makes some important observations about the implementation of perfect preventive technology. Part III briefly discusses the punitive and preventive states and their limitations, and explains why those limitations are inapplicable to the perfect preventive state. This Part further compares the perfect preventive state to precursors, such as SCP, and explains how advocates of these precursors have failed to provide the theoretical foundation necessary to develop limits on perfect prevention. Part IV identifies and assesses possible objections to perfect prevention and explores potential substantive limits to address those concerns. Specifically, Part IV addresses the impact of perfect prevention on individual autonomy, concerns raised by the equal application of perfect prevention, and the question of whether and when perfect prevention should be the preferred approach to preventing certain criminal conduct. Part V concludes by identifying issues relating to perfect prevention that remain for further exploration.

II. CONCEPTUALIZING THE PERFECT PREVENTIVE STATE

This Part deals with two preliminary issues. First, it defines perfect prevention. Second, it makes further relevant observations about how perfect prevention works.

A. *Defining Perfect Prevention*

Perfect prevention seeks to prevent all instances of certain targeted criminal conduct by rendering that conduct practically impossible. This definition incorporates four requirements for a crime prevention tool to be part of the perfect preventive state. The first is that it requires *government* action; conversely, it does not include private self-help. A government directive that all homeowners put bars on ground-floor windows to prevent break-ins would be part of the perfect preventive state. A private homeowner choosing to put bars on the ground-floor windows of her home to prevent burglaries would not. Perfect prevention is limited to only government directives because the State's involvement implicates

individual liberty interests where private action does not.⁶¹

Note that actions by the State that fall short of directly mandating the implementation of preventive technology are still tools of perfect prevention. For instance, unauthorized duplication of copyrighted materials is a crime,⁶² but the federal government does not require copyright owners to implement any specific technology to prevent such copying.⁶³ Rather, the DMCA criminalizes the creation of means to circumvent whatever technological protection measures that copyright owners choose to implement.⁶⁴ In doing so, the DMCA aims to make the tools of circumvention unavailable to the general public.⁶⁵ Without those tools, the criminal conduct of unauthorized duplication becomes practically impossible for the average person. Thus, the DMCA's anti-circumvention provisions are part of the perfect preventive state even though they do not mandate the use of preventive technology.⁶⁶

The second notable characteristic of the perfect preventive state is that it targets criminal *conduct* instead of specific potential criminals. Laws that require that all convicted drunk drivers install ignition interlocks that prevent operation of their automobiles absent a clean breath sample are not part of the perfect preventive state, because they target only the subset of

⁶¹ Freedom and liberty, after all, are defined in relation to government, rather than private, restraint. See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”); Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY* 166, 169–71, 178 (Henry Hardy ed., 2002) (defining negative and positive liberty in terms of the relationship between the individual and the government and the amount of interference from the government or outside forces). Thus, while a private homeowner’s decision to place a high fence around her property to keep out burglars would not intrude on anyone’s liberty interest, a government mandate that all private property be surrounded by such a fence certainly would. See Larry Alexander & Kimberly Kessler Ferzan, *Danger: The Ethics of Preemptive Action*, 9 OHIO ST. J. CRIM. L. 637, 641 (2012) (discussing the practice of protection as a “technique for dealing with dangerous persons,” explaining that fences are a form of protection because they are designed to make criminal conduct impossible or undesirable, and arguing that protection does not interfere with the liberty rights of others because the “would-be burglar has no right that our property *not* be surrounded by a high fence [and] no right that we make his planned violation of *our* rights easy or safe”).

⁶² See 17 U.S.C. § 506(a)(1) (2012) (“Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18.”). For a history of the criminalization of copyright infringement, see Note, *The Criminalization of Copyright Infringement in the Digital Era*, 112 HARV. L. REV. 1705, 1706–12 (1999).

⁶³ See 17 U.S.C. § 1201(e)(3) (“Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or a computing product provide for a response to any particular technological measure”).

⁶⁴ 17 U.S.C. § 1201(a)(1)(A).

⁶⁵ Cohen, *supra* note 44, at 7.

⁶⁶ Polk Wagner describes the DMCA’s anti-circumvention provisions as an example of “legal preemption” by which the law addresses the regulatory effect of software. Wagner, *supra* note 51, at 485. Wagner’s legal preemption and perfect prevention overlap where the law uses the regulatory power of code with the aim of making criminal conduct practically impossible.

the population deemed most likely to commit the offense of drunk driving.⁶⁷ On the other hand, a law requiring all cars be manufactured with a similar ignition interlock system would be part of the perfect preventive state, because it would aim to prevent all instances of the targeted criminal conduct, regardless of the specific criminal proclivities of the actor.

The third defining characteristic of the perfect preventive state is that it aims to eliminate the targeted criminal conduct by making the conduct *practically impossible*, rather than merely inadvisable. The distinction here is both temporal and a matter of degree. Thus, government efforts to detect crime after the fact, like cameras that photograph the license plates of vehicles that run a red light, are not part of the perfect preventive state. Instead, these efforts try to increase the efficacy of the punitive state by enhancing deterrence.⁶⁸ The perfect preventive state may tackle the same problem through in-vehicle technology that detects a red light and automatically stops the vehicle before it enters the intersection.⁶⁹

However, the *ex ante* nature of a measure is not sufficient to situate it squarely in the perfect preventive state. The measure must also seek to increase the difficulty of committing the crime so as to not only deter the potential criminal but to simply frustrate her.⁷⁰ Take, for example, a statute requiring convenience stores to install drop safes that allow employees to deposit money but prevent them from taking it out in the event of a robbery.⁷¹ A drop safe increases the time and effort a would-be robber must expend to steal a substantial amount of money from the store, which in turn gives police more time to respond and increases the likelihood of apprehension. From this perspective, the drop safe requirement is a tool of the punitive state, because it aims to deter crime by convincing potential

⁶⁷ See, e.g., N.C. GEN. STAT. § 20-179.3(g5) (2012) (detailing how North Carolina's "ignition interlock" law applies to individuals who have had their drivers licenses revoked for drunk driving).

⁶⁸ See Dorothy J. Glancy, *Privacy in Autonomous Vehicles*, 52 SANTA CLARA L. REV. 1171, 1208 (2012) ("One purpose of overt surveillance is to affect the behavior of those being watched, to assure that individual behavior conforms to societal norms.").

⁶⁹ See John Markoff & Somini Sengupta, *Drivers with Hands Full Get a Backup: The Car*, N.Y. TIMES, Jan. 12, 2013, at A1 (explaining similar technology that automatically slows or stops the car when a pedestrian or cyclist is in the path, making it so drivers will no longer "have to worry about car crashes and collisions" because the movement of the car will be out of their control).

⁷⁰ See Cheng, *supra* note 50, at 664 ("Viewed from a would-be defendant's perspective, there is a difference between being able to do something but knowing that you will likely get caught . . . and not being able to do it at all.").

⁷¹ See, e.g., HOUS., TEX., CODE OF ORDINANCES § 28-408 (2013) (requiring convenience stores in Houston, Texas, to "have a drop safe on the premises to keep the amount of cash available to employees to a minimum"). Edward Cheng uses the example of metal post boxes to illustrate a similar point. See Cheng, *supra* note 50, at 664 ("[W]ith the mailbox, the fact that a would-be mail thief must now spend additional time picking the mailbox lock or carry conspicuous welding equipment to cut the steel makes the thief more vulnerable to detection."). I eschew this example because the governmental origins of the U.S. Postal Service raise the murky issue of whether the use of such mailboxes constitutes a government mandate or private self-help.

criminals that if they try to rob a convenience store they will either steal very little money or get caught. But if the mandated drop safe is so secure that accessing its contents is practically impossible, then it becomes a tool of the perfect preventive state. The point at which a measure stops being punishment and becomes perfect prevention is not amenable to clear definition.⁷² The critical point, though, is that there is a point at which a measure makes criminal conduct so costly and difficult to achieve that it no longer seeks to deter but instead aims to frustrate those who might engage in the conduct by making it practically impossible to do so.⁷³

The fourth and final defining characteristic of the perfect preventive state is that it targets *criminal* conduct for prevention. The State of course could theoretically mandate the use of technology to prevent any harmful conduct, whether that conduct has been legislatively defined as criminal or not.⁷⁴ But when the legislature defines conduct as criminal, it communicates moral condemnation of conduct that is so unacceptable and deleterious to society's interests that the conduct is not just discouraged but *forbidden*.⁷⁵ Civil sanctions, on the other hand, lack that moral element⁷⁶ and thus do not define forbidden conduct as much as they place a cost on conduct that society wishes to discourage.⁷⁷ The State's interest in preventing criminal conduct is therefore subject to the narrowest limitations.⁷⁸ By the same token, the limitations on the State's ability to prevent criminal conduct will apply with equal or greater force when the State seeks to prevent non-criminal conduct.⁷⁹ Consequently, limiting our consideration to technologies that aim to prevent criminal conduct allows us to identify limitations that also apply to the State's use of technology to

⁷² See Cheng, *supra* note 50, at 664 (acknowledging that the difference may smack of "splitting hairs").

⁷³ *Id.*

⁷⁴ See ZITTRAIN, *supra* note 1, at 108 (recognizing that one could seek to "design[] against" any "undesirable conduct" and providing examples of technological preemption of conduct).

⁷⁵ See Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 538 (2000) ("Law, particularly criminal law, also serves an educational function—to express boundaries between the acceptable (but possibly distasteful) and the forbidden—illuminating the border and suggesting that the public steer clear."); Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 731 (1990) ("The rules of conduct function [of the criminal law] gives the general population ex ante direction as to what they can, must, and must not do.").

⁷⁶ See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) ("What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition."). *But see* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 782–84 (1997) (discussing the breakdown in the distinction between criminal and civil regulations).

⁷⁷ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105–06 (1972) (discussing how regulating entitlements helps society solve internal conflicts).

⁷⁸ See Reidenberg, *Technology and Internet Jurisdiction*, *supra* note 52, at 1965 (explaining the internal constitutional and public policy limits on the use of state power).

⁷⁹ See Hart, *supra* note 76, at 404 (explaining the difference between criminal and civil sanctions).

prevent non-criminal conduct.

B. *One Disclaimer and Two Additional Observations*

Now that we have defined perfect prevention, one disclaimer and two interrelated, non-definitional observations are helpful to understand how perfect prevention works. The disclaimer is that perfect prevention is not so named because it does, or even can, prevent all instances of the targeted criminal conduct. Technology inevitably fails,⁸⁰ and the resourcefulness of motivated criminals knows few limits.⁸¹ Instead, the “perfect” in perfect prevention comes from its *goal* of preventing *all* instances of that conduct. This quest for the elimination of all criminal conduct distinguishes the perfect preventive state from punishment and prevention. The punitive state serves both utilitarian and retributive functions, and thus punishment is not calibrated to achieve perfect deterrence of all crime.⁸² Even if it were, some crimes and criminals cannot be deterred.⁸³ Similarly, because prevention targets only those most likely to commit crime, it would not prevent all instances of criminal conduct even if it could flawlessly identify those people.⁸⁴ Perfect prevention seeks to wipe out certain criminal conduct entirely, and even if it can never quite succeed, the sweeping aim has unique implications that demand exploration.⁸⁵

The first observation is that, like any structural regulation, the perfect preventive state can, but need not, operate non-transparently. Physical architecture can regulate conduct non-transparently by simply removing choices, thus making it so that the targets of regulation do not even know that their choices have been constrained.⁸⁶ Similarly, the “tethered appliances” discussed by Jonathan Zittrain often do not reveal the conduct

⁸⁰ See Rich, *supra* note 46 (describing the inevitable errors in perfect preventive technology); Reidenberg, *Technology and Internet Jurisdiction*, *supra* note 52, at 1965 (noting that technological enforcement of laws is inevitably imperfect).

⁸¹ See Cheng, *supra* note 50, at 691 (noting that if the State required speed governors on all new vehicles, the “governors could be disconnected or otherwise disabled”); Cohen, *supra* note 44, at 41 (“Technically-skilled risk-takers will be able to hack the code, defeat the watchers, and nurture thriving darknets.”).

⁸² See U.S. SENTENCING GUIDELINES MANUAL § 1A.1.2 (2013) (delineating the purposes of sentencing as “deterrence, incapacitation, just punishment, and rehabilitation”).

⁸³ Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1243 (1985).

⁸⁴ See *id.* (explaining that because courts cannot obtain perfect information about individuals and their acts, “[t]he courts . . . cannot employ [appropriate] sanctions”).

⁸⁵ See COHEN, *supra* note 51, at 175 (recognizing that imperfect structural constraints can have an “effect on the everyday lives of network users”).

⁸⁶ See Lee Tien, *Architectural Regulation and the Evolution of Social Norms*, 7 YALE J.L. & TECH. 1, 7 (2004–2005) (“Architectural regulation . . . structures the conditions of action, e.g., social settings and/or the resources available in those settings. It thus regulates the behavior that occurs in those settings or that utilizes those resources.”).

or action that they restrict.⁸⁷ And even when regulation is evident, the parameters governing what conduct is permitted and what conduct is forbidden may not be.⁸⁸ Finally, structural regulation can obscure who is responsible for the limitations on individual action.⁸⁹

Yet opacity is not a necessary feature of structural regulation generally, or perfect prevention specifically.⁹⁰ The government can choose to reveal its role in regulating conduct and specify, or at least not obscure, the conduct it means to prevent, its reasons for doing so, and the means necessary to accomplish that goal. The fact that perfect prevention can be transparent or obscure does not tell us whether transparency is good or bad or what kind of transparency should be preferred—there will be more on that later⁹¹—but the important point for now is that the transparency of perfect prevention is often a design decision.

Second, the use of perfect prevention to frustrate criminal conduct is most plausible where the targeted criminal conduct is dependent upon or enabled by some technological intermediary.⁹² When criminal conduct depends on technology, the State can prevent the criminal conduct by either restricting the availability of the technology altogether or by mandating limitations on the capacity of the enabling technology to allow criminal conduct.⁹³

The Undetectable Firearms Act of 1988⁹⁴ is an example of the former approach,⁹⁵ as it criminalizes the manufacture, importation, or possession

⁸⁷ ZITTRAIN, *supra* note 1, at 107–09.

⁸⁸ See James Grimmelmann, *Regulation by Software*, 114 YALE L.J. 1719, 1736 (2005) (describing how physical architecture is “ambiguous”).

⁸⁹ See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 541–43 (1999) (discussing secret government regulation and its potential role in society today); Tien, *supra* note 86, at 6–8 (providing examples of how many architectural regulations leave unknown the source of the regulation).

⁹⁰ See Katyal, *supra* note 49, at 2284–85 (noting that some forms of government regulation are more transparent than others).

⁹¹ See *infra* Parts III.A, III.B.

⁹² See LESSIG, *supra* note 53, at 49 (noting that in the context of copyright violations, “regulating users alone would be difficult but regulating the code that users use would not be as difficult”).

⁹³ See Wagner, *supra* note 51, at 485–86 (discussing other examples of this regulatory technique). When the government dictates that producers of technology put limitations on its use, these limitations legitimize Lawrence Lessig’s famous, and often criticized, aphorism, “Code is law.” LESSIG, *supra* note 53, at 6; see also Grimmelmann, *supra* note 88, at 1721 (“[C]ode does the work of law, but does it in an architectural way.”); Greg Lastowka, *Decoding Cyberproperty*, 40 IND. L. REV. 23, 57 (2007) (“[C]ode is digital ‘architecture’ that does the work of law, but is not law, *qua* law.” (quoting Grimmelmann, *supra* note 88, at 1721)).

⁹⁴ 18 U.S.C. §§ 921–22 (2012).

⁹⁵ The anti-circumvention provisions of the DMCA, see *supra* notes 43–44 and accompanying text, and the Audio Home Recording Act, which required that digital audio recording devices “incorporate technological controls to block second-generation digital copies,” Peter S. Menell & David Nimmer, *Legal Realism in Action: Indirect Copyright Liability’s Continuing Tort Framework and Sony’s De Facto Demise*, 55 UCLA L. REV. 143, 163 (2007) (citing 17 U.S.C. § 1002(a) (2000)),

of a firearm that cannot be detected by a metal detector or x-ray machine.⁹⁶ That ban makes other criminal conduct, like the unauthorized possession of a firearm on an airplane,⁹⁷ practically impossible for the general public who lacks the expertise to manufacture such a firearm themselves.⁹⁸ Examples of the latter approach include government mandates that Internet Service Providers (ISPs) prevent their customers from accessing websites that contain child pornography, as the State directly limits the technology that one might use to engage in the criminal conduct of possessing child pornography.⁹⁹

Though perfect prevention more easily targets those crimes that depend upon a technological intermediary for their commission, it is not necessarily so limited. Chemical castration already aims to deprive individuals of their capacity to experience sexual desire or to engage in criminal sexual activity.¹⁰⁰ Other pharmaceuticals target antisocial and racist thought processes.¹⁰¹ These advances presage the potential to make more “traditional” crimes like rape or murder practically impossible by limiting an individual’s capacity to form the desire to commit the targeted offense.

III. THE PERFECT PREVENTIVE STATE IS DIFFERENT

The first important claim of this Article is that perfect prevention is different from punishment and prevention in ways that make the limitations placed on the punitive and preventive states inapposite to the perfect preventive state. This Part develops that claim by addressing the punishment and prevention in turn. It then discusses perfect prevention’s

are other examples of the State preventing criminal conduct by restricting access to enabling technology.

⁹⁶ 18 U.S.C. § 922(p)(1).

⁹⁷ See 49 U.S.C. § 46505(b) (2012) (criminalizing the concealed carry of firearms on an aircraft).

⁹⁸ See Cory Doctorow, *Congressman Calls for Ban on 3D Printed Guns*, BOING BOING (Dec. 9, 2012), <http://boingboing.net/2012/12/09/congressman-calls-for-ban-on-3.html> (suggesting that the Undetectable Firearms Act may require manufacturers of three-dimensional printers to make it impossible for their devices to be used to make plastic firearms).

⁹⁹ See Dawn C. Nunziato, *How (Not) to Censor: Procedural First Amendment Values and Internet Censorship Worldwide*, 42 GEO. J. INT’L L. 1123, 1136–37 (2011) (discussing the use of this approach internationally).

¹⁰⁰ See John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS. L. REV. 559, 573 (2006) (discussing how the chemical castration drug MPA reduces the brain’s exposure to testosterone, which results in a suppression of sexual desires that creates sexual apathy toward both deviant and non-deviant sexual acts).

¹⁰¹ See Erica Beecher-Monas & Edgar Garcia-Rill, *Genetic Predictions of Future Dangerousness: Is There a Blueprint for Violence?*, 69 LAW & CONTEMP. PROBS. 301, 321 n.125 (2006) (recognizing the potential for drug therapy to suppress abnormal responses and desires); Sylvia Terbeck et al., *Propranolol Reduces Implicit Negative Racial Bias*, 222 PSYCHOPHARMACOLOGY 419, 420, 422 (2012) (finding that the drug propranolol significantly reduced implicit racial bias).

similarity to precursors like the SCP movement, which seeks to prevent crime through changes to the environment. Finally, it discusses how scholars have failed to develop sufficient justifications for, and limitations on, these precursors.

A. *Perfect Prevention Is Not Punishment*

The punitive state imposes some unpleasantness on individuals who violate the State's criminal laws.¹⁰² The task of identifying the specific contours of punishment's justification has long occupied scholars, with various versions of retributivism and utilitarianism occupying the field.¹⁰³ A common thread in both retributive and utilitarian theories is that punishment can be justified only where the target of punishment has been adjudicated guilty of some crime.¹⁰⁴ For the retributivist, the past offense requirement strictly delineates when and how much punishment is appropriate: an individual's moral desert justifies and limits the punishment the State may impose, in that the State should punish the criminal as much, and only as much, as she deserves to be punished.¹⁰⁵ The utilitarian account's relationship to a finding of guilt is more complex.¹⁰⁶ Under this approach, punishment is justified only to the extent that its social benefit—in the form of specific deterrence, general deterrence, rehabilitation, or other social good—exceeds the harm it causes.¹⁰⁷ Many retributivists criticize utilitarianism because it might justify the punishment of an innocent individual for an offense committed by another or for an offense that never occurred.¹⁰⁸ But even if the

¹⁰² See H. L. A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 4 (1968) (defining punishment as something that must involve pain or other consequences normally considered unpleasant); Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 343–44 (1983) (“In typical cases of punishment, persons who possess authority impose designedly unpleasant consequences upon, and express their condemnation of, other persons who are capable of choice and who have breached established standards of behavior.”).

¹⁰³ See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997) (discussing the broad grounds on which criminal punishment can be justified and the various versions of utilitarianism and retributivism).

¹⁰⁴ See Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 17 (2006) (discussing both retributive and utilitarian punishment as they apply to the “offender”).

¹⁰⁵ See *id.* at 16–17 (emphasizing the desirability of apportioning the severity of punishment to the offenders' blameworthiness).

¹⁰⁶ See *id.* at 17–18 (discussing the utilitarian calculation of punishment that could justify a very serious punishment imposed “on an offender who committed a venial offense, or . . . on an innocent person whom everyone except the judge believed to be guilty”).

¹⁰⁷ See *id.* (explaining that the only constraint on punishment is the principle that no punishment should cause greater harm than it prevents).

¹⁰⁸ See, e.g., MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 93 n.19 (1997) (“The main problem with the pure utilitarian theory of punishment is that it potentially sacrifices the innocent in order to achieve a collective good.”).

utilitarian account would allow for punishment of the innocent—a concession few utilitarians are willing to make—a finding that the punished individual committed some past offense, real or imagined, is still a necessary predicate of the punishment.¹⁰⁹

With this in mind, perfect prevention obviously cannot be justified on the same grounds as punishment or limited by the same principles. Perfect prevention restricts individual liberty before the criminal act occurs. Thus, there is no past offense and no moral desert to provide the threshold justification for the intrusion on liberty. Likewise, punishment's requirement of proportionality to moral desert provides no limitation on the perfect preventive state.

B. *Perfect Prevention Is Not Prevention*

The preventive state “attempt[s] to identify and neutralize dangerous individuals before they commit crimes by restricting their liberty in a variety of ways.”¹¹⁰ Prevention has a long history, with the civil commitment of the dangerous and mentally ill tracing its roots back to common law.¹¹¹ It has come into vogue recently as federal and state governments have sought to expand their authority to civilly commit sexually-violent predators and terrorists.¹¹² The liberty restrictions employed by the preventive state can range both in terms of severity and time, from the brief detention for police questioning authorized by *Terry v. Ohio*¹¹³ to potentially indefinite incarceration¹¹⁴ or even death.¹¹⁵

The preventive state's authority derives from the government's police

¹⁰⁹ See Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1105 (1952) (recognizing that “invocation of a penal sanction necessarily depends on past behavior” even when “the object is control of harmful conduct in the future”).

¹¹⁰ Steiker, *supra* note 4, at 774.

¹¹¹ See Klein, *supra* note 28, at 566–67 (“Under the common law, dangerousness was a necessary finding for civil commitment. People were confined if mad and dangerous; those who were mad but not dangerous remained in the community.” (footnotes omitted)).

¹¹² See Robert M. Chesney, *supra* note 11, at 26 (discussing the Justice and Defense Departments' incapacitation of suspected terrorists through military and criminal detention); Eric S. Janus, *The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence*, 40 CRIM. L. BULL. 576, 576–77 (2004) (discussing radical prevention, which seeks to intervene when there is a risk of future harm and does so by curtailing a person's liberty before harm results).

¹¹³ 392 U.S. 1, 30–31 (1968).

¹¹⁴ See *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (holding the potentially indefinite detention of sexually violent predators to be constitutional).

¹¹⁵ Though no state permits the implementation of the death penalty solely on the basis of a finding of future dangerousness, the Supreme Court has approved of the use of future dangerousness as a factor to be considered in capital sentencing. *Jurek v. Texas*, 428 U.S. 262, 276 (1976); see also *Robinson*, *supra* note 4, at 1430 n.4 (listing jurisdictions that consider dangerousness in sentencing).

power to ensure public safety.¹¹⁶ This justification provides the first of two substantive limits on the preventive state: the State must establish that the individual who is subject to a preventive intrusion on her liberty is dangerous.¹¹⁷ The range in severity of possible intrusions from the preventive state correlates to the finding of dangerousness required to justify the intrusion.¹¹⁸ Preventive detention, which interferes with the “individual’s constitutionally protected interest in avoiding physical restraint,” is justified under the due process clause upon a finding of volitional impairment and dangerousness pursuant to “proper procedures and evidentiary standards.”¹¹⁹ Meanwhile, a *Terry* stop, during which a person is restrained for only a brief period of time,¹²⁰ is justified upon mere reasonable suspicion that the target is or has been engaged in criminal activity.¹²¹

The second substantive limitation on the preventive state cabins its use to narrow subcategories of the dangerous, including pretrial detainees, immigrants facing deportation, and the mentally ill.¹²² If there is a single unifying justification for how to define the categories of dangerous people who are subject to prevention, it is that the threat they pose to public safety

¹¹⁶ See *Addington v. Texas*, 441 U.S. 418, 426 (1979) (“[T]he state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.”). This is actually an oversimplification, as the police power belongs only to the states, *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring), while the federal government’s authority to prevent crime must derive from its enumerated powers, *see id.* at 1956 (majority opinion) (concluding that the Federal Government’s enumerated powers grant Congress legislative power sufficient to enact a law that allows a district court to order civil commitment of a mentally ill, sexually dangerous federal prisoner beyond the date he would otherwise be released). This distinction is of little practical significance in this context, as the federal government’s preventive authority generally derives from concerns about public safety that relate to its specifically enumerated powers. *See id.* at 1959–60 (discussing the history of civil commitment under federal law and the animating concern that mentally ill and dangerous former federal prisoners might threaten public safety).

¹¹⁷ See *Hendricks*, 521 U.S. at 357 (“States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety. We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards.” (citations omitted)). Of course, all people can be said to be “dangerous” in the sense that any conscious person is physically capable of engaging in violent crime at any moment. At the same time, every person is entitled to a presumption of harmlessness, and the State therefore bears the burden of making some individualized showing of dangerousness before preemptively restricting an individual’s liberty. See Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778, 804–05 (1996) (arguing that it is necessary to show culpability to make a finding of dangerousness).

¹¹⁸ See Slobogin, *supra* note 14, at 50–53 (proposing a “proportionality principle” to govern the amount of dangerousness that must be proven to justify preventive action).

¹¹⁹ *Hendricks*, 521 U.S. at 356–57.

¹²⁰ See *United States v. Swanson*, 341 F.3d 524, 528 (6th Cir. 2003) (explaining that during a *Terry* stop, an officer may only ask “a moderate number of questions”).

¹²¹ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

¹²² See Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SEC. J. 85, 87 (2011) (cataloguing examples of preventive detention).

cannot be deterred adequately by the punitive state.¹²³ Thus, the Supreme Court has held that the State can civilly commit sexual predators only if they have some mental illness or abnormality that creates a “serious difficulty in controlling behavior.”¹²⁴ Similarly, pretrial detention solves a problem—flight by dangerous individuals charged with serious crimes—for which *ex post* punishment is ill-suited; after all, when a defendant flees, she cannot be punished for either the underlying offense or the subsequent crime of flight.¹²⁵

This limitation does not derive from, and indeed undermines, the public safety justification for the preventive state, as the public would be safer if all dangerous people were preventively detained. Instead, the Supreme Court has explained that the requirement of mental illness is necessary in the sexual predator context to ensure that prevention does not “become a mechanism for retribution or general deterrence”—functions properly those of criminal law.”¹²⁶ In other words, it ensures that *ex post* punishment remains the preferred avenue for preventing crime.¹²⁷ This preference is based on the understanding that punishment better respects individual autonomy by restricting liberty only after an individual has chosen to break the law.¹²⁸

Neither limitation on the preventive state provides useful guidance for the proper implementation of perfect prevention, however. First, because perfect prevention targets only criminal conduct, it by definition advances the State’s interest in public safety and falls within the State’s police power.¹²⁹ Consequently, there is no need for an additional limitation on perfect prevention, like the dangerousness limitation on the preventive state, to ensure that perfect prevention serves the State’s interest in protecting its citizens. Second, the limitation of prevention to only those individuals who cannot be handled adequately by the punitive state is inapposite to perfect prevention. Perfect prevention targets criminal conduct no matter who engages in it and does not limit specific classes of

¹²³ See *id.* at 88 (claiming that “American law eschews [preventive detention] *except* where legislatures and courts deem it necessary to prevent grave public harms”).

¹²⁴ *Kansas v. Crane*, 534 U.S. 407, 409, 412–13 (2002).

¹²⁵ Schulhofer, *supra* note 9, at 86–87.

¹²⁶ *Crane*, 534 U.S. at 412 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 372–73 (1997)); see also *Hendricks*, 521 U.S. at 360 (noting that a “lack of volitional control” adequately distinguished the detainee “from other dangerous persons who [were] perhaps more properly dealt with exclusively through criminal proceedings”).

¹²⁷ *Hendricks*, 521 U.S. at 360.

¹²⁸ See Ferzan, *supra* note 3, at 152–53 (explaining that theorists “decry the denial of the potential offender’s autonomy” when “we wish to substantially interfere with an individual’s liberty to prevent him from harming us”).

¹²⁹ See *Lawton v. Steele*, 152 U.S. 133, 136 (1894) (noting that “[t]he police power . . . is universally conceded to include everything essential to the public safety”).

individuals.¹³⁰ Moreover, it is not immediately obvious that punishment is more respectful of autonomy than perfect prevention, and thus there is no per se preference for punishment over perfect prevention.¹³¹

C. Predecessors of Perfect Prevention

The idea of preventing crime by removing criminal conduct from the range of choices available to the potential criminal is not new. For example, the SCP movement seeks to “reduce the opportunities for crime and increase its risks” through the “management, design, or manipulation of the immediate environment in as systematic and permanent a way as possible.”¹³² In a similar vein, Neal Kumar Katyal discusses the use of architecture for the purposes of crime control by focusing on four architectural mechanisms: natural surveillance, territoriality, building community, and strengthening targets.¹³³ Katyal also argues for consideration of analogous mechanisms to prevent cybercrime.¹³⁴ Meanwhile, Edward Cheng contends that the government should use structure to prevent crimes like speeding and music piracy.¹³⁵

These structural and architectural approaches to crime control overlap in part with perfect prevention in that they involve generally applicable State mandates that aim to make specific criminal conduct practically impossible, rather than merely costly. For instance, more than forty years ago John Decker studied the effectiveness of new parking meters in New York City that aimed to prevent the illegal use of “slugs” instead of coins in the meters.¹³⁶ The meters were a success, markedly reducing the targeted criminal activity,¹³⁷ and an advocate of SCP rightly trumpets the anti-slug meters as a success story of “[t]arget [h]ardening.”¹³⁸ The meters also are an example of perfect prevention: they were installed by the

¹³⁰ One can imagine a hybrid between prevention and perfect prevention that aims to make it practically impossible for specific individuals to engage in targeted criminal conduct, but consideration of such an approach is outside the scope of this Article. *See infra* Part IV.

¹³¹ The nature and extent of perfect prevention’s intrusion on individual liberty and the proper preference between punishment and prevention are both explored in more detail below. *See supra* Parts IV.A, IV.C.

¹³² Clarke, *supra* note 47, at 91.

¹³³ *See* Katyal, *supra* note 48, at 1048, 1050–71 (describing “Natural Surveillance,” “Territoriality,” “Building Community,” and “Strengthening Targets”).

¹³⁴ *See* Katyal, *supra* note 49, at 2286 (suggesting the use of software and performance standards to enforce cybersecurity).

¹³⁵ *See* Cheng, *supra* note 50, at 689, 691–92, 694, 703–14 (suggesting structures such as “copy protection technology”).

¹³⁶ John F. Decker, *Curbside Deterrence? An Analysis of the Effect of a Slug-Rejector Device, Coin-View Window and Warning Labels on Slug Usage in New York City Parking Meters*, 10 *CRIMINOLOGY* 127, 128–29 (1972).

¹³⁷ *Id.* at 133.

¹³⁸ Clarke, *supra* note 47, at 110.

government, they target criminal conduct, and they seek to make the targeted conduct practically impossible.¹³⁹

But even though perfect prevention has a long history under the umbrellas of SCP and architectural or structural crime control, scholarly attention to the proper limits of the government's power to mandate the use of crime prevention technologies has been scant. This failure is attributable in part to inherent characteristics of perfect prevention. First, structural controls aim to prevent only criminal conduct,¹⁴⁰ and few goals are more politically palatable than crime prevention.¹⁴¹ Second, structural controls do not intrude on individual liberty in the obvious fashions of prevention and punishment.¹⁴² Thus, structural regulations are easy to laud as a solution to the problems caused by these more traditional crime-prevention methods.¹⁴³ Third, the crime reduction benefits of structural controls are statistically quantifiable,¹⁴⁴ but the impact of perfect prevention on individual liberty is diffuse and indeterminate as everyone is prevented from doing something—committing a crime—that they have no right to do in the first place.¹⁴⁵ As a result, it is easy to trumpet the successes of structural crime control while giving little attention to the potential downsides and proper limitations.¹⁴⁶

Nonetheless, some scholars have grappled with the downsides of the perfect preventive state, even though most have fallen short of suggesting

¹³⁹ Decker, *supra* note 136, at 131.

¹⁴⁰ See, e.g., Katyal, *supra* note 48, at 1041 (“[A]dditional attention to cities, neighborhoods, and individual buildings can reduce criminal activity.”).

¹⁴¹ See, e.g., Darren DaRonco, *Ex-Tucson Mayoral Hopeful Plans Free Shotguns for High-Crime Areas*, ARIZ. DAILY STAR, Mar. 27, 2013, at State and Regional News (showing that crime prevention is so popular that a politician has proposed, as his political platform, providing free shotguns to residents to prevent crime). *But see* Steven P. Lab, *Crime Prevention, Politics, and the Art of Going Nowhere Fast*, 21 JUST. Q. 681, 682–84 (2004) (arguing that politicians focus on arresting, prosecuting, and punishing offenders instead of activities “designed to reduce the actual level of crime” because “crime prevention . . . is not politically expedient”).

¹⁴² See *supra* Part II.B.

¹⁴³ See Cheng, *supra* note 50, at 664–65 (“Because structure . . . is largely self-executing, it minimizes many of the problems that plague fiat regimes.”).

¹⁴⁴ See, e.g., *id.* at 677–78 (arguing for the success of structural controls on tax evasion by pointing to data about the revenue lost due to noncompliance for various income categories); Katyal, *supra* note 48, at 1070 (trumpeting the success of traffic barriers in certain areas of Los Angeles that reduced assaults “from 190 to 163 in the first year, and from 163 to 138 in the next year”).

¹⁴⁵ See, e.g., Alexander & Ferzan, *supra* note 61, at 641 (arguing that making crime more difficult to commit “does not interfere with the rightful liberty” of potential criminals); Corrado, *supra* note 117, at 808 (“Exclusion from someone else’s property is likewise not a denial of anything the actor has a right to—particularly if his only reason for being there would be to harm another.”).

¹⁴⁶ See, e.g., Clarke, *supra* note 47, at 134–35 (discussing “supposed infringements of constitutional liberties” resulting from SCP); Barry Poyner, *What Works in Crime Prevention: An Overview of Evaluations*, 1 CRIME PREVENTION STUD. 13, 15–16 (1993) (rating studies of SCP techniques on the sole basis of whether they showed a reduction in crime).

concrete limitations on government power.¹⁴⁷ Katyal, for instance, recognized that architectural crime prevention techniques may raise concerns about social control and individual privacy.¹⁴⁸ His response to these concerns is two-fold. First, he encourages government action to enhance privacy.¹⁴⁹ Second, Katyal argues that regulation through architecture is inevitable and that government use of architecture is preferable to private action because it “can be more responsible and far more transparent than private decisionmaking.”¹⁵⁰ Both points are valid, as far as they go,¹⁵¹ but neither addresses how to ensure that the perfect preventive state is not misused. Similarly, Cheng analyzed how structural crime control might threaten individual interests in privacy and autonomy,¹⁵² but he avoided the question of limits on perfect prevention. Instead, he ultimately concluded that “a greater use of structural laws would in fact require a shift in democratic values” away from individual rights and toward communitarian interests.¹⁵³

However, the same characteristics that make perfect prevention resistant to scholarly criticism also highlight the need for discussion of proper limitations on it. Like the preventive and punitive states, perfect prevention is justified by the government’s obligation to protect the public.¹⁵⁴ Public safety garners strong political support, thus creating a push to expand government authority to prevent crime. In the context of punishment and prevention, this push is counterbalanced to some extent by concern about the infringement on individual liberties. Criminal legal theory provides a rich source for discussion of individual liberties in the context of crime control, but few theorists have seriously tackled the

¹⁴⁷ See Rich, *supra* note 46, at 805–28 (cataloguing costs and benefits of perfect preventive measures).

¹⁴⁸ Katyal, *supra* note 48, at 1128–33.

¹⁴⁹ For example, Katyal suggests the creation of “semipublic spaces that mediate the tension between an atomized group of individuals and a collective and undifferentiated mass.” *Id.* at 1129.

¹⁵⁰ *Id.* at 1132.

¹⁵¹ Certainly, in an ideal world governments will act to maximize individual privacy and minimize invidious social control and will do so with maximum transparency, but recent experience teaches that limitations on government power are necessary. See, e.g., Charlie Savage et al., *U.S. Confirms That It Gathers Online Data Overseas*, N.Y. TIMES, June 7, 2013, at A1 (discussing acknowledgement by the United States government that it collected massive amounts of data on domestic and foreign phone calls).

¹⁵² See Cheng, *supra* note 50, at 669–73 (exploring whether “the legislative aversion to structural laws may derive from concerns about their impact on personal freedom” in the context of “surveillance and violations of privacy”).

¹⁵³ *Id.* at 671.

¹⁵⁴ See Andrew Ashworth & Lucia Zedner, *Preventive Orders: A Problem of Undercriminalization?*, in THE BOUNDARIES OF THE CRIMINAL LAW 59, 71 (R.A. Duff et al. eds., 2010) (“The ostensible rationale for such [preventive] measures is usually claimed to reside in protecting the public or averting risk of harm, not in past wrongdoing.”); Katyal, *supra* note 48, at 1046 (calling on “government [to] draw upon all constraints on crime . . . to have maximum impact”).

question of how perfect prevention might intrude on these liberties and when such intrusion might be justified.¹⁵⁵ Instead, some view prevention of criminal conduct as a brick on the road to a science-fiction dystopia,¹⁵⁶ while others scoff at the idea that perfect prevention would intrude on any meaningful rights.¹⁵⁷ A thoughtful consideration of the impact of perfect prevention on individual rights is needed instead to counterbalance the politically-attractive goal of crime prevention and to help trace some limits on the proper scope of its use.¹⁵⁸

IV. LIMITS ON THE PERFECT PREVENTIVE STATE

This Part identifies three concerns that might be raised with the use of perfect prevention and discusses limits on the perfect preventive state that respond to those concerns. The first concern is that perfect prevention interferes with individual autonomy. The second concern is that by treating everyone the same, perfect prevention treats all people like criminals. The third concern asks whether and in what circumstances perfect prevention should be preferred over punishment or prevention as a means of preventing certain criminal conduct.

A. *The Autonomy Concern*

The punitive and preventive states are subject to substantive and procedural due process limitations because they impinge on individual liberty.¹⁵⁹ For instance, the State can punish an individual only if it had placed the individual on notice that her conduct was forbidden,¹⁶⁰ provided proper procedural protections to the individual in finding her guilty of the

¹⁵⁵ See Andrew von Hirsch & Clifford Shearing, *Exclusion from Public Space*, in *ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION* 77, 82–85 (Andrew von Hirsch et al. eds., 2000) (arguing that situational crime prevention should respect an individual’s liberty of movement).

¹⁵⁶ See Husak, *supra* note 2, at 215–16 (discussing the difficulties of social control).

¹⁵⁷ See Marcus Felson & Ronald V. Clarke, *The Ethics of Situational Crime Prevention*, in *RATIONAL CHOICE AND SITUATIONAL CRIME PREVENTION: THEORETICAL FOUNDATIONS* 197, 208 (Graeme Newman et al. eds., 1997) (“It is remarkable to us that situational prevention should draw criticism for neglecting individual rights when the most usual alternative is to try harder to arrest people and remove their freedom altogether.”).

¹⁵⁸ See Ashworth & Zedner, *supra* note 154, at 73–74 (“[W]hat matters in a society that is—or wishes to . . . become—a liberal democracy is not that we control crime but *how* we do so.”) (quoting Ian Loader, *The Anti-Politics of Crime*, 12 *THEORETICAL CRIMINOLOGY* 399, 405 (2008)) (internal quotation marks omitted).

¹⁵⁹ See *DeShaney v. Winnebago Cnty. Dept. of Soc. Serv.*, 489 U.S. 189, 200 (1989) (“[I]t is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the ‘deprivation of liberty’ triggering the protections of the Due Process Clause.”); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (“This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”).

¹⁶⁰ See *Bouie v. City of Columbia*, 378 U.S. 347, 350–51 (1964) (presenting the “basic principle that a criminal statute must give fair warning of the conduct that makes it a crime”).

offense,¹⁶¹ and chose a punishment for the criminal conduct that was proportional to the crime.¹⁶² Similarly, the State can use the tools of the preventive state only upon a proper individualized finding that the target of the State's power endangers society's interests.¹⁶³ In either case, the substantive and procedural limitations on the State's power are roughly proportional to the extent of the resulting interference with the individual's autonomy. In the punitive context, this explains why entitlement to a jury trial or the assistance of counsel depends on the extent of the deprivation of liberty to which the defendant may be subject.¹⁶⁴ And the State's burden of proving an individual's dangerousness increases in proportion to the extent of the proposed preventive deprivation of her liberty.¹⁶⁵

But what is obvious about punishment and prevention—that they must be subject to limitations because they intrude on legitimate exercises of individual autonomy—is not so clear with respect to perfect prevention.¹⁶⁶ Even in their most limited applications, both the punitive and preventive states engage in “blunderbuss interventions”¹⁶⁷ on liberty, by which an individual is deprived of the freedom to engage in a wide swath of legal activity in order to prevent criminal conduct.¹⁶⁸ For instance, in a punitive or preventive state, an individual who is imprisoned or preventively detained is prevented from committing most crimes, but she also loses the freedom to see friends, travel, or shop at the grocery store. Perfect prevention, on the other hand, aims to prevent individuals from engaging in criminal conduct and only criminal conduct.¹⁶⁹ This makes perfect

¹⁶¹ See, e.g., U.S. CONST. amend. VI (guaranteeing rights to trial and confrontation of witnesses).

¹⁶² *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008).

¹⁶³ See *supra* notes 116–21 and accompanying text (citing cases in which the federal government uses its preventive authority to protect societal interests).

¹⁶⁴ See *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (requiring that counsel be provided “when one’s liberty is in jeopardy”); *Duncan v. Louisiana*, 391 U.S. 145, 161–62 (1968) (holding that a jury trial is required for crimes punishable by two years in prison).

¹⁶⁵ See *supra* notes 116–18 and accompanying text (describing the necessity that criminal behavior be dangerous before it justifies preventive action).

¹⁶⁶ Maybe for this reason, when scholars do express concern over crime prevention technologies, their concerns are often vague. See Husak, *supra* note 2, at 215 (“The concept of punishment is vague and allows for many borderline cases.”).

¹⁶⁷ Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 117 (1996).

¹⁶⁸ See Corrado, *supra* note 117, at 808 (discussing the differences in restraints on liberty between preventive detention and a restraining order); Schulhofer, *supra* note 9, at 93 (analyzing preventive detention’s interference with an individual’s capacity to lead a free life).

¹⁶⁹ In this way, perfect prevention appears analogous to the digital “worm” hypothesized by Lawrence Lessig that would be deployed by the government to search private computers and could identify only contraband, LESSIG, *supra* note 53, at 17–19, or other “binary search[es]” that reveal only the presence of contraband, see Timothy C. MacDonnell, *Orwellian Ramifications: The Contraband Exception to the Fourth Amendment*, 41 U. MEM. L. REV. 299, 302 (2012) (defining the binary search doctrine); Ric Simmons, *The Two Unanswered Questions of Illinois v. Caballes: How to Make the World Safe for Binary Searches*, 80 TUL. L. REV. 411, 424 (2005) (explaining the history of the “binary

prevention's offense to autonomy less clear because people have no legitimate autonomy interest in committing a crime, either as a matter of legal doctrine¹⁷⁰ or theory.¹⁷¹ For instance, when police stop a person on the steps of a bank who is wearing a mask and carrying a gun and prevent her from robbing the bank, we do not complain that they have improperly intruded on her autonomy.¹⁷²

Thus, to discuss perfect prevention's impact on individual autonomy, we must first pinpoint what, if any, legitimate autonomy interest is at stake. Once that interest has been identified, we next must determine what limits should be imposed on the perfect preventive state as a result. This section addresses these issues in turn.

1. *The Legitimate Interest in Deciding Whether to Break the Law*

To answer the question of what legitimate autonomy interest might be threatened by perfect prevention, it is helpful to consider again the autonomy interests that are threatened by the preventive state. As noted, prevention generally and preventive detention specifically are obviously problematic because they intrude on an individual's legitimate autonomy interest in engaging in a broad range of lawful activities.¹⁷³ The concern with preventive detention, however, goes deeper than this. When the State preemptively restricts the liberty of responsible individuals, it "fails to treat

search" in Supreme Court case law). Unfortunately, the primary concern of critics of the contraband exception is inapplicable in the perfect prevention context. Both scholars and Supreme Court Justices fear that allowing searches like Lessig's "worm" will lead to an Orwellian world in which citizens must assume that they are constantly under surveillance and any deviation from the law will be immediately punished. See *United States v. Jacobsen*, 466 U.S. 109, 138 (1984) (Brennan, J., dissenting) (presenting the dangers of these surveillance techniques); MacDonnell, *supra*, at 300–01 (describing the "binary search" doctrine in which "individuals have no right to privacy in contraband, regardless of the location"). As described, such punishment would then lead to substantial intrusion on legitimate autonomy interests. But that concern simply brings us back to the distinction between punishment and perfect prevention and the original question of whether perfect prevention intrudes on any legitimate autonomy interest.

¹⁷⁰ See Daniel R. Dinger, *Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution*, 28 SEATTLE U. L. REV. 955, 1024 n.367 (2005) (citing cases so holding); see also *Jacobsen*, 466 U.S. at 123 (majority opinion) (holding that a test that discloses only whether a particular substance is contraband does not intrude on a legitimate privacy interest).

¹⁷¹ See Ferzan, *supra* note 3, at 178 ("We certainly do not claim that criminals ought to have unfettered ability to commit crime and that any restrictions on that freedom interfere with their autonomy.").

¹⁷² How, precisely, the law should deal with this individual is nevertheless a matter of substantial debate. See, e.g., Alexander & Ferzan, *supra* note 61, at 641–60 (arguing against using the criminal law to punish incomplete attempts); Ferzan, *supra* note 3, at 178 (arguing that "[p]rotecting citizens' security is a good reason for State interference").

¹⁷³ See Corrado, *supra* note 117, at 808 (discussing the limitations on the actor's freedom with a restraining order); Schulhofer, *supra* note 9, at 93 (suggesting that the criminal process is most effective for those societies committed to individual liberty).

the person as an autonomous moral agent who can be guided by reason.”¹⁷⁴ This “bad bacteria” approach to personhood treats people merely as “potentially beneficial or harmful objects.”¹⁷⁵ Christopher Slobogin terms this critique the “dehumanization objection” to prevention.¹⁷⁶ Specifically, prevention fails to acknowledge that the ability to choose whether to abide by the law is unique and essential to one’s humanity.¹⁷⁷ To put it another way, prevention of a responsible agent is offensive because it deprives her of the opportunity to decide whether to obey the law.¹⁷⁸

Thus, the preventive state threatens two legitimate autonomy interests: the interest in engaging in lawful conduct and the interest in choosing whether to break the law. The first is obvious and uncontroversial, while the second has generally evaded substantial discussion by scholars¹⁷⁹ and might strike some as troublesome on its face.¹⁸⁰ Nevertheless, the existence of the latter interest finds ample support in criminal and constitutional law principles.

In criminal law, the requirement of a voluntary act is a recognition that “a civilized society does not punish for thoughts alone.”¹⁸¹ That rule in turn is a manifestation of the “inalienable right[,]” to be free in one’s

¹⁷⁴ Morse, *supra* note 15, at 1122.

¹⁷⁵ Morse, *supra* note 3, at 57.

¹⁷⁶ Slobogin, *supra* note 14, at 27.

¹⁷⁷ See Cole, *supra* note 9, at 696 (“We generally presume that individuals have a choice to conform their conduct to the law.”); Slobogin, *supra* note 14, at 27 (“The capacity to choose one’s course is an essential aspect of our notion of what it means to be human.”).

¹⁷⁸ See R.A. Duff, *Dangerousness and Citizenship*, in *FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOR OF ANDREW VON HIRSCH* 141, 149 (Andrew Ashworth & Martin Wasik eds., 1998) (arguing that preventive detention of the responsible is inconsistent with respect for individual autonomy because it “does not leave citizens free to decide for themselves whether to obey the law”); Alec Walen, *A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists*, 70 MD. L. REV. 871, 881 (2011) (arguing that the State “must let those [dangerous] individuals have the chance to exercise their free will to choose rightly or wrongly, as long as it is sufficiently likely that they can be held accountable if they choose wrongly”).

¹⁷⁹ See, e.g., Alec Walen, *Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 803, 838–40 (2011) (discussing the manner in which “freedom of thought must include the freedom to choose to indulge any thoughts one wants to indulge”).

¹⁸⁰ For instance, then-Vice President Richard Nixon said, in the context of the civil rights movement, “the deterioration [of respect for the rule of law] can be traced directly to the spread of the corrosive doctrine that every citizen possesses an inherent right to decide for himself which laws to obey and when to disobey them.” KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 31 (1997) (internal quotation marks omitted).

¹⁸¹ MODEL PENAL CODE § 2.01 cmt. 1, at 214 (1985); see also JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 373 (6th ed. 2012) (“[P]eople are not punished for thoughts alone.”); GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 49 (1998) (“Everyone seems to agree that it would be a perversion of the institution [of criminal justice] to punish in the absence of action—for thoughts alone.”); Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 282 (2002) (“The maxim that civilized societies should not punish individuals for their ‘thoughts alone’ has existed for three centuries.”).

thoughts, which is embodied in the First Amendment.¹⁸² As Justice Cardozo recognized, the “freedom of thought, and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom.”¹⁸³ Thus, the Supreme Court has rejected the government’s use of a defendant’s “abstract beliefs” to enhance his sentence¹⁸⁴ and has overturned a criminal conviction for private possession of obscene materials on the ground that “control[ing] the moral content of a person’s thoughts . . . is wholly inconsistent with the philosophy of the First Amendment.”¹⁸⁵ Similarly, constitutional rights to free speech, privacy, and substantive due process can be seen to protect “deliberative autonomy,” or an individual’s ability to formulate opinions and make decisions based on a maximum amount of information.¹⁸⁶ Thus, speech that does not appeal to or support rational decision making—such as fighting words, incitement, and libel—is entitled to less constitutional protection.¹⁸⁷

The importance of civil disobedience—lawbreaking as political protest—as an engine of social change in America also supports the existence of a legitimate autonomy interest in deciding to break the law.¹⁸⁸ Protests that deliberately violate laws that are thought to conflict with deeper moral imperatives serve a useful social purpose by drawing needed attention to problems that have escaped social recognition.¹⁸⁹ Such protests have been the catalyst for the expansion of civil rights and other reforms in the United States.¹⁹⁰ But of course such protests cannot occur unless the protestor can exercise her autonomy and choose to break the

¹⁸² *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (stating that the First Amendment includes a penumbra of inalienable rights).

¹⁸³ *Palko v. Connecticut*, 302 U.S. 319, 326–27 (1937); *see also* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) (“I cede authority to the state to draw the necessary concrete boundaries between our respective spheres of action. But no such necessity requires, indeed self-respect forbids, that I cede to the state the authority to limit my use of my rational powers.”).

¹⁸⁴ *Dawson v. Delaware*, 503 U.S. 159, 167 (1992).

¹⁸⁵ *Stanley v. Georgia*, 394 U.S. 557, 565–66 (1969).

¹⁸⁶ *See* Aditi Bagchi, *Deliberative Autonomy and Legitimate State Purpose Under the First Amendment*, 68 ALB. L. REV. 815, 815–17 (2005) (discussing the right to free speech in the context of deliberative autonomy); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 2 (1995) (propounding a constitutional theory on the ground of securing deliberative autonomy).

¹⁸⁷ *See* Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 177–86 (1997) (outlining the different types of protected speech and the level of protection afforded to each).

¹⁸⁸ *See* Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 CARDOZO L. REV. 2083, 2085–92 (2007) (articulating a philosophy of civil disobedience, including the conscientious violation of the law and acceptance of punishment).

¹⁸⁹ *Id.* at 2095.

¹⁹⁰ *Id.* at 2094; *see* Rich, *supra* note 46, at 826–27 (describing the burning of draft cards and sit-ins as criminal conduct that “benefit[ed] society”).

law.¹⁹¹

Though it seems clear that there is some legitimate autonomy interest in deciding whether to break the law rooted in freedom of thought, it is somewhat harder to define its contours.¹⁹² To that end, I make three claims about the scope of the interest. First, the interest in deciding whether to break the law encompasses anything that occurs within an individual's mind¹⁹³ and does not involve a voluntary physical manifestation of the individual's thoughts.¹⁹⁴ Thus, one has a legitimate autonomy interest in fantasies, thoughts, desires, plans, and intentions that involve illegal activity.¹⁹⁵ As soon as one voluntarily engages in some conduct to make

¹⁹¹ Cf. William P. Marshall, *Truth and the Religion Clauses*, 43 DEPAUL L. REV. 243, 248 (1994) ("When the laws of the state conflict with religious duties, the believer must choose between obeying her government's laws or following her religious obligations."). Note that the necessity of an autonomy interest in deciding whether to break the law is a separate question from the much thornier issue of whether law-breaking in the name of civil disobedience should be punished. See, e.g., Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1158–60 (2007) (recognizing that the failure of the State to punish those who engage in civil disobedience would undermine the expressive value of their conduct).

¹⁹² See Recent Case, *Constitutional Law—Freedom of Thought—Seventh Circuit Upholds City's Order Banning Former Sex Offender from Public Parks*, 118 HARV. L. REV. 1054, 1054 (2005) ("[I]t seems clear that there is a constitutional right to freedom of thought, but the scope and contours of this right are poorly developed."). The failure of scholars to articulate the right to freedom of thought more clearly makes sense in light of traditional technological limitations on the State's ability to intrude on an individual's thoughts. Marc Jonathan Blitz, *Freedom of Thought for the Extended Mind: Cognitive Enhancement and the Constitution*, 2010 WIS. L. REV. 1049, 1051 (recognizing that there has been "no reason for the law to protect our private, unexpressed thoughts because such internal thoughts were, in any case, beyond the reach of the state"). Moreover, such a discussion has been unnecessary in the context of the preventive state, because most tools of prevention intrude so broadly on individual autonomy that any limitation on an individual's thoughts could be lumped together with the more obvious limitations on her freedom to engage in lawful activities. Nevertheless, at least one scholar has attempted to articulate the scope of, and boundaries on, the freedom of thought. *Id.*; see also Marc Jonathan Blitz, *The Freedom of 3D Thought: The First Amendment in Virtual Reality*, 30 CARDOZO L. REV. 1141, 1150–52 (2008) (articulating a theory of freedom of thought in the context of virtual reality experiences).

¹⁹³ On this point, I disagree with Alec Walen, who argues that "the law can criminalize choosing to form an intention to pursue a criminal plan of action without criminalizing mere thought." Walen, *supra* note 179, at 839 (emphasis omitted). Walen's argument depends on a distinction he draws between conceiving or evaluating an idea, which he calls "mere thought," and choosing to engage in action, which he considers something more. *Id.* at 838 (emphasis omitted). Though I agree that choosing to do something is different than conceiving or evaluating an idea, I do not see how the former takes what occurs merely in one's mind out of the realm of "mere thought" and thus outside of the protection of the freedom of thought.

¹⁹⁴ Thus, the involuntary physical manifestations that may accompany criminal thoughts, such as increased heart rate or changes in skin temperature, are also protected by the autonomy interest in deciding whether to break the law.

¹⁹⁵ See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)) (internal quotation marks omitted)); Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*,

those thoughts real, however, she is no longer within the scope of her legitimate autonomy interest in deciding whether to break the law.¹⁹⁶ Second, conditioning one's liberty to engage in otherwise legal conduct on whether she wishes to later break the law intrudes on that person's legitimate autonomy interest in deciding whether to break the law. This claim is a corollary to the more general proposition that the State infringes on a freedom when it denies a benefit or forbids conduct otherwise permitted to all on the basis of an individual's exercise of that freedom.¹⁹⁷ Third, because the autonomy interest in deciding whether to break the law involves deliberative autonomy, the meaningful exercise of that autonomy requires that an individual have access to as much legitimately relevant information as possible.¹⁹⁸

The next section explores the implications of these claims. One issue still remains, however. Though there is a legitimate autonomy interest in deciding whether to break the law, which stems from the freedom of thought protected under the First Amendment, this does not mean that the State can never intrude on that interest. Even the most fundamental constitutional rights can be restricted when the State's interest in doing so is great enough.¹⁹⁹ The question remains, then, of when state interests might overcome an individual's legitimate autonomy interest in deciding

10 WM. & MARY BILL RTS. J. 647, 657 (2002) (“[A] central tenet of liberalism is that a boundary must be drawn between the outward realm of the state and the inward life of the individual.”).

¹⁹⁶ The distinction that I draw here between those things that occur internal to one's mind and the voluntary physical manifestations of those internal mental processes does not mean that thoughts cannot constitute acts or even culpable acts. See ALEXANDER & FERZAN, *supra* note 4, at 200–10 (discussing whether intentions are acts or culpable acts). Rather, I contend that even if mental processes can be culpable acts, they are covered by the freedom of thought and the legitimate autonomy interest in deciding whether to break the law.

¹⁹⁷ See *Bd. of Cnty. Comm'rs, v. Umbehr*, 518 U.S. 668, 674 (1996) (“[O]ur modern ‘unconstitutional conditions’ doctrine holds that the government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech’ even if he has no entitlement to that benefit.” (second alteration in original) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972))); *Torcaso v. Watkins*, 367 U.S. 488, 495–96 (1961) (holding that a religious test for public office violated the “freedom of belief and religion,” even though “a person is not compelled to hold public office”).

¹⁹⁸ See, e.g., Benjamin Moulton & Jamie S. King, *Aligning Ethics with Medical Decision-Making: The Quest for Informed Patient Choice*, 38 J.L. MED. & ETHICS 85, 87 (2010) (noting that the American Medical Association requires that physicians disclose all relevant medical information to their patients); Todd E. Pettys, *The Immoral Application of Exclusionary Rules*, 2008 WIS. L. REV. 463, 492 (“When our exclusionary rules operate to conceal relevant, readily available information from a jury—which is precisely what those rules typically are designed to do—we infringe on jurors’ deliberative autonomy”); Marcy Strauss, *Toward a Revised Model of the Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 340–41 (1987) (discussing autonomy in the context of information disclosure in the attorney-client relationship). See generally Clarence H. Braddock et al., *Informed Decision Making in Outpatient Practice: Time to Get Back to Basics*, 282 J. AM. MED. ASS'N 2313 (1999) (considering patient autonomy in the context of informed medical decision making).

¹⁹⁹ Cf. Wells, *supra* note 187, at 179–86 (discussing categories of speech which are accorded lesser protection under the First Amendment).

whether to break the law. At this point, however, it is not necessary to answer this question. Instead, it is enough for now to recognize that one's freedom to think as one wishes, even if those thoughts are detestable, antisocial, and potentially harmful,²⁰⁰ is a normative guidepost in suggesting that the State generally should allow an individual to decide whether to break the law absent some strong countervailing interest.

2. *Protecting the Interest in Deciding Whether to Break the Law*

The three prior claims about the scope of the interest in deciding whether to break the law suggest three limitations on the perfect preventive state. First, the State should not attempt to make criminal conduct impossible by directly interfering with an individual's capacity to decide whether to break the law. Second, the State should not selectively prevent people from engaging in otherwise lawful conduct because of their intent to break the law. Third, the State should be at least somewhat transparent when it implements perfect preventive measures in order to permit citizens to maximize their deliberative autonomy if they decide whether to break the law. These limitations are discussed below.

a. Preventing the Desire to Engage in Criminal Conduct

The most obvious way for the State to prevent criminal conduct would be to make it impossible for people to want to engage in the conduct. This could be done directly. For instance, the State could inject a hypothetical pharmaceutical in the water supply to suppress its citizens' anti-social or violent impulses,²⁰¹ or distribute a pharmaceutical that replaces the high from an illegal narcotic with unpleasant physical reactions to prevent people from deciding to use the drug.²⁰² Less directly, the State could use involuntary aversion therapy to prevent criminal desires.²⁰³ Because such

²⁰⁰ See Walen, *supra* note 179, at 838–39 (detailing how the intent to commit a criminal act makes the commission of that act more likely).

²⁰¹ Though no such drug currently exists, its development is possible. See Erica Beecher-Monas & Edgar Garcia-Rill, *Genetic Predictions of Future Dangerousness: Is There a Blueprint for Violence?*, 68 LAW & CONTEMP. PROBS. 301, 321 n.125 (2006) (recognizing the potential for drug therapy to suppress abnormal responses and desires in violent offenders).

²⁰² See Ryan Calo, *Future of the Internet Symposium: (Im)Perfect Enforcement*, CONCURRING OPINIONS (Sept. 7, 2010), <http://www.concurringopinions.com> (discussing such an effort in the context of prohibition). Though such efforts are the stuff of science fiction, see, e.g., ANTHONY BURGESS, *A CLOCKWORK ORANGE* 100–05 (1962) (telling the story of the narrator who, after committing violent crimes, becomes a test subject for a technique in which violent acts become associated with the effects of a nausea-inducing drug through a type of aversion therapy), and conspiracy theories, see, e.g., CHARLES ELIOT PERKINS, *THE TRUTH ABOUT WATER FLUORIDATION* 11 (1952) (“[Water fluoridation] is a planned experiment in mass medication which is part of the technique of the Communist philosophy to implant itself in America through mass control of the people by the State.”), their scientific plausibility demands some discussion.

²⁰³ “Aversion therapy” is a form of behavioral therapy that aims to make a patient give up an undesirable habit by associating it with an unpleasant stimulus. See *Aversion Therapy*, M-W.COM,

tactics would either interfere directly with an individual's ability to choose whether to break the law or place a physical price on doing so, they should not be permitted.²⁰⁴

One might argue, however, that involuntary aversion therapy is simply a more aggressive version of efforts by the State to establish community norms against certain criminal conduct.²⁰⁵ For example, the State inculcates law-abiding norms in its citizens by punishing those who break the law,²⁰⁶ and governments invest substantial resources in publicity campaigns to discourage crimes like drunk driving and child abuse.²⁰⁷ But punishment and public information campaigns treat people as responsible agents who are capable of being rationally persuaded to give up their harmful conduct.²⁰⁸ Involuntary aversion therapy, on the other hand, does not appeal to rational decision-making and instead activates a subconscious aversion to the decision to engage in harmful conduct.²⁰⁹ Thus, neither aversion therapy nor more direct modes of limiting people's thoughts should be permissible tools of the perfect preventive state.

b. Selective Screen Based on Mental State

The perfect preventive state also could screen individuals who seek to engage in otherwise lawful conduct and prevent those who harbor an undesirable mental state from doing so. Though not currently available, the technology to make the necessary sorts of determinations about the

<http://www.merriam-webster.com/dictionary/aversion%20therapy> (last visited Jan. 25, 2014) (defining "aversion therapy" as "therapy intended to suppress an undesirable habit or behavior . . . by associating the habit or behavior with a noxious or punishing stimulus").

²⁰⁴ See *Mackey v. Procunier*, 477 F.2d 877, 877–78 (9th Cir. 1973) (holding that administration of "fright drug" in prison "raise[s] serious constitutional questions respecting . . . impermissible tinkering with the mental processes"). The involuntary administration of pharmaceuticals also intrudes on fundamental interests that are not the subject of the instant discussion, such as the right to bodily integrity. See Rich, *supra* note 46, at 818–19 (discussing the wide range of possibly invasive prevention techniques).

²⁰⁵ See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662 (1998) (describing the role of social norms in regulating behavior).

²⁰⁶ See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597–600 (1996) (describing the expressive theory of punishment as one based on moral condemnation).

²⁰⁷ See, e.g., Admin. for Children & Families, *National Child Abuse Prevention Month*, U.S. DEP'T HEALTH & HUMAN SERVS., <https://www.childwelfare.gov/preventing/preventionmonth/> (last visited Jan. 25, 2014) (providing resources to help abused children and to raise awareness of children's issues); R. Gil Kerlikowske, *National Impaired Driving Prevention Month*, OFF. NAT'L DRUG CONTROL POL'Y (Dec. 1, 2012, 1:00 PM), <http://www.whitehouse.gov/blog/2012/12/01/national-impaired-driving-prevention-month> (discussing government efforts to reduce impaired driving).

²⁰⁸ See, e.g., Sherry F. Colb, *Oil and Water: Why Retribution and Repentance Do Not Mix*, 22 QUINNIPAC L. REV. 59, 65 (2003) (discussing the treatment of sexual predators in terms of taking responsibility for their actions).

²⁰⁹ See *id.* at 78 (noting that the "experience of aversion therapy bypasses the conscious, intellectual, and autonomous being").

contents of an individual's mind might someday exist.²¹⁰ Such technology would allow the State to narrowly target conduct already defined as unlawful. For instance, the possession of pseudoephedrine—a common ingredient in cold medications—is legal, but many jurisdictions outlaw possessing it with the intent to manufacture methamphetamine.²¹¹ The perfect preventive state could screen those who seek to purchase over-the-counter medication containing pseudoephedrine and prevent those who intend to use it to produce methamphetamine from buying the medicine.

In addition to enabling perfect prevention of previously-defined criminal conduct, technology that could effectively ascertain an individual's mental state or intentions would allow for the loosening of some legal restrictions and the more careful tailoring of others. For instance, the Gun-Free Schools Act of 1994²¹² criminalizes the possession of firearms in school zones on the stated ground that their possession gives rise to violence and threatens the quality of education.²¹³ Were it possible to distinguish with sufficient certainty those who intend to commit violence from those who do not, the current ban on gun possession in school zones could be amended to permit those who do not harbor a violent intent to maintain possession of their weapons.²¹⁴ This sort of tailoring would allow those who do not harbor criminal plans to enjoy a more robust Second Amendment freedom, while continuing to prevent the dangerous criminal conduct that led to the passage of the Act in the first place.

Such screening is problematic, however, because it conditions an individual's ability to engage in otherwise legal conduct on the contents of

²¹⁰ Much has been written about the potential of neuroimaging to provide insight into the mental state of a party to a dispute. See, e.g., Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States*, 62 STAN. L. REV. 1119, 1125 (2010) (arguing that in view of the current state of neuroimaging science, such evidence should not be admitted in criminal trials); Jean Macchiaroli Eggen & Eric J. Laury, *Toward a Neuroscience Model of Tort Law: How Functional Neuroimaging Will Transform Tort Doctrine*, 13 COLUM. SCI. & TECH. L. REV. 235, 237–38 (2012) (offering an optimistic view of the utility of neuroimaging as evidence in tort cases). Though there are many obstacles to the accuracy of neuroimaging, the proposed use to identify an individual's current, rather than past, mental state would eliminate at least some of those roadblocks. See Brown & Murphy, *supra*, at 1187–88 (arguing that neuroimaging evidence is of limited probative value to prove past mental states because all it can do is measure a brain's present reactions to stimuli). Regardless, my goal is not to attempt to predict how technologies of the future might work, but to point out their potential for intruding on legitimate individual interests.

²¹¹ See, e.g., WASH. REV. CODE § 69.50.440 (2007) (criminalizing ephedrine possession with intent to manufacture methamphetamine, but allowing possession for other lawful purposes).

²¹² 18 U.S.C. § 922(q) (2012).

²¹³ *Id.* § 922(q)(1)(F), (q)(2)(A).

²¹⁴ There may be other reasons for forbidding the possession of guns on school grounds, such as fear of accidents, which might provide support for maintaining the ban in some form. The fact remains, however, that intent-discerning technology would permit finer tailoring of criminal prohibitions.

her mind. In the pseudoephedrine example, anyone could buy cold medicine containing pseudoephedrine except for those who have decided to use it for a criminal purpose. Or if we forbid only those who possess a firearm with an intent to cause injury from entering schools, one's ability to engage in the hypothetically lawful conduct of entering a school with a firearm would be contingent on whether she intends to break the law once inside. In this way, conditioning one's freedom to engage in otherwise lawful conduct on thinking lawful thoughts—or not thinking unlawful ones—intrudes on an individual's legitimate autonomy interest in deciding whether to break the law.²¹⁵

The State has two options to avoid this intrusion on an individual's freedom of thought. First, it can prevent all instances of the conduct regardless of the content of the actor's mind. This is the current approach to gun possession in school zones: it is forbidden by law and, if technology permitted, it could be made practically impossible. Second, the State can allow all instances of the otherwise lawful conduct and punish those who engage in that conduct with the improper mental state. The State takes this approach with respect to the possession of pseudoephedrine and many other acts in preparation of crimes.²¹⁶

Yet there is something seemingly incongruous in saying that the State may punish otherwise lawful conduct engaged in with an improper mental state but cannot preemptively prevent the same combination of conduct and mental state. To put it more concretely, if the State can punish someone who possesses pseudoephedrine with the intent to manufacture methamphetamine, why should the State not be allowed to prevent that person from obtaining the pseudoephedrine in the first place if it can determine in advance that she has the same intent? This inconsistency does not arise merely with respect to the limited class of crimes defined as the commission of an otherwise lawful act with some nefarious intent. For example, the criminal law punishes incomplete attempts—such as when an actor intends to commit a crime and takes a substantial step beyond mere preparation in furtherance of that intent, but is prevented from bringing her criminal plan to fruition.²¹⁷ These steps need not be, and often are not,

²¹⁵ See *supra* note 197 and accompanying text (discussing the fact that the Constitution protects individual rights even when a citizen does not wish to act on those rights).

²¹⁶ See, e.g., 18 U.S.C. § 2421 (forbidding the transportation of another person in interstate or foreign commerce “with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense”).

²¹⁷ DRESSLER, *supra* note 181, at 374–75. The criminalization of incomplete attempts is arguably part of the preventive state in that it allows law enforcement to intervene to prevent more serious harms. See Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 387 (“[S]ufficiently threatening behavior may allow law enforcement to intervene early . . . , [or] provide . . . justification for preventative civil commitment.”).

criminal standing alone.²¹⁸ But if the State could technologically identify individuals who possess a criminal intent, why should it not be allowed to prevent those individuals from taking substantial, non-criminal steps in furtherance of that intent?

One could resolve this conundrum by concluding that incomplete attempts and otherwise-lawful acts with specific criminal intents should not be criminalized, either because the punished acts are not culpable or because punishing them impermissibly punishes thoughts.²¹⁹ In either case, the inconsistency disappears because both the punitive and perfect preventive states are now subject to the same limitation: the State can neither punish nor make practically impossible otherwise lawful conduct based on the contents of the actor's mind. However normatively or analytically tempting this resolution may be, it is descriptively inaccurate, because jurisdictions do punish incomplete attempts.

The inconsistency also can be resolved by recognizing that punishment is different from perfect prevention in a way that justifies the former's use even where the latter is inappropriate. Before an actor can be punished for an incomplete attempt, a factfinder must find that she had a criminal intent and completed a sufficiently culpable act in furtherance of that intent.²²⁰ The former question is a normative one, at least in part, as the factfinder must decide if the actor's intent was sufficiently firm and not too contingent on future events to give rise to criminal culpability.²²¹ The

²¹⁸ A classic incomplete attempt hypothetical involves a person lying in wait to kill another and then changing her mind or being arrested. See Alexander & Ferzan, *supra* note 61, at 642 (“[W]hen Frankie lies in wait for Johnny to return . . . , at which time she intends to kill him [she has] committed an incomplete attempt at murder.”). Lying in wait, of course, is not a criminal act, as the popularity of surprise birthday parties establishes. Though precisely the point at which an individual can be found guilty of attempt for coming close to realizing her intent to commit a future crime varies from jurisdiction to jurisdiction, and in some cases from crime to crime; most jurisdictions employ the Model Penal Code's broad definition of the actus reus of attempt as “a substantial step in a course of conduct planned to culminate in . . . commission of the crime.” MODEL PENAL CODE § 5.01(1) (1985); see John Hasnas, *Attempt, Preparation, and Harm: The Case of the Jealous Ex-Husband*, 9 OHIO ST. J. CRIM. L. 761, 762 (2012) (“[G]oing to a potential victim's home with a loaded firearm and lurking in the bushes outside a window . . . is clearly a substantial step toward the crime of attempted murder.”).

²¹⁹ See Alexander & Ferzan, *supra* note 61, at 643 (arguing that incomplete attempts are not culpable acts); Morse, *supra* note 217, at 389 (finding it “plausible” that “punishment for incomplete attempts is punishment for thoughts rather than for culpable actions”).

²²⁰ See, e.g., MODEL PENAL CODE § 5.01(2) (describing conduct that may constitute a substantial step).

²²¹ See ALEXANDER & FERZAN, *supra* note 4, at 203–06 (discussing the conditional nature of intents in the context of attempt liability); D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1294–95 (2004) (arguing that even the most “ordinary” inquiries into a defendant's mental state “depend so much on minor variations in detail,” and they thus require the jury to operate “in a contextually rich environment”); see also *Holloway v. United States*, 526 U.S. 1, 11–12 (1999) (holding that some, but not all, conditional intents would be sufficient for guilt under a federal carjacking statute).

latter inquiry also can be broken into two pieces: a factual assessment of the individual's action and a normative judgment about whether those acts are sufficiently wrongful to deserve criminal punishment. For instance, the factfinder must evaluate the seriousness of the intended crime, how close the actor was to its completion, how certain the crime was to occur, and how much the actor already has done in order to decide whether her (possibly) non-criminal conduct subjects her to liability for a criminal attempt.²²² These normative judgments by the factfinder are uniquely necessary in the context of criminal attempts because, unlike in the typical case where the legislature has defined the harmful, forbidden conduct with some specificity, the act required for an attempt is intentionally vague.²²³ Thus, when faced with two actors who are charged with the same attempt offense based on the same specific otherwise lawful act, two juries may rightly find one guilty and another not guilty because of the small variations in the surrounding circumstances.²²⁴ While the punitive state permits, and indeed requires, this individualized normative inquiry, perfect prevention does not. Without that fact-specific judgment, the State therefore intrudes on an individual's legitimate autonomy interest in deciding whether to break the law when it conditions the individual's freedom to engage in otherwise lawful conduct on the contents of her mind.

Two further observations are in order. First, this limitation on the use of screening in perfect prevention applies only to incomplete attempts and to the relatively narrow subset of crimes that forbid the combination of otherwise lawful conduct and the intent to engage in future criminal conduct. Instead, most crimes that involve some future intent requirement use that future intent to distinguish a more serious crime from a less serious one.²²⁵ In these cases, if it were possible to make the underlying criminal conduct practically impossible, the State would presumably do so regardless of whether those engaging in that conduct have the aggravating intent to engage in some future criminal act. And even if the State were to condition an individual's ability to engage in the underlying criminal conduct on the absence of the aggravating future intent, this would not

²²² Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. RICH. L. REV. 477, 490–92 (2004).

²²³ See Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 909 (2007) (noting the various formulations of the act required for attempt liability to attach).

²²⁴ See Risinger, *supra* note 221, at 1295 & n.66 (discussing how small variations in a case can change a jury's understanding of a factual circumstance).

²²⁵ For instance, criminal codes frequently punish the possession of an illegal drug with the intent to sell to a greater extent than mere possession. See, e.g., N.C. GEN. STAT. § 90-95(b)(1), (d)(1) (2011) (providing different punishments for the possession of controlled substances and possession with the intent to sell, deliver, or manufacture).

intrude on any legitimate liberty interest of the individual.

Second, the limitation described in this Section is not necessarily absolute. The State can intrude on fundamental individual liberties when its interests are sufficiently compelling and the intrusion is narrowly tailored to serve those interests.²²⁶ So too might the State be justified in screening people under certain circumstances and selectively restricting their liberty to engage in otherwise lawful conduct based on their mental state. Fleshing out when such circumstances might exist is beyond the scope of this Article, but certain factors would likely be relevant: the severity of the harm threatened; the frequency with which the targeted conduct leads to the threatened harm; and whether the targeted conduct is subject independently to constitutional protection.²²⁷

c. Transparency

In order to meaningfully exercise her autonomy interest in deciding whether to break the law, an individual must have access to as much information as possible that is legitimately relevant to that decision.²²⁸ The constitutional fair warning doctrine provides useful guidance in ascertaining what information is legitimately relevant to this decision. It teaches that the law must inform potential criminals as clearly as possible both what the law forbids and the potential punishment for breaking the law.²²⁹ This doctrine is primarily justified on the ground that punishment without notice is unfair and unjust.²³⁰ Fair warning also ensures that potential criminals have enough information to craft their conduct in a way that avoids the law's prohibitions, if they wish.²³¹ The hope, of course, is that the potential criminal will choose not to violate the law, but fair warning also provides the criminal who is committed to breaking the law with an opportunity to make an informed decision to do so.

²²⁶ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (applying the "strict scrutiny" standard for laws that burden protected speech).

²²⁷ See Ferzan, *supra* note 3, at 155–57 (discussing the factors that might be considered in assessing the risk factors of an individual under a selective prevention scheme).

²²⁸ See *supra* note 198 and accompanying text (discussing autonomy in informed decision making in various contexts).

²²⁹ See *United States v. Harriss*, 347 U.S. 612, 617 (1954) ("[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."); *Jordan v. De George*, 341 U.S. 223, 230 (1951) ("The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct."); *McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.").

²³⁰ See Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 461–62 (2001) (examining the fair warning principle and describing ex post facto laws as being unjust).

²³¹ See *id.* at 463 ("[T]he Ex Post Facto Clause imposes a requirement of notice consistent with the principle of legality: It requires that a legislature give advance notice of its intent to treat conduct as criminal so that individuals may ensure that their actions conform to the law.").

Similarly, when the State prevents people from engaging in certain conduct on the grounds that it is criminal, citizens are entitled to know what conduct the State aims to prevent. With this information, they can meaningfully decide whether to abandon their desired criminal ends, to seek to achieve them in a way that is not frustrated by perfect prevention, or to overcome the State's efforts at prevention. Imagine, for instance, that State A wants to prevent people from engaging in the criminal conduct of viewing child pornography online and thus mandates that ISPs block access to websites known to host child pornography in order to prevent its citizens from engaging in the crime of possessing child pornography.²³² In implementing its mandate, State A can choose to be transparent—requiring an ISP to inform the user that a site was blocked because it contains child pornography, that viewing such material is a crime, and that the State ordered the ISP to block the site²³³—or it can choose to be obscure—requiring that the ISP display an innocuous error message that conceals all of this information.²³⁴ In light of the harm and moral outrage caused by the production and viewing of child pornography, most citizens of State A might be perfectly happy that the State prevents people from viewing child pornography on the Internet, transparently or not.²³⁵

The choice between transparency and obscurity matters, however. Imagine that Sam, a resident of State A, wants to view child pornography. If State A chooses to prevent him from doing so obscurely, Sam may not know that he is being prevented from doing something, what he is being prevented from doing, why he is prevented from doing it, or who is responsible for the obstacles to his Internet access. Without any of this

²³² The United Kingdom, Canada, and Finland take a version of this approach to preventing the viewing of child pornography. See Federica Casarosa, *Protection of Minors Online: Available Regulatory Approaches*, 14 J. INTERNET L. 25, 31 (2011) (describing the Internet Watch Foundation's system for reporting sites with illegal content to ISPs to facilitate blocking or disabling access); Nunziato, *supra* note 99, at 1136–38 (describing the Cleanfeed system adopted in the United Kingdom to block blacklisted websites, as well as similar models in Canada and Finland).

²³³ For example, in the United Kingdom, the Internet Watch Foundation suggests that it is “good practice” for ISPs to post the following statement when they block a page that is believed to contain child pornography: “Access has been denied by your internet access provider because this page may contain indecent images of children as identified by the Internet Watch Foundation. If you think this page has been blocked in error please contact <your service provider>.” *Blocking Good Practice*, INTERNET WATCH FOUND., <http://www.iwf.org.uk/members/member-policies/url-list/blocking-good-practice> (last visited Jan. 25, 2014).

²³⁴ The Chinese government takes this approach when it prevents access to undesirable foreign websites. JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD* 94 (2006).

²³⁵ Of course, there are other issues that would likely arise in the context of such a government mandate. Most notably, the censorship model almost certainly would intrude on the First Amendment interests of both the publisher of the targeted websites and those seeking to view them. See Broder Kleinschmidt, *An International Comparison of ISP's Liabilities for Unlawful Third Party Content*, 18 INT'L J.L. & INFO. TECH. 332, 341–42 (2010) (discussing challenges to similar regimes in the United States).

information, he may become frustrated and give up, satisfy his interest elsewhere, or bypass the perfect preventive scheme by happenstance. But regardless of what happens, State A has failed to respect his autonomy and, given Sam's ignorance, it is not accurate to say that he has made a fully autonomous choice to break the law or to obey it.²³⁶ Indeed, even if he discovers some of the information that the State has hidden, Sam's autonomy will remain effectively ignorant. Maybe he will realize that he is being prevented from accessing some portion of the Internet, but nonetheless conclude that his particular ISP is seeking to prevent access to all obscene material, lawful or not. Or maybe he will perceive the State's hand, but not recognize that the State is trying to keep him from committing a crime. Thus, even if it reveals some of this information, the State will undermine Sam's autonomy.²³⁷

But if the State transparently reveals to Sam that it is responsible for the limitations on his web browsing and that those limitations exist because the targeted websites contain child pornography, then Sam would be able to exercise his autonomy fully in deciding how he will proceed. Specifically, Sam could accept the blocking as justified and forego his interest, or seek to circumvent or overcome the perfect preventive technology in some way. We would hope Sam would choose the first option, of course, and if he does then we can say that the choice was truly his own. Likewise, if Sam chooses the second option and ultimately violates the law, the State can punish him, knowing again that the choice was his and that he is fully deserving of punishment.

This transparency and respect for Sam's autonomy may come at some cost. If the State obscures its involvement in preventing criminal conduct and its goals in doing so, the determined criminal must spend some resources ascertaining those facts before she can begin to circumvent the State's efforts. But when the State is transparent, the determined criminal can seek to achieve his goal more efficiently. Moreover, reactance theory teaches that perceived restrictions on an activity increase the desirability of engaging in that activity.²³⁸ Thus Sam, knowing that the State has limited his access to child pornography, may seek more actively to view it. Intentional law-breaking is always a risk of permitting individual

²³⁶ Cf. Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 9–10 (2012) (recognizing that the “knowing” requirement for a valid waiver of trial rights is consistent with the Supreme Court’s focus on individual autonomy in plea bargaining).

²³⁷ Of course, it is possible that a particularly enterprising individual will be able to figure out all these legitimately relevant facts even if the State seeks to obscure them. Even then, the most that can be said is that the individual will get to decide autonomously whether to break the law. It would still be inaccurate, however, to say that the State has respected that individual’s autonomy.

²³⁸ See Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions*, 6 PSYCHOL. PUB. POL’Y & L. 677, 693 (2000) (“[W]hen free behaviors are threatened, the attractiveness of the threatened behavior increases.”).

autonomy, however, and the State can punish Sam if he is successful, with confidence that he is a culpable and dangerous criminal.

Though facts like the State's role in perfect prevention and the nature of the conduct the State seeks to prevent are legitimately relevant to an individual's decision of whether to break the law, the mechanics of *how* the State aims to make criminal conduct practically impossible are not. In the realm of traditional crime fighting, the State is not required to publicize its specific strategies and tactics. Police can actively conceal their attempts to ferret out crime by going undercover²³⁹ and are permitted to lie to suspects in an effort to obtain incriminating information.²⁴⁰ The techniques and procedures of law enforcement investigations are also exempt from Freedom of Information Act requests.²⁴¹ This secrecy is justifiable on a number of grounds, including officer safety and a desire not to undermine law enforcement effectiveness.²⁴² Such secrecy also makes sense here because revealing law enforcement techniques to potential criminals does not advance any legitimate autonomy interest. Certainly, knowledge about specific police strategies would be relevant to a potential criminal's decision about whether to break the law because the knowledge would allow her to accurately assess, and possibly seek to diminish, her risk of apprehension. But just as the potential criminal does not have a legitimate interest in breaking the law, she has no legitimate interest in minimizing the likelihood of apprehension and punishment if she does. Similarly, the potential criminal does not have a legitimate interest in accurately assessing the risk of apprehension and punishment; rather, the State has a valid interest in maximizing deterrence by inflating the perception of that risk.

In the perfect prevention context, this means that information detailing the specifics of how a perfect preventive technology works is not legitimately relevant to an individual's decision of whether to conform to the law. Recall Sam once more. If he knows that State A is preventing him from accessing websites that contain child pornography, he can decide to forego his desire to engage in criminal conduct or seek to circumvent or overcome the perfect preventive technology in violation of the law. Sam has a legitimate interest in making this decision as a responsible citizen of State A, but if he tries to break the law, he has no legitimate interest in succeeding. Information about how State A is preventing him from

²³⁹ See Nita A. Farahany, *Searching Secrets*, 160 U. PA. L. REV. 1239, 1300 n.318 (2012) (collecting cases where federal courts have approved of recording conversations between suspects and undercover agents and informants).

²⁴⁰ See *Frazier v. Cupp*, 394 U.S. 731, 737–39 (1969) (upholding the admission of a confession that was made during an interrogation in which police lied about strength of their case).

²⁴¹ 5 U.S.C. § 552(b)(7)(E) (2012).

²⁴² *Id.*

accessing websites containing child pornography is relevant to Sam's decision about whether to break the law only in that it might allow him to circumvent the perfect preventive technology more efficiently or effectively. Thus, extending the transparency of perfect prevention to the mechanics of the perfect preventive technology does not advance legitimate autonomy interests.

B. *The Problem of Equality*

One virtue of structural approaches to the regulation of private conduct is that they apply equally to all affected people.²⁴³ In that vein, by targeting criminal conduct rather than specific people, perfect prevention does not allow the State to discriminate on improper bases such as race, religion, or political animosity.²⁴⁴ Perfect prevention in turn might restore some of the trust that marginalized communities have lost in the State and address broader societal concerns about inequality in the criminal justice system.²⁴⁵

The equality of perfect prevention also has a downside, however, in that it treats every person like a potential criminal.²⁴⁶ Specifically, by preventing all people equally from engaging in the targeted criminal conduct, the perfect preventive state effectively assumes that everyone has the same baseline capacity, inclination, and tendency to engage in that conduct sufficient to justify an intrusion on their liberty. This assumption is problematic for at least three reasons. First, it is almost certainly not true. From a purely statistical standpoint, crimes are often committed more frequently by certain classes of people and less frequently by others. For instance, young males commit far more violent crime than older females.²⁴⁷ Meanwhile, middle-aged white males with less education are more likely

²⁴³ See Cheng, *supra* note 50, at 665 (noting that structure “tends to produce higher compliance rates, because its regulatory power is immediate and uniformly imposed on most members of the population without the need for further police intervention”).

²⁴⁴ See Rich, *supra* note 46, at 807 (noting the possibility that prosecutorial “choices can be infected by improper considerations that give rise to constitutional concerns”).

²⁴⁵ *Id.*

²⁴⁶ See Keith Hayward, *Situational Crime Prevention and its Discontents: Rational Choice Theory Versus the “Culture of Now,”* 41 Soc. POL’Y & ADMIN. 232, 243 (2007) (“Today, in contrast, contemporary [situational crime prevention] theorists proceed from the standpoint that ‘we are all criminals now’—almost as if criminality was a shared or universal social norm.”).

²⁴⁷ Compare *Crime in the United States 2011: Table 39*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2011/crime-in-the-u.s.-2011/tables/table-39> (last visited Jan. 25, 2014) (placing the number of 2011 violent crime arrests among males who were age eighteen and under at 42,822), with *Crime in the United States 2011: Table 40*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2011/crime-in-the-u.s.-2011/tables/table-40> (last visited Jan. 25, 2014) (placing the number of 2011 violent crime arrests among females who were age eighteen and under at 9542).

to commit multiple drunk-driving offenses.²⁴⁸ Moreover, if some people are predisposed to flout the law, others are presumably predisposed to abide by it scrupulously.

Second, treating everyone like a potential criminal communicates to each person specifically and to the citizenry generally that their government does not trust them.²⁴⁹ Such a lack of trust is insulting because it suggests that the government does not respect the moral fiber of its citizens and their ability to forego criminal conduct.²⁵⁰ With respect to certain minor offenses that are committed by broad swathes of the population, like jaywalking or speeding, this lack of trust may in fact be justified. But the expression of distrust of its citizens by the government has the potential of undermining the legitimacy of our representational system.²⁵¹

Third, the equality of perfect prevention runs contrary to the liberal presumption that a citizen is law-abiding absent individualized evidence to the contrary.²⁵² Thus, the State must provide individualized proof of guilt to punish²⁵³ and the nature and duration of punishment are determined based somewhat on the individual circumstances of the crime and the criminal.²⁵⁴ Similarly, the State may use the tools of the preventive state only after putting forth individualized proof of dangerousness and irresponsibility.²⁵⁵ Individualized treatment in the allocation of punishment and the imposition of prevention respects the humanity and

²⁴⁸ Matthew DeMichele & Nathan C. Lowe, *DWI Recidivism: Risk Implications for Community Supervision*, 75 FED. PROBATION 19, 21 (2011).

²⁴⁹ See R.A. Duff & S.E. Marshall, *Benefits, Burdens and Responsibilities: Some Ethical Dimensions of Situational Crime Prevention*, in ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION, *supra* note 155, at 17, 21–22 (“[Situational Crime Prevention] measures typically manifest a lack or loss of trust: they are (seen as) necessary because we do not trust people not to commit the crimes that they aim to prevent.”).

²⁵⁰ *Id.* at 22.

²⁵¹ See Scott E. Sundby, “Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen, 94 COLUM. L. REV. 1751, 1777–81 (1994) (discussing the role of reciprocal trust in the legitimacy of a republican government).

²⁵² See Alec Walen, *A Punitive Precondition for Preventive Detention: Lost Status as a Foundation for a Lost Immunity*, 48 SAN DIEGO L. REV. 1229, 1230–31 (2011) (noting that “[a] state must normally accord its autonomous and accountable citizens” the presumption that they are law-abiding “as a matter of basic respect for their autonomous moral agency”).

²⁵³ See Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 524 (2012) (“[T]here is no substitute for an individual determination of guilt before a deprivation of liberty.”).

²⁵⁴ See *Spears v. United States*, 555 U.S. 261, 264 (2009) (per curiam) (recognizing that judges can depart from federal sentencing guideline range “based on an individualized determination that they yield an excessive sentence in a particular case”).

²⁵⁵ See *Kansas v. Hendricks*, 521 U.S. 346, 357–58 (1997) (holding that a Kansas civil commitment statute was “consistent with the requirements of . . . other statutes that [the Court has] upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness”).

dignity of the person subject to the State's power.²⁵⁶ Perfect prevention, on the other hand, does not require, and indeed does not allow for, such individualized findings, and it operates from the unsubstantiated assumption that all citizens are equally predisposed to break the law.

By treating everyone like a potential criminal, perfect prevention upsets the relationship between the State and its citizens and threatens our deliberative democracy. Just like the parent who makes a tempting but dangerous toy disappear during a child's naptime, the State removes the option of engaging in a dangerous or undesirable activity.²⁵⁷ Surreptitiously removing dangerous temptation makes sense in the parental context: it ensures that the parent can fulfill her duty to protect her child, avoids the complications of dealing with the child's anger over losing the toy, and abrogates any need to explain the decision. But with the exception of those unable to care for themselves, the State does not act as a parent to its citizens.²⁵⁸ Thus, while a parent may relish the opportunity to avoid a child's tantrums, the State does not have that luxury.

Rather, for the State's authority of its people to be legitimate, public officials must be accountable for their decisions.²⁵⁹ Deliberative democracy theory in turn teaches that government accountability requires that citizens be able to demand explanations from their public officials, and the decisions of those officials are legitimate only to the extent that these officials can provide acceptable explanations.²⁶⁰ Citizens can then cast their votes on the basis of the explanations given by public officials.²⁶¹ Of course, for citizens to be able to demand explanations from the State, they must know what their government does, and thus the State must act

²⁵⁶ See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development.").

²⁵⁷ See Tien, *supra* note 86, at 6–7 ("Consider the following situation: in a drug-infested neighborhood, dealers use public coin telephones so that their calls cannot be traced to their home phones. The coin phones are then removed to stop such calls. Such regulation is not fully captured by the model of sanction-backed or duty-declaring rules. Neither sanctions nor duties are imposed upon the drug dealers by such action. They remain 'free' to act, but their conditions of action have been changed through the elimination of a resource (phones) with a design feature that facilitated drug dealing (untraceability).").

²⁵⁸ See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57–58 (1890) (recognizing the State's *parens patriae* authority "for the prevention of injury to those who cannot protect themselves").

²⁵⁹ See Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1254 (2009) ("[V]oters must be able to hold public officials accountable for their *specific policy choices* to ensure that those decisions are consistent with the preferences of a majority.").

²⁶⁰ *Id.* at 1254–55.

²⁶¹ See John J. Worley, *Deliberative Constitutionalism*, 2009 BYU L. REV. 431, 442–44 ("[T]he hallmark of deliberative democracy is that it requires voters to deliberate about how they should vote on the basis of their impartial judgments as to what best conduces to the common good rather than on the basis of what best advances their own individual or group interests.").

transparently.²⁶² Yet, perfect prevention often can operate opaquely,²⁶³ undermining deliberative democracy, government accountability, and ultimately the legitimacy of State action.²⁶⁴

In a similar vein, perfect prevention can interfere with civil disobedience. By making criminal conduct practically impossible, perfect prevention eliminates the most obvious avenue of protesting of an unjust law—engaging in the outlawed conduct. It opens the door for another, however: those who object to the criminalization of the conduct targeted by perfect prevention or the use of perfect prevention in a given context may protest by publicly seeking to circumvent the technology. For instance, when a court in the United Kingdom ordered ISPs to block access to The Pirate Bay website on the ground that it provided movies, music, and other content for download in violation of copyright law, methods to circumvent the block appeared within minutes.²⁶⁵ Some of those who provided the workarounds defended them as a protest against a court order they perceived to be unjust.²⁶⁶ But again, either kind of civil disobedience relies on perfect prevention being transparent. If citizens are not aware that a restriction has been implemented by the government and that its purpose is to prevent certain criminal conduct, they will not know enough to recognize that civil disobedience may provide a useful mode of protest.

Moreover, perfect prevention undermines the value of less intentional, but perhaps more fundamental, interactions between the public and government regulation, and specifically what Julie Cohen calls the “Play of Everyday Practice.”²⁶⁷ Unlike civil disobedience or political engagement, the play of everyday practice originates “in ad hoc, tactical responses to institutional structures and cultural patterns.”²⁶⁸ It involves an informal

²⁶² See Staszewski, *supra* note 259, at 1281 (“If citizens are unaware that a particular government official has made a specific policy decision, they cannot possibly hold that official accountable in any meaningful way for this action. A requirement or expectation that the public official will provide a reasoned explanation for the decision enables interested citizens and other public officials to evaluate, discuss, and criticize the action, as well as potentially to seek political or legal reform.”); see also David S. Levine, *The People’s Trade Secrets?*, 18 MICH. TELECOMM. & TECH. L. REV. 61, 104 (2011) (“[D]eliberative democracy requires transparency in order for it to be operative; without transparency, deliberative democracy cannot exist.”).

²⁶³ See *supra* notes 86–89 and accompanying text.

²⁶⁴ See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 895–99 (2006) (outlining the arguments for transparency as being fundamental to democratic government).

²⁶⁵ Zack Whittaker, *U.K.’s Largest ISP Blocks the Pirate Bay, but to No Avail*, CNET (June 20, 2012), http://news.cnet.com/8301-1023_3-57457001-93/u.k.s-largest-isp-blocks-the-pirate-bay-but-to-no-avail/.

²⁶⁶ See Ben Woods, *Pirate Bay: Protest Ban with Local MPs*, ZDNET (May 1, 2012), <http://www.zdnet.com/pirate-bay-protest-ban-with-local-mps-4010026052/> (“[The Pirate Bay] has urged its users to write to their local MPs and ISPs to protest the ban as it represents a form of censorship that could have far reaching consequences in future cases.”).

²⁶⁷ See COHEN, *supra* note 51, at 50–57 (describing the play of everyday practice).

²⁶⁸ *Id.* at 55.

pushing against and working within the structural constraints imposed by technological capabilities, cultural rules, and government regulation.²⁶⁹ The play of everyday practice is “shaped from the outset by institutional and material constraints,” “takes what it can get,” and “can provoke reexamination of the law.”²⁷⁰ From a practical standpoint, the play of everyday practice is central to moral and intellectual development and can lead to transformative creativity and innovation in response to constraints.²⁷¹ For instance, Cohen cites the example of people who, in response to widespread video surveillance in New York City, engaged in creative, transgressive performances on camera or developed Internet-based applications to allow people to avoid being watched.²⁷² The play of everyday practice might also include innovation that occurs through tolerated, illegal conduct.²⁷³ In the copyright realm, for example, the notice-and-takedown provisions of the DMCA have allowed copyright owners to tolerate certain infringing uses of copyrighted material, which in turn has led to innovative business models for copyright owners to profit from their content.²⁷⁴

Cohen identifies a number of requirements for the play of everyday practice, two of which are most obviously threatened by perfect prevention: operational transparency and semantic discontinuity.²⁷⁵ Operational transparency “means that people must know how they are situated in code and technologies, what is being done to them, how code and technology limit their actions and choices, and why.”²⁷⁶ Operational transparency is necessary because it allows people to “exercise meaningful control over their surroundings” in the same way that one needs to know the basic laws of science to manipulate the physical world.²⁷⁷ Semantic discontinuity involves gaps and imperfections in systems of control and surveillance.²⁷⁸ These gaps and imperfections are necessary because they are, in some sense, the playground—the (theoretical) space in which the play of everyday practice occurs.

The requirement of operational transparency reinforces the importance of broad transparency in the operation of the perfect preventive state. Yet

²⁶⁹ See *id.* (discussing the inherent difficulties in characterizing play).

²⁷⁰ *Id.* at 50, 55.

²⁷¹ See *id.* at 54, 227 (stating that some individuals “engage in more transgressive performances, ‘acting out’ for the cameras,” while others “help people plot circuitous routes around them”).

²⁷² *Id.* at 52.

²⁷³ See Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 618–20 (2008) (discussing the frequency of tolerated copyright violations).

²⁷⁴ ZITTRAIN, *supra* note 1, at 119–21.

²⁷⁵ COHEN, *supra* note 51, at 223–24.

²⁷⁶ Balkin, *supra* note 59, at 103.

²⁷⁷ COHEN, *supra* note 51, at 235.

²⁷⁸ Balkin, *supra* note 59, at 103; see COHEN, *supra* note 51, at 239–41 (describing semantic discontinuity as “the opposite of seamless”).

the fact that perfect prevention targets conduct that has been legislatively defined as criminal complicates matters. The play of everyday practice would best flourish if perfect prevention were transparent not only in *what* it seeks to prevent and the State's role in doing so, but also in *how* it seeks to prevent criminal conduct.²⁷⁹ This pits the play of everyday practice against the State's interest in crime-fighting, which is best advanced by limiting public access to information about law enforcement strategies.²⁸⁰ Similarly, the need for semantic discontinuity would suggest that the State should build imperfections into perfect prevention that allow for innovative play in the gaps.²⁸¹ Once again, however, such efforts would likely be resisted by those who view crime prevention and societal protection as the State's most important responsibilities.²⁸²

One way to avoid the potentially intractable political tension that results when one starts talking about efforts that undermine crime prevention is to focus instead on ensuring that the legislature's power to criminalize conduct is not overused. Scholars frequently bemoan the proliferation of criminal statutes, noting, *inter alia*, that they vest too much unchecked discretion in state actors.²⁸³ That discretion has ample downsides, but one upside is that it can ensure that overbroad criminal statutes are not used to prosecute conduct that society did not mean to forbid.²⁸⁴ When a criminal statute is used, however, as the foundation for perfect preventive technology, that discretion disappears and all instances of the targeted conduct are potentially eliminated. Moreover, once conduct is described as criminal, it becomes difficult to argue that the government should forego any opportunity to prevent it. This is less troubling for

²⁷⁹ See COHEN, *supra* note 51, at 236–37 (noting the importance of “technological due process” which would require “the public provision of meaningful information about the ways that traditionally public functions are performed”).

²⁸⁰ See text accompanying notes 238–41 (detailing some of the investigative techniques available and the reasons for their secrecy).

²⁸¹ See COHEN, *supra* note 51, at 264 (arguing that the DMCA's anti-circumvention provisions should apply only to technologies that protect copyrighted materials while “incorporate[ing] more tolerance for play”).

²⁸² See Balkin, *supra* note 59, at 118 (recognizing the tension between Cohen's argument for semantic discontinuity and treatment of undesirable conduct as a threat to society's security).

²⁸³ See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 749 (2005) (noting that a “common feature[.]” of overcriminalization is “excessive unchecked discretion in enforcement authorities”).

²⁸⁴ See Wayne R. LaFare, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533 (1970) (suggesting that the criminal codes are overbroad in scope since they criminalize all actions of which people disapprove and leave prosecutors to decide what laws are necessary to enforce); Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 816 (2012) (arguing that prosecutors decriminalize conduct by using “discretionary decision making” in deciding what to prosecute).

crimes like murder or rape, where the harms are obvious and severe.²⁸⁵ But where it raises constitutional concerns, as in the unauthorized duplication of copyrighted material,²⁸⁶ or is less clearly harmful, as in sleeping on a park bench,²⁸⁷ the political momentum in favor of crime prevention and the sweeping effect of perfect prevention counsel for more judicious use of the criminal law and narrow construction.

C. *The Ordering of Crime Preventing Measures*

When comparing punishment and prevention, most scholars agree that the tools of the preventive state should be used only in those situations where punishment cannot effectively prevent crime.²⁸⁸ Such a limitation, which finds some support in Supreme Court jurisprudence,²⁸⁹ derives from respect that the punitive state pays to individual autonomy.²⁹⁰ Punishment respects an actor's choice. She can avoid punishment by choosing not to offend, but if she decides to offend, the punitive state will punish her only in proportion to her chosen wrongdoing.²⁹¹ Meanwhile, the preventive state curtails autonomy by taking that choice out of the actor's hands altogether.²⁹² If this were not bad enough, the tools of the preventive state also tend to be overbroad, restricting far more liberty than is necessary to

²⁸⁵ See ZITTRAIN, *supra* note 1, at 110 (suggesting that perfect law enforcement for serious crimes is appealing).

²⁸⁶ See Golan v. Holder, 132 S. Ct. 873, 890 (2012) (recognizing that the Copyright Act has "built-in First Amendment accommodations" such as the fair use doctrine which permits exact reproduction of copyrighted works in particular circumstances like news reporting, teaching, and research so that unauthorized copying is not always punishable (quoting Eldred v. Ashcroft, 537 U.S. 186, 219 (2003)) (internal quotation marks omitted)).

²⁸⁷ See Pottinger v. City of Miami, 810 F. Supp. 1551, 1575–77 (S.D. Fla. 1992) (discussing ordinances that forbid sleeping in public for possible Eighth and Fourteenth Amendment constitutional violations).

²⁸⁸ See Cole, *supra* note 9, at 696 ("[A]ny consideration of preventive detention should begin with a strong presumption that society should deal with dangerous people through criminal prosecution and punishment, not preventive detention."); Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. REV. 77, 85 (2005) (arguing that preventive detention should be permitted only for "those who cannot conform to the law, including those not in control of their behavior"); Schulhofer, *supra* note 9, at 85 (proposing that prevention is permissible "only as a gap-filler, to solve problems that the criminal process cannot address").

²⁸⁹ See, e.g., Kansas v. Crane, 534 U.S. 407, 412 (2002) (noting the "constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings'" (quoting Kansas v. Hendricks, 521 U.S. 346, 360 (1997))); see also Schulhofer, *supra* note 9, at 85–90 (arguing that Supreme Court precedents implicitly recognize that the criminal process is preferred over preventive measures).

²⁹⁰ Schulhofer, *supra* note 9, at 90–91.

²⁹¹ *Id.*

²⁹² See Morse, *supra* note 15, at 1122 ("[I]t is a massive infringement on [dangerous agents'] liberty and autonomy to institute pure preventive detention for responsible agents."); Schulhofer, *supra* note 9, at 93 (arguing that in order to not infringe personal autonomy, "the criminal process [must serve] as its first line of defense").

prevent crime.²⁹³ Thus, where both punishment and prevention might be used to prevent crime, punishment is typically viewed as the better option,²⁹⁴ though scholars debate precisely when the punitive state can be said to be inadequate and when prevention is appropriate.²⁹⁵

Where, though, does perfect prevention fit into this hierarchy? Specifically, how does perfect prevention compare to punishment? How does it compare to prevention? The initial answer to the first question is straightforward: punishment should be preferred over perfect prevention for the same autonomy-respecting reason as it is preferred over prevention. As noted previously, punishment respects an actor's autonomy by making any loss of liberty contingent on her choice to break the law.²⁹⁶ Like prevention, perfect prevention, on the other hand, deprives the actor of that choice entirely.²⁹⁷ Consequently, when both options are available for the prevention of certain criminal conduct, punishment should be preferred over perfect prevention.

To those who value individual autonomy as a right of the highest order, this analysis may be sufficient to require that perfect prevention never be used. But to those who are not absolutists about individual autonomy, it is quite plausible that there might be instances where a certain kind of criminal conduct is sufficiently harmful and has proven sufficiently resistant to the deterrent effects of punishment that punishment can be said

²⁹³ See *supra* notes 167–68 and accompanying text (stating that efforts by both punitive and preventive governments to thwart criminal activity—such as threats of punishment, preventive detention, and restraining orders—inhibit an individual's freedom to engage in a wide range of legal activity in addition to preventing criminal conduct).

²⁹⁴ See *supra* note 288 and accompanying text (arguing that most scholars agree that preventive measures should only be used when punishment fails to prevent crime). *But see* Slobogin, *supra* note 10, at 122 (arguing for a scheme of prevention to replace the current criminal justice system based on punishment).

²⁹⁵ See CHRISTOPHER SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* 134 (2006) (arguing that one who “wants to commit serious crime so badly that he is willing to be deprived of liberty or suffer similarly serious consequences” should be eligible for preventive detention); Corrado, *supra* note 288, at 108 (noting the difficulty in differentiating between the individual who is not deterred and the one who cannot be deterred); Walen, *supra* note 178, at 904 (suggesting evidentiary difficulties arise when determining whether to detain someone on the basis that they might do future harm).

²⁹⁶ This is not to say that the threat of punishment does not intrude on an actor's autonomy at all. It certainly does, but that intrusion is the smallest intrusion possible for the State to still fulfill its obligation to protect its citizenry. See Morse, *supra* note 3, at 58 (calling the threat of punishment for a violation of the criminal law an “ordinary, ‘base-rate’ infringement” on autonomy).

²⁹⁷ Note that this argument depends on there being a legitimate autonomy interest in deciding whether to break the law. See *supra* notes 179–91 and accompanying text (arguing that the state intervention threatens the individual's interests in lawful conduct and that the freedom of thought, which prohibits punishment for thoughts alone, also includes the power to decide whether to break the law or undertake civil disobedience). If that interest is not legitimate, then a properly tailored perfect preventive measure that makes criminal conduct, and only criminal conduct, practically impossible, would be less intrusive on an individual's legitimate autonomy than punishment.

to have failed, thus opening the door to the use of perfect prevention.²⁹⁸ The question of punishment's failure in preventing a certain kind of criminal conduct will require an assessment of both the seriousness of the harm caused by the conduct and the extent to which society has exhausted the potential of punishment to deter the conduct. This Article will not attempt herein to identify the threshold at which the requisite harmfulness or exhaustion can be met. Note, however, that the magnitude of the pressure to conclude that punishment has failed will depend in large part on the political power wielded by those who are injured by the targeted criminal conduct. This pressure will threaten to distort the process by which the State decides whether certain perfect preventive measures are appropriate.²⁹⁹

Turning then to the question of preference between prevention and perfect prevention, the comparison is somewhat similar to comparing apples and oranges. Though both perfect prevention and prevention intrude on an actor's ability to choose whether to break the law, prevention effects an autonomy intrusion that is greater in magnitude but more narrowly targeted than that of perfect prevention. The preventive state imposes often-substantial limitations on the liberty of targeted individuals to engage in both lawful and unlawful conduct.³⁰⁰ The perfect preventive state, on the other hand, limits everyone's autonomy to a lesser degree by seeking to prevent only criminal conduct.

Which, then, is more intrusive on liberty and therefore less desirable? One way to answer this question is to begin with the reasonable assumption that the State may properly prevent actual criminal conduct and then to assess to what extent prevention and perfect prevention each intrudes unnecessarily on individual autonomy in pursuit of that goal. With respect to prevention, this means inquiring into the accuracy of the State's assessment of an individual's likelihood of offending, i.e., the risk of false determinations of dangerousness, however that is defined,³⁰¹ and the extent to which the preventive measure in question restricts lawful

²⁹⁸ For instance, more than ten thousand people die annually in motor vehicle accidents involving drunk drivers. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS 2009 DATA: ALCOHOL-IMPAIRED DRIVING 1 (2010), available at <http://www-nrd.nhtsa.dot.gov/Pubs/811385.pdf>. Despite extensive and costly efforts to deter drunk driving through traditional means, the rate of drunk-driving-related fatalities has remained constant for several years. See Rich, *supra* note 46, at 829 (describing a decline in the effectiveness of efforts to reduce drunk driving in the 1990s). Thus, the argument could be made that with respect to preventing drunk driving, the punitive state has failed.

²⁹⁹ See generally Cohen, *supra* note 44 (discussing strategies, including the anti-circumvention provisions of the DMCA, pushed by "major copyright industries" to prevent online copyright infringement and protect their business interests).

³⁰⁰ See *supra* note 168 and accompanying text (arguing that broad preventive measures reduce the freedom to engage in lawful conduct).

³⁰¹ See, e.g., Robinson, *supra* note 4, at 1450 (criticizing the use of prior record as a predictive factor for dangerousness).

conduct. With respect to perfect prevention, the inquiry should focus on how widespread the targeted criminal conduct is, and thus how much the perfect preventive technology also prevents non-criminal conduct because some people will never seek to engage in criminal conduct yet will still suffer an intrusion on their liberty.³⁰² This analysis is somewhat more fine-grained than that of the libertarian absolutist, but it still requires resolution of difficult normative questions. For instance, how many people who never would have engaged in the targeted criminal conduct must be subject to perfect prevention to outweigh the mistaken preventive detention of one person who would not have committed the targeted crime? I will leave such questions for another day. Nonetheless, they teach that whether prevention or perfect prevention is preferable must be determined on a case-by-case basis.

V. CONCLUSION AND AREAS FOR FUTURE INQUIRY

Perfect prevention—the State’s use of technology to make certain criminal conduct practically impossible—is a new paradigm for crime prevention that creates opportunities for the State to cure social ills that have been resistant to traditional punishment and targeted prevention. At the same time, perfect prevention poses new threats to individual liberties and to the relationship between the State and its citizens, as proper limitations on the perfect preventive state have not been adequately developed. This Article raises some of these concerns herein and has proposed responsive limits to the substantive scope and application of perfect prevention.

The perfect preventive state demands that we explicitly recognize an individual’s legitimate interest in being allowed to decide whether to break the law. Recognition of this interest suggests three limits on the perfect preventive state: (1) the State cannot interfere directly with an individual’s decision whether to break the law; (2) the State should not condition one’s freedom to engage in otherwise lawful conduct on her future intent to engage in criminal conduct; and (3) the State should be transparent in its use of perfect preventive technology, clarifying its role in the

³⁰² For a discussion of the latter issue, see Rich, *supra* note 46, at 820–21. I thank Professor Jonathan Zittrain for the observation that this analysis is analogous to that required by the existence of the “substantial noninfringing use” safe harbor in the copyright infringement context. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (discussing the balance between effective protection for the copyright holder and fair use by consumers). Unfortunately, the substantial non-infringing use standard provides little clear guidance on how to balance “non-infringing” or noncriminal conduct against infringing or criminal conduct. See Shane Nix, *Lifting the Supreme Court’s Thumb Off of the Scale: Promoting Technological and Entrepreneurial Innovation, While Protecting the Interests of Copyright Holders After MGM v. Grokster*, 16 DEPAUL-LCA J. ART & ENT. L. 49, 88 (2005) (“[I]t is unclear as to what evidentiary standards are required to find inducement under *Grokster* and ‘substantial non-infringing use’ for contributory infringement under *Sony*.”).

implementation of that technology and articulating the conduct it seeks to prevent.

By imposing a blanket restriction on all people, perfect prevention can interfere with valuable interactions between the State and its citizens and hamper the “play of everyday practice.”³⁰³ These concerns underscore the need for transparency in perfect prevention, counsel in favor of perfect preventive technologies that leave open the room for “play,” and place increased importance on legislative decisions to criminalize conduct. Finally, because punishment best respects individual autonomy, it should be the preferred means of crime prevention vis-à-vis perfect prevention. Nonetheless, there may be situations where punishment fails to prevent enough instances of particularly harmful conduct and where the use of other means of crime prevention might be justified. The proper hierarchy of perfect prevention and prevention is less clear-cut, however, and which approach is preferable will require a case-by-case assessment.

Numerous issues regarding the use of perfect prevention remain outstanding. First, what sort of procedural limitations should be placed on the perfect preventive state? Because perfect prevention applies to everyone, the normal due process paradigm, which requires individualized finding before the State can deprive a person of a cognizable liberty or property interest, does not cleanly apply. What sort of findings, then, should we require before we allow the State to impose perfect preventive technologies? Also, what sort of requirements should we impose on perfect preventive technology to ensure that it targets criminal conduct, and only criminal conduct, as accurately as possible? And once perfect prevention technology is in place, what sort of review process should be required to guarantee that we do not become wedded to archaic and malfunctioning technology?³⁰⁴

Second, how are political pressures likely to influence the potential adoption of perfect preventive measures? What constituencies have an interest in the development of the perfect preventive state? How should the process of assessing potential perfect preventive measures account for these political pressures?

Third, under what circumstances should perfect prevention be preferred over punishment? How much value do we place on the autonomy that is lost when one is prevented from engaging in criminal conduct? This Article argues that there is no legitimate autonomy interest in committing crime, but that we do have an interest in deciding to break the law. If that is so, how valuable is that autonomy interest? Is it proper

³⁰³ See COHEN, *supra* note 51, at 50–57.

³⁰⁴ See ZITTRAIN, *supra* note 1, at 114–17 (describing the pitfalls of using technology to apply legal standards); Wagner, *supra* note 51, at 462–63 (arguing that an enforcement scheme reliant on technology will lack flexibility and stability).

to weigh that interest against the social harm of certain criminal conduct?

Fourth, is there some hybrid between prevention and perfect prevention that is superior to both? In other words, is the best approach one in which we identify those individuals most likely to engage in certain criminal conduct and use technology to make it practically impossible for them to do so?³⁰⁵ Or do issues about fairness and accuracy make such a paradigm impracticable?

Fifth, at what point, if any, should the concerns raised by perfect prevention give way to the societal interest in crime prevention? Are there categories of crimes—like terrorism or sexual assault or computer crimes—that are so severe that individual autonomy should be set aside in favor of protecting the public? If so, how do we impose limits on those categories to prevent continuing encroachment by perfect prevention in the name of public safety and crime prevention?

³⁰⁵ See, e.g., Alexander & Ferzan, *supra* note 61, at 667 (recognizing the potential of technology to prevent crime by imposing minimally-intrusive restrictions on the liberty of responsible but dangerous individuals).