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The Scope of Serious Crime and Preventive Justice

Tom Sorell

Abstract:

I offer an account of serious crime that goes beyond victimizing crimes committed by individuals against other individuals. This approach extends the well-known framework offered by Von Hirsch and Jareborg to include crimes undermining welfare-producing institutions. I then consider how the seriousness of crime justifies preventive measures, including the criminalization of acts preparatory to the commission of serious crime. I shall defend preventive measures, including highly intrusive ones, for the most serious crimes, such as terrorism in the form of mass killing, but I shall take issue with very expansive conceptions of serious crime that include what are intuitively much less serious offences than terrorism or murder. In England and Wales, the Serious Crime Act (2007) lists relevant types of serious crime in its Schedule 1. This and other pieces of serious crime legislation in the UK are discussed critically.

Keywords: Serious Crime, Public Crimes, Preventive Justice, Culpability, Harm

What is a serious crime? The question is important for at least three reasons. First, sentencing policy, at least in England and Wales, is geared to the seriousness of a crime, understood as determined by scales of harm and culpability; second, whether a jurisdiction *overcriminalizes* wrongdoing is directly related to whether some kinds of wrongdoing are not serious enough

to be punished. Uncontroversial criminalization tends to be associated with offences conventionally regarded as serious: murder, wounding, and rape, for example. Offences that seem remote from these in relation to harm caused, but that are still subject to prison sentences, may appear to have much weaker claims to legitimate criminalization. The possession and use of certain drugs is a much-discussed case in point. Third, there is a connection between serious crime and the justifiability of preventive measures: the more serious the crime, it is plausible to claim, the more justifiable it is for those authorized to enforce the law to prevent it. For the *most* serious crimes —terrorism in the form of an organized, large-scale, lethal attack, for example— policing policy can even seem to permit the use of preventive measures that are secret, highly intrusive, or border on entrapment. Here the issue is whether that permission is morally justified by the seriousness of the crime.

In this paper I concentrate on serious crime mainly in connection with the *third* of the three reasons just given for defining serious crime: namely, the way the seriousness of crime justifies preventive measures. I shall defend preventive measures, including highly intrusive ones, for the most serious crimes, but I shall consider critically very expansive conceptions of serious crime that include what are intuitively much less serious offences than terrorism or murder. In England and Wales, the Serious Crime Act (2007) lists relevant types of serious crime in its Schedule 1. These include infringements of copyright, fraud, tax evasion, and counterfeiting, alongside people trafficking, arms trafficking and child prostitution. The Serious Crime Act (2007) permits certain kinds of preventive measures against a very large array of Schedule 1 offences. Although these measures are neither routinely secret nor very intrusive, they are liberty-limiting, and might be thought to infringe the norm of presuming innocence. What is more, the offences in question are not easily conceptualized as involving the same kind of harm as one-on-one victimizing and violent offences, which are probably the paradigm cases of serious crime. Does this show that the serious crimes in question

shouldn't be prevented? Not necessarily: it may show instead that the conceptualization of serious crime needs to be pluralistic or hybrid, and that different crimes can be serious for different reasons. Differently conceptualized, the serious crimes in question may indeed be *serious* enough to justify prevention, but the character of the criminal activity in this range may make the preventive measures contemplated in existing legislation ineffective or unjust.

The rest of this paper falls into five sections. In the first, I quickly expound the standard conceptualization of serious crime as victimizing crime. Section II extends that conceptualization to include acts of undermining harm-minimizing or welfare-increasing institutions. Section III asks whether that hybrid conceptualization encompasses the whole range of serious crime e.g. as represented in Schedule 1 of the Serious Crime Act (2007). It turns out that the conceptualization requires refinement. In section IV, I consider the justifiability of dirty-handed preventive policing measures for the most serious crimes, and liberty-limiting preventive orders for lesser serious crimes. Although liberty-limiting orders are not always justified, I deny (in section V) that there is something wrong with preventive orders in general, deriving from a supposedly objectionable "logic" of preventive justice.

I.

The most systematic treatment of the relative seriousness of well-recognized criminal offences is due to Andrew von Hirsch and Nils Jareborg.¹ They distinguish offences by the culpability of the offender and the effects of a standard example of a type of offence in a scale of "harm gradations," these in turn being related to various levels of a human "standard of living"² corresponding to various dimensions of human interest.³ According to them, the most basic dimension of human interest is in physical integrity. The standard of living that caters only to physical integrity and no further interests they call "subsistence." The most

serious harms threaten physical integrity by taking away subsistence. Offences that take away subsistence are correspondingly the most serious offences. The central illustration is homicide.

Battery is less serious than homicide. It is an offence connected with the same dimension of interests (physical integrity) and the same level of standard of living (subsistence) as homicide, but its effects are temporary, and they fall short of taking away subsistence.

However, assault and battery also engage further dimensions of interest. Von Hirsch and Jareborg distinguish, in addition to interests in subsistence, interests in material amenity, interests in freedom from humiliation, and interests in autonomy and privacy. According to von Hirsch and Jareborg, assault and battery standardly involve humiliation, which adds to their gravity as offences, even when their physical effects in the dimension of integrity are relatively short-lived and not very painful.

Von Hirsch and Jareborg apply their analysis not only to crimes that produce physical injury in victims or that affect them through the threat of physical injury (varieties of rape, armed robbery) but also crimes that violate privacy and deprive people materially (burglary) or only take away amenity (car theft). These are all victimizing types of offences, but they differ in seriousness, because not all set back an equally wide set of interests, and because (as in the case of loss of amenity) the loss resulting from the crime can be met by replacement.

The von Hirsch-Jareborg approach readily accommodates differences between attempts and actual commission of serious offences, and it is capable of accommodating the relative severity of combinations of offences. So, within its chosen area of application, it has some claim to be both systematic and plausible. It can also be adapted to further offences. For example, terrorism –in the sense of a lethal act carried out to force a government to change policy and to spread fear among a local population-- is not explicitly considered by von

Hirsch and Jareborg, but it is related to crimes that their analysis readily encompasses, such as wounding and homicide. Terrorism –in the sense of a large-scale lethal attack⁴-- matters to this paper because (i) pretheoretically, it has some claim to be counted among the *most* serious crimes; (ii) the most serious crimes might be those that most easily justify preventive measures, (iii) the most serious crimes might justify, if any do, the most dirty-handed of preventive measures, that is, preventive measures that consist of or involve means that are normally immoral or legally questionable, such as long-term deception, measures bordering on entrapment or inciting crime, and collusion in crime or tolerating crime for the sake of gathering evidence for a prosecution.

Does the von Hirsch-Jareborg theory tend to support the intuition that terrorism in the form of the large-scale lethal attack might be at the severe end even of serious crime? Yes, the theory implies that terrorism in this form is standardly more serious than typical homicide, because it is detrimental to a wider array of interests and is intended to take away many lives. Besides the interest in subsistence through bodily integrity that each of its possibly thousands of victims might have, terrorism runs counter to the interests its victims have in being free from fear. Furthermore, terrorism sets back interests in autonomy, including political autonomy. This is because it often seeks to bypass democratic institutions to coerce actions by governments, actions that would typically not have the support of many or most members of a citizenry, and that might even command their overwhelming opposition.

II.

When von Hirsch and Jareborg consider the limitations of their analysis, and how it might be extended to types of widely-recognized crime that it does not readily cover but that are nevertheless regarded as serious in many jurisdictions, they seem to me to go wrong:

Our analysis has been directed at the simple victimizing offence: defendant (intentionally or negligently) injures (or creates an unjustified risk of injuring) another person, in a manner proscribed by the criminal law. Our thesis has been that the extent of the injury can ordinarily be gauged by the impact on the standard victim's living standard. This simple paradigm, however, does not embrace the entire criminal law. Various types of crime involve numerous victims, numerous actors, harm to consenting victims, or do not directly seem to involve injury to persons at all. . . . Other types of crimes present a more fundamental question: does the obnoxiousness of the conduct reside in its injurious impact on persons, or some other feature? Consider crimes involving duties of citizenship, such as tax fraud. . . . Some crimes, finally, seem aimed at protecting interests other than chiefly those of human victims. We could continue this list, but its implications should be evident already. There is no unitary account that can explain the harm dimension in all kinds of crime⁵

The idea that the single-agent/single non-consenting victim case is the central one in criminal law, and that it is increases in numbers –of victims or agents—that force departures from the main account, is clearly falsified not only by tax fraud, but by a whole range of criminal offences including perjury, bribery, money -laundering, counterfeiting and many others. As I shall suggest, the rationale for regarding these offences as serious is not to do with victimization, but with the way their general or organized commission undermines harm-reducing or welfare-increasing public institutions.

Are von Hirsch and Jareborg right to say, in view of the recalcitrant cases they mention, that there is no unitary account of the harm dimension in all kinds of serious crime? There might be a *more* unitary account, even if no fully unitary account is available. A possible source for a more unitary theory is Thomas Hobbes. According to Hobbes, the primary purpose of the

state, and the guiding purpose of law-making is “public safety,” where the term is understood to extend beyond security from physical attack.⁶ A body of law gives every citizen a strong reason for abstaining from general violence, and for working for a modest prosperity from which the security-promoting institutions of the state as well as general production can be financed. The overarching goal of the state is to stave off war and to create conditions for a “commodious” life for each. The state’s military, economic, educational, and legal institutions are instrumental to public safety in this broad sense. Those who would break the law, in particular by not taking part as the law prescribes in military, economic, and educational institutions of the state, increase the chances of violence and poverty.

Tax fraud, bribery, perjury, counterfeiting –all of these weaken what can be understood with Hobbes’s help to be the harm-reducing or safety-promoting institutions of the state. The same can be said of laundering the proceeds of crime, as that allows law-breakers to keep the rewards of crime, encourages others who know about their success to follow their example, and allows more crime to be financed from a position in the mainstream economy. As for crimes like homicide and assault, these can be interpreted as strong signs of a will to behave as if the fact that something was made unlawful by an authorized sovereign was *not* a good reason for omitting certain kinds of action, or, in Hobbes’s terms, as if there were no state and warlike behavior or general violence were permissible.⁷ Even organized crime falls into place in a Hobbesian understanding of crime: it is one of the “regular but unlawful systems,”⁸ that is, unitary co-operative organizations within the state that work against the sovereign and his authorized institutions, and that therefore betray the promise of submission that each member of such an organization makes.

A Hobbesian account unifies victimizing action and institution-undermining action. It conceptualizes direct victimization at the level of individuals as an attempt to provoke or return to the war of all against all. It conceptualizes familiar state institutions and wider

public institutions –courts, tax collectors, armies, properly regulated schools and universities, regulated markets of all kinds, even properly run churches -- as bulwarks against a local war of all against all and as facilitators of commodious life –life containing a modest distribution of goods above the level of survival. In this respect --in its reliance on the idea of commodious life--Hobbes’s concept of public safety is tied to a sort of “standard of living” in roughly the sense of von Hirsch and Jareborg.

Of course, many other elements of Hobbes’s account –its dependence on a hypothetical contract among a majority of subjects, its insistence on the absolute submission of all citizens to a sovereign, the idea that a sovereign power is above the law, the idea that law itself is what the sovereign declares it to be, so long as he sincerely thinks it promotes safety, all of these lie well outside the liberal presuppositions of von Hirsch and Jareborg. These illiberal Hobbesian elements can be rejected. But even liberals can agree with Hobbes that some serious crimes directly do harm while others act against harm-reducing or basic welfare-increasing (in Hobbesian language, “public safety”-promoting) institutions. This insight is a way of seeing the connection between kinds of serious crime that von Hirsch and Jareborg *can* accommodate and others that elude their account.

A reason von Hirsch and Jareborg have a one-sided account of serious crime is that they approach the topic from the angle of sentencing and not, as Hobbes does, from the standpoint of a law-making agent. A sentencing perspective like theirs assumes a schedule of standard crimes and humane punishments. It tries to arrive at conditions that the offences must meet for the usual associated punishments to seem reasonable, and for differences in punishments for different crimes –usually measured in lengths of incarceration in humane prison conditions-- to seem reasonable. The crucial considerations are, roughly, the amount of harm done and the degree to which the offender aimed at and was responsible for that harm.

Harm looks different from a legislator's perspective. It is not just the result of crime, but of disease, failed harvests, floods, and of the lack of institutional support in normal times for those with least. The reduction of harm is associated with a wider range of public institutions than von Hirsch and Jareborg consider – not just the courts, police, and prisons, but public health laboratories, say, or water treatment plants, or dams or pesticide purchasers. Then there are legislative purposes other than harm reduction: for example, to facilitate efficient economic exchange; to educate people; to provide or encourage the production of effective shelter, to provide or encourage the production and distribution of food. What ties together institutions of all the kinds we have been reviewing is that they are supposed to raise the standard of living –in the von Hirsch and Jareborg sense—of those who take part in them. Serious crime is crime that depresses the standard of living either directly –through victimization--or through weakening institutions calculated to secure for most people a basic standard of living.

Depending on how essential institutions are to a *basic* living standard, the standard that is, or is close to, survival, acting against the (rules of) the relevant institutions can be *prima facie* criminalizable on grounds of serious harm. And the more regular and the more egregious the undermining of the institutions, the more serious the relevant offences can be understood to be. For example, if perjury and bribery are routine in a given jurisdiction, they can disable the local administration of justice and provide pretexts for rebellion or the erection of competing, informal and arbitrary institutions for dispute-resolution. Again, large-scale counterfeiting can undermine economic exchange of all kinds. A domestic black economy or the existence abroad of “tax havens” can so reduce local tax receipts that even basic policing and redistribution from the well-off to the destitute are ruled out. Organized crime can provide resources for the growth of informal power structures that compete with those of the state that can create no-go areas for state institutions, and so on.

How can anti-institutional behavior be added to the von Hirsch-Jareborg account? We can say that

a crime is serious if it intentionally inflicts on an identifiable victim a type of harm that is high in the von Hirsch and Jareborg scale of harm, or if its general or organized commission would undermine institutions for protecting a basic standard of living, and the relevant legislative authority has evidence of its general or organized commission.⁹

To illustrate, if the worst-off in a jurisdiction are kept above the most precarious existence by a limited budget for payments or vouchers for goods, then others who are not among the worst-off, but who seek to benefit from that system, contribute to an easily foreseeable worsening of the plight of the worst-off, a worsening that registers on a harm scale, even though no one of the worst-off is targeted or “victimized.”

In this example, we can distinguish between uncoordinated fraud, where people who are not among the worst-off each opportunistically and fraudulently appropriate a small share of benefits intended for the worst-off, and *organized* fraud, e.g. where criminals forge documents necessary for claiming payments or vouchers, and these are sold on a big scale to all comers.¹⁰ Organized fraud is much more likely to take place on a large scale and therefore to undermine an institution than one-time or uncoordinated fraud, making it more serious as a crime. Midway on the spectrum between uncoordinated and organized commission of crime is its uncoordinated but general commission, as when welfare benefit fraud is uncoordinated but widely practised. General commission is a reasonable ground for criminalization in the kind of case we have been considering even in the absence of organized criminals.

With the addition of a plausible empirical assumption, the proposed hybrid criterion for seriousness of crime can even accommodate cases like drug dealing, which some have argued

is or can be a victimless crime. The additional empirical assumption, for which there is ample evidence, is that illicit markets in drugs are regulated by a lot of threatened and actual victimizing violence, some of it life-threatening, mainly inflicted by members of criminal gangs on one another and on customers and dealers who default on payments.¹¹ This means that even if illegal drug purchases are typically uncoerced and do not lead to debilitating addiction, they take place within a market that relies heavily and conspicuously on victimizing violence. Knowledge of that violence is not esoteric: the violence is effective because it is generally visible to market participants. Acting as a dealer in the drug market signals a tolerance of that violence. Acting as a regular purchaser can also signal tolerance. What is more, acting as a purchaser can help to fund drug dealers to buy de facto impunity from police investigation and prosecution through bribery. Taking part in the drug market may also contribute indirectly to the recruitment of young people to crime instead of education, and to imbalances in the allocation of policing and other resources in response.¹²

If drug markets and other illicit markets are themselves regarded as (informal) institutions, then we can complicate the criterion for serious crime as follows:

A crime is serious if

- (i) it intentionally inflicts on an identifiable victim a type of harm that is high on the von Hirsch and Jareborg scale of harm;
- (ii) its general or organized commission would undermine institutions for protecting a basic standard of living, and the relevant legislative authority has evidence of its general or organized commission;
- (iii) its generalized or organized commission actually maintains an institution depending heavily, and known by those who take part in it to depend heavily, on type (i) serious crime.

Type (iii) serious crime could arguably cover purchases of some class-A drugs; less controversially, it would cover importation of class-A drugs and running a distribution network. It would also include purchases of services from people who are trafficked, as in illicit labor markets. People-trafficking itself is of course directly victimizing. A final example is taking part in a market for photographs of child abuse.

Although I have been speaking in general terms about “institutions,” there are reasons for thinking that acting to undermine specifically legal ones –courts, the police-- is more serious criminality than acting to undermine others, because of relations of dependence between legal and other institutions. For example, a welfare agency is in theory answerable to the courts, but not conversely. Again, criminals who succeed in undermining legal institutions acquire the freedom to victimize while accumulating and legitimizing the proceeds of crime. The resulting financial power (especially when exercised behind the facade of legitimate business) enables criminals to influence legislation, to buy strategically valuable information from the authorities, to get the best professional services to expand their activities, and to defend against prosecution in a “home” jurisdiction, and to diversify and globalize their activities. On this view, bribery of judges or the police might be at the most serious end of the institution-undermining range of serious crimes, because it facilitates the commission of all other crimes and especially organized crime.

Serious crimes can be *both* victimizing and (indirectly) undermining of institutions. Drug dealing is one case in point. Terrorism –as previously defined in section I-- is another.

Terrorism can aim at death on a large scale, so that, when successful, it inflicts the most severe kind of harm on its victims. It is also an attempt to coerce governments and to bypass peaceful participation in political institutions. When terrorist acts are carried out in liberal democracies, liberal democratic governments may limit liberties and be supported by citizens for doing so. This can be understood as a kind of erosion of liberal institutions. Again, when

democratic governments co-operate with terrorists, say by paying ransoms or guaranteeing safe passage, the incentive to pursue demands through institutional channels may weaken.

Under such conditions, terrorism counts as a serious crime twice over by our criterion.

Is a crime that is both victimizing on a large scale *and* undermining of institutions *more* serious than one which is merely serious under the victimizing heading? Yes, but the contribution of institutional undermining may be slight in comparison to the victimizing component, because the most extreme victimizing harm takes away conditions for life itself, while the associated undermining of institutions need not do so. Again, it takes time to undermine institutions, and acts that cumulatively have this effect and create a tipping point may individually be much less corrosive of a living standard than a victimizing act.

III.

Do all crimes recognized as serious under English law count as serious according to the criteria given? Schedule I of the Serious Crime Act (2007)¹³ recognizes all of the following as serious crimes: drug trafficking, people trafficking, arms trafficking, prostitution and child sex, armed robbery, money laundering, fraud, tax evasion, corruption and bribery, counterfeiting, blackmail, intellectual property, and environmental offences, including large-scale fishing by prohibited methods and water pollution. Many of these offences are directly victimizing. Counterfeiting, intellectual property offences and some environmental crimes are different. They undermine welfare-producing institutions, namely legally permitted commercial markets, but with no particular connection to a *basic* standard of living. Do our criteria of serious crime accommodate these types of crime?

Since the kind of counterfeiting referred to in the Serious Crime Act (2007) is of money,¹⁴ and since access to the cashless economy is usually confined to those who are employed or who have financial resources greater than those of people with a basic standard of living, the institution-undermining criterion already outlined seems to apply. The adulteration of the supply of currency will probably affect the worst-off disproportionately, robbing them of some of the means of subsistence. It will also adversely affect relatively badly-off *sellers* of goods in the cash economy. If it is the work of organized crime and conducted on a large scale, the sector of the economy depending on cash transactions may suffer ill effects.

Many of the offences in the Serious Crime Act (2007) are assumed by the legislation to be carried out by organized crime.¹⁵ The organization of the commission of offences is a way of multiplying offences, and so a feature of criminal activity that aggravates the offences committed. The more often the offence is committed, the greater the ill effect or harm associated with it. But there is also a sense in which the gravity of even a seldom-committed offence is aggravated by organization. Organized crime not only concentrates the law-breaking potential of a plurality of agents, keeping a multitude of people ready to commit many crimes, including the worst victimizing crimes, as directed; it also encourages the division of labor among criminals and specialization, and erects and maintains a structure of authority that competes with legitimate authority, as well as with legitimate business. Organized crime enforces its authority and its share of commercial markets typically by extreme violence. These facts, and the fact that some organized crime gangs can engage in the whole spectrum of offences anticipated by Schedule I, suggests that *any* crime committed by organized crime is thereby more serious than the same crime committed by the autonomous criminal, and perhaps any crime characteristically committed by an organized criminal gang rises to the threshold for serious crime.

Against this background, the inclusion of seemingly minor offences in Schedule 1 makes some sense. Take intellectual property offences. These are widely committed by individuals in the UK, but with no obvious adverse effects for the worst-off. The people hurt by online piracy might be thought to be only rich music, film and software producers, who remain well off even if the offences are committed.¹⁶ So intellectual property offences seem to be left out by the institution-undermining criterion of serious crime. They seem not to pass the test for a type (ii) serious offence. Or at least they seem to be left out unless the market or markets in music, film and software make such a difference to the standard of living of those participating in them that generalized acts of weakening it are very harmful. Without taking a stand on this question, it is possible to refine our criterion of seriousness in crime by letting the criminal *organization* of intellectual property offences have weight of its own. For the same reasons that organized crime in general is objectionable, the participation of organized crime in the commission of an otherwise minor offence could turn it into a serious offence.¹⁷ This line of thought suggests that we should add a sufficient condition to the trio of conditions so far introduced:

A crime is serious if

- (i) it intentionally inflicts on an identifiable victim a type of harm that is high on the von Hirsch and Jareborg scale of harm;
- (ii) if its general or organized commission would undermine institutions for protecting a basic standard of living, and the relevant legislative authority has evidence of its general or organized commission;
- (iii) its generalized or organized commission actually maintains an institution depending heavily, and known by those who take part in it to depend heavily, on type (i) serious crime *or*

(iv) it is committed on a large scale and is organized.

Intellectual property offences seem properly to be classified as serious if they are type (iv) serious crimes. Not all type (iv) serious crimes have to be the work of conventional crime gangs. A technology could facilitate it in such a way that it began to be practised on a large scale, so that the economic losses to the owners of the relevant intellectual property were very great. This may have been the form that widespread online piracy originally took, facilitated by content-sharing platforms on the internet. Again, there are problematic intermediate cases: Where a political movement, such as the Pirate Party in Europe, campaigns for freedom to download and urges civil disobedience as part of a campaign to decriminalize online privacy, things are not so clear. Let us consider people who respond to that call. Evidently, we do not have piracy plain and simple, but there is still significant financial loss to companies who produce and distribute musical works in good faith, and who invest money they prevented by piracy from earning back.¹⁸ Again, if piracy is part of a political campaign, one would expect the pirates not to try to evade the existing penalties for what they do, but to gain publicity from taking the punishment for the relevant offences.

IV.

The more serious the crime, the more justified its prevention, even by dubious means, if no alternative means are available. Or so I shall argue. Our previous discussion has suggested, following von Hirsch and Jareborg, that the most serious victimizing crimes are those that threaten the lives of people, the more lives threatened the more serious the crime. On the other hand, the most serious institution-undermining crimes include bribery and corruption (especially of officials like police and judges) and fraud that takes away resources from those who are worst off economically. If the worst institution-undermining crimes are carried out

by organized crime groups, they are worse still, because of the way organization multiplies the adverse effects of crime. The prevention of all of these kinds of serious crimes seems justified, but not necessarily by any and all means.

Let us call a measure for preventing a serious crime “dirty-handed” if normally it would be morally wrong to implement it, but implementing it in the case at hand would serve a morally good purpose. Dirty-handed, then, does not mean “wrong”; it means doing something of a type that is normally wrong, but can be used for a purpose that on balance *justifies* doing that thing in the circumstances. Undercover policing measures are relevant. They invariably involve deception, and often intrusion, including by bugging and interception of telephone- and internet-communications. These measures are normally wrong, since deception and intrusion are normally wrong. Their special status is reflected in law, since, in England and other legally similar jurisdictions, special official permission needs to be obtained before undercover operations are launched, and different normally excluded measures must be individually authorized, often for a limited period only. For example, dirty-handed measures are common in both anti-pedophile operations and counter-terrorism.

Are dirty-handed measures justified in the prevention of serious victimizing crime? Actual police practice in England assumes as much, and a justification for it is not hard to articulate in the case of life-threatening crime and crime against the particularly vulnerable. One partial justification is that many victimizing crimes are often extremely harmful to victims, with pervasive psychological ill effects quite apart from physical injury. The timing of these crimes is often unpredictable, and intervention is often only possible when their commission seems to be imminent. Dirty-handed measures can promote timely interventions by affording some foresight of the offender’s actions.

In the case of online grooming of children for sex, it is possible for police in England to intervene by assuming the identities of the children for a short time, once an invitation to meet has been issued by the offender, or an invitation seems imminent, based on what the groomer is saying to the potential victim. The offender can then be arrested and charged with meeting a child after grooming, and, while he is in custody, evidence of related offences can be collected by a seizure of computers and so on from his home. In this way, arrest for a preparatory offence can do more than prevent an imminent sexual assault: it can also aid prosecution for past offences, including offences related to downloading images of child abuse, a leading example of a type (iii) serious crime.

Could the kind of measures used to prevent or prosecute serious victimizing crime ever be justified in the prevention or prosecution of institution-related serious crime? Yes, at the “most serious” end of the spectrum of institution-related crime. For example, intrusive surveillance could well be justified to prosecute police receiving payments from individual criminals and crime gangs, on the ground that bribery facilitates victimizing crimes and also undermines a harm-reducing institution, namely the police, or a branch of the police. On the other hand, it seems to me doubtful that high-volume DVD piracy is harmful enough to justify the same tactics, unless the DVD-piracy operation of a big criminal gang were a convenient entry point for an investigation that might bring down the whole organization. The relevant legislation in England and Wales, the Regulation of Investigatory Powers Act (2000), incorporates tests of both necessity and proportionality for intrusive surveillance. The proportionality test probably fails to be met in all but the most unusual cases of DVD piracy, while the necessity test might standardly be met only by highly victimizing crimes carried out or planned by forensically aware offenders, that is, offenders who are aware of, and know how to evade, police techniques for identifying and prosecuting offences. Against

forensically aware offenders, all but the most intrusive methods might produce no useful evidence.

Not all preventive measures relevant to serious crime are necessarily implemented by the police. In relation to bribery of judges or other officials, professional standards boards or ombudsmen might invite complaints or reports of suspicions, and carry out investigations. Arrangements of this kind in principle avoid being dirty-handed. But they might also work more slowly and have less access to wrongdoing than covert methods. These facts might make them unsuitable for discouraging or prosecuting very well hidden wrongdoing. At the “most serious” end of corruption and bribery, where a wealthy criminal gang was able both to reward its insiders generously and help to launder or conceal its payments, covert action might be *necessary* in a clear sense, even though the criminal activity taking place might be related to no specific victims and no specific criminal plans.

Not all measures for preventing serious crime are surveillance or administrative measures. The Serious Crime Act (2007) instead introduces liberty-limiting ones. It enables courts to restrict the activities of those who have been convicted of Schedule 1 offences after they have served their sentences. Section 5 (3) illustrates the range of restrictions:

Examples of prohibitions, restrictions or requirements that may be imposed on individuals (including partners in a partnership) by serious crime prevention orders include prohibitions or restrictions on, or requirements in relation to—

- (a) an individual's financial, property or business dealings or holdings;
- (b) an individual's working arrangements;
- (c) the means by which an individual communicates or associates with others, or the persons with whom he communicates or associates;

(d) the premises to which an individual has access;

(e) the use of any premises or item by an individual;

(f) an individual's travel (whether within the United Kingdom, between the United Kingdom and other places or otherwise).

These are very broad areas of potential interference, and they seem to impose a penal burden on an offender even when a conviction is spent. Instead of returning to society with a clean slate, those who are released from prison after having been convicted of a serious crime are liable to suffer a considerable loss of autonomy, with conditions of life significantly determined by judicial decision.

Serious crime prevention orders can last for five years. This is a long time: the corresponding loss of autonomy may make sense where a conviction for serious crime belongs to a long criminal record, or where there is evidence that an offence or offences were committed by members of organized criminal gangs. Convicts leaving prison might face hard-to-refuse demands of co-operation from criminal gangs and might actually be helped not to co-operate by serious crime prevention orders. At the same time, non-members of criminal gangs could be impeded in a program of reform by the very same sort of order, and if the threshold for serious crime can be met by someone guilty of no more than online piracy, the risk of injustice seems substantial.

V.

Serious Crime Preventive Orders belong to a range of measures that have captured the attention of critics of so-called preventive justice.¹⁹ Some of these critics²⁰ suggest that the very concept of preventive justice might verge on incoherence, because it envisages

punishments for people before they have committed a crime, or assumes powers for “precognizing” offences that belong to science fiction or Hollywood fantasy.²¹ Other critics concede that justice has always been concerned with prevention as well as punishment, but express doubts about the justifiability of certain instruments of prevention, including, in English law, various preventive orders, as well as the criminalization of acts of preparing serious crime. My own criticism of Serious Crime Prevention Orders in the last section concedes something to this scepticism. My criticism was that, on its face, the Serious Crime Act (2007) allows preventive orders to be served on people convicted of relatively minor offences who do not belong to criminal gangs. In such cases the restriction of autonomy can be disproportionate. But this criticism at most calls for the fine-tuning of the legislation, since most of the offences to which it is applied *are* serious and might *in practice* involve organized crime.

Andrew Ashworth and Lucia Zedner point out that the forerunner and prototype of all civil preventive orders in English law is the Anti-Social Behaviour Order (ASBO), recently superseded by the Injunction to Prevent Nuisance and Annoyance introduced in the Anti-Social Behaviour, Crime and Policing Act (2014). Ashworth and Zedner review a long list of objections against ASBOs: (1) They had the drawback of carrying disproportionately severe criminal penalties for their breach. Occasionally they prohibited behavior (e.g. spraying graffiti on public transport vehicles) that caused no harm to anyone, and yet breaches carried penalties as high as, or higher than, those attracted by harm-causing offences. (2) They could be served on offenders on the basis of relatively low standards of evidence (i.e. civil proceeding standards). (3) They in effect personalized a criminal law, setting out prohibitions that, unlike the orthodox criminal law, only one person might have to abide by, prohibitions that, what is more, might prevent an agent from harmlessly going to places necessary for getting a job or leading an otherwise lawful social life. Worse, according to Ashworth,

Zedner and others,²² (4) ASBOs and orders like them failed to treat offenders as responsible agents with respect to the harm or nuisance the orders sought to prevent. By coercively excluding certain kinds of behavior, ASBOs pre-empted *choices* by offenders not to engage in them.

How many of these objections apply convincingly to Serious Crime Prevention Orders (SCPOs)? Objection (2) does not, since conviction for a serious crime is a condition for imposing such an order. In other words, civil standards do not, in the case of SCPOs, bring into force a disproportionate criminal penalty for prohibited behavior. Instead, criminal evidence standards have to be met at the conviction stage. At a later stage, when the prevention order is imposed, courts –in the first place the High Court in England and Wales-- must have reasons for believing that the behavior prohibited by the order “would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales.”²³ As I understand this condition, it would not be met if the places from which a person subject to the order were excluded were not reasonably believed to be connected with serious crime, or if excluded personal associates were not reasonably believed to be involved in serious crime.²⁴

Objection (1) does not apply, either, since, in the case of SCPOs, the penalty for the breach on indictment is not disproportionately severe. It is no more in fact than the maximum for a breach of an ASBO: five years.²⁵ What about objection (3)? The idea seems to be that preventive orders single out offenders and their circumstances in ways that criminal law shouldn't. But many of the crimes to which the Serious Crime Act (2007) refers are carried out by crime gangs, with known associates. To the extent that orders are reasonably believed to prevent an agent from resuming a place in a criminal gang, they seem justified. Admittedly, they might be out of place in many other cases. e.g. if imposed on an ex-criminal who had a short record of committing offences independently. And certain specific

prohibitions in the order may be unreasonable in some cases. The fact that the orders are directed at particular people and so lack the generality of law does not by itself seem to me to be an objection, so long as the reasons for imposing the orders are drawn from a well-established pattern of re-offending on the part of the offender, and facts about the plans and influence of the offender's associates

I come, finally, to objection (4), that agents addressed by preventive orders are treated as lacking responsibility. Someone can be ordered to do something they are responsible enough to do anyway. And orders can sometimes help those who are weak-willed or exposed to coercion to behave better than they might have in the absence of the orders. I have already pointed out that the existence of the orders may actually help those who were once involved in organized crime, and who want to leave it, not to succumb to pressure from associates to rejoin. If they can face re-arrest and imprisonment for resuming their former place in a criminal gang, and their past criminal associates know this fact, the ex-offender has more scope to avoid making contact or refusing to make contact on the pretext of protecting himself from the "authorities." This keeps the ex-offender from having dangerously to spurn the advances of a crime gang on his own initiative. In other words, the order can be an *aid* to responsible behavior, helping an offender to avoid recruitment for the commission of victimizing harm or behavior that damages worthwhile institutions.

In any case, the question of what it is to treat the addressees of criminal law as responsible is relevant to much more than prevention orders. For example, when criminal law proper threatens a life-sentence for homicide, it is threatening hard treatment for a kind of offence there are perfectly good independent reasons for not committing, reasons that have nothing to do with undergoing that hard treatment. The pain inflicted by many methods of murder; the fact that loss of life puts an end to a person's practical capacities and a person's plans, causes misery for others who are close to the victim—those are commonly known good reasons for

omitting murder, and criminal laws take them as givens rather than spell them out. A genuinely responsible agent would presumably act on these reasons rather than be deterred from murder by the unpleasantness of a life sentence.

When criminal laws are communicated with a threat of hard treatment to agents then, are agents being treated as responsible? In Kant, the threats make sense because people living together under law in actual polities (as opposed to a kingdom of ends) are assumed to be imperfectly rational—with a pathology as well as reason. Accordingly, criminal laws, which are meant to regulate pathologically-influenced behavior, have to appeal to more than reason. They have to operate in the sphere of what Kant calls “inclinations” —impulses to pursue gratification adding up to “happiness” and to avoid pain. That is the reason why laws threaten punishments. The more rational one is, the more autonomous one is, the more responsible-- in the sense of autonomous-- one is, the more one abides by the law against murder for reasons *other* than hard treatment. For this sort of agent, the threat of hard treatment is as much an insult to their responsibility or rational agency as a list of places he must not go and people he must not associate with. If the insult to responsibility is tolerable in the law against homicide, why isn't it tolerable in the preventive order?

At this point, skeptics about preventive justice may have to turn to fundamental differences in “logic” between punishment and prevention. Punishment takes account of an agent's past law-breaking behavior and imposes hard treatment proportionate to that behavior.

But where a measure is preventive, a rather different logic seems to be entailed— that the type and quantum of the measure imposed must be those judged necessary to bring about a significant reduction in the risk of future harm, irrespective of whether those measures are proportionate to any past or present conduct of the subject. . . .

[W]here the rationale is desert, the punishment must censure the subject in a way and

to an extent that respects his or her responsible agency, and the role of prevention is to supply underlying deterrence, whereas the choice or quantum of the sanction should be governed by proportionality considerations. Where prevention is the rationale its logic applies without respect for whether the subject is a responsible agent or not, since the purpose is to obtain the optimal preventive outcome.²⁶

But this line of thought is highly disputable.²⁷ It implies that proportionality is at home with punishment but not prevention, and it is easy to think of counterexamples. Thus, it is customary for department stores to prevent shoplifting by CCTV surveillance, by alarm-activating devices attached to goods, and by posting unarmed security guards at exits equipped with alarms. Preventing shoplifting by *shooting* shoplifters at exits might be *more* effective, but there is nothing in the logic of prevention that entails that shoplifting be prevented at all costs, or that shooting be preferred to arrest by unarmed guards when both are effective.

Preparatory offences are proportionately less severely punished than consummated offences. If the penalties reflected the alleged logic of prevention, the penalties would be whatever was sufficient to discourage taking first steps toward the consummated offence. Sufficiency might be associated with much more severe penalties than are actually threatened or applied in relation to preparatory offences. Again, preparatory offences work with police strategies of disrupting the plans of those embarked on serious crime. This is not a matter of as it were paralyzing the planners of serious crime, but of bringing charges so as to induce the thought that continuing with those plans will be futile because the plans are no longer secret.

The “different-logics” claim associates proportionate punishment for individuals after prosecution with respecting persons, and associates prevention with treating people indiscriminately –regardless of their past conduct—and treating them as appropriate sites for

whatever discouraging pressures produce omissions of unwanted behavior. This sharp contrast between prevention and punishment makes no allowance for the way that the *threat* of punishment works in laws against consummated offences. For example, the law against homicide is addressed to everyone in a jurisdiction—irrespective of their past or present behavior. If ignoring past behavior is objectionable in the criminalization of preparatory acts, why is it not also objectionable in the threats of punishment carried by laws whose prosecution starts after the fact? In laws against homicide, for example, the threat of hard treatment in the form of a long term of imprisonment is addressed to those who would not dream of killing anyone, as well as those who would. Why does not this indiscriminate form of address treat too many people as dangerous if preparatory offences do? Again, why is not the threat of severe treatment for homicide also open to the objection that it uses fear of imprisonment to deter people rather than thoughts about the costs to people of being killed? I think the Ashworth-Zedner argument from the different logics of prevention and punishment does imply—controversially if not simply incorrectly-- that the threat in the law against homicide is objectionable for both its indiscriminateness and its eliciting demotivating fear rather than demotivating *reasons* --thoughts about the badness of being killed.

When the Terrorism Act prescribes punishments for, among other offences, violent killing on a large-scale, the rationale of the specified punishments is desert. According to the preventive justice skeptics, however, the criminalization of acts preparatory to terrorism depends on a different logic just because it is preventive. This kind of argument also proves too much. It seems to me to distort the relation between a serious victimizing offence and e.g. the offence of *attempting* the victimizing offence. Clearly the gravity of the fully realized offence is part of the *source* for the gravity of the offence of attempt. In other words, if it is very wrong (and punishable by the severest hard treatment) to murder a great number of people, then it is also wrong to *attempt* to murder a great number of people, and the rationale for making attempts

punishable has something in common with the rationale for punishing mass murder itself, i.e. the badness of loss of life, the typical violence and pain associated with murders, mass fear and so on. In the case of an offence that often aims at mass-murder, i.e. terrorism, the Terrorism Act not only says “Don’t do it-- or else!”; it says, roughly, “Don’t even think about it—or else!” Of course the “or else” in the case of pre-attempt offences alludes to a much less severe penalty than for a successful terrorist act, because the harm done by pre-attempt offences can be minimal. In this sense proportionality operates. The agent has set off on a path toward a terrorist act, though perhaps not very far on that path: how does it show disrespect to the agent for the law to insert into his deliberations the thought of a punishment for taking *any* steps toward an atrocity?

There may be a good answer to this question, based on the breadth of the definition of terrorism in the UK Terrorism Acts,²⁸ and the sheer variety and vagueness of offences treated as preparatory or precursor offences. ‘Terrorism’ as defined in these Acts is far wider in application than the working definition used in section I, where we were operating at the transjurisdictional level of generality occupied by von Hirsch and Jareborg, and where we related terrorism to mass homicide for the coercion of governments. The Terrorism Act (2006) notoriously contains an offence (Section 1) of indirectly encouraging an act of terrorism. This can take the form of an approving online comment for a UK audience on a past terrorist act. It is certainly questionable whether something along these lines is likely to or is intended to lead to an act of terrorism, so that criminalizing it does, perhaps, prejudice the danger posed by people whose radicalism consists primarily of online poses and gestures. Poses and gestures may not be steps toward any atrocity at all. Neither need they inspire the large-scale violent acts that constitute uncontroversial examples of terrorism. Offences of possessing articles for the use of terrorism (Terrorism Act (2000) Section 57) may be open to similar criticism.

So although I deny that the criminalization of preparatory offences belongs to a logic of bypassing the agency of potential offenders, I do not maintain that all of the criminalization associated with the Terrorism Act is entirely in order. I agree that the offence of glorifying terrorism is ill defined, that “possession” offences may catch the innocent, and that non-disclosure offences can be hard for people to avoid if they are researching terrorism for academic purposes and subject themselves to the usual confidentiality norms governing interviews with research subjects. Here the Terrorism Act carries serious risks of injustice. But I am unconvinced by more general arguments against preventive justice in the area of serious crime.

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Notes

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1 See von Hirsch and Jareborg, “Gauging Criminal Harm,” 1-38. The authors say that their paper was prompted by the increasing invocation of proportionality in the 1980s. The paper continues to be highly influential. See the latest edition of Ashworth, *Sentencing and Criminal Justice*, ch 4. Also heavily influenced by von Hirsch and Jareborg are Greenfield and Paoli, “Framework to Assess Harms.” A number of other approaches gauge seriousness of harm by length of sentence and victim or public perceptions of seriousness. These latter are of little use in justifying sentencing. For an overview and a variation on these approaches, see Sherman, Neyroud, and Neyroud “Cambridge Crime Harm Index.”

2 von Hirsch and Jareborg, “Gauging Criminal Harm,” 17-19. The general approach is inspired by Sen, *Standard of Living*.

3 von Hirsch and Jareborg, “Gauging Criminal Harm,” 19-21.

4 I realize that the large-scale lethal attack is not the only variety of terrorism, and that terrorism legislation in England and Wales is often criticized for criminalizing precursor and preparatory acts, not to mention acts of praising past attacks. Some of these offences will be discussed later. But for the purpose of discussing von Hirsch and Jareborg a standardized type of offence is required, and I am stipulating that it is the large-scale lethal attack. The difficulty of defining terrorism is well known and perhaps insuperable. See for example, Hodgson and Tadros, “Impossibility of Defining Terrorism.”

5 Von Hirsch and Jareborg, “Gauging Criminal Harm,” 33-34.

6 Hobbes, *Leviathan*, 231. “But by Safety here, is not meant a bare Preservation, but also all other Contentments of life, which every man by lawfull Industry, without danger, or hurt to the Common-wealth, shall acquire to himselfe.”

7 Ibid., 123

8 Ibid., 163

9 This evidence could take the form of reliable information from informants, convictions, social scientific investigations commissioned by the government, or independently carried out by e.g. university researchers.

10 Transparency International mentions the use by organized crime of social housing for prostitution by women it has trafficked. See *Corruption in the UK*, 10.

11 See Home Office, *The Illicit Drug Trade*.

12 The argument for treating participation in a violent, illegal market as serious crime may also be an argument for policy that will remove the violence, e.g. by creating a legal and regulated drug market. Discussion of this issue is outside the scope of the present paper.

13 *Serious Crime Act 2007*. <http://www.legislation.gov.uk/ukpga/2007/27>

14 Counterfeiting of goods is not within the scope of Schedule 1 counterfeiting offence.

15 See Home Department, *Memorandum to the Home Affairs Committee*, 3. In the UK an estimated 38,000 people are involved in organized crime. See Transparency International, *Corruption in the UK*, 2.

16 This is not to say that the well-off are not damaged by having their property stolen. They are still victims of intellectually property offences notwithstanding their wealth. If they have invested in the products pirated at some risk of losing their money, they might deserve, other things being equal, to reap the financial rewards, notwithstanding the fact that they do not need those rewards. A multibillionaire who loses a million through theft is in that sense also a victim of a serious financial crime. But if the loss of a million is the aggregate of minute losses from individual downloads by poor downloaders, there may be no one on whom a just punishment can be visited by a Serious Crimes Act.

17 An official of the UK National Crime Agency has recently suggested that downloading offences lead to serious cyber-crime offences. See Drury, “Web Whizkids.”

18 In another intermediate case internet sites are hacked and information stolen. If the point of the theft is simply to bring to light a vulnerability, and the information is not used to victimize data subjects, maybe even punishment is out of order.

19 See Ashworth and Zedner, *Preventive Justice*, ch. 1, notes 21, 22, 30-34.

20 See Lomell, “Punishing the Uncommitted Crime,” 83-100.

21 Ibid. See also Asp, “Preventionism and Criminalization.”

22 See Duff, “Perversions and Subversions of Criminal Law,” 100.

23 *Serious Crime Act (2007)*, Section 1 (b).

24 The cases of *R v. Hancox (Dennis)* [2010] EWCA Crim 102, [2010] 1 W.L.R. 1434 and *R v. Carey (Andrew) and Taylor (Darren)* [2012] EWCA Crim 1592 say that there has to be “a real and significant risk” and “more than just a bare possibility” that the defendant will commit further serious crimes in order for an SCPO to be necessary to protect the public. This means that people who are convicted of more minor offences and have no previous convictions would not necessarily be subject to an order. In *Carey*, one of the applicants

successfully appealed against an SCPO on the basis that the judge had held that the risk of his being involved in future serious crimes was very low, and although he had participated in organised drug dealing, he had not played an organising role and was therefore unlikely to be an organiser in future.

The orders imposed are apparently sweeping at times, and this is at least partly due to the breadth of the restrictions that the Act allows in section 5. For example, in *R v. Hall (Robert), Wynne (Emmet) and Knight (Ian David)* [2014] EWCA Crim 2046, the defendants, who had conspired to rob a bank, were prohibited from being near bank premises at night for longer than fifteen minutes while in charge of a vehicle, which in the end prevented their doing things like going to the cinema: they appealed and were allowed to make written submissions on the drafting of the restrictions. Again, SCPOs have on occasion been in danger of interfering with fundamental rights, as in *R v McIntyre (Andrew James)*[2012] EWCA Crim 3085, in which the defendant, a drug-dealer, was prohibited from associating or communicating with his long-term partner of ten years, who was a co-conspirator. This provision was modified, as it was held to interfere with the defendant's right to maintain private relationships.

I am grateful to my daughter, Lucy Sorell, for researching relevant case law.

25 See Serious Crime Act (2007), Section 25.

26 Ashworth and Zedner, *Preventive Justice*, 18.

27 The next two paragraphs are drawn from my forthcoming “Online Grooming and Preventive Justice.”

28 The breadth of the definition has been a recurring topic of criticism from the Independent Reviewer of the legislation, David Anderson, and his predecessor, Lord Carlile. See e.g. Anderson, “Terrorism Acts in 2012,” ch.4. For comprehensive discussion, see Walker, “Legal Definition of ‘Terrorism.’”