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Limits on the Perfect Preventive State

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ABSTRACT

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 by making criminal conduct practically impossible. 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 2000 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 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 from preventing certain criminal conduct. Third, I highlight areas for future discussion of perfect prevention by scholars.
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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

INTRODUCTION

A “gap”³ exists between punishment and prevention, the twin traditional approaches to preventing 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 committed and only in proportion to the seriousness of the offense.⁶ The preventive state, meanwhile, “attempt[s] to identify and neutralize dangerous individuals before they commit crimes by restricting their liberty in a variety of ways.”⁷ 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

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³ Stephen J. Morse, Preventive Commitment of Dangerous Offenders, 32 J.L. MED. & ETHICS 56, 58 (2004); see also Kimberley Kessler Ferzan, Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible, 96 MNN. L. REV. 141, 142 (2011).
⁵ Steiker, supra note 4 at 773.
⁶ See Morse, supra note 4 at 58.
⁷ Id. at 774.
liberty restrictions. Because of these limitations on punishment and prevention, responsible people who are committed to their criminal goals despite the threat of punishment remain “free to pursue their projects until they actually offend, even if their future wrongdoing is quite certain.”

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 the two states 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. They also make it easier to civilly commit people considered particularly dangerous, such as potential sex offenders or terrorists. Meanwhile, prosecutors push to expand the reach of existing inchoate crimes to allow

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9 Morse, supra note 4 at 58; see also Kimberly Kessler Ferzan, Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible, 96 MINN. L. REV. 141, 142 (2011) (“We have 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 or rational decisions by police or prosecutors, juries that reach the wrong decisions, 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. Dangerousness is difficult to predict, see Christopher Slobogin, The Civilization of Criminal Law, 58 VAND. L. REV. 121, 145 (2005) (noting that even with improvement in risk assessment, recidivism prediction still cannot satisfy clear and convincing evidence standards), and mental illness often slips by unnoticed until it manifests in criminal conduct.
10 See Robert M. Chesney, The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention, 42 HARV. J. ON LEGIS. 1 (2005) (material support); Robinson, supra note 4 at 1430 (gang membership); Steiker, supra note 4 at 774-75 (loitering).
11 See Eric D. Janus, Failure to Protect: America’s Sexual Predator Laws and the Rise of the Preventive State (2009); Alec D. Walen, Crossing a Moral Line: Long-Term Preventive Detention in the War on Terror, 28 PHIL. & PUB. POL’Y Q. 15 (2008); Morse, supra note 4 at 60-65.
police to intervene earlier in the potentially dangerous activities.  

Scholars too are concerned with crime in 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.

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. These tools of what I call herein the “perfect preventive state” 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 “detrarrability” of potential criminals; rather, they seek to frustrate any attempt to engage in the prohibited conduct. They do not require the State to make the empirically challenging determination of who is dangerous and

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13 See, e.g., Ferzan, supra note 9 at 167-68 (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 for the responsible individual who “wants to commit serious crime so badly that he is willing to be deprived of liberty or suffer similarly serious consequences for it”).

14 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 . . . .”).

15 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. Like Zittrain, I use of the adjective “perfect” to describe the goal of the technology in question rather than its ultimate effectiveness in accomplishing that goal. See infra notes 73 - 77 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.
irresponsible and therefore can be subject to special liberty deprivation; instead, they target criminal conduct and aim to prevent anyone from engaging in it.

Take the “epidemic” of gun violence, for example. 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 law decade. Moreover, more than four times that number suffer non-fatal injuries each year as a result of intentional assaults with a firearm.

This violence persists despite traditional efforts at deterrence through punishment. Criminals who use or possess firearms face substantial sentencing enhancements. Those who traffic in drugs or commit crimes of violence and use, brandish, or discharge a firearm face onerous mandatory minimum sentences. Mere possession of a firearm by a felon

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17 Printz v. United States, 521 U.S. 898, 940 (1997) (Stevens, J., dissenting) (citation omitted). I use “gun violence” here to mean the intentional use of a firearm to harm another person, and thus excludes suicide and accidental shootings, which made up nearly two-thirds of the fatalities caused by firearms in 2012. CDC, WISQARS Fatal Injury Reports, 1999-2010, for National, Regional, and States, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_us.html. For the reasons explained below, however this Article focuses only on criminal conduct. See infra notes 70-72 and accompanying text.
21 See, e.g., U.S.S.G. § 2B3.1(b)(2) (2012) (increasing the base offense level for robbery where firearm was used); see also DAVID M. KENNEDY, DETERRENCE AS CRIME PREVENTION: RECONSIDERING THE PROSPECT OF SANCTION 10, 13 (2008) (discussing state laws enhancing punishment for felony offenses committed while using or brandishing a firearm).
22 18 U.S.C. § 924(c)(1)(A) (2012); see also Beale, supra note 20 at 1670 (calling § 924(c) “a kind of super-enhancement statute”).
is a felony. Yet enhanced punishments are at best of marginal benefit in deterring gun use, a fact confirmed by the sizable number of criminals who continue to possess or use guns in the course of their criminal activity.

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. Federal law prohibits people who have been “adjudicated as mentally defective” or previously “committed to a mental institution” from purchasing a firearm. The mentally ill continue to commit gun violence, however. And though the ineffectiveness of efforts to keep guns out of the hands of the mentally ill may be due in part to inadequacies in their implementation, even if they were airtight 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.

25 See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, Firearm Use by Offenders at 1 (Nov. 2001) (reporting that approximately one-third of violent offenders carried or used a firearm).
28 See id. (describing the mental health history of perpetrators of large-scale killings with firearms).
29 See id. (arguing that the national database of those who are disqualified from buying firearms due to mental illness is inadequate).
Perfect prevention may succeed where the punitive and preventive states have failed, however, by aiming to prevent the criminal conduct underlying the violence.31 For instance, many perpetrators of gun violence use guns that they do not legally possess.32 Some are stolen.33 Others are obtained through “straw man” purchases by which one legally permitted to buy a firearm does so before passing it on to a person, such as a felon, not lawfully entitled to own the weapon.34 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.35 Similarly, technology exists that could disable guns in public places where gun possession is illegal, like schools, universities, and commercial establishments.36 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. Older weapons lacking these technologies would need to be removed from circulation or updated.37 And opponents of gun control

31 Of course, one can also imagine fantastic technologies, like smart bullets that break apart harmlessly before hitting a person, that would make impossible the gun violence itself. I will attempt, however, to limit my discussion herein to technologies that are at least plausible.
33 Id. at 78.
34 Id.
35 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. See SKYFALL (Eon Productions 2012).
36 See Bilton, supra note 35.
would certainly oppose the implementation of these new technologies.\textsuperscript{38} 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.\textsuperscript{39}

Some perfect prevention regimes are in place already. For example, the anti-circumvention provisions of the Digital Millennium Copyright Act of 2000 (DMCA) make it illegal to develop technology that could be used to circumvent technological protections on copyrighted material.\textsuperscript{40} By causing such technologies to be unavailable, the DMCA aims to make many kinds of copyright infringement practically impossible for the average person.\textsuperscript{41} Other perfect prevention technologies are under development.\textsuperscript{42} 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.\textsuperscript{43}


\textsuperscript{39} Efforts to reduce gun violence also face unique constitutional and political hurdles. The Supreme Court has recognized an expanded individual Second Amendment right to possession of a firearm that invalidated a ban on handgun possession in the home. District of Columbia v. Heller, 554 U.S. 570, 594, 628-29 (finding individual Second Amendment right to keep and bear arms and invalidating ban on handgun possession in the home); 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, -- F.3d --, 2012 WL 6156062, at *9 (Dec. 11, 2012).


\textsuperscript{41} See Julie E. Cohen, Pervasively Distributed Copyright Enforcement, 95 GEO. L.J. 1, 9-11 (2006).


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 new. For more than three decades, the Situational Crime Prevention (SCP) movement has advocated for crime prevention measures that make crime more costly to commit and, in some instances, practically impossible.44 More recently, Neal Katyal has discussed the use of architecture to prevent crime in spaces both real45 and digital,46 and Edward Cheng has argued that in some circumstances structure may be a better crime prevention tool than legislative fiat.47 Technologists have joined the party, too.48 Joel Reidenberg recognized that the Internet created an opportunity for ex ante enforcement of legal rules.49 Lawrence Lessig’s famous claim that “code is law” acknowledged that the structure of the Internet can be used by powerful interests to prevent conduct they do not like.50 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.51

These scholars have recognized the (relatively untapped) potential of technology to impose powerful, and sometimes unseen, restrictions on

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48 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 (2012); R. Polk Wagner, On Software Regulation, 78 S. CAL. L. REV. 457 (2005).
50 Lawrence Lessig, Code and Other Laws of Cyberspace 6-7 (1999).
51 ZITTRAIN, supra note 1 at 104-10.
They have also delineated some potential practical and legal concerns with the implementation of such restrictions. But scholars thus far have failed to situate the emergence of perfect preventive technologies within relevant legal theories. Doing so is crucial. The political pressure to prevent crime is enormous, and similar pressure can be expected in support of using technology to prevent criminal conduct. 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. Examining the emerging perfect preventive state in the light of this experience is necessary to identify limits on the use of perfect prevention 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 responsive to those concerns. Third, it identifies areas for future consideration of the perfect preventive state by scholars.

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52 See COHEN, supra note 48 at 156 (“Architectures of control are emerging gradually, in a piecemeal, uncoordinated fashion, at points where the interests of powerful institutional actors align.”).

53 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 43 (engaging in an economic analysis of perfect preventive technology); see also Reidenberg, supra note 49 at 1965 (noting that technological rule enforcement must comply with constitutional due process requirements).

54 See infra notes 126-133 and accompanying text.


57 See generally Steiker, supra note 4 (noting some of the limits placed on the punitive state and proposing others on the preventing state).
Part I defines the perfect preventive state and makes some important observations about the implementation of perfect preventive technology. Part II 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 explaining how advocates of these precursors have failed to provide the theoretical foundation necessary to develop limits on perfect prevention. Part III identifies and assesses possible objections to perfect prevention and explores potential substantive limits to address those concerns. Specifically, this Part 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 IV concludes by identifying issues relating to perfect prevention that remain for further exploration.

I. 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.\textsuperscript{58}

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,\textsuperscript{59} but the federal government does not require copyright owners to implement any specific technology to prevent such copying. Rather, the Digital Millennium Copyright Act of 2000 (DMCA) criminalizes the creation of means to circumvent whatever technological protection measures that copyright owners choose to implement.\textsuperscript{60} In doing so, the DMCA aims to make the tools of circumvention unavailable to the general public.\textsuperscript{61} 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.\textsuperscript{62}

\textsuperscript{58}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 intrusions into a dwelling or other private places. . . . Liberty presumes an autonomy of self that includes the freedom of thought, belief, expression, and certain intimate conduct.”); Isaiah Berlin, Two Concepts of Liberty, in LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY 166, 169-81 (Henry Hardy ed., 2002) (defining negative and positive liberty in terms of the relationship between the individual and the government). Thus, while a private homeowner’s decision to place a high fence around her property to keep out burglar’s would not intrude on anyone’s liberty interest, see Larry Alexander & Kimberly Fessler Ferzan, Danger: The Ethics of Preemptive Action, 9 OHIO ST. J. CRIM. L. 637, 641 (2012), a government mandate that all private property be surrounded by such a fence certainly would.


\textsuperscript{61}Cohen, supra note 41 at 7.

\textsuperscript{62}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 48 at 486. 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 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 drunken 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 by the subset of the population deemed most likely to commit the offense of drunk driving. 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 increase the detectability of crime after the fact, like cameras that photograph the license plates of those 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. 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.

But the ex ante nature of a measure is not sufficient to situate it squarely in the perfect preventive state, however. The measure also must seek to so increase the difficulty of committing the crime that the goal is no longer to deter the potential criminal but to simply frustrate her. 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

63 See, e.g., N.C. GEN. STAT. § 20-179.3(g5) (2012).
64 Dorothy J. Glancy, Privacy in Autonomous Vehicles, 52 SANTA CLARA L. REV. 1171, 1208 (2012).
66 See Cheng, supra note 47 at 664 (“Viewed from a would-be defendant’s perspective, there is a difference between being able to do something and knowing that you will likely get caught … and not being able to do it at all.”).
the event of a robbery.\textsuperscript{67} 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 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 moves from the punitive state and becomes perfect prevention is not amenable to clear definition.\textsuperscript{68} 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.

The fourth and final defining characteristic of the perfect preventive state is that it targets \textit{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.\textsuperscript{69} 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.\textsuperscript{70} Civil sanctions, on the other hand, lack that moral

\footnotesize{\begin{itemize}
\item[\textsuperscript{67}] See, \textit{e.g.}, \textsc{Houston Code of Ordinances} \textsc{s} 28–408 (2012). Edward Cheng uses the example of metal post boxes to illustrate a similar point. \textit{See} Cheng, \textit{supra} note 47 at 664. I eschew this example because the governmental origins of the United States Postal Service raise the murky issue of whether the use of such post boxes constitutes the result of a government mandate or constitutes private self-help.
\item[\textsuperscript{68}] \textit{See} Cheng, \textit{supra} note 47 at 664 (acknowledging that the difference may smack of “splitting hairs”).
\item[\textsuperscript{69}] \textit{See} \textsc{Zittrain}, \textit{supra} note 1 at 108 (recognizing that one could seek to “design[] against” any “undesirable conduct”).
\item[\textsuperscript{70}] \textit{See} Erik Luna, \textit{Principled Enforcement of Penal Codes}, 4 \textsc{Buff. Crim. L. Rev} 515, 538 (2000) (“Law, particularly criminal law, also serves an educational function—to express boundaries between the acceptable (and possibly distasteful) and the forbidden—illuminating the border and suggesting that the public steer clear.”); Paul S. Robinson, \textit{Rules of Conduct and Principles of Adjudication}, 57 \textsc{U. Chi. L. Rev.} 729, 731 (1990)
\end{itemize}}
element and thus do not define forbidden conduct as much as they place a cost on conduct that society wishes to discourage. The State’s interest in preventing criminal conduct is therefore subject to the narrowest limitations. 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. 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 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 understanding 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, and the resourcefulness of motivated criminals knows few limits. 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

(“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.”).

71 See Henry M. Hart, Jr., The Aims of the Criminal Law, 23 LAW & CONTEMP. PROBS. 402, 404 (1958) (“What distinguishes a criminal from a civil sanction ... is the judgment of community condemnation which accompanies it 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, 782-97 (1997) (discussing the breakdown in the distinction between criminal and civil regulations).


73 See Rich, supra note 43 at -- (describing the inevitable errors in perfect preventive technology); Reidenberg, supra note 49 at 1965 (noting that technological enforcement of laws is inevitably imperfect).

74 See Cohen, supra note 41 at 41 (“Technically-skilled risk-takers will be able to hack the code, defeat the watchers, and nurture thriving darknets.”); Cheng, supra note 47 at 691 (noting that if the State required speed governors on all new vehicles, the “governors could be disconnected or otherwise disabled”).
deterrence of all crime.\textsuperscript{75} Even if it were, some crimes and criminals cannot be deterred.\textsuperscript{76} 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. Perfect prevention seeks to wipe out certain criminal conduct entirely, however, and even if it can never quite succeed, the sweeping aim has unique implications that demand exploration.\textsuperscript{77}

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.\textsuperscript{78} Similarly, the “tethered appliances” discussed by Jonathan Zittrain often do not reveal the variety of things they do not permit their users to do.\textsuperscript{79} And even when the fact of regulation is evident, the parameters governing what conduct is permitted and what is forbidden may not be.\textsuperscript{80} Finally, structural regulation can obscure who is responsible for the limitations on individual action.\textsuperscript{81}

Yet opacity is not a necessary feature of structural regulation generally, or perfect prevention specifically.\textsuperscript{82} The government can choose to reveal its role in regulating conduct and specify, or at least not obscure, the conduct it means to prevent, why it is doing so, and how it means to accomplish that goal. That perfect prevention can be transparent or obscure does not

\textsuperscript{75} See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 1 (2011) (delineating the purposes of sentencing as “deterrence, incapacitation, just punishment, and rehabilitation”).

\textsuperscript{76} See Steven Shavell, Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent, 85 COLUM. L. REV. 1232, 1243 (1985).

\textsuperscript{77} See COHEN, supra note 48 at 175 (recognizing that imperfect structural constraints can have an “effect on the everyday lives of network users”).

\textsuperscript{78} Lee Tien, Architectural Regulation and the Evolution of Social Norms, 7 YALE J.L. & TECH. 1, 7 (2003-04).

\textsuperscript{79} ZITTRAIN, supra note 1 at 107-08.

\textsuperscript{80} See James Grimmelmann, Regulation by Software, 114 YALE L.J. 1719, 1736 (2005).


\textsuperscript{82} See Katyal, supra note 46 at 2284-85 (noting that some forms of government regulation are more transparent than others).
tell us whether transparency is good or bad or what kind of transparency should be preferred—there will be more on that later—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. 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. The Undetectable Firearms Act of 1988 is an example of the former approach. It criminalizes the manufacture, importation, or possession of a firearm that cannot be detected by a metal detector or x-ray machine. That ban makes other criminal conduct, like the unauthorized possession of a firearm on an airplane, practically impossible for the general public who lack the expertise to manufacture such a firearm themselves. Government mandates that Internet service providers prevent their customers from accessing websites containing child pornography are examples of the latter approach, as the State directly

83 See infra §§ III.A.2.c, III.B.
84 See LESSIG, supra note 50 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”).
85 See Wagner, supra note 48 at 485-86 (discussing other examples). When the government dictates that producers of technology put limitations on its use, these limitations make true Lawrence Lessig’s famous, and often criticized, aphorism, “Code is law.” LESSIG, supra note 50 at 6. See 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.”); Grimmelmann, supra note 80 at 1721 (“[C]ode does the work of law, but does it in an architectural way.”).
86 The anti-circumvention provisions of the DMCA are another example of the State preventing criminal conduct by restricting access to enabling technology. See supra notes 40-43 and accompanying text.
89 See Cory Doctorow, Congressman calls for ban on 3D printed guns, Boingboing.net, Dec. 9, 2012 (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).
limits the technology that one might use to engage in the criminal conduct of possessing child pornography.  

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. Other pharmaceuticals target antisocial and racist thought processes. 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.

II. 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 similarity to precursors like the Situational Crime Prevention (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.93 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.94 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. 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.95 The utilitarian account’s relationship to a finding of guilt is more complex. 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.96 Many retributivists criticize utilitarianism because it may justify the punishment of an innocent individual for an offense committed by another or for an offense that never occurred.97 But even if the 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.98

95 See Michael Tonry, Purposes and Functions of Sentencing, 34 CRIME & JUST. 1, 16-17 (2006).
96 See id. at 17.
97 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.”)
98 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”).
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.” 99 Prevention has a long history, with the civil commitment of the mentally ill and dangerous tracing its roots back to common law. 100 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. 101 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 102 to potentially-indefinite incarceration 103 or possibly even death. 104

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99 Steiker, supra note 4 at 774.
102 392 U.S. 1 (1968).
104 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 (1976); see also Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 Harv. L. Rev. 1429, 1430 n.4 (2001) (listing jurisdictions that consider dangerousness in sentencing).
The preventive state’s authority derives from the government’s police power to ensure public safety. 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. The range in severity of possible intrusions on liberty from the preventive state correlates to the finding of dangerousness required to justify the intrusion. 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.” Meanwhile, a Terry stop, during which a person is restrained for only a brief period of time, is justified upon

105 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, U.S. 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. 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).

106 See Hendricks, 521 U.S. at 357 (“States have in certain narrow circumstances provided for the forcible civil detention 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.”). 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 out 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)

107 See Slobogin, supra note 13 at 50-53 (proposing a “proportionality principle” to govern the amount of dangerousness that must be proven to justify preventive action).

108 Id. at 356, 357.

109 See U.S. v. Swanson, 341 F.3d 524, 528 (6th Cir. 2003).
mere reasonable suspicion that the target is or has been engaged in criminal activity.\textsuperscript{110}

The second substantive limitation on the preventive state cabins its use to narrow sub-categories of the dangerous, including pretrial detainees, immigrants facing deportation, and the mentally ill.\textsuperscript{111} 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 cannot be deterred adequately by the punitive state.\textsuperscript{112} 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 controlling behavior.”\textsuperscript{113} Similarly, pretrial detention solves a problem – flight by dangerous individuals charged with serious crimes – that \textit{ex post} punishment is ill-suited for: after all, when a defendant flees, she cannot be punished for either the underlying offense or the subsequent crime of flight.\textsuperscript{114}

This limitation does not derive from, and indeed undermines, the public safety justification for the preventive state, however, 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.”\textsuperscript{115} In other words, it ensures that \textit{ex post} punishment remains the preferred avenue for preventing crime. This preference is based on the understanding that punishment better respects

\textsuperscript{110} Terry v. Ohio, 392 U.S. 1, 27 (1968).
\textsuperscript{112} See id. at 88 (claiming that “American law eschews [preventive detention] except where legislatures and courts deem it necessary to prevent grave public harms”).
\textsuperscript{113} Kansas v. Crane, 534 U.S. 407, 413 (2002).
\textsuperscript{114} Schulhofer, \textit{supra} note 8 at 86-87.
\textsuperscript{115} Crane, 534 U.S. at 412; \textit{see also} Kansas v. Hendricks, 521 U.S. 346, 360 (1997) (noting that a “lack of volitional control” adequately distinguished the detainee “from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings”).
individual autonomy by restricting liberty only after an individual has chosen to break the law.\footnote{See Ferzan, supra note 13 at 152-53.}

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. 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 thus is not amenable to limitation to specific classes of individuals.\footnote{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 § IV.} Moreover, it is not immediately obvious that punishment is more respectful of autonomy than perfect prevention, and thus there is no \textit{per se} preference for punishment over perfect prevention.\footnote{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 infra §§ III.A, III.C.}

C. Predecessors of Perfect Prevention

Though it is fundamentally different than either punishment or 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 Situational Crime Prevention (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.”\footnote{Clarke, supra note 44 at 91.} In a similar vein, Neil 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. He also argues for consideration of analogous mechanism to prevent cybercrime. Edward Cheng, meanwhile, contends that the government should use structure to prevent crimes like speeding and music piracy.

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. The meters were a success, markedly reducing the targeted criminal activity, and advocates of SCP rightly trumpet the anti-slug meters as a success story of “target hardening.” The meters also are an example of perfect prevention: they were installed by the government, they target criminal conduct, and they seek to make the targeted conduct practically impossible.

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, and few goals are more politically palatable than crime prevention. Second, structural controls do not intrude on individual liberty in the obvious fashions of prevention and punishment. Thus, structural regulations are easy to laud as a solution to the problems caused by these more traditional crime prevention

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120 Katyal, supra note 45 at 1050-71.
121 Katyal, supra note 46 at 2286-88.
122 Cheng, supra note 47 at 691-92, 703-14.
124 Id. at 133.
125 See Clarke, supra note 44 at 110.
Third, the crime reduction benefits of structural controls are statistically quantifiable. Meanwhile, the impact of perfect prevention on individual liberty is diffuse and indeterminate: everyone is prevented from doing something—committing a crime—that they have no right to do in the first place. 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.

Nonetheless, some scholars have grappled with the downsides of the perfect preventive state, even though most have fallen short of suggesting meaningful limitations. Katyal, for instance, recognized that architectural crime prevention techniques may raise concerns about social control and individual privacy, but deferred the question of how to balance those concerns against the government’s role in crime prevention for another day. Similarly, Cheng analyzed how structural crime control might threaten individual interests in privacy and autonomy. He ultimately avoids the question of limits on perfect prevention, however, instead concluding that “a greater use of structural laws would in fact

126 See Cheng, supra note 47 at 665 (“Because structure . . . is largely self-executing, it minimizes many of the problems that plague fiat regimes.”).
127 See, e.g., id. at 677 (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 45 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”).
128 See, e.g., Alexander & Ferzan, supra note 58 at 641 (arguing that acts that make crime more difficult to commit “does not interfere with the rightful liberty” of potential criminals); Corrado, supra note 106 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.”).
129 See, e.g., Clarke, supra note 44 at 134-35 (discussing “supposed infringements of constitutional liberties” resulting from SCP); Barry Poyner, What Works in Crime Prevention: An Overview of Evaluations, in CRIME PREVENTION STUDIES, VOL. 1 15-16 (Ronald V. Clarke, ed. 1993) (rating studies of SCP techniques on the sole basis of whether they showed a reduction in crime).
130 See Rich, supra note 43 (cataloguing costs and benefits of perfect preventive measures).
131 Katyal, supra note 45 at 1128-33.
132 Cheng, supra note 47 at 669-73.
require a shift in democratic values” away from individual rights and toward communitarian interests.\(^\text{133}\)

The same characteristics that make perfect prevention resistant to scholarly criticism also highlight the need for discussion of proper limitations on it, however. Like the preventive and punitive states, perfect prevention is justified by the government’s obligation to protect the public.\(^\text{134}\) 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 question of how perfect prevention might intrude on these liberties and when such intrusion might be justified.\(^\text{135}\) Instead, some view prevention of criminal conduct as a brick on the road to a science-fiction dystopia,\(^\text{136}\) while others scoff at the idea that perfect prevention would intrude on any meaningful rights.\(^\text{137}\) A thoughtful consideration of the impact of perfect prevention on individual rights is needed instead to counterbalance the

\(^{133}\) Id. at 671.

\(^{134}\) 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 __ at 1046 (calling on “government [to] draw upon all constraints on crime . . . to have maximum impact”).

\(^{135}\) See Andrew von Hirsch & Clifford Shearing, Exclusion from Public Space, in Ethics and Social Perspectives in Situational Crime Prevention 77, 81-86 (Andrew von Hirsch et al. eds., 2000) (arguing that situational crime prevention should respect an individual’s liberty of movement).

\(^{136}\) See Husak, supra 2 at 215-16.

\(^{137}\) See Marcus Felson and 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.”).
politically-attractive goal of crime prevention and help trace some limits on the proper scope of perfect prevention.  

III. 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 responsive 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 limits because they impinge on individual liberty. For instance, the State can punish an individual only if it had placed the individual on notice that their conduct was forbidden, it provides proper procedural protections to the individual in finding her guilty of the offense, and the punishment for the criminal conduct is proportional to the crime. Similarly, the State can use the tools of the preventive state only upon a proper individualized finding that the target

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138 See Ashworth & Zedner, supra note 134 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)).

139 See DeShaney v. Winnebago County Dept. of Social Services, 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 protection 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.”).


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

of the State’s power endangers society’s interests.\textsuperscript{143} 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.\textsuperscript{144} 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.\textsuperscript{145}

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.\textsuperscript{146} Even at their most limited, both the punitive and preventive states engage in “blunderbuss interventions”\textsuperscript{147} 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.\textsuperscript{148} For instance, 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.\textsuperscript{149} This makes perfect prevention’s offense to autonomy less

\textsuperscript{143} See supra notes 105-110 and accompanying text.
\textsuperscript{144} See Duncan v. Louisiana, 391 U.S. 145, 161-62 (1968) (holding that jury trial required for crime punishable for two years in prison); Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (requiring that counsel be provided “when one’s liberty is in jeopardy”).
\textsuperscript{145} Supra notes 105-110 and accompanying text.
\textsuperscript{146} Maybe for this reason, when scholars do express concern over crime prevention technologies, the concerns are often vague. See Husak, supra note 2 at 215-16.
\textsuperscript{148} See Corrado, supra note 106 at 808; Schulhofer, supra note 8 at 93.
\textsuperscript{149} 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 50 at 17-19, or other “binary searches” that reveal only the presence of contraband. See Timothy C. MacDonnell, \textit{Orwellian Ramifications: The Contraband Exception to the Fourth Amendment}, 41 U. MEM. L. Rev. 299 (2012); Ric Simmons, \textit{Two Unanswered Questions of Illinois v. Caballes: How to Make the World Safe for Binary Searches}, 80 TULANE L. Rev. 411 (2005). Unfortunately, the primary concern of critics of the contraband
clear, because people have no legitimate autonomy interest in committing a crime, either as a matter of legal doctrine or theory. For instance, when police stop a person on the steps of a bank 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.

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 threatened by the preventive state. As noted, 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 U.S. v. Jacobsen, 466 U.S. 109, 138 (1984) (Brennan, J., dissenting); MacDonnell, supra at 300-301. 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.


151 See Kimberly Kessler Ferzan, Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible, 96 Minn. L. Rev. 141, 178 (2011) (“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.”).

152 How precisely the law should deal with this individual is nevertheless a matter of substantial debate. See, e.g., Larry Alexander & Kimberly Kessler Ferzan, Danger: The Ethics of Preemptive Action, 9 Ohio St. J. Crim. L. 637, 641-60 (2012) (arguing against using the criminal law to punish incomplete attempts).
prevention generally, and preventive detention specifically, is obviously problematic because it intrudes on an individual’s legitimate autonomy interest in engaging in a broad range of lawful activity.\textsuperscript{153} The concern with preventive detention goes deeper than this, however. When the State preemptively restricts the liberty of responsible individuals, it “fails to treat the person as an autonomous moral agent who can be guided by reason.”\textsuperscript{154} This “bad bacteria” approach to personhood treats people merely as “potentially beneficial or harmful objects.”\textsuperscript{155} Christopher Slobogin terms this critique the “dehumanization objection” to prevention.\textsuperscript{156} Specifically, prevention fails to acknowledge that the ability to choose whether to abide by the law is unique and essential to one’s humanity.\textsuperscript{157} 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.\textsuperscript{158}

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 scholars\textsuperscript{159} and may

\textsuperscript{153} See supra note 148.

\textsuperscript{154} Morse, supra note 14 at 1122.

\textsuperscript{155} Morse, supra note 4 at 57.

\textsuperscript{156} Slobogin, supra note 13 at 27.

\textsuperscript{157} See id. (“The capacity to choose one’s course is an essential aspect of our notion of what it means to be human.”); Cole, supra note 8 at 696 (“We generally presume that individuals have a choice to conform their conduct to the law.”).

\textsuperscript{158} See 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 [dangerous] individual 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”); 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”).

\textsuperscript{159} For one such discussion, see 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).
strike some as troublesome on its face.\textsuperscript{160} 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.”\textsuperscript{161} That rule in turn is a manifestation of the “inalienable right,” embodied in the First Amendment, to be free in one’s thoughts.\textsuperscript{162} As Justice Cardozo recognized, the “freedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom.”\textsuperscript{163} Thus, the Supreme Court has rejected the government’s use of a defendant’s “abstract beliefs” to enhance his sentence\textsuperscript{164} and overturned a criminal conviction for private possession of obscene materials on the ground that “control[ling] the moral content of a person’s thoughts . . . is wholly inconsistent with the philosophy of the First Amendment.”\textsuperscript{165} 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

\textsuperscript{160} For instance, 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.” \textsc{Katherine Beckett}, \textit{Making Crime Pay: Law and Order in Contemporary American Politics} 31 (1997) (internal quotation marks omitted).

\textsuperscript{161} \textsc{Model Penal Code} § 2.01 cmt. 1 at 218 n.14 (Official Draft and Revised Comments, 1985); \textit{see also} \textsc{Joshua Dressler}, \textit{Understanding Criminal Law} 373 (6th ed. 2012); \textsc{George P. Fletcher}, \textit{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.”); \textsc{Deborah W. Denno}, \textit{Crime and Consciousness: Science and Involuntary Acts}, 87 \textsc{Minn. L. Rev.} 269, 282 (2002) (“The maxim that civilized societies should not punish individuals for their ‘thoughts along’ has existed for three centuries.”).

\textsuperscript{162} \textsc{United States v. Alvarez}, 132 S. Ct. 2537, 2550 (2012) (Kennedy, J.); \textsc{Griswold v. Connecticut}, 381 U.S. 479, 482 (1965).

\textsuperscript{163} \textsc{Palko v. Connecticut}, 302 U.S. 319, 326-27 (1937); \textit{see also} \textsc{Charles Friend}, \textit{The New First Amendment Jurisprudence: A Threat to Liberty}, 59 \textsc{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.”).

\textsuperscript{164} \textsc{Dawson v. Delaware}, 503 U.S. 159, 167 (1992).

information. Thus, speech that does not appeal or support rational decision-making, such as fighting words, incitement, and libel, are entitled to less constitutional protection.

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. Protests that include deliberate violation of 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. Such protests have been the catalyst for the expanding recognition of civil rights in the United States and other important reforms. But of course such protest cannot occur unless the protestor can exercise her autonomy and choose to break the law.

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


169 Id. at 2095.

170 Id. at 2094; see Rich, supra note 43 at --.

171 Cf. William P. Marshall, Truth and the Religion Clauses, 43 DEPAUL L. REV. 243, 249 (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 to civil disobedience of an autonomy interest in deciding whether to break the law is a separate question from the much thornier issue of whether lawbreaking 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 to fail to punish those who engage in civil disobedience would undermine the expressive value of their conduct).
somewhat harder to define its contours. 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 mind and does not involve a voluntary physical manifestation of the individual’s thoughts. Thus, one has a legitimate autonomy interest in fantasies, thoughts, desires, plans, and intentions that involve illegal activity. As soon as one voluntarily engages in some

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172 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 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 Wisc. L. Rev. 1049, 1051 (recognizing that there has been “no reason for the law to protect out 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 some of the scope of, and boundaries on, the freedom of thought. See id.; Marc Jonathan Blitz, The Freedom of 3D Thought: The First Amendment in Virtual Reality, 30 Cardozo L. Rev. 1141 (2008).

173 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 159 at 839. 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. 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.

174 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.

175 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. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); Steven J. Heyman, Spheres of Autonomy, Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence, 10 WM. & MARY BILL RTS. J. 647, 657 (“[A] central tenet of
conduct to make those thoughts real, however, she is no longer within the scope of her legitimate autonomy interest in deciding whether to break the law.\textsuperscript{176} 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.\textsuperscript{177} Third, as 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.\textsuperscript{178}

\textsuperscript{176} 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 be 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 that they are covered by the freedom of thought and the legitimate autonomy interest in deciding whether to break the law.

\textsuperscript{177} See Bd. of Cnty. Comm’rs Wabaunsee Cnty., Kan. 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 . . . .”)(internal citations omitted); 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”).

\textsuperscript{178} See, e.g., 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 . . . .”); 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); Clarence H. Braddock et al., Informed Decision Making in Outpatient Practice: Time to Get Back to Basics, 282 J.A.M.A. 2313 (1999) (considering patient autonomy in the context of informed medical decision making); Marcy Strauss, Toward a Revised Model of the Attorney-Client Relationship: The Argument for Autonomy, 65 N.C.
The next section explores implications of these claims. One issue still remains, however. Though there is a legitimate autonomy interest in deciding whether to break the law and this interest 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 of constitutional rights can be restricted when the State’s interest in doing so is great enough.\(^{179}\) The question lingers, then, of when state interests might overcome an individual’s legitimate autonomy interest in deciding whether to break the law. At this point, however, an answer to this question is not necessary. 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,\(^{180}\) 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 preventing people from engaging in otherwise lawful conduct because of their intent to break the law. Third, the State should be transparent in at least some ways when it implements perfect preventive measures in order to permit citizens to maximize their deliberative autonomy they decide whether to break the law. These limitations are discussed in turn below.

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\(^{180}\) See Walen, *supra* note 173 at 838-39 (detailing how the intent to commit a criminal act makes the commission of that act more likely).
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.\(^{181}\) Less directly, the State could use involuntary aversion therapy to prevent criminal desires.\(^{182}\) Thus, to prevent people from deciding to use an illegal narcotic, the State could distribute a pharmaceutical that replaces the high from that drug with unpleasant physical reactions.\(^{183}\) Because such 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.\(^{184}\)

One might argue, however, that involuntary aversion therapy is nothing more than a more aggressive version of efforts by the State to establish

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\(^{181}\) 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)

\(^{182}\) “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 MERRIAM-WEBSTER ONLINE DICTIONARY, available at http://www.merriam-webster.com/dictionary/aversion%20therapy (last visited February 14, 2013).

\(^{183}\) See Ryan Calo, Future of the Internet Symposium: (Im)Perfect Enforcement, CONCURRING OPINIONS (Sept. 7, 2010, 2:58 PM) (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 (1962), and conspiracy theories, see, e.g., CHARLES ELLIOT PERKINS, THE TRUTH ABOUT 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.

\(^{184}\) See Mackey v. Procunier, 477 F.2d 877, 878 (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 43 at --.
community norms against certain criminal conduct. For example, the State inculcates law-abiding norms in its citizens by punishing those who break the law, and governments invest substantial resources in publicity campaigns to discourage crimes like drunk driving and child abuse. But punishment and public information campaigns treat people as responsible agents who are capable of being rationally persuaded to give up their harmful conduct. Involuntary aversion therapy, on the other hand, does not appeal to rational decision-making and instead activates an unconscious aversion to the decision to engage in harmful conduct. Thus, neither aversion therapy nor more direct modes of limiting people’s thoughts should be permissible tools of the perfect preventive state.

b. Selective Screening Based on Mental State

The perfect preventive 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 capable of the sort of screening the perfect preventive state would require, the technology to make the necessary sorts of determinations about the contents of an individual’s mind may someday exist. Such technology would allow

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188 See Sherry F. Colb, Oil and Water: Why Retribution and Repentance Do Not Mix, 22 QUINNIPIAC L. REV. 59, 78 (2003) (noting that the “experience of aversion therapy bypasses the conscious, intellectual, and autonomous being”).
189 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., 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 (2012) (offering an optimistic view of the utility of neuroimaging as evidence in tort cases); 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 (2010) (arguing that in view of the current state of neuroimaging science, such evidence should not be admitted in criminal trials). Though there are many obstacles to the accuracy of
the State to narrowly target for prevention 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.\textsuperscript{190} 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 1994 criminalized the possession of firearms in school zones on the stated ground that their possession gives rise to violence and threatens the quality of education.\textsuperscript{191} 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.\textsuperscript{192} 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 her mind. In the pseudoephedrine example, anyone could buy cold

\textsuperscript{190}See, e.g., \textit{WASH. REV. CODE} § 6950.440 (2013).


\textsuperscript{192}There may be other reasons for forbidding the possession of guns on school grounds, such as fear of accidents, that may counsel for maintaining the ban in some form. The fact remains, however, that intent-discerning technology would permit finer tailoring of criminal prohibitions.
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.193

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.194

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? And 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. The criminal law punishes incomplete attempts, 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

193 See supra note 177 and accompanying text.
194 See, e.g., 18 U.S.C. § 2421 (2012) (forbidding the transportation of another 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”).
to fruition. These steps need not be, and often are not, criminal standing alone. 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. 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, though, 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 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.

195 DRESSLER, supra note 161 at 374. 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.

196 A classic incomplete attempt hypothetical involves a person lying in wait to kill another and then changing her mind or being arrested. See Larry Alexander & Kimberly Kessler Ferzan, Danger: The Ethics of Preemptive Action, 9 OHIO ST. J. CRIM. L. 637, 642 (2012). Lying in wait of course is not a criminal act, as the popularity of surprise birthday parties establishes. Though precisely how close an individual must come to realizing her intent to commit a future crime before she is guilty of attempt 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).

197 See Alexander & Ferzan, supra note 196 at 643 (arguing that incomplete attempts are not culpable acts); Morse, supra note 195, at 389 (finding it “plausible” that “punishment for incomplete attempts is punishment for thoughts rather than for culpable actions”).
and completed a sufficiently culpable act in furtherance of that intent. 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. The latter inquiry also can be broken in two pieces: a factual assessment of what the actor did, 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 attempt liability. 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. 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 because of the small variations in the surrounding circumstances. 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.

198 See, e.g., MODEL PENAL CODE § 5.01 (1985).
199 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. U.S., 526 U.S. 1, 12 (1999) (holding that some, but not all, conditional intents would be sufficient for guilt under federal carjacking statute).
Two further observations are in order. First, this limitation on the use of screening in perfect prevention applies only to incomplete attempts and 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. 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 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. So too might the State be justified in certain circumstances in screening people 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, including: 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.

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 that is legitimately relevant to that decision as possible.

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202 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) (2013) (providing different punishments for the possession of controlled substances and possession with the intent to sell, deliver, or manufacture).


204 Supra note 178.
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.\footnote{See U.S. 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. U.S., 283 U.S. 25, 27 (1931) (“[I]t is reasonable that 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.”).} This doctrine is primarily justified on the ground that punishment without notice is unfair and unjust.\footnote{See Trevor W. Morrison, \textit{Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes}, 74 S. CAL. L. REV. 455, 461-62 (2001).} 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.\footnote{Id. at 463.} The hope, of course, is that the potential criminal will choose not to violate the law, but fair warning also allows the criminal committed to breaking the law the opportunity to make an informed decision to do so.

Similarly, when the State prevents people from engaging in certain conduct on the ground 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 Internet Service Providers (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.\footnote{The United Kingdom, Canada, and Finland take a version this approach to preventing the viewing of child pornography. See Dawn C. Nunziato, \textit{How (Not) to Censor: Procedural First Amendment Values and Internet Censorship Worldwide}, 42 GEO. J. INT’L L. 1123, 1136-38 (2011); Federica Casarosa, \textit{Protection of Minors Online: Available Regulatory Approaches}, 14 J. INTERNET L. 25, 31 (2011).} In implementing its mandate, State A can choose to be transparent—requiring that when an ISP blocks access to a site, it inform the user that the 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 site—or it can choose to be
obscure—requiring that the ISP display an innocuous error message that
conceals all of this information. In light of the harm and moral outrage
caused by the production and viewing of child pornography, most citizens
of State A may be perfectly happy that the State prevents people from
viewing child pornography on the Internet, transparently or not.

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
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
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. Indeed, even if

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209 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 contained 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
FOUNDATION (last visited Mar. 5, 2013), http://www.iwf.org.uk/members/member-
policies/url-list/blocking-good-practice.

210 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).

211 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
Liability 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).

212 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).
he discovers some of the information that the State has hidden, Sam’s autonomy will remain effectively ignorant. Maybe he will realize what he is being prevented from accessing some portion of the Internet, but 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.\textsuperscript{213}

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 to 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 the fact of 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 her goal more efficiently. Moreover, reactance theory teaches that perceived restrictions on an activity increase the desirability of engaging in that activity.\textsuperscript{214} 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

\textsuperscript{213} 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.

\textsuperscript{214} Joel D. Lieberman & Jamie Arndt, \textit{Understanding the Limits of Limiting Instructions}, 6 PSYCHOL. PUB. POL’Y & L. 677, 693 (2000).
risk of permitting individual 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 undercover and are permitted to lie to suspects in an effort to obtain incriminating information. The techniques and procedures of law enforcement investigations are also exempt from Freedom of Information Act requests. This secrecy is justifiable on a number of grounds, including officer safety and a desire not to undermine law enforcement effectiveness. 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 whether to break the law in the sense that it 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

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218 Id.
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 chooses to try to break the law, he has no legitimate interest in succeeding. Information about how State A is preventing him from 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 of the virtues of structural approaches to the regulation of private conduct is that they apply equally to all affected people.219 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, political animosity, or the like.220 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.221

The equality of perfect prevention also has a downside, however, in that it treats every person like a potential criminal.222 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.

219 See Cheng, supra note 47 at 665.
220 See Rich, supra note 43 at --.
221 Id. at --.
222 See Keith Hayward, Situational Crime Prevention and its Discontents: Rational Choice Theory versus the “Culture of Now”, 41 SOC. POL’Y & ADMIN. 232, 243 (June 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.”).
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.223 Meanwhile, middle-aged white males with less education are more likely to commit multiple drunk driving offenses.224 Moreover, if some people are predisposed to flout the law, others are 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.225 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.226 With respect to certain minor offenses that are committed by broad swaths 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.227

225 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 17, 21-22 (Andrew von Hirsch et al. eds., 2000) (“[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.”).
226 Id. at 22.
Third, the equality of perfect prevention runs contrary to the liberal presumption that a citizen is law-abiding absent individualized evidence to the contrary. Thus, the State must provide individualized proof of guilt to punish and the nature and duration of punishment are determined based at the least somewhat on the individual circumstances of the crime and the criminal. Similarly, the State may use the tools of the preventive state only after putting forth individualized proof of dangerousness and irresponsibility. Individualized treatment in the allocation of punishment and the imposition of prevention respects the humanity and dignity of the person subject to the State’s power. 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 from its citizens the option of engaging in a dangerous or undesirable activity. 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. Thus, while a parent may relish the

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228 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);
233 See Tien, supra 78 at 7.
234 See Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U.S., 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”).
opportunity to avoid a child’s tantrums, the State does not have that luxury.

Rather, in order for the State’s authority of its people to be legitimate, public officials must be accountable for their decisions. 235 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. 236 Citizens can then cast their votes on the basis of the explanations given by public officials. 237 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 transparently. 238 Yet, perfect prevention often can operate opaquely, 239 thus undermining deliberative democracy, government accountability, and ultimately the legitimacy of State action. 240

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 a protest 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

236 Id. at 1254-55.
238 Staszewski, supra note 235 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.”); David S. Levine, The People’s Trade Secrets?, 18 MICH. TELECOMM. TECH. L. REV. 61, 104 (2011), available at http://www.mttlr.org/voleighteen/levine.pdf.
239 Supra notes 78-83 and accompanying text.
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, ways to circumvent the block appeared within minutes. Some of those who provided the workarounds defended them as a protest against a court order they perceived to be unjust. 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.” Unlike civil disobedience or political engagement, the play of everyday practice originates “in ad hoc, tactical responses to institutional structures and cultural patterns.” It involves an informal pushing against and working within the structural constraints imposed by technological capabilities, cultural rules, and government regulation. 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.” 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. 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. The play of

243 See COHEN, supra note 48 at 50-57.
244 Id. at 55.
245 Id.
246 Id. at 55, 56.
247 Id. at 54, 227.
248 Id. at 52.
everyday practice might also include innovation that occurs through tolerated, illegal conduct. 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.

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. 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.” 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. Semantic discontinuity involves gaps and imperfections in systems of control and surveillance. 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 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. This pits the play of everyday practice

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250 ZITTRAIN, supra note 1 at 119-21.
251 COHEN, supra note 46 at 223-24.
252 Balkin, supra note 56 at 103.
253 COHEN, supra note 46 at 235.
254 Balkin, supra note 56 at 103; see COHEN, supra note 46 at 239-41.
255 See COHEN, supra note 46 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”).
against the State’s interest in crime-fighting, which is best advanced by limiting public access to information about law enforcement strategies.\(^\text{256}\) 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.\(^\text{257}\) 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.\(^\text{258}\)

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, \textit{inter alia}, that they vest too much unchecked discretion in state actors.\(^\text{259}\) 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.\(^\text{260}\) When a criminal statute is used as the foundation for perfect preventive technology, however, 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 crimes like murder or rape, where the harms are obvious and severe.\(^\text{261}\) But where raises constitutional concerns—as in the unauthorized duplication of

\(^{256}\) See \textit{supra} notes 215-218 and accompanying text.

\(^{257}\) See \textit{Cohen}, \textit{supra} note 46 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”).

\(^{258}\) See \textit{Balkin}, \textit{supra} note 56 at 118 (recognizing the tension between Cohen’s argument for semantic discontinuity and treatment of undesirable conduct as a threat to society’s security).

\(^{259}\) See, \textit{e.g.}, Sara Sun Beale, \textit{The Many Faces of Overcriminalization: From Morals to 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”).


\(^{261}\) See \textit{supra} note 1.
copyrighted material—or is less clearly harmful—as in sleeping on a park bench—the political momentum in favor of crime prevention and the sweeping effect of perfect prevention counsel for judicious use of the criminal law and narrow construction.

C. The Ordering of Crime Prevention 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. Such a limitation, which finds some support in Supreme Court jurisprudence, derives from respect that the punitive state’s pays to individual autonomy. 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. Meanwhile, the preventive state curtails autonomy by taking that choice out of the actor’s hands altogether. If this were not bad enough, the tools of the preventive state also tend to be overbroad, restricting far more liberty than


264 See Cole, supra note 8 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 8 at 85 (proposing that prevention “is permissible only as a gap-filler, to solve problems that the criminal process cannot address”).

265 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”); see also Schulhofer, supra note 8 at 85-90 (arguing that Supreme Court precedents implicitly recognize that the criminal process is preferred over preventive measures).

266 Schulhofer, supra note 8 at 90-91.

267 See Morse, supra note 14 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 8 at 93.
is necessary to prevent crime.\textsuperscript{268} Thus, where both punishment and prevention might be used to prevent crime, punishment is typically viewed as the better option,\textsuperscript{269} though scholars debate precisely when the punitive state can be said to be inadequate and when prevention is appropriate.\textsuperscript{270}

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.\textsuperscript{271} Perfect prevention, on the other hand and like prevention, deprives the actor of that choice entirely.\textsuperscript{272} Consequently, when both are available options for the prevention of certain criminal conduct, punishment should be the 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 instances where a certain kind of criminal

\textsuperscript{268} Supra notes 147-148 and accompanying text.

\textsuperscript{269} But see Christopher Slobogin, The Civilization of Criminal Law, 58 V AND. L. REV. 121 (2005) (arguing for a scheme of prevention to replace the current criminal justice system based on punishment).

\textsuperscript{270} See Walen, supra note 158 at 905; Slobogin, supra note 12 at 42 (arguing that one who “wants to commit serious crime so badly that he is willing to be deprived of liberty or suffer similar serious consequences” should be eligible for preventive detention); Corrado, supra note 264 at 108 (noting the difficulty in differentiating between the individual who is not deterred and the one who cannot be deterred).

\textsuperscript{271} 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 minimum 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).

\textsuperscript{272} Note that this argument depends on there being a legitimate autonomy interest in deciding whether to break the law. See supra notes 159-171 and accompanying text. 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.
conduct is sufficiently harmful and has proven sufficiently resistant to the deterrent effects of punishment that punishment can be said to have failed, thus opening the door to the use of perfect prevention. 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. I 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.

Turning now to the question of preference between prevention and perfect prevention, the comparison is somewhat apples to 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. The perfect preventive state, on the other hand, limits everyone’s autonomy to a lesser degree by seeking to prevent only criminal. Which, then, is worse? One way to answer this question is to assume first that the State may properly prevent actual criminal conduct and then to ask to what extent each unnecessarily intrudes 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

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273 For instance, more than 10,000 people die annually in motor vehicle accidents involving drunk drivers. NATL. HWY. TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS: ALCOHOL-IMPAIRED DRIVING I (2010). 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 43 at …. The argument could certainly be made that with respect to drunk driving, punishment has failed.

274 See generally Cohen, supra note 41 (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).

275 See supra note 148 and accompanying text.
likelihood of offending, *i.e.*, the risk of falsely determining an individual is dangerous, and the extent to which the preventive measure in question restricts lawful conduct. With respect to perfect prevention, the inquiry should focus on how widespread the targeted criminal conduct is, and thus how many people who will never engage in the criminal conduct will still suffer a liberty intrusion, and how much the perfect preventive technology also prevents non-criminal conduct. Though this analysis is somewhat more fine-grained, it still requires resolution of difficult normative questions about the relative value of autonomy interests. For instance, how many people who never would have engaged in the targeted criminal conduct must be subject to perfect prevention to overcome the mistaken preventive detention of one person who would not have committed the targeted crime? I also will leave such questions for another day. Nonetheless, their presence teaches that whether prevention or perfect prevention is preferable must be determined on a case-by-case basis.

**IV. 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. I raise some of these concerns herein and propose responsive limits to the substantive scope and application of perfect prevention. I argue first that 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: the State cannot interfere directly with an individual’s decision whether to break the law; the State should not condition one’s freedom to engage in otherwise lawful conduct on her future intent to engage in criminal conduct; and the State should be transparent in its use of perfect preventive technology, making clear its role in the implementation of that technology and articulating the conduct it seeks to prevent.

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276 For a discussion of the latter issue, see Rich, *supra* note 43 at --.
I also argue that 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.” 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, I conclude that 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 can be said to have failed 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 of each.

Numerous issues regarding the use of perfect prevention remain outstanding, however. 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?277

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?

277 See ZITTRAIN, supra note 1 at 114-17; Wagner, supra note 48 at 295.
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? I have posited that there is no legitimate autonomy 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 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 by which we aim identify those individuals most likely to engage in certain criminal conduct and use technology to make it practically impossible for them to do so? 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?

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278 Cf. Alexander & Ferzan, supra note 58 at 667 (recognizing the potential of technology to prevent crime by imposing minimally-intrusive restrictions on the liberty of responsible but dangerous individuals).