

A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists

Alec Walen

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [National Security Commons](#)

Recommended Citation

Alec Walen, *A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists*, 70 Md. L. Rev. 871 (2011)
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol70/iss4/3>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

MARYLAND LAW REVIEW

VOLUME 70

2011

NUMBER 4

© Copyright Maryland Law Review 2011

Articles

A UNIFIED THEORY OF DETENTION, WITH APPLICATION TO PREVENTIVE DETENTION FOR SUSPECTED TERRORISTS

ALEC WALEN*

ABSTRACT

In this Article, I argue for a unified theory of detention that explains how the wide range of defensible modes of detention, including the detention of prisoners of war and of some suspected terrorists, can be justified within a liberal tradition that respects the liberty of autonomous individuals. The overarching principle for what I call the Autonomy Respecting Model of Detention is this: Those who can be adequately policed and held accountable for their choices as normal autonomous agents and who can control whether their interactions with others will be impermissibly harmful can be subjected to long-term detention only if they have committed a crime for which long-term punitive detention or loss of the right not to be subjected to long-term preventive detention is a fitting punishment. The Autonomy Respecting Model justifies the long-term preventive detention of prisoners of war on the ground that were such prisoners to escape or be released, they would not be policed in a way that would hold them accountable for their use of force in the future. The model justifies the long-term preventive detention of suspected terrorists only in those cases in which they too would be effectively unaccountable for their future actions. Importantly, the autonomy respecting model does not allow the long-term preventive detention of suspected terrorists simply

Copyright © 2011 by Alec Walen.

* Associate Professor of Law, Rutgers School of Law, Camden; Associate Professor of Philosophy, Rutgers University, New Brunswick.

because they are predicted to pose a threat larger than that of almost all other criminals.

I. INTRODUCTION

A. *Introduction to the Problem Presented by Suspected Terrorists*

Nearly ten years after the attacks of 9/11, the U.S. government is still struggling to formulate a coherent policy that is morally and legally defensible for detaining suspected terrorists (“STs”).¹ The problem is that the war on terror, or as the Obama administration now frames it, the war against al Qaeda,² is an anomalous war that does not fit cleanly into the law of war paradigm. Al Qaeda and other terrorist groups are not states.³ The underlying problem, however, is that discussions, both inside and outside of government, are not informed by a principled understanding of how crime and war—the two competing paradigms for handling STs—fit together into one morally defensible legal framework.⁴ The only framework that exists for uniting the two paradigms is a fundamentally utilitarian one: As the risks associated with giving an ST his liberty go up, detention without criminal conviction becomes increasingly justifiable.⁵ In war, the risks associ-

1. For example, although President Obama has asserted the power to detain anyone who “substantially supported” al Qaeda, the habeas courts that have handled cases since he took this position have split on whether to require more. *Compare* Mohammed v. Obama, 704 F. Supp. 2d 1, 5 (D.D.C. 2009) (adopting the “substantially supported” standard), and Ghorebi v. Obama, 609 F. Supp. 2d 43, 54–55 (D.D.C. 2009) (same), with Hamilly v. Obama, 616 F. Supp. 2d 63, 69 (D.D.C. 2009) (rejecting the “substantially supported” standard).

2. Peter Baker, *Obama’s War Over Terror*, N.Y. TIMES, Jan. 17, 2010, at 30.

3. See William H. Taft, IV, *War Not Crime*, in THE TORTURE DEBATE IN AMERICA 223, 224 (Karen J. Greenberg ed., 2006) (“Al Qaeda, of course, is not a state . . .”).

4. Perhaps the first person to note the problematic absence of a unified theory or account of the various forms of detention, particularly preventive detention, was Carol Steiker. See Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 778 (1998).

5. For some authors who take a fundamentally utilitarian approach to the question of who can be detained, see BENJAMIN WITTES, *LAW AND THE LONG WAR* 35 (2008); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 698 (2009); Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. REV. 77, 105 (2005); Don E. Scheid, *Indefinite Detention of Mega-terrorists in the War on Terror*, CRIM. JUST. ETHICS, Apr. 2010, at 1, 2. Each of these authors offers an instrumental account of the reluctance to impose preventive detention on autonomous persons. Stephen Morse is more of a hypothetical utilitarian. See Stephen J. Morse, *Neither Desert nor Disease*, 5 LEGAL THEORY 265 (1999). He starts with the position that “pure preventive detention is an anathema, we believe, because polities devoted to liberty and autonomy have no moral or political warrant to confine or similarly oppress innocent, responsible agents.” *Id.* at 265. But he also accepts that “[e]veryone . . . has a right to be free from unjustifiable, intentional harm from others.” *Id.* at 294. This leads him to conclude that the use of pure preventive detention would be justifiable if it were possible to predict with sufficient accu-

ated with giving members of the enemy’s forces their liberty are large, and therefore prisoners of war (“POWs”) can be detained without having been convicted of a crime.

Problematically, this utilitarian framework leaves no basis on which to make sense of the principled reluctance to subject an autonomous person—a person who has reached a threshold capacity to use practical reason to frame and pursue a conception of a good life⁶—to preventive detention. One is left with the sense that there are really two legal regimes: the criminal, in which basic liberty rights are protected, and the war, in which, due to the extreme nature of the threat, basic liberty rights must be put aside. What does one do with STs in such a divided legal space? There seem to be three ultimately unsatisfying strategies: (1) treat STs as criminals,⁷ (2) treat STs as combatants who can be detained like POWs,⁸ or (3) simply split the difference.⁹

racy the dangerousness of people who would be detained. *Id.* at 266. He is skeptical about the potential for such accurate predictions and argues that “until predictive technology improves, explicit, pure preventive detention is a defective blunderbuss that will cause greater harm than good.” *Id.* Ultimately, however, Morse is open to utilitarian reasoning, at least in the hypothetical world in which predictions of dangerousness are accurate. Given their assessments of the way things actually work, some of these authors—Morse and Corrado in particular—reach conclusions very much in line with mine. But as far as I know, there is only one prior attempt to develop the kind of uncompromisingly deontological approach that I develop here. See generally Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003). It is somewhat ironic that Slobogin would have written the one prior paper to offer a unified non-utilitarian perspective on detention, because he is fundamentally a utilitarian. But he has assured me that he did indeed write the paper from a non-utilitarian point of view. For a discussion of my basic problem with Slobogin’s view, see *infra* note 39.

R

6. I use the concept of autonomy here primarily in the descriptive sense identified by Richard Fallon. See Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 877 (1994) (explaining that “[i]n one fundamental usage, autonomy is largely a *descriptive* concept, which refers to people’s actual condition and signifies the extent to which they are meaningfully ‘self-governed’ in a universe shaped by causal forces”). The ascriptive sense concerns the moral and legal claim that a person whose autonomous capacity normally reaches a threshold level cannot be paternalized; that is, it grounds a claim to be treated *as if* he is acting autonomously at all times. See *id.* at 878. This sense of the term has, with a few exceptions, only a limited, background significance in this Article. See *infra* notes 203, 216 and accompanying text.

R
R

7. See, e.g., James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts: 2009 Update and Recent Developments*, 42 CASE W. RES. J. INT’L L. 267, 270–71 (2009); cf. Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT’L L. 499 (2005).

8. See, e.g., BENJAMIN WITTES & COLLEEN A. PEPPARD, *DESIGNING DETENTION: A MODEL LAW FOR TERRORIST INCAPACITATION* 5 (June 26, 2009), available at http://www.brookings.edu/~media/Files/rc/papers/2009/0626_detention_wittes/0626_detention_wittes.pdf; Cole, *supra* note 5, at 698; Taft, *supra* note 3, at 224–25; see also Andrew C. McCarthy & Alykhan Velshi, *Outsourcing American Law: We Need a National Security Court* 27–30 (Am. Enter. Inst. for Pub. Policy Research, Working Paper No. 156), available at <http://www.aei.org/docLib/20090820-Chapter6.pdf>.

R

Another way of highlighting the need for a principled, unified theory of detention is by considering the problematic nature of the two kinds of responses generally given to the threat posed by STs. One response argues that there is no alternative to diminishing respect for basic liberty rights when the risks to society posed by STs become too great. The second response argues that the principled reluctance to subjecting autonomous people to long-term detention without a criminal conviction is misguided. Some will try to embrace both responses, using the second to mitigate the sense of moral compromise inherent in the first. As I will explain, neither response is fully satisfactory, nor does combining them help.

Those who take the first position—that there is no alternative to diminishing respect for basic liberty rights when the risks to society posed by STs become too great—argue that war is an extreme condition in which the balance struck between security and liberty is wholly different than the balance offered by criminal law.¹⁰ The need for a different kind of balance, or a different legal framework, is suggested by the fact that, despite having committed no crimes, POWs can legally and morally be detained until the cessation of active hostilities.¹¹ This fact seems to suggest that when the risks to society are great, as they are in times of war, then the moral principles underlying the use of the criminal justice system as a precondition for long-term detention are a luxury that society must put aside.¹² The argument, admittedly, is not that simple. Combatants are privileged to use force, and therefore POWs whose conduct has respected the law of war are guilty

9. See, e.g., Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1132 (2008). It does not help our understanding to talk about third models of detention, such as administrative detention (as opposed to military detention). But see Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 40 CASE W. RES. J. INT'L L. 593, 598 (2009) (advocating “[t]he oft-overlooked administrative model”). The underlying problem remains, namely, providing a principled framework for knowing *when* detention is permissible.

10. Cf. Hakimi, *supra* note 9, at 594-95 (“In wartime, the law of armed conflict generally . . . permits states to detain persons reasonably suspected of threatening state security, without affording them judicial guarantees.”).

11. See Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (“Prisoners of war shall be released and repatriated without delay after cessation of active hostilities.”); see also *id.* art. 138 (defining “prisoners of war” as that term is used in the Convention).

12. See Hakimi, *supra* note 9, at 595 (“That expansive authority to detain reflects the understanding that, during war, the balance between security and liberty shifts. The state’s security interests become paramount, so the liberty costs of detaining and thereby incapacitating the enemy are tolerated.”).

R

R

of no crimes.¹³ As a result, the criminal justice system could not, even in principle, be used to detain POWs for their past acts, and therefore criminal punishment cannot be relied on to prevent them from carrying out future attacks.¹⁴ Nevertheless, the notion that POWs can be subjected to long-term preventive detention (“LTPD”) seems to reinforce the idea that war is different, and that the values and principles that guide society in times of peace may need to be suspended when dealing with the enemy in times of war.¹⁵

It is worth noting, not as a criticism, but just as a point of clarification, that a further question arises if one tries to move from POWs to STs. One must ask whether the United States is really or effectively at war with terrorist organizations and their members and supporters. If we are, the United States can detain members and supporters of terrorist organizations as enemy combatants.¹⁶ If we are not, we cannot.¹⁷

Those who take the second position—that the principled reluctance to subjecting autonomous people to long-term detention without a criminal conviction is misguided—argue that it is a mistake to take too seriously the idea that long-term detention must be based on

13. See Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 3-4 (2004) (defining “combatants’ privilege” as “an international law immunity that places some violent actions and actors substantially outside the purview of ‘normal’ criminal law”).

14. See *id.* at 9-10 (explaining that, unlike traditional criminal detention, the purpose of detaining POWs “is to disable enemy combatants from participation in combat, not to punish or rehabilitate them”).

15. Even Tom Gerety, who thinks that the “war on terror” is best conceived of as “a novel form of policing, of criminal work, on a global scale” with “small wars [encompassed] within it,” Tom Gerety, *The War Difference: Law and Morality in Counter-Terrorism*, 74 U. CIN. L. REV. 147, 164 (2005), seems all too ready to accept this line of reasoning, see *id.* at 150 (“When war happens—when a war begins—we enter a new legal and moral universe. The most prominent and obvious feature of this universe is the moral shift to a position that is rarely if ever true in peacetime . . .”).

16. See Hakimi, *supra* note 9, at 595 (noting that one strand of thought “asserts that states are at war with al Qaeda and other transnational jihadi groups, and that the law of armed conflict thus applies to permit the detention of terrorism suspects captured anywhere in the world for as long as necessary or until ‘hostilities’ cease”).

17. For a good reflection of this debate, at least with regard to STs captured in the United States, not on a traditional battlefield, compare *Al-Marri v. Pucciarelli*, 534 F.3d 213, 259-60 (4th Cir. 2008) (Traxler, J., concurring in the judgment) (concluding that the United States is at war with al Qaeda and may therefore detain enemy combatants associated with that war under the Authorization for Use of Military Force), *vacated sub nom.* *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.), with *id.* at 235 (Motz, J., concurring in the judgment) (rejecting the view “that individuals with constitutional rights, unaffiliated with the military arm of any enemy government, can be subjected to military jurisdiction and deprived of those rights solely on the basis of their conduct on behalf of a terrorist organization”).

criminal convictions.¹⁸ Many have pointed out that war is not the only context in which liberal states hold people in LTPD. The U.S. legal system allows the LTPD of those who are mentally ill and pose a danger to themselves or others.¹⁹ The United States also has a history of subjecting illegal immigrants who cannot be repatriated to LTPD.²⁰ Those with contagious and dangerous diseases can be subjected to long-term quarantine.²¹ Moreover, the criminal justice system itself seems to have a number of preventive dimensions mixed into or attached to it.²² Consider, for example, the LTPD of “sexually violent predators” who have served their terms but are found to suffer from a “mental abnormality or personality disorder that makes it difficult, if not impossible, for the [dangerous] person to control his dangerous behavior.”²³

Collectively, these practices do not exactly refute the claim made by the plurality in *Hamdi v. Rumsfeld*: “In our society liberty is the norm, and detention without trial is the carefully limited exception.”²⁴ But they do provide a basis for wondering what principle carefully limits the exceptions. Given that there are so many exceptions to the rule that a criminal sentence must be the predicate for depriving someone of his liberty for an extended period of time, one can argue that it should not be a matter of great concern if the State finds another reason to depart from the rule in subjecting STs to LTPD.²⁵

18. See WITTES, *supra* note 5, at 34 (explaining that “[i]t is part of our civic mythology that our system does not lock up people except when it can prove their guilt of a crime”).

19. See *Addington v. Texas*, 441 U.S. 418, 426 (1979) (noting the state’s “power to protect the community from the dangerous tendencies of some who are mentally ill”); see also, WITTES, *supra* note 5, at 34 (“All states authorize the detention of the mentally ill under some circumstances.”).

20. WITTES, *supra* note 5, at 36-37. The Supreme Court recently limited this practice in *Zadvydas v. Davis*, 533 U.S. 678 (2001). The *Zydydas* Court concluded that “an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.” 533 U.S. at 701.

21. See A. John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227, 1269-71 (2006) (explaining that public health emergencies can justify the lengthy quarantine of exposed or infected individuals).

22. See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention As Criminal Justice*, 114 HARV. L. REV. 1429, 1429-31 (2001) (asserting that “the justice system’s focus has shifted from punishing past crimes to preventing future violations through the incarceration and control of dangerous offenders” and listing various criminal laws that place significant emphasis on the prevention of future crimes).

23. See *Kansas v. Crane*, 534 U.S. 407, 409, 411 (2002) (alteration in original) (emphasis omitted) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)) (internal quotation marks omitted) (referring to the Kansas Sexually Violent Predator Act).

24. 542 U.S. 507, 529 (2004) (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)) (internal quotation marks omitted).

25. This is part of the argument for a number of writers, but most emphatically for Benjamin Wittes. See WITTES, *supra* note 5, at 33-34 (noting that the rule limiting deten-

R

R

R

R

One could even agree with the Supreme Court of the United States that we must remain “careful not to minimize the importance and fundamental nature of the individual’s right to liberty,”²⁶ and yet suggest that relying on a simple utilitarian balance between security and liberty satisfies that standard: As security needs increase, forms of detention other than detention based on a criminal conviction become more readily justifiable.²⁷

I reject both positions in this Article. I reject the simple balancing approach²⁸ and argue instead that an individual may not be deprived of his liberty unless the reasons for doing so respect his status as an autonomous person. As Carol Steiker put it, “[T]hose able to [choose to comply with the law] should have their liberty and their autonomy respected by being treated as rational beings—and thus prosecuted pursuant to the criminal law should they choose to do wrong.”²⁹ This deep principle underlies the *Hamdi* plurality’s statement that “liberty is the norm, and detention without trial is the carefully limited exception,”³⁰ and it does not yield to simple balancing considerations.

I also reject the argument that war is different; it does not present a moral space where the normal moral rules simply do not apply. Cicero did say that “‘during war, the laws are silent’ (*silent enim legis inter arma*).”³¹ But as Justice A. Barak, President (Emeritus) of the Israeli High Court of Justice, wrote, “[This] saying[is] regrettable. [It] re-

tion to criminal punishment is one with many exceptions); see also Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SECURITY J. 85, 88 (2011) (“The best way to understand preventive detention under American law and practice, we submit, is not that some broad principle prohibits it. It is, rather, that American law eschews it *except* where legislatures and courts deem it necessary to prevent grave public harms.”).

26. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (quoting *Salerno*, 481 U.S. at 750) (internal quotation marks omitted).

27. Compare this utilitarian balancing test with the procedural due process balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and relied on by the plurality in *Hamdi*, 542 U.S. at 528–29. The *Mathews* balancing test considers three factors: “[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest.” *Mathews*, 424 U.S. at 335.

28. For a short essay on the complexities often overlooked by those who simply *weigh* the competing values of security and liberty, see generally Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191 (2003).

29. Steiker, *supra* note 4, at 785.

30. 542 U.S. at 529 (internal quotation marks omitted).

31. HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Gov’t of Isr.*, slip op. ¶ 61 [Dec. 11, 2005] (Isr.), available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

flect[s] neither the existing law nor the desirable law[.] It is when the cannons roar [i.e., during war] that we especially need the laws.”³²

The existence of international humanitarian law, a body of law that treats war as a law-governed activity informed by humanitarian moral concerns, makes it clear that war is governed by laws that are informed by basic moral concerns.³³ But my moral point goes beyond the legal relevance of humanitarian concerns. I follow the many just war theorists who treat war as an activity that should be governed by our normal moral concepts, including a concern with basic rights.³⁴ It is in this spirit that I argue that we can find a satisfying solution to the problem of when the State may subject STs to LTPD only by rejecting the argument that war exists in its own moral space. We must instead provide a unified moral theory of detention, one that not only takes into account individual interests in both liberty and security but that also protects the liberty rights of autonomous individuals.

To be clear, I am not suggesting a model in which autonomy is a “value” to be promoted.³⁵ In such a model, autonomy is merely one more good, even if a very important one, to be placed in the utilitarian balance. Rather, the model on which I rely treats autonomy as a capacity that gives those who have it a kind of moral status that we might call dignity. Dignity is also not a value to be promoted; it is a status that must be respected.³⁶

In light of this idea, it might seem that I must, if I want my theory to be at all plausible, take the first approach and accept that war is an exceptional situation in which dignity can be sacrificed for the greater

32. *Id.* (citations omitted).

33. The International Committee of the Red Cross, the official reporter of the Geneva Conventions and the body responsible for providing legal commentary on and interpretations of international humanitarian law, defines international humanitarian law, also known as the law of war or the law of armed conflict, as “a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict.” Fact Sheet, Advisory Serv. on Int’l Humanitarian Law, Int’l Comm. of the Red Cross, What is International Humanitarian Law? (July 31, 2004), available at http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

34. See, e.g., JEFF McMAHAN, *KILLING IN WAR* 4 (2009) (discussing war in terms of traditional moral constructs); MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 14–16 (4th ed. 2006) (same); Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 PHIL. & PUB. AFF. 148, 148 (2005) (suggesting that war, a form of “collective violence,” “poses a particular set of challenges to the application of moral principles”).

35. By contrast, this is exactly how Slobogin conceives of autonomy, see Slobogin, *supra* note 5, at 28, which explains why he is more ready than I to balance liberty and security.

36. Cf. F. M. Kamm, *Non-consequentialism, the Person as an End-in-Itself, and the Significance of Status*, 21 PHIL. & PUB. AFF. 354, 382–83 (1992) (arguing that the status of being inviolable does not allow for minimizing violations).

good. I reject that view. My goal here is to articulate and defend a unified theory of detention that will explain when detention is respectful of the dignity of persons, including POWs, and that will provide a critical perspective from which to assess the justifiability of the various exceptions to the criminal model of detention.

B. Introduction to the Autonomy Respecting Model of Detention

The unified theory I argue for in this Article is based on what I call the Autonomy Respecting (“AR”) Model of detention. Its core principle is that individuals who can be adequately policed and held criminally liable for their illegal choices as normal autonomous agents and who can choose whether their interactions with others will be impermissibly harmful or not can be subjected to long-term detention *only if* they have been convicted of a crime for which long-term punitive detention, and/or the loss of the right not to be subjected to LTPD, is a fitting punishment.

One way to break down this AR Model into its component parts is as follows. Those who can be detained fall into two basic categories: (1) those subject to punitive detention and (2) those subject to preventive detention. Those subject to preventive detention can be detained in the short term for the sake of security, but they may be subjected to LTPD only if they fall into one of four categories: (i) they lack the normal autonomous capacity to govern their own choices; (ii) they have, as a matter of criminal punishment, lost their right not to be subjected to LTPD; (iii) they have an independent duty to avoid contact with others because such contact would be impermissibly harmful, and LTPD simply reinforces this duty; or (iv) they are incapable of being adequately policed and held accountable for their choices. Importantly, POWs and some STs fall under this last category, and thus, even if there is no other justification for subjecting them to LTPD, their LTPD can be accounted for in the AR Model. If, however, an ST does not fall under any of these categories, especially the last one—and many STs do not—and if he is not tried and convicted of a crime, then he must be released and policed like any criminal defendant who is acquitted at trial.

It is important to dispel one possible misreading of my thesis up front.³⁷ The AR Model does not require that all STs who could possibly be prosecuted face prosecution before LTPD is considered. There are costs and risks involved in prosecution, and prosecutors must balance these risks against the moral reasons that weigh in favor of prose-

37. I am grateful to David Gray for pushing me to be clear about this point.

cuting individuals for past actions, such as achieving retributive justice, promoting general deterrence, ensuring individual incapacitation, and providing the chance for rehabilitation.³⁸ The availability of LTPD affects this balance by providing an alternative route to individual incapacitation. But, the justifiability and hence availability of LTPD must be determined independently of and prior to the decision to prosecute or not, and it does not require that all prospects for prosecution be exhausted before LTPD is considered. Nor does it require that LTPD be reserved for those who are not fit for prosecution.³⁹ Prisoners of war can be subjected to LTPD even if they may also be tried, at the prosecutor's discretion, for committing war crimes. The same would be true for those STs who are subjected to LTPD but who can also be tried for various terrorism-related crimes.

This is not to deny that LTPD is a particularly horrible thing to have to endure. It is, and this fact is, of course, relevant. But my argument neither turns on the special degree of harm peculiar to LTPD alone nor on the greater risk that an innocent person will be detained if LTPD, rather than prosecution, is used as a tool for incapacitation. Degrees of harm and risk can be outweighed. Rather, my argument is based on the thought that the fundamental liberal commitment to respecting autonomy requires the State to treat autonomous agents as

38. See generally 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 1.5, at 36–47 (2d ed. 2003) (outlining six primary theories of punishment); Adil Ahmad Haque, *Lawrence v. Texas and the Limits of the Criminal Law*, 42 HARV. C.R.-C.L. L. REV. 1, 27–28 (2007) (discussing harm prevention in the context of “acceptable goals of punishment”). Note that, while retribution, deterrence, incapacitation, and rehabilitation are legitimate reasons to *prosecute*, they are not all legitimate factors to take into account at sentencing. See *infra* Part III.A.

39. Slobogin gets off on the wrong foot by failing to appreciate this point. He states: “If government chooses to preventively detain an individual rather than punish him, it must show the person is not eligible for the right to punishment.” Slobogin, *supra* note 5, at 5. He tries to support this position by appealing to a supposed right to punishment, which, following Hegel, he grounds in human honor and dignity. *Id.* at 28–29. But his argument misses the relevance of two factors considered below: (1) states do not have a duty to release and police individuals who are not their own citizens, and (2) those who are not citizens of a state and who will not be held accountable for future acts by other states can be detained as unaccountable even though they cannot be prosecuted for past acts by a state of which they are not a citizen. In addition, his argument overlooks the possibility of justifiably punishing or subjecting to LTPD those with reduced autonomous capacity. See *infra* Part III.C. Finally, Slobogin’s categorization of those who lack the right to be punished is overly broad. For Slobogin, an individual lacks the right to be punished when he “lacks the capacity or lacks the willingness to adhere to society’s basic norms.” Slobogin, *supra* note 5, at 29. This definition blurs an important distinction between those who may not be punished because they lack the capacity to adhere to society’s basic norms, and those who choose to flout those norms and therefore lack the willingness to adhere to them. See Corrado, *supra* note 5, at 104 (drawing a distinction between “the man who cannot control his behavior” and “the man who will not control his behavior”).

R

R

R

presumptively law-abiding—unless they have been convicted of having committed a crime, as a result of which they have lost their right to be so treated—as long as the State has the ability to hold them accountable for their choices if they misuse their free will. Even if the State could predict with reasonable certainty that some individuals are likely to wrong others,⁴⁰ it must let those individuals have the chance to exercise their free will to choose rightly or wrongly, as long as it is sufficiently likely that they can be held accountable if they choose wrongly. The core objection to LTPD, when it is objectionable, is that it treats autonomous and accountable persons as though they do not have the free will to choose rightly. Such treatment disrespects their dignity, and a liberal society may not do that.⁴¹

My ultimate aim is not to provide a precise answer to the question of when, if ever, STs can justifiably be held in LTPD. My aim is to frame the issue so that it is clear what questions must be answered in order to justify the LTPD of STs. Some key questions are as follows: (1) Has a particular ST done anything to lose his right not to be subjected to LTPD?; (2) Does the State have an obligation to release and police a particular person, and if not, will some other country step in to do so?; and (3) Can the ST be adequately policed by the detaining power or by another country willing to take responsibility for him? Reasonable people will disagree to some extent about how to answer these questions. But if reasonable people can at least agree on what questions need to be answered, this will hopefully help any resolution that is adopted gain moral and legal legitimacy.

I proceed as follows. Part II will explore potential problems with using either the criminal justice model or the war paradigm as the framework for addressing the threat posed by STs. It also will address three arguments that purport to show there is no particularly compelling moral reason to worry about LTPD for STs. Part III will flesh out the AR Model for detention and apply it to the LTPD of STs. Part IV will defend the AR model against three objections. Throughout, I will focus on the United States as “the State” for the purposes of this dis-

40. For a good summary of the prospects for prediction, see Richard L. Lippke, *No Easy Way Out: Dangerous Offenders and Preventive Detention*, 27 *LAW & PHIL.* 383, 388–91 (2008).

41. This is a fundamental deontological principle almost on par with not treating people simply as a means. Some scholars who reason mostly as utilitarians nonetheless think we should generally avoid treating people simply as a means. See, e.g., Scheid, *supra* note 5, at 9–10 (“The ‘use’ of innocent individuals (intentional killing of noncombatants) is prohibited in the Just War tradition, just as the ‘use’ of innocent persons in punishment . . . is prohibited in the domestic context.”). This is an overly narrow conception of the relevance of deontological principles. See *infra* note 106.

cussion, but the points I make are meant to be valid for any liberal democracy.

II. THE PROBLEM PRESENTED BY SUSPECTED TERRORISTS

What is to be done with STs? I argue in this Part that this question is a real problem, which cannot easily be solved. One might think there is no need to argue this is a difficult problem. But some think it is obvious enough what we should do with STs, and therefore they believe STs present no interesting or difficult problem. Some think it is obvious STs should be prosecuted;⁴² others think it is obvious STs can be held in LTPD.⁴³ It is important as a precondition for the rest of my argument to show that neither view is correct with respect to STs as a class. Accordingly, I first argue that the criminal justice system cannot provide adequate security against some STs. I then argue that there are moral problems with detaining some STs in the same way as POWs. Finally, I examine and reject three arguments that purport to show there is nothing morally worrisome about subjecting STs to LTPD.

A. *Limitations of Prosecution*

There are two reasons why reasonable people may resist relying on criminal prosecution alone to protect society against the threat of terrorism. First, per person, terrorists pose a larger threat to public safety than almost any other kind of criminal, and their membership in organized groups makes their collective threat potentially very large. Second, terrorists may often be harder to prosecute than other criminals. Neither reason is as compelling as it may seem at first blush. Nonetheless, as I will explain, there are some cases that the criminal justice system does not seem well equipped to handle.

Before exploring these two reasons, two points of clarification are in order. First, to the best of my knowledge, no one is arguing that the United States should prosecute, rather than hold in LTPD, *all* STs, even those captured and held⁴⁴ in an active war zone like Afghanistan.

42. See, e.g., RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 1-2 (May 2008); Benjamin, *supra* note 7, at 270-71.

43. See, e.g., Scheid, *supra* note 5, at 2 (asserting that “mega-terrorists,” those terrorists capable of perpetrating acts of “catastrophic terrorism,” may be subject to LTPD).

44. I say “*captured* and held,” rather than just “held,” because it is important that the law not invite a government to send captured STs into a war zone as an end run around norms governing the treatment of STs. See *Al Maqaleh v. Gates*, 605 F.3d 84, 98-99 (D.C. Cir. 2010) (acknowledging the petitioning detainees’ concern that the U.S. government might transfer detainees into active conflict zones in order to avoid judicial review).

Even staunch proponents of using the criminal justice system recognize that traditional war zones are a separate matter.⁴⁵ The relevant question is whether we should use the criminal justice system for those captured or held *outside* of traditional war zones. Second, using LTPD may not actually help to provide security against terrorist attacks. Whether LTPD provides such security depends on whether its positive value as a means of incapacitation, as a deterrent, and possibly even as an opportunity for rehabilitation⁴⁶ is outweighed by both its potential to radicalize detainees⁴⁷ and its propaganda value for terrorist organizations that look to recruit even more terrorists than they lose.⁴⁸ If LTPD is inherently more harmful than helpful, then the answer is simple: Do not engage in it.⁴⁹ I will assume throughout this Article, however, that LTPD of STs is (or when used judiciously, can be, on balance) helpful in the fight against terrorist organizations.

1. *Terrorists Are More Dangerous than “Ordinary” Criminals*

I turn, then, to the first reason not to rely solely on the criminal justice system to deal with terrorism. As Richard Posner put it, “[O]rdinary crime does not imperil national security; modern terrorism does.”⁵⁰ There is clearly something to what Posner says. No single nonterrorist criminal act, nor any coordinated set of nonterrorist criminal acts, not even the worst mafia or gang violence, compares in terms of the destruction or the impact on the nation’s sense of security to the attacks by nineteen terrorist hijackers on 9/11.⁵¹ That said,

45. See, e.g., ZABEL & BENJAMIN, *supra* note 42, at 2 (“As part of ongoing military operations, soldiers and sailors will capture and detain enemy fighters, without punishing them, in order to disable them from fighting against the United States.”).

46. See, e.g., Sara Wood, *Iraq Detention Operations Focus on Education, Rehabilitation*, ARMED FORCES PRESS SERV. (Oct. 10, 2007), <http://www.defense.gov/news/newsarticle.aspx?id=47746> (describing rehabilitative and educational programs offered in U.S. detention facilities in Iraq).

47. See Rajiv Chandrasekaran, *From Captive to Suicide Bomber*, WASH. POST, Feb. 22, 2009, at A1 (considering whether a former Guantánamo detainee’s “descent into unrepentant radicalism [was] an unintended consequence of his incarceration”).

48. Cf. Deborah Pearlstein, *We’re All Experts Now: A Security Case Against Security Detention*, 40 CASE W. RES. J. INT’L L. 577 (2009).

49. This was the lesson the British drew from their brief experiment with LTPD in their struggle with the IRA in Northern Ireland. See generally PETER R. NEUMANN, *BRITAIN’S LONG WAR: BRITISH STRATEGY IN THE NORTHERN IRELAND CONFLICT, 1969-98*, at 56–58 (2003).

50. RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 65 (2006).

51. This is true in the United States. Arguably, organized crime does imperil national security in other countries, such as Mexico. See Marc Lacey, *In an Escalating Drug War, Mexico Fights the Cartels, and Itself*, N.Y. TIMES, Mar. 30, 2009, at A1 (discussing national security issues presented by Mexican drug cartels). This may be in part because organized crime has assumed terrorist means in pursuit of political ends in such countries.

it is useful to pause to consider just how different terrorists and other criminals actually are, in terms of their destructive capacity, in the more ordinary sorts of cases. As Justice Holmes warned, “Great cases, like hard cases, make bad law.”⁵²

If one was to look at the distribution curves for “normal” violent criminals and terrorists, plotting the number of people killed by an individual on the X-axis and the relative frequency of persons causing that much harm (normalized against the total number of persons engaging in that sort of activity—the normal crime or terrorism—in a given period of time) on the Y-axis, one might think there would be fairly little overlap. Thus, one might guess the most destructive serial or mass murderers who fall on the far right tail for the number of deaths caused per person on the “normal” criminal curve would fall more or less in the heart of the terrorist curve. But one would be mistaken; the curves show substantial overlap.

Consider first Gary Ridgway, the so-called “Green River Killer.” Purported to be the most lethal serial killer in U.S. history, he killed somewhere in the range of forty-nine to seventy people.⁵³ Now compare him to the most common sorts of terrorists operating today: suicide bombers, roadside bombers, and car or truck bombers.⁵⁴ Looking at reports in the *New York Times* of suicide, roadside, and car or truck bombings from around the world for the first six months of 2010,⁵⁵ only one out of more than 200 individual bombers single-handedly killed more people than Ridgway did,⁵⁶ only three attacks total (the two others by multiple attackers) caused more harm.⁵⁷ In

52. *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

53. Over a period of time, Ridgway pled guilty to killing forty-nine women but told prosecutors he had killed as many as seventy. Jennifer Sullivan, *Family of 49th Victim Reacts Bitterly as Green River Killer Avoids Death Penalty Again Under Previous Plea Deal*, SEATTLE TIMES, Feb. 19, 2011, at A1.

54. Focusing on such bombers overlooks the significance of those who plan, organize, finance, or otherwise direct terrorist actions. But it is difficult to determine the exact significance of such individuals, because if one is captured or killed, another member of the organization normally rises to take his place. See Dexter Filkins, *Two Leaders of Taliban Are Arrested in Pakistan*, N.Y. TIMES, Feb. 19, 2010, at A8 (reporting that “the Taliban have proved capable of quickly replacing their killed or captured leaders”).

55. A chart listing all suicide, roadside, and car or truck bombings in the first half of 2010, as reported by the *New York Times*, was prepared by Julio Navarro and is on file with the author.

56. See Ismail Khan & Richard A. Oppel, Jr., *Suicide Bombing on Playing Field in Pakistan Town*, N.Y. TIMES, Jan. 2, 2010, at A1 (reporting that the attack, a truck bombing, “killed at least 89 people and wounded scores more, making it one of the deadliest in a string of suicide attacks”).

57. See Waqar Gillani & Jane Perlez, *Attackers Kill Dozens in Mosques of Minority Islamic Sect in Pakistan*, N.Y. TIMES, May 29, 2010, at A8 (“More than 80 worshipers . . . were killed . . . Friday in a coordinated assault by seven well-trained attackers on two mosques in

fact, most bombers in this period, which I take to be representative, were nowhere near as lethal as the Green River Killer. The average number of people killed per attacker was less than 6.5.⁵⁸ And it is important to realize that this figure is probably high, as there were likely many less successful attacks not reported by the *New York Times*.

Indeed, in Afghanistan, even though suicide bombings have been on the rise, they have been surprisingly ineffective: “[A]t least 480 people were killed in 129 suicide bombings in Afghanistan in 2007, not counting the bombers themselves. That death toll dropped to 275 in 2009, even though the number of bombings had increased.”⁵⁹ This means that the death toll per bombing averaged just under 3.75 in 2007. If we assume that some bombings involved more than one bomber, then the number killed per bomber is even lower. In 2009, it would have dropped to less than 2.25 per bombing.⁶⁰

Of course, suicide bombers in Afghanistan may be particularly ineffective: “In 2009, Islamist militants, mainly Taliban, carried out eighty-seven suicide attacks inside Pakistan, killing about thirteen hundred people, almost ninety percent of them civilians, according to the Pak Institute for Peace Studies.”⁶¹ These facts make for an average death rate, per suicide bomber, of approximately fifteen, which illustrates that terrorists wreak more damage, on average, in some countries than in others.⁶²

Nevertheless, the global average is surprisingly low. “According to data released by the U.S. Central Intelligence Agency in the spring

Lahore, Pakistan[]”); see also Associated Press, *Bomber in Pakistan Strikes at Checkpoint*, N.Y. TIMES, Mar. 14, 2010, at A12 (“Suicide bombers killed at least 55 people in near-simultaneous blasts on Friday in Lahore.”).

58. The number 6.5 is derived by assuming that, when a report indicated there were multiple “attackers,” there were two attackers. Of course, in many such cases there would have been more than two attackers, and thus the average number of killings per attacker would be lower.

59. Rod Nordland, *Afghan Suicide Bombings Less Effective as a Tactic*, N.Y. TIMES, Feb. 16, 2010, at A11.

60. If one divides 275 (the 2009 death toll) by 129 (the number of bombings in 2007), the average comes out to 2.13 deaths per bombing. If the number of bombings went up from 2007 to 2009, then the yield per bomber may have been less than two. Nordland goes on to report that “[s]ix of the last 17 suicide bombers did not wound anyone beyond themselves. In all, those 17 bombers wounded 23 members of NATO or Afghan security forces, while killing 6 civilians and wounding 27 others.” *Id.* In other words, the death toll per bomber dropped to about 0.33. At that rate—even considering the fact that these numbers do not include the number of people wounded (but not killed)—it is hard to maintain that the attackers pose, on average, a threat that exceeds in magnitude the threats the criminal law was designed to address.

61. Steve Coll, *Don’t Look Back*, NEW YORKER, Mar. 1, 2010, at 21.

62. In those countries where the kill rate is particularly high, it may be more plausible to say that the criminal justice system cannot handle the threat posed by terrorists.

of 2006, there were 11,111 terrorist incidents in 2005, in which more than 14,600 civilian noncombatants were killed.”⁶³ Obviously this number represents a large number of attacks, causing a large number of deaths—“a 400 percent increase compared with 2004.”⁶⁴ Yet even if we round the number of deaths caused by terrorist incidents up to 15,000, the number of deaths per incident in 2005 was only 1.35.

And, to put the total number killed in perspective, it is useful to compare the total killed by terrorism *globally* with the total killed by other forms of homicide in the United States alone: 18,361 in 2007.⁶⁵ That means that in a year when terrorism deaths worldwide were up by 400 percent, there were still, two years later, more deaths caused by homicide in the United States alone than there were deaths caused by terrorism worldwide. Considering that the United States claims only about five percent of the world’s population,⁶⁶ it is clear that the harm caused by terrorism is relatively small.

Kill rate is, of course, not the only factor relevant to the capacity of the criminal justice system to handle the threat of terrorism; the frequency and coordination of attacks by terrorists also matter. Even if suicide bombing is, on average, surprisingly ineffective, if attacks are directed by organizations dedicated to causing tremendous amounts of harm, and if those organizations have many terrorists ready, willing, and able to risk or end their lives to achieve the organizations’ goals—as is the case in countries like Afghanistan, Pakistan, and Iraq—then normal policing where those organizations are flourishing may not be up to the security challenge posed by terrorism.

This is an important point, but again, it is important to be clear about the actual, domestic threat facing the United States at the present moment. The actual damage caused in the United States in 2009 by jihadist-motivated killers—a close proxy for the kind of terrorists with whom the United States is “at war”—was quite low: “Exactly 14 of the approximately 14,000 murders in the United States last year resulted from allegedly jihadist attacks: 13 people shot at Fort Hood in Texas in November and one at a military recruiting station in Little

63. PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 16 (2008).

64. *Id.*

65. Jiaquan Xu et al., *Deaths: Final Data for 2007*, 58 NAT’L VITAL STAT. REP., May 20, 2010, at 19-1, 35 tbl.10 (2010), available at http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_19.pdf.

66. According to the U.S. Census Bureau, as of March 16, 2011, the estimated U.S. population is 310,996,517, and the estimated global population is 6,906,184,544. *U.S. & World Population Clocks*, CENSUS.GOV, <http://www.census.gov/main/www/popclock.html> (last visited Mar. 16, 2011).

Rock, Ark., in June.”⁶⁷ Given these figures, the relatively low number of deaths caused by terrorist bombers in general, and the relatively sophisticated policing ability of various federal and local agencies, it is difficult to maintain that there is any need to treat the threat of *domestic* terrorism as too great for the criminal process to handle.

None of this is to deny that global terrorist organizations pose a substantial threat to the United States. To take just one recent example, if would-be suicide bomber Umar Farouk Abdulmutallab had been a bit more competent, he would have killed hundreds on his Detroit-bound Northwest Airlines flight on Christmas Day of 2009.⁶⁸ Abdulmutallab’s failed attempt to blow up that plane is a reminder of the capacity terrorist acts have for creating damage beyond the scale of normal criminal acts inside the United States.⁶⁹ My point is only that one should not overgeneralize from such cases what a “typical” ST might do in the United States or elsewhere.⁷⁰

2. Suspected Terrorists May Be Harder to Prosecute than “Ordinary” Criminals

With respect to the second reason not to rely on the criminal justice system—that STs may be more difficult to prosecute than other suspected criminals⁷¹—legitimate and illegitimate concerns have been raised. I start by sweeping aside one of the illegitimate concerns, namely, that terrorists are so committed to their cause that they willingly risk (or intend to cause) their own death and therefore are undeterrable. Don Scheid, for example, makes the following invalid

67. Scott Shane, *Year of Plots: A 2nd Prism*, N.Y. TIMES, Jan. 13, 2010, at A1.

68. See Scott Shane & Eric Lipton, *Passengers’ Actions Thwart a Plan to Down a Jet*, N.Y. TIMES, Dec. 27, 2009, at A1 (detailing the attempted bombing).

69. A similar point can be made about other recent failed attempts at terrorism in the United States. See, e.g., Mark Mazzetti & Scott Shane, *Evidence Mounts for Taliban Role in Car Bomb Plot*, N.Y. TIMES, May 6, 2010, at A1 (reporting on Faisal Shahzad’s failed bombing attempt in New York City’s Times Square); William K. Rashbaum, *Terror Suspect Is Charged with Preparing Explosives*, N.Y. TIMES, Sept. 25, 2009, at A1 (reporting on the foiled attempt by Najibullah Zazi to use large amounts of explosives to cause damage in the United States).

70. In this vein, it is at least misleading to assert that “mega-terrorists, such as al-Qaeda . . . threaten a level of destructive violence far beyond virtually any form of criminal activity.” Scheid, *supra* note 5, at 4. At the high end, al-Qaeda affiliated terrorists do threaten violence beyond virtually any form of criminal activity, but the high end is very atypical for terrorist violence.

71. Evidence of this difficulty may be found in the fact that “[t]he government is prosecuting only about one out of four of those charged in connection with terrorism.” Lolita C. Baldor, *Study: Fewer Terrorism Suspects Going to Trial*, CNSNEWS.COM (Sept. 28, 2009), <http://www.cnsnews.com/news/article/54646>. One reason for the low prosecution rate is that “[p]eople charged with terrorism often go free because the evidence wasn’t strong enough to bring them to trial.” *Id.*

inference: “Since the [terrorist] is undeterrable, his conduct cannot be controlled or significantly influenced by the threat of future punishment. The State’s only realistic option, therefore, is preventive detention.”⁷² Scheid’s inference overlooks the great number of resources the State has to intercede, using criminal law, before an ST causes any harm. As Justice Souter wrote in *Hamdi*, “[T]here is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous citizens within the United States, given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit.”⁷³

A more legitimate concern is that it may be particularly difficult to bring a successful prosecution against an ST. Matthew Waxman wrote:

[I]nformation used to identify terrorists and their plots includes extremely sensitive intelligence sources and methods, the disclosure of which during trial would undermine or even negate counterterrorism operations; [and] the conditions under which some suspected terrorists are captured, especially in faraway combat zones or ungoverned regions, make it impossible to prove criminal cases using normal evidentiary rules⁷⁴

The first reason—that the relevant information is highly sensitive—presumably applies primarily to prosecutions based on foreign detentions in which the activities of the CIA or the cooperation of foreign states is at issue.⁷⁵ The Guantánamo Review Task Force, however, concluded:

72. Scheid, *supra* note 5, at 7.

73. *Hamdi v. Rumsfeld*, 542 U.S. 507, 547 (2004) (Souter, J., concurring in part, dissenting in part, concurring in the judgment). To illustrate this point, Justice Souter cited the following statutes: “18 U.S.C. § 2339A (material support for various terrorist acts); § 2339B (material support to a foreign terrorist organization); § 2332a (use of a weapon of mass destruction, including conspiracy and attempt); § 2332b(a)(1) (acts of terrorism ‘transcending national boundaries,’ including threats, conspiracy, and attempt); . . . § 2339C . . . (financing of certain terrorist acts); . . . § 3142(e) (pretrial detention).” *Id.* at 547–48.

74. Mathew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT’L SECURITY L. & POL’Y 1, 11 (2009); see also *Al-Marri v. Pucciarelli*, 534 F.3d 213, 306 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part) (describing the barriers to criminal prosecution of STs, including the use of “evidence that does not meet the constitutional and statutory requirements of a traditional criminal proceeding”), *vacated sub nom. Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.).

75. See *McCarthy & Velshi*, *supra* note 8, at 11–12 (stating that foreign intelligence agencies, like the CIA, will be reluctant to share information that may be made public under U.S. discovery laws).

R

R

[T]he principal obstacles to prosecution in the cases deemed infeasible . . . typically did not stem from concerns over protecting sensitive sources or methods from disclosure, or concerns that the evidence against the detainee was tainted. While such concerns were present in some cases, most detainees were deemed infeasible for prosecution based on more fundamental evidentiary and jurisdictional limitations tied to the demands of a criminal forum⁷⁶

In other words, the problems with prosecuting detainees at Guantánamo were primarily based on Waxman's second concern and jurisdictional limitations, such as that the federal material support laws, 18 U.S.C. §§ 2339A and 2339B, "were not amended to expressly apply extraterritorially to non-U.S. persons until October 2001 and December 2004, respectively."⁷⁷

Because the jurisdictional limitations would not apply to most cases going forward, Waxman's second concern—that the conditions of capture would make it difficult to use normal evidentiary rules to prosecute STs—is the primary obstacle to prosecuting STs domestically in the future. But, that concern would not apply to domestic prosecutions of terrorists captured in the United States. This is not to deny that prosecuting domestic terrorism cases is difficult; it is only to say that prosecuting domestic STs is not so distinctly difficult that there is reason to use LTPD instead.⁷⁸ These distinctive difficulties seem likely to arise only with regard to STs who are captured abroad or who are captured domestically but whose prosecution would depend on evidence obtained from abroad.⁷⁹

To deal with those cases in which prosecution of STs might be distinctly more difficult than prosecution of normal criminals, President Obama has agreed to use Military Commissions ("MCs") for the

76. DEP'T OF JUSTICE ET AL., FINAL REPORT: GUANTANAMO REVIEW TASK FORCE 23 (Jan. 22, 2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>. The interagency Task Force consisted of the Department of Justice, the Department of Defense, the Department of State, the Department of Homeland Security, the Office of the Director of National Intelligence, and the Joint Chiefs of Staff. See *id.* at i–ii (explaining the review process).

77. *Id.* at 22 n.21.

78. I leave aside the problem of cost. The United States is wealthy enough that the cost of providing a fair trial need not result in the loss of liberty caused by substandard procedural protections. But see WITTES, *supra* note 5, at 172 (discussing the vast resources consumed by the trial of Zacarias Moussaoui).

79. Pointing out that these difficulties would not arise in most cases is not to suggest that the domestic trial process, including charging a defendant and alerting him to the right to remain silent, should be commenced immediately upon detention. Whether a period of short-term investigative detention should be used first is a matter I do not address here.

prosecution of some Guantánamo detainees.⁸⁰ These MCs allow the prosecution, for example, to use different evidentiary rules that admit more hearsay than would be allowed in a civilian trial.⁸¹ Use of these different evidentiary rules should not be automatically disqualifying. What matters is that criminal trials preserve fundamental procedural fairness. If trials do not preserve fundamental fairness, however—if the trial system is corrupted by reliance on unreliable hearsay; if the defendant is prevented from seeing secret evidence, such that he does not have a fair opportunity to respond to it, or even to advise his counsel (who might be allowed to see it) how best to respond to it;⁸² or if the standard for conviction is allowed to slip below proof beyond a reasonable doubt⁸³—then the State might as well admit that its concern is not so much with punishing past crimes as it is with preventing future ones. For if the State uses such unreliable procedures, then it is implicitly admitting that it does not really care about *proving* that the detainee committed a crime; it is simply using the façade of the criminal law in order to lock up someone considered to be a future threat. In that case, pretending to use criminal law is pointless; it would be more honest and more effective simply to move into a regime that uses LTPD. But if MCs can maintain basic procedural fairness, they can provide a meaningful alternative forum that accommodates the special problems that arise in dealing with evidence obtained abroad.⁸⁴

80. President Barack Obama, Remarks by the President on National Security at the National Archives, Washington, D.C. (May 21, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/. President Obama proposed using MCs only for detainees suspected of violating the laws of war and pledged a set of reforms that would align the MCs “with the rule of law.” *Id.*

81. 10 U.S.C. § 949a(b)(2)(E) (2006).

82. These were problems with the earlier versions of MCs created by the Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001), and by the Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2600–37 (codified as amended at 10 U.S.C. §§ 948a–950w). Both earlier sources of authority also allowed the use of evidence derived from cruel, inhuman, or degrading treatment. The 2009 version of the Military Commissions Act, Pub. L. No. 111-84, 123 Stat. 2190 (codified at 10 U.S.C.S. (Lexis Supp. 2010)), follows essentially the same procedures for dealing with classified evidence as the Classified Information Procedures Act, 18 U.S.C. app. §§ 4-6 (2006). The Military Commissions Act no longer allows the use of evidence obtained using “torture or [] cruel, inhuman, or degrading treatment.” 10 U.S.C.S. § 948r (Lexis Supp. 2010).

83. *But see* POSNER, *supra* note 50, at 65 (arguing that the burden of proof for terrorist convictions should be lower than that for ordinary crimes because of the national security interests at stake).

84. *See* Remarks, Obama, *supra* note 80 (asserting that MCs are an appropriate forum for trying detainees accused of violating the laws of war, provided that reforms are made to bring MCs “in line with the rule of law”).

R

R

In sum, there is actually not much reason to think prosecutions of STs captured in the United States are beyond the capacity of U.S. courts. Nor are STs typically super-villains capable of wreaking the kind of destruction on the United States that some authors presuppose they are. The real problems, instead, are these: First many STs who could be prosecuted in the United States are captured abroad in conditions where evidentiary issues complicate the prospects of obtaining a successful prosecution. Second, as in any criminal case, there is always a chance the prosecution will fail to obtain a conviction. And, finally, if there is strong—perhaps clear and convincing—evidence that an ST is a significant terrorist capable of contributing in a distinctive and nontrivial way to the kinds of terrorist attacks that do cause harm at the very high end of the criminal spectrum, then there is good reason to question whether such a person should simply be released if he is not convicted of a crime.

Jack Goldsmith, a former Assistant Attorney General in the George W. Bush administration, made this last point when he wrote that, in criticism of the Obama administration's drive to prosecute STs, "high-stakes terrorism trials" are problematic in part because "the government cannot afford to let the defendant go."⁸⁵ While I would disagree with this position if it was applied to U.S. citizens, Goldsmith is, I believe, correct with regard to STs from other countries. If these STs were released abroad into countries where the policing capacity could not adequately ensure that they did not return to terrorist activities—including activities that would affect U.S. citizens abroad, our allies, and the United States itself—then there is good reason to consider using LTPD in those cases.

B. *Strained Use of the POW Model*

If we are at war with al Qaeda, as both the Bush and Obama administrations have maintained,⁸⁶ then it might seem that there is no reason to struggle with prosecuting STs; the United States can simply detain them as a species of combatant.⁸⁷ The State might choose to

85. Jack Goldsmith, *Don't Try Terrorists, Lock Them Up*, N.Y. TIMES, Oct. 9, 2010, at A21. Although Goldsmith's argument concerned only detainees in Guantánamo, his logic clearly extends to all STs.

86. See Baker, *supra* note 2 ("The nation is at war with Al Qaeda, Obama says . . ."); Eric Lichtblau, *Bush Seeks to Affirm U.S. War On Terror*, N.Y. TIMES, Aug. 30, 2008, at A10 (reporting that President Bush's advisors wanted Congress to explicitly declare "that [the] nation remains engaged in an armed conflict with Al Qaeda, the Taliban, and associated organizations" (internal quotation marks omitted)).

87. Of course, because terrorists do not wear uniforms, the process for sorting real terrorists from innocent detainees must be much more careful than that used to determine

prosecute certain high-profile STs if doing so will help reinforce the idea that those STs are accused of a horrible crime, but it should not feel that criminal prosecution is the presumptive mode for responding to the threat of terrorism. From this point of view, those who favor the criminal justice system simply do not understand that we are “at war” with al Qaeda and other terrorist organizations.⁸⁸

There are, however, two reasons why this is not an altogether morally comfortable proposition and why many civil libertarians resist it. First, it gives short shrift to the importance of treating criminals like criminals. Second, it reflects a simple balancing approach to security and liberty that a liberal society should not accept. I cover each in turn.

First, as a matter of international law, the law of war in particular, terrorists are not combatants. They do not meet the conditions for combatant privilege: They do not wear “a fixed distinctive sign recognizable at a distance”; they do not carry their “arms openly”; they do not conduct “their operations in accordance with the laws and customs of war.”⁸⁹ Therefore, under the law of war, terrorists are civilians.⁹⁰

who can be detained as a POW. Past failure to take such care is becoming evident as habeas cases from Guantánamo work their way through the legal system. *See generally* Boumediene v. Bush, 553 U.S. 723 (2008) (establishing that the Guantánamo detainees have a constitutional right to a habeas hearing). The need for more careful process is not, however, my concern here.

88. *See, e.g.*, Senator Mitch McConnell, U.S. Senate Minority Leader, Remarks at the Heritage Foundation: After the Christmas Day Bomber: Staying on Offense in the War on Terror (Feb. 3, 2010), <http://mccconnell.senate.gov/public/index.cfm?p=PressReleases> (under the “Browse By” heading, select “February” and “2010”; follow the “GO” hyperlink; follow the “02/03/10 After The Christmas Day Bomber” hyperlink) (describing the “deeper problem” with the Obama administration’s approach to fighting terrorists: “the administration’s apparent belief that terrorism is a narrow law enforcement—not a military and intelligence—matter”).

89. *See* GC III, *supra* note 11, art. 4(A)(2) (listing conditions identifying one category of “prisoners of war”); *see also* INT’L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 61 (Jean S. Pictet ed., A. P. de Heney trans., 1960) [hereinafter GC III Commentary] (“The enemy must be able to recognize partisans as combatants in the same way as members of regular armed forces, whatever their weapons.”).

90. *See generally* Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 50(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (“A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1) [members of the armed forces], (2) [partisans], (3) [members of regular armed forces who profess allegiance to an authority not recognized by the Detaining Power] and (6) [mass levies] of the Third Convention and in Article 43 [armed forces] of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”). The United States is a signatory of the Geneva Conventions, but has not signed Additional Protocol I (“AP I”). Nevertheless, many articles of the AP I, including Article 50, are generally regarded as

R

Civilian status does not mean that STs cannot be subjected to LTPD. The various judges who heard the habeas petitions of Guantánamo detainees in 2009 were at least arguably correct in finding that nothing in the Geneva Conventions *legally* bars the United States from treating members of al Qaeda as if they were POWs.⁹¹ Nonetheless, there is a sense in which detaining members of al Qaeda as though they were POWs, rather than criminals, bucks the strong presumption in both international and constitutional law that civilians who can be prosecuted for crimes should face prosecution rather than LTPD. As a reflection of the underlying spirit of both species of law, consider these words from Jelena Pejic, Legal Advisor at the International Committee of the Red Cross (“ICRC”) and Head of the ICRC Project on the Reaffirmation and Development of International Humanitarian Law:

Internment [i.e. LTPD] . . . is not a measure that is meant to replace criminal proceedings. A person who is suspected of having committed a criminal offence, whether in armed conflict or other situations of violence, has the right to benefit from the additional stringent judicial guarantees provided for in humanitarian and/or human rights law for criminal suspects, which include the right to be tried by a regularly constituted, independent and impartial court.⁹²

In that light, it is important to recall that while LTPD is designed to address the future threat that a detainee is thought to pose, the reason a detainee is thought to pose a threat is almost always grounded in the belief that he has already engaged in or has already plotted to engage in terrorist acts that are criminal activities. Thus, in a straightforward sense, he is being detained because of the belief that he has engaged in criminal activities. Normally to detain someone for a criminal activity, it is insufficient to say that there is a substantial risk that he will do it again; normally the State must prove beyond a rea-

customary international law. See Melissa J. Epstein & Richard Butler, *The Customary Origins and Elements of Select Conduct of Hostilities Charges Before the International Criminal Tribunal for the Former Yugoslavia: A Potential Model for Use by Military Commissions*, 179 MIL. L. REV. 68, 112–15 (2004) (discussing rulings issued by the International Criminal Tribunal for the Former Yugoslavia on the customary status of principles underlying various articles of the AP I, including Article 50).

91. See, e.g., *Gherebi v. Obama*, 609 F. Supp. 2d 43, 63–67 (D.D.C. 2009).

92. Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT’L REV. OF THE RED CROSS 375, 381 (2005), available at http://www.icrc.org/eng/assets/files/other/irrc_858_pejic.pdf.

sonable doubt that he actually *did* engage in criminal activity.⁹³ Then, and only then, is the State free to sentence him accordingly.

The second reason the POW analogy is morally unsatisfying is that it reflects a simple balancing model for how to accommodate the competing concerns of liberty and security. This point is made clear by considering why some people think the POW analogy applies. At its best, the case for saying that the United States is “at war” with al Qaeda turns on the fact that al Qaeda used and continues to threaten to use force to seek changes in U.S. government policy.⁹⁴ This motivation is different from the motivation of normal criminals, who have reason to affect policy only insofar as the policy is designed to target them. Of course, al Qaeda is hardly unique in using force to seek change in U.S. policy. For example, various groups used force to try to change U.S. policy with regard to civil rights and the war in Vietnam in the 1960s and 1970s,⁹⁵ and while the U.S. may have used dubious tactics against them,⁹⁶ their members were never subjected to LTPD as if they were POWs. Nevertheless, two differences seem to distinguish the conflict with al Qaeda from these earlier conflicts: (1) many of the STs are nonresident aliens, and (2) the terrorist tactics al Qaeda is willing to use have killed thousands of innocent civilians and continue to threaten innocent civilians on a scale greater than that posed by the earlier groups. With regard to the first point, I should state explicitly that I believe even nonresident aliens should and do benefit from basic due process rights, and thus cannot simply be subjected to LTPD whenever the U.S. government decides that doing so would promote national security.⁹⁷ But even putting nonresident

93. See, e.g., *United States v. Melendez-Carrion*, 790 F.2d 984, 1000 (2d Cir. 1986) (“It cannot seriously be maintained that under our Constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future.”).

94. See Michiko Kakutani, *A Dark View of U.S. Strategy*, N.Y. TIMES, July 9, 2004, at E25 (reviewing ANONYMOUS, *IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR* (2004)) (“Al Qaeda’s attacks are meant to advance a set of clear, focused and limited foreign policy goals . . .”).

95. Examples of such groups include the Black Panthers and the Weather Underground Organization (also known as the Weathermen). See Edgar Bittle, *The Tinker Case: Reflections Thirty Years Later*, 48 *DRAKE L. REV.* 491, 492–93 (2000).

96. See, e.g., Athan G. Theoharis, *FBI Surveillance: Past and Present*, 69 *CORNELL L. REV.* 883, 884–86 (1984) (noting that the FBI conducted warrantless break-ins during its investigation of the Weather Underground in the early 1970s and that these break-ins were “not atypical” of FBI tactics used in that period).

97. See *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (holding that nonresident alien enemy combatants detained at Guantánamo Bay are entitled to the “constitutional privilege of habeas corpus”); see also Alec D. Walen, *Constitutional Rights for Nonresident Aliens*, *PHIL. & PUB. POL’Y Q.*, Summer–Fall 2009, at 2, 6 (concluding that nonresident aliens captured outside of a war zone and detained by the United States should be afforded

aliens to the side, many support treating STs generally, at least those affiliated with groups like al Qaeda, as though they were POWs who can be subjected to LTPD as a matter of course. And they take this position because they believe STs present a threat to use the kind of force that is used only in war.

For that reason, a majority of the Fourth Circuit in *Al-Marri v. Pucciarelli*⁹⁸ agreed that U.S. citizens could be subjected to LTPD as STs.⁹⁹ Granted, all the judges who took that position agreed Congress first needed to pass a law allowing such detention.¹⁰⁰ But the fact that the judges would uphold the detentions of U.S. citizens assuming the existence of such a law is the important point. I presume they would not have upheld a similar law declaring that military force could be used against members of organized crime groups, at least not given their current level of criminal activity. I infer therefore that what led a majority of the Fourth Circuit judges to approve of LTPD for U.S. citizens who are STs is the belief that terrorist organizations are much more threatening than organized crime. In other words, these judges, and those who agree with them, think the norms that dictate use of the criminal law can legally be pushed aside if the threat is of a size similar to that found in war.¹⁰¹

To explain my resistance to that sort of balancing of security and liberty, consider the following thought experiment¹⁰²: Suppose the United States has 100 detainees with respect to whom it is as confident as possible that, despite their denials, there is some non-negligible

constitutional due process rights); Alec Walen & Ingo Venzke, *Detention in the "War on Terror": Constitutional Interpretation Informed by the Law of War*, 14 ILSA J. INT'L & COMP. L. 45, 46 (2007) (asserting that all persons detained by the United States in the war on terror have Fifth Amendment due process rights).

98. 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated sub nom.* *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.).

99. *See id.* at 217–18 (4th Cir. 2008) (Motz, J., concurring in the judgment) (“Our colleagues hold that the President can order the military to seize from his home and indefinitely detain anyone in this country—including an American citizen—even though he has never affiliated with an enemy nation, fought alongside any nation’s armed forces, or borne arms against the United States anywhere in the world.”).

100. *See id.* at 216 (per curiam) (holding that “if the Government’s allegations about al-Marri are true, Congress has empowered the President to detain him as an enemy combatant”). The law granting the authority for such detention was the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

101. *See, e.g., Al-Marri*, 534 F.3d at 260 (Traxler, J., concurring in the judgment) (asserting that “al Qaeda is much more and much worse than a criminal organization,” and noting therefore that its members should not be “entitled to all the protections and procedures granted by our constitution”).

102. A similar thought experiment was first proposed, as far as I know, by Michael Louis Corrado. *See Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778, 792–94 (1996).

probability that they are committed terrorists. To put a number on it, suppose the United States is fifty percent confident that each detainee is a terrorist, so if all 100 were released, it could expect fifty percent to engage in terrorist acts that would lead to the death of individuals who otherwise would not die. Additionally, suppose the expected “yield” of a terrorist, based on empirical data, is ten innocent deaths.¹⁰³ (This yield reflects the fact that some terrorists fail to kill anyone and some will kill a hundred or more, so that the average effect of releasing a terrorist is that ten innocent people will die who otherwise would not.¹⁰⁴) It follows that the expected harm of releasing those 100 detainees is 500 innocent deaths. The expected harm of detaining that group of 100 is fifty innocent detainees subjected to LTPD, say for ten years on average. Five hundred deaths surely outweigh fifty wrongful ten-year detentions. Thus on a simple balancing approach, the State should detain all 100.

One might be tempted to bite the bullet and say that if the State is fifty percent confident that each detainee is a terrorist, it *should* detain all 100 STs.¹⁰⁵ But, what if the State is only ten percent confident that each detainee is a terrorist? In that scenario, the State thinks it is ninety percent likely that any given detainee is *not* a terrorist.¹⁰⁶ Does that mean the State should release every detainee? If we look again at the expected harms and are guided by a utilitarian balance, then it turns out that the State should not release the detainees. If the State releases all 100 detainees and is only ten percent confident each detainee is a terrorist, it can expect ten of the detainees to be terrorists and can expect 100 innocents to die. One hundred innocent deaths are worse than ninety wrongful ten-year detentions. Thus, on a utilitarian balance, the State should continue to detain all 100 detainees.

103. As we saw in Part II.A.1, this number is probably high, but it is close enough for thought-experiment purposes.

104. It is particularly hard to know the “yield” of a terrorist who does not kill directly, but who supports or directs other terrorists who do kill. If one terrorist did not assume a leadership role, it is possible that another would have. *See supra* note 54. But for thought experiment purposes, we can suppose that releasing a leader will cause another potential leader to remain directly engaged in terrorist acts, and that on average the effect of one supporter’s help is to facilitate acts that otherwise would not have occurred and that will cause, on average, ten extra deaths.

105. This is the position that Corrado takes. Corrado, *supra* note 102, at 792–93.

106. Even under these conditions, Scheid would still bite the bullet: “Under the threat of mega-terrorism, it would seem that . . . [it is] better that 10 innocents be detained than that one mega-terrorist go free.” Scheid, *supra* note 5, at 9. He fails to recognize the implausible implications of his position, however, asserting that his “case for the preventive detention of mega-terrorists . . . assumes that those who are held in long-term detention are, indeed, terrorists.” *Id.* at 13. He cannot meaningfully make that assumption if the odds of any person in detention being a mega-terrorist are only one in ten.

R

R

Indeed, if we assume the death of an innocent is worse than the ten-year detention of an innocent, then the degree of confidence at which the State could justifiably detain people could be as low as one or two percent. Surely this is wrong. We cannot justify detaining anyone as an ST because there is a tiny chance he is actually a committed terrorist.

One might want to object to this thought experiment on the ground that it unrealistically overlooks secondary effects. Detaining innocent people might turn them into terrorists,¹⁰⁷ and it might help recruit others to be terrorists.¹⁰⁸ But even if that risk requires the State to be somewhat more confident that someone is a terrorist before subjecting him to LTPD,¹⁰⁹ empirical studies could still conceivably show that the State does not need to be even close to fifty percent confident each detainee is a terrorist to justify detaining him if justification turns on a utilitarian balance.

To avoid this conclusion, one might take what I call the “reluctant pragmatist” position and insist that normal limits on using LTPD can be compromised if—but only if—the security need crosses a particular threshold. David Cole, surely among the most sensitive reluctant pragmatists writing on this topic, puts the point this way:

[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. . . . Given the dangers of preventive detention, we should depart from this model only where the criminal process cannot adequately address a particularly serious threat.¹¹⁰

Cole’s approach aims to balance the civil libertarian commitment to using the criminal process to “deal with dangerous people” with the need for security that the criminal process cannot always “adequately”

107. Consider the case of Abdallah Saleh al-Ajmi, a Kuwaiti, who was held in Guantánamo from 2002 until 2005, and who seems to have been transformed by his time there. See Chandrasekaran, *supra* note 47. After being released from the detention facility, al-Ajmi committed a serious terrorist attack, killing thirteen Iraqi soldiers and wounding forty-two others. *Id.*

108. See Pearlstein, *supra* note 48, at 591 (“[I]f the U.S. detains . . . [STs] under a system believed to be illegitimate, we trade [one ST’s] particular incapacitation for the need to incapacitate many more.”).

109. But see Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1371 (2008) (suggesting that the law of war does not say much about “how certain a detaining power must be in determining whether an individual really is an enemy fighter, as opposed to an innocent bystander” when making its detention decisions).

110. Cole, *supra* note 5, at 696–97.

R

R

R

provide. As long as the threshold for departing from the criminal model is sufficiently high—somewhere in the range of the security concerns found in war—one can say that the State has given the presumption in favor of using the criminal process its due.¹¹¹

The problem with this sort of “threshold balancing” is that it is not necessarily connected to a proper appreciation of what is required to respect the dignity of autonomous persons. If this balancing allows dignity to be outweighed for the sake of security, then a reluctant pragmatist is, to quote Winston Churchill, merely “haggling about the price.”¹¹² Putting the point more generally, it is crucial to a rights-based moral view that aims to respect the dignity of autonomous individuals that the ends do not always justify the means, and that there are certain principles that must be respected in the pursuit of even the most pressing ends.¹¹³ Reluctant pragmatism, however, shortcuts the important work that ought to be done to determine just which principles apply and what their application actually requires.¹¹⁴ I am

111. *See id.* at 747 (“Because we must start with a presumption that the criminal justice system is how we deal with dangerous persons—whether terrorists, murderers, rapists, spies, or traitors—we ought not authorize preventive detention absent a strong showing that criminal prosecution is inadequate to address a compelling need to protect the community from danger.”).

112. The full exchange is as follows:

Churchill: Madam, would you sleep with me for five million pounds?

Woman: My goodness, Mr. Churchill. . . Well, I suppose. . . we would have to discuss terms, of course

Churchill: Would you sleep with me for five pounds?

Woman: Mr. Churchill, what kind of woman do you think I am?!

Churchill: Madam, we’ve already established that. Now we are haggling about the price.

Witty Quotes and Insults from Winston Churchill, TALKING IN CIRCLES (June 2, 2008), <http://talkingincircles.net/2008/06/02/witty-quotes-and-insults-from-winston-churchill/>.

113. This position is best understood as implying that with any right comes a normative status that prevents others from using certain justifications for actions that would harm the right-holder’s interests. Richard Pildes and Frederick Schauer have developed a “structural conception” of rights, according to which rights function to block certain *kinds* of justifications in the context of constitutional law. *See generally* Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999). The justification focus of their model of rights can and should be extended to rights generally.

114. Of course, there might be conditions so dire that it seems morally justifiable, all things considered, to violate the rights of some individuals. *See* Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 894 (2000) (“There are some acts that are morally wrong despite producing a net positive balance of consequences; but if the positive balance of consequences becomes sufficiently great—especially if it does so by averting horrible consequences as opposed to merely making people quite well off—then one is morally permitted, and perhaps required, to engage in those acts that are otherwise morally prohibited.”). This is the position known as threshold deontology. *Id.* But that position is not the same as reluctant pragmatism. First, at least on my interpretation of

not rejecting the notion of balancing; in fact, I use it throughout this Article. My point is that balancing is appropriate only in certain contexts and not in others. If used in an inappropriate context, balancing licenses wrongful actions.

In sum, terrorism, unlike the force used by lawful combatants, is a criminal activity, and therefore presents a straightforward moral case for prosecuting STs. Substituting the POW model for the criminal model, even reluctantly, presupposes that liberty and security can simply be balanced against each other. But that sort of balancing sacrifices some for the welfare of others without first determining whether those who are sacrificed have a right not to be so treated. Such unprincipled balancing needlessly cedes the moral high ground.

C. Objections to Claims Regarding the Moral High Ground and Replies to the Objections

Many of those who hew to the moral high ground are fond of quoting (or paraphrasing) Benjamin Franklin's warning that "[t]hey who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety."¹¹⁵ But supporters of using LTPD for STs can argue that the high ground actually allows for that sort of detention. I consider here three arguments designed to show there is no reason to think that subjecting STs to LTPD is particularly problematic: (1) the claim that unimpeded liberty should be far from absolute; (2) the claim that LTPD can be analogized to collateral damage; and (3) the claim that it is normal and appropriate to predict people's behavior and act accordingly. I argue that all of these arguments come up short, and that we therefore need to look for a unified autonomy-respecting theory of detention to approach the problem in a morally sound way.

threshold deontology, those whose rights are violated are still wronged. In contrast, reluctant pragmatism holds that when the security concerns are high enough, the dignity concerns of the individual are simply outweighed. Second, the threshold for disregarding the normal limits on what may be done to individuals for the sake of the greater good is lower for a reluctant pragmatist than for a threshold deontologist. See WALZER, *supra* note 34, at 251–68 (arguing, from the perspective of a threshold deontologist, that stepping outside the rules of war is justified only when conditions reach the level of “supreme emergency”). I return to this issue in Part IV.B.

115. 1 MEMOIRS OF THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN 270 (A. J. Valpy ed., 1818).

1. *Responding to the Claim That Unimpeded Liberty Should Be Far from Absolute*

It is quite normal to trade liberty for security. Each of us must respect limits on our liberty so that others can enjoy their liberty in peace.¹¹⁶ This means two things. First, the rights of others to enjoy bodily integrity, control over their property, and freedom from certain nuisances impose restrictions on each of us.¹¹⁷ We may not do things—ranging from battery to trespass to shouting too loudly—that violate these rights.¹¹⁸

Second, even if one is not threatening to violate the rights of others, one may have to accept the restriction of one's liberty in various ways that reflect the fact that *some* will not respect the rights of others. Because there is no way for the State to tell who will disrespect the rights of others in advance, all must accept certain limits on their liberty.¹¹⁹ For example, to get on an airplane, one must submit oneself to metal detectors and, in some cases, to full-body scans.¹²⁰ Additionally, one cannot take all sorts of safe items on the airplane because the State cannot be sure that one is not smuggling bomb-making material onto the airplane.¹²¹ These restrictions on what would otherwise be lawful behavior are designed to address the fact that a mere criminal punishment for bringing weapons or explosives on an airplane would be insufficient for security purposes. Thus, one may ask why we should not apply the same logic to LTPD. Long-term preventive detention is only a more extreme example of restricting the liberty of some innocents because the State cannot tell who really is a threat, and it has no better means of protecting innocents from the even greater harm of a terrorist attack.

116. See Waldron, *supra* note 28, at 192 (“We always have to strike a balance between the individual’s liberty to do as he pleases and society’s need for protection against the harm that may accrue from some of the things it might please an individual to do.”).

117. See generally Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 116 (1996) (“Preventing harmdoing by threat or actual restraint surely intrudes on the liberty of the potential harmdoer, but such an intrusion is justified in some circumstances by the potential infringement on the liberty of others.”).

118. See *id.* (noting “every person’s right not to suffer unjustifiable harm and the lack of a right to inflict such harm”).

119. See LARRY ALEXANDER ET AL., *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 290 (2009).

120. See, e.g., Cam Simpson & Daniel Michaels, *TSA Pressed on Full-Body Scans Despite Concerns*, WALL ST. J., Jan. 9, 2010, at A2 (noting that full-body scanning machines are in use at nineteen airports in the United States).

121. For a list of items that the Transportation Security Administration prohibits passengers from taking on an airplane as of March 2009, see U.S. TRANSP. SEC. ADMIN., *PREPARE FOR TAKEOFF: PROHIBITED ITEMS LIST* (Mar. 2009), available at http://www.tsa.gov/assets/pdf/prohibited_items_brochure.pdf.

The main answer to that challenge is that LTPD is not just a limit on liberty; it is its essential negation. As Justice Breyer put it, “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.”¹²² Not being allowed to take one’s beverage on an airplane is, in all cases to which the rule should apply,¹²³ a mild inconvenience. In contrast, being subjected to LTPD amounts to a complete denial for a substantial fraction of one’s life of the ability to lead a productive life.

The scale of the harm matters: When a harm is large enough, a State should not be allowed to require innocents to endure harm for the sake of the greater good. The relevant contrast here is with the harm of short-term preventive detention (“STPD”), which I will argue in Part III is small enough that it can justifiably be imposed on someone if doing so is reasonably thought to be necessary for the greater good. Long-term preventative detention cannot be justified in those terms.

2. *Responding to the Claim That LTPD Can Be Analogized to Collateral Damage*

One might argue that, even if LTPD is one of the greatest harms that one can suffer, it is no greater than death, and innocents can be justifiably killed as a matter of collateral damage.¹²⁴ Just as we accept that it is sometimes justifiable to target combatants and other military targets using lethal force, even though it is impossible to do so without putting innocent civilians in harm’s way, we should accept that it is sometimes justifiable to subject real terrorists to LTPD, even though

122. *Zadydas v. Davis*, 533 U.S. 678, 690 (2001). Another answer is that (almost) everyone has to accept the other restrictions, such as not bringing liquids on airplanes. But the unequal distribution of the burden imposed on those subject to LTPD is not as significant as the size of the burden, as shown by the relative acceptability of short-term preventive detention, which is equally unequally distributed.

123. To their credit, regulators of airline security do make some exceptions, such as for baby formula and other “[m]edically necessary liquids.” U.S. TRANSP. SEC. ADMIN., 3-1-1 FOR CARRY-ONS: PREPARE FOR TAKE-OFF 1 (2009), available at http://www.tsa.gov/assets/pdf/311_brochure.pdf.

124. This is implicit in the Additional Protocol’s principle of “discrimination,” which requires “the Parties to the conflict . . . at all times [to] distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly [to] direct their operations only against military objectives.” AP I, *supra* note 90, art. 48. While the parties may not “direct their operations” against civilians, they may direct their operations at military objectives in a way that foreseeably causes harm to civilians, as long as those actions do not cause superfluous and disproportionately large injury. See generally THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 111–14 (Dieter Fleck ed., 1995).

the procedures used will cause some innocent civilians to be subjected to LTPD as well.¹²⁵

This analogy overlooks the fact that it is not possible to respond to each affected person individually in cases of collateral damage. It is possible, however to provide individualized determinations in cases of LTPD. Given the possibility of individualized hearings, the State must show for each detainee that the odds of *his* causing unacceptable harm justify detaining *him*.¹²⁶ If he is an autonomous person capable of being held accountable for his actions, and if he has done nothing to lose his right to be treated accordingly, then the State may not treat him as though he is a mere thing that is more or less likely to act in a certain way.¹²⁷ Doing so is akin to treating him simply as a means;¹²⁸ it is a denial of a basic form of respect due to autonomous individuals.

3. *Responding to the Claim That It Is Normal and Appropriate to Predict People's Behavior and Act Accordingly*

In response to my last point, one might point out that the State and private individuals must be permitted to treat people as though they will follow through on their intentions, however they are manifested. Doing so is not disrespecting their agency; it is treating people as temporally extended agents, beings who can decide at one time what they will do at another.¹²⁹ Indeed, most normal interactions, whether in cooperative or competitive situations, require us to anticipate what others will do and act accordingly. For example, if *B* has the intention of violating *A*'s rights, and if the threatened harm is serious and imminent, then both *A* and those acting on *A*'s behalf are entitled to use force, including lethal force, if necessary to protect *A*.¹³⁰

125. See Waxman, *supra* note 109, at 1394–402 (analogizing targeting methods to detention decisions, but recognizing that the analogy is limited). R

126. Cole, *supra* note 5, at 700 (explaining that in cases involving LTPD “the government bears the burden of demonstrating that the individual poses a danger that warrants his detention”). R

127. See *id.* at 696 (“To lock up a human being on the prediction that he will undertake dangerous and illegal action if left free is . . . to deny his autonomy.”).

128. For a defense of the idea that individuals may not be treated simply as a means, see generally Alec Walen, *A Moral Ground for the Means Principle: Accounting for the Right Not to Be Used Merely as a Means by Appeal to the Restricting Claims Principle* (2010) (unpublished manuscript) (on file with author).

129. Michael E. Bratman, *Reflection, Planning, and Temporally Extended Agency*, PHIL. REV., Jan. 2000, at 35, 35 (suggesting that “[a]ny reasonably complete theory of human action” must include a theory of “planfulness”—the ability to “form prior plans and policies that organize our activity over time”).

130. MODEL PENAL CODE §§ 3.04-05 (1985).

Of course, problems may arise when *A* causes harm to *B* by misreading *B*'s intentions. Still, if *A* "reasonably believes that [deadly force] is necessary to prevent imminent and unlawful use of deadly force by the aggressor," then at common law, *A*'s action was permissible even if regrettable.¹³¹ Likewise, a police officer, acting as an agent of the State, must be permitted to make such reasonable mistakes.¹³² Thus, one might argue that because the State must be free to infer people's intentions and act on that basis, even to the extent of using lethal force, it must also be free to subject them to LTPD.¹³³

This argument is invalid. Predictions of dangerousness do not justify LTPD; at best they justify immediate actions necessary to prevent imminent harm. Such actions could include both lethal force and STPD to disrupt the execution of any dangerous plans and to ascertain what a person really is or was intending to do. The problem is not that LTPD is too great a harm; it is, I assume, less of a harm than death. The problem is that there are alternatives to LTPD that must be used once the moment of crisis has passed.

For example, if the State determines that a person was plotting to engage in terrorism or some other crime, then the State has the option of bringing criminal charges for the inchoate crime. If the State lacks sufficient evidence to convict the person of an inchoate crime, or if for some reason prosecutors are not willing to use the criminal process, then under normal circumstances—involving adequate policing of a normal, competent adult—the State must release and police him. It can and should police him with extra care if it thinks there is still reason to worry he was intending to wrong another.¹³⁴ But the

131. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 223 (5th ed. 2009) (emphasis omitted).

132. See MODEL PENAL CODE § 3.07(2)(b)(iv) (providing that the use of deadly force by law enforcement is permissible as long as the actor believes that the alternative involves a substantial risk to others).

133. What if *A* predicts that *B* will form an intention to use illegal force, even though *B* does not have that intention at the time? It is hard to imagine how such a prediction could be sufficiently certain to justify using lethal force. See Lippke, *supra* note 40, at 389–91 (discussing the limits of actuarial methods of predicting violence). One could imagine, for example, that *A* knows that *B* has been drugged, and that the drugs will likely cause him to fly into a lethal rage. But if *B* is not yet in that sort of rage, *A* should seek nonlethal response options. Likewise, if *A* believes that *B* will fly into a lethal rage when *B* learns certain information, *A* may not kill *B* simply in anticipation of that rage. He must seek other forms of protection unless and until *B* is actually coming to kill him. I am grateful to Debbie Hellman for causing me to be more careful about the distinction between predicting behavior and inferring intentions from behavior.

134. Policing too can become so invasive that it is no more respectful of a person's dignity than LTPD. See, e.g., Lucia Zedner, *Preventive Justice or Pre-Punishment? The Case of Control Orders*, 60 CURRENT LEGAL PROBS. 174, 179–80 (2007) (discussing the substantive,

State cannot subject him to LTPD on the basis of an intention it takes him to have formed at one point in time, without even bothering to get a conviction for criminal plotting.¹³⁵

This leaves open one possibility, namely, that the State could detain a person for successive short periods of time, as long as the detainee continues to manifest the intention to cause some wrongful harm.¹³⁶ The problem with this suggestion is primarily evidentiary. How will the State know that he still has the intention to do harm after he has been detained for a short period of time? If the burden is on the State to show that he still has the intention to do harm, it will quickly become impossible to do so. Any even half-witted detainee will cease doing and saying things that indicate that he has the intention to cause wrongful harm and will instead deny that he has (or indeed ever had) such an intention. At that point, the detainee will have to be released. Alternatively, the burden could shift from the State to the detainee once the State shows that it had sufficient evidence of an illicit intention to detain him in the first place. But then one of three things will happen: (1) the desire for security will lead to indefinite detention; (2) the detainee will be able to fake a change of heart and get out reasonably quickly; or (3) the State will split the difference by detaining him about as long as it would have done if it had convicted him of the crime associated with that intention.¹³⁷ The second option does not allow for LTPD in practice, while the first and third amount to unjust end runs around the criminal justice system and deny the detainee the benefits of the criminal law's procedural protections.¹³⁸ Thus, the option of successive short periods of detention cannot be used to justify LTPD.

psychological, and collateral burdens imposed by the terrorism-related British Control Orders). I will assume throughout this Article, however, that the forms of adequate policing options under discussion *are* sufficiently respectful of dignity.

135. I return to the idea that the State cannot know what an individual was planning without first obtaining his conviction in Part IV.C.

136. Kim Ferzan makes this suggestion in a forthcoming article. See Kimberly Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, 95 MINN. L. REV. (forthcoming 2011) (draft on file with author and cited with permission of Professor Ferzan).

137. I am told by Emmanuel Gross, Professor of Law at the University of Haifa, that this is what happens in Israel when the State detains an ST in LTPD.

138. Ferzan suggests that the burden stays on the State, which, in order to continue detaining someone, must show, every six months or so, first by clear and convincing evidence, and then perhaps by proof beyond a reasonable doubt, that the detainee still has an intention that would justify detaining him. Ferzan, *supra* note 136, at 46. The problem with this suggestion is that it does not avoid the dilemma described in the text. In practice, the burden will either be too high for the state to meet, in which case no security is provided beyond that provided by STPD, or it will be low enough to meet, despite detainee

In sum, none of these three arguments shows that LTPD for STs is morally unproblematic. Thus, if we are to determine how best to handle STs, we must turn to formulating and applying an autonomy-respecting, unified theory of detention.

III. THE AUTONOMY RESPECTING MODEL: A MORAL FRAMEWORK FOR DETENTION CONSISTENT WITH RESPECT FOR AUTONOMY

The AR Model posits that those who can be policed and held accountable for their choices as normal autonomous agents, capable of choosing whether or not their interactions with others will be impermissibly harmful, have a right not to be subjected to long-term detention *unless* they have committed a crime for which long-term punitive detention or the loss of the right not to be subjected to LTPD is a fitting punishment. The central idea in this Model is that respect for the dignity of individuals allows STs to be detained only under certain limited conditions. These conditions are (1) that STs are subject to punitive detention, or as an element of their punishment, they have lost their right not to be subjected to LTPD; (2) that their detention is short-term; (3) that they lack the normal autonomous capacity to govern their own choices; (4) that they have an enforceable duty not to interact with others; and (5) that they are incapable of being adequately policed and held accountable for their choices. These may seem to be disparate and disjointed conditions, but I will explain why they are all united in showing how detention can be consistent with respect for the dignity of autonomous persons, whether a particular individual is or is not autonomous and accountable as such.¹³⁹

A. *Punitive Detention and Loss of the Right to be Treated as an Accountable Person*

Punitive detention respects autonomy for the straightforward reason that it only applies to those who exercise their free will by choosing to commit crimes. In other words, the justification, on a standard retributivist account, is that one who chooses to break the law may (and, on a strong version of retributivism, should) be punished to a degree that is proportional to the product of the severity of his crime and his culpability for committing it.¹⁴⁰ Naturally, such punishment

denials, in which case this suggestion just provides an end run around the criminal justice system.

139. Having refined the list for several years, I believe it is exhaustive. I admit, however, that I have no proof that I am not overlooking some other condition.

140. See Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 698 (1994) (distinguishing between a strong and weak form

respects an individual's rights only insofar as the punishment is a fitting response to an act that the law can justly categorize as criminal.¹⁴¹ But assuming these conditions hold, one who is punitively detained justly suffers a punishment he brought on himself by his own autonomous choice.

What complicates this picture is that there seem to be a number of preventive dimensions mixed into or attached to the criminal justice system in ways that seem *prima facie* inconsistent with retributivism. As noted above, those convicted as "sexually violent predators" are subject to LTPD even after they have served their sentences.¹⁴² In addition, in many jurisdictions those who serve their sentence, are released, and then convicted again face longer sentences as repeat offenders than do first-time offenders.¹⁴³ Furthermore, the various purposes of punishment, including incapacitation and deterrence, imply that those who are thought to be more dangerous will, at least in some cases, be locked up longer than those thought to be less dangerous.¹⁴⁴ I argue that these practices can be reconciled with the AR Model to some extent and that, to the extent they cannot, revision of the practices is in order.

There are two ways to reconcile mixing a preventive dimension, which aims to prevent *future* harms, with punitive practices, which, on a retributive model, aim to do justice for *past* wrongs. The first is by the notion of a recidivist premium, which does not aim to prevent future harms but has the effect of giving longer sentences to repeat offenders, who are presumably more likely to reoffend than those who have been convicted only once. The second is by the "lost-status" view, a more or less profound loss of the right not to be subjected to pre-

of retributivism); Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 *BUFF. CRIM. L. REV.* 65, 69 (1999) (describing seriousness of the wrong and culpability for the wrong as considerations relevant to the deserved level of punishment); *see also generally* Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 *MINN. L. REV.* 1829 (2007) (analyzing the connection between proportionality and retributivism); David Gray, *Punishment as Suffering*, 63 *VAND. L. REV.* 1619 (2011) (considering retributivism and "comparative proportionality").

141. *See generally* MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997); Moore, *supra* note 140, at 69–73 (discussing a norm-centered approach to retributivism). R

142. *See supra* note 23 and accompanying text. R

143. This is true, for example, under the Federal Sentencing Guidelines. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL §§ 2K2.1, 2L1.1 (2010) (defining instances where previous charges affect the length of a pending charge).

144. These examples and others are discussed at length by Paul Robinson. *See Robinson, supra* note 22, at 1429–31; *see also* Morse, *supra* note 5, at 289–91 (noting that those who are thought to be more dangerous are sometimes perceived as deserving of longer sentences). R

ventive measures. As I will explain, insofar as both are consistent with retributivism, both fit the AR Model.

One way to justify recidivist premiums on a retributivist model is by appeal to the premise that first offenses are less culpable—and therefore worthy of less severe penalties—than subsequent offenses because the offender may not yet fully appreciate the significance of his criminal acts.¹⁴⁵ Another way to justify recidivist premiums is by appeal to the premise that repeat offenders should be taken to have been given a special injunction against committing further crime as part of the sentence for their earlier crime, so that further criminal activity is a choice to flout not only the criminal law but also the specific injunction to take the criminal law seriously.¹⁴⁶

These justifications may succeed with respect to mild recidivist premiums, but they fail to justify the kinds of severe recidivist premiums represented by, for example, three strikes laws.¹⁴⁷ Under three strikes laws, a person who has, for example, been convicted of shoplifting golf clubs three times may receive a twenty-five year prison sentence.¹⁴⁸ It cannot be true that a thief deserves at least twenty-five years in prison for such a petty theft, even if the penalty is appropriately augmented by a premium for prior felonies; such punishment is too far from a proportionate penalty.¹⁴⁹ That kind of sentence can

145. Several authors state this premise. See, e.g., ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES* 81–91 (1986) (suggesting a “scaled-down response for first offenders”); R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 169 (2001) (agreeing with von Hirsch that that a crime is the offender’s first offense “should be a modestly mitigating factor”); Andrew von Hirsch, *Criminal Record Rides Again*, *CRIM. JUST. ETHICS*, Summer–Fall 1991, at 2, 55–56 (describing various levels of culpability across first and subsequent offenses).

146. Duff rejects this premise. DUFF, *supra* note 145, at 168.

147. Duff and Robinson take this position. DUFF, *supra* note 145, at 168–69; Robinson, *supra* note 22, at 1435–36.

148. This was the sentence upheld by the Supreme Court in *Ewing v. California*, 538 U.S. 11, 15–16 (2003) (citing CAL. PENAL CODE ANN. § 667(e)(2)(A) (West 1999); § 1170.12(c)(2)(A) (West Supp. 2002)); see also David Gray & Jonathan Huber, *Retributivism for Progressives: A Response to Professor Flanders*, 70 MD. L. REV. 141, 161 (2010) (discussing *Ewing v. California*). California’s three strikes law, which is harsher than most, requires that a defendant convicted of a felony receive an “indeterminate term of life imprisonment” if he had two or more prior serious or violent felony convictions. *Ewing*, 538 U.S. at 15–16 (quoting CAL. PENAL CODE ANN. § 667(e)(2)(A) (West 1999); § 1170.12(c)(2)(A) (West Supp. 2002)). Indeterminate life sentences include the possibility of parole “calculated by reference to a ‘minimum term,’ which is the greater of (a) three times the term otherwise provided for the current conviction, (b) 25 years, or (c) the term determined by the court pursuant to § 1170 for the underlying conviction, including any enhancements.” *Id.* (quoting CAL. PENAL CODE ANN. § 667(e)(2)(A)(i)–(iii) (West 1999); § 1170.12(c)(2)(A)(i)–(iii) (West Supp. 2002)).

149. See, e.g., *Ewing*, 538 U.S. at 37 (Breyer, J., dissenting) (arguing that the Court should have found the twenty-five year sentence imposed in *Ewing* “‘grossly disproportionate’ to the crime”).

represent nothing but a judgment that such a person can no longer be trusted to obey the law and thus should be preventively detained.¹⁵⁰

My suggestion is that subjecting someone to such a long period of detention for a third felony—though arguably only for a third *violent* felony—can be justified by appeal to the idea that an element of the punishment is loss of the right not to be subjected to preventive measures, including LTPD. I call this the “lost status” view, and I think it can help justify something *like* three strikes laws.¹⁵¹

Justification for the lost status view rests on the premise that loss of status is akin to other forms of loss normally inflicted as part of retributive punishment. According to retributive theory, there are a range of deprivations one can deserve for committing a particular crime. We normally think of punishment as involving the loss of property, liberty, or perhaps even life.¹⁵² There is no reason, however, that a person cannot also lose his status as one who must be treated like every other autonomous and accountable person, at least for a period of time somewhat longer than the loss of liberty.¹⁵³ Thus, a person might lose his liberty for, say, ten years, but lose his status as a person who then has to be released and policed like any other autonomous person, for an additional ten years. In that latter period of time, it might or might not be appropriate to detain him. Whether it is appropriate to detain him would depend on how dangerous he is

150. For evidence that such laws are aimed at preventive detention, not retribution, see Robinson, *supra* note 22, at 1429 n.2.

151. I develop this view in greater depth in Alec D. Walen, *A Punitive Precondition for Preventive Detention: Lost Status as an Element of a Just Punishment*, 43 SAN DIEGO L. REV. (forthcoming 2011).

152. See U.S. CONST. amend. V. In an earlier age, punishment also involved loss of limb: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” *Id.*

153. It is worth noting that in some weak sense, loss of status is clearly part of the larger criminal justice system. Consider, for example, Megan’s laws, which require sex offenders to register their address and place of employment with the government, either for a period of time or for the rest of their lives, so that others can know whether any of their neighbors or co-workers have been convicted of sexual offenses. See generally Ranak K. Jasani, Note, *Graves v. State: Undermining Legislative Intent: Allowing Sexually Violent Repeat Offenders to Avoid Enhanced Registration Requirements Under Maryland’s Registration of Offenders Statute*, 61 MD. L. REV. 739, 742–43 (2002) (describing the origins and motivations behind state and federal sex offender registration laws). Such laws, officially, are not meant to be punitive. But susceptibility to this kind of registration clearly depends on having committed a predicate crime. More controversial is the loss of the right to vote. For more on disenfranchisement of felons, see Susan E. Marquardt, Comment, *Deprivation of a Felon’s Right To Vote: Constitutional Concerns, Policy Issues and Suggested Reform for Felony Disenfranchisement Law*, 82 U. DET. MERCY L. REV. 279 (2005).

thought to be, the strength of his liberty interest,¹⁵⁴ and whether a less restrictive alternative would provide adequate protection against his commission of further crimes. In other words, justification for his detention would be based on a judgment that his ongoing detention provides the best balance of security and liberty.¹⁵⁵ But in this second ten-year period, his punishment would consist in his susceptibility to LTPD, not the detention itself. Therefore, if he is detained, his detention should be structured to be as nonpunitive as possible.¹⁵⁶

Notice that the lost status view is a sort of mirror image of the practice of parole. Parole, in the criminal context,¹⁵⁷ allows a criminal to be released from prison under supervision before his sentence has been completed.¹⁵⁸ Lost status could cause someone to be detained *beyond* his punitive detention. These two practices may look the same, but there are three significant differences. First, our notion of proportionality for sentencing sets an outer bound for the length of a punitive sentence. A convict to whom parole is granted may be released before his time in prison has reached this “outer bound,” but his punitive sentence cannot be extended beyond that outer bound without a new conviction for a new crime.¹⁵⁹ Lost status, however, allows detention beyond the period of detention that could be justified as punitive—though not beyond the period of warranted lost status. Second, since long-term detention under lost status is *preventive*, not *punitive*, detention, the conditions of detention should be as nonpunitive as possible. This is not the case for those who are denied parole. Third, there should be a difference in the presumption with regard to detention. Parole is granted at the discretion of the parole board, which is not required to seek the least restrictive conditions possible for the safety of the community because the detainee *deserves*

154. The strength of his liberty interest should reflect the length of his overall detention: The longer he is detained, the more his liberty interest is denied, and the stronger his interest in regaining his liberty becomes.

155. In this context, where a person has lost his status as an autonomous and accountable person, balancing security and liberty *is* appropriate.

156. See Robinson, *supra* note 22, at 1446-47 (highlighting the difference between detention for “society’s benefit” and detention for “deserved punishment”).

157. I specify the context because we will come to parole in the military context later. See *infra* Part III.A.

158. See generally Daniel S. Medwed, *The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 497-504 (2008) (articulating the history and purposes of the parole system).

159. This possibility presupposes that some weak form of retributivism is true, one which allows the State, for a variety of practical reasons, to allow people to serve *less* time than they deserve, but not *more*. See *supra* text accompanying note 140.

R

R

his loss of liberty.¹⁶⁰ In contrast, those who suffer LTPD because of their lost status do not *deserve* to lose their liberty. Rather, they deserve only the loss of status, and while loss of status allows loss of liberty, it does so only if loss of liberty is the least restrictive alternative.

The lost status view is similar, but not identical, to a view articulated by R. A. Duff.¹⁶¹ Duff starts from the premise that some people do more than commit individual crimes: They act out a “pattern of conduct manifesting a persisting criminal attitude”;¹⁶² they engage “in a *continuing* attack, a *continuing campaign* of attacks, on the community’s members and its central values.”¹⁶³ These people who commit serious crimes—not the mere pilfering of golf clubs—commit a persistent crime that is “categorically more serious” than the sum of its parts.¹⁶⁴ They commit the more serious crime of *attacking* the community and its central values.¹⁶⁵ For that serious crime, they deserve a more serious punishment, namely, exclusion from the community.¹⁶⁶ Effectively, this means they can be “subjected to deterrent or incapacitative punishments that no longer address them as citizens sharing in the community’s defining values.”¹⁶⁷ Duff makes clear that the exclusion “should be *presumptively* permanent, it should not be *irreversibly* permanent; we would owe it to them, as moral agents who could still redeem themselves, to allow them a way back to the community.”¹⁶⁸ Duff thinks, however, that such exclusion might be the most just way for a retributivist to deal with the repeat offender.¹⁶⁹

The lost status view differs from Duff’s proposal in two ways. First, the lost status view is not as radical as Duff’s proposal. It neither categorizes lost status as a complete, presumptively permanent exclusion from the moral community nor requires deep redemption in order for one to be granted liberty. Lost status is simply another

160. See Medwed, *supra* note 158, at 493, 504–09 (describing the exercise of discretion by parole boards). R

161. It should be pointed out that Duff is not fully comfortable endorsing his proposal. See DUFF, *supra* note 145, at 172. R

162. *Id.* at 169.

163. *Id.* at 172.

164. *Id.*

165. *Id.*

166. *Id.* at 171–72.

167. *Id.* at 166.

168. *Id.* at 172.

169. Importantly, Duff’s argument is *retributive*. While he clearly is motivated by a concern with what one could say to victims of a persistent criminal who is released from prison and harms again, his *justification* is retributive, based on the emergent pattern of crime. Lippke’s discussion of Duff misreads him as being fundamentally concerned with an actor’s dispositions, which is a future-oriented, not retributive, concern. Lippke, *supra* note 40, at 391–99. R

penalty. Second, because it is not as radical, the lost status view does not require the agent to have committed a “campaign” of attacks. The view could be attached to certain crimes even if committed only once. If committed only once, the crime must be quite serious, such as a terrorist act, for the penalty to be proportional. For less serious crimes, like theft, the harm to society is not so great that it makes sense to say the person deserves to lose his status for a period of time beyond the fitting criminal sentence. For crimes of an intermediate nature, such as robbery, this punitive element would be fitting only if part of a recidivist premium. The thought behind the connection is that multiple offenses indicate that the person has chosen not to reform himself, and so loss of the normal presumption that he will be law abiding is fitting.¹⁷⁰ The presupposition here is that one who is convicted of a crime has an obligation to reform himself, and his subsequent crimes are more culpable because they carry the weight of having failed to do so.¹⁷¹ That particular type of culpability is best expressed through loss of the presumption, at least for a while, that he will be law abiding. These two differences notwithstanding, the lost status view is clearly in the same family of ideas as Duff’s proposal.

Applying the lost status view to four of the preventive practices in the criminal law discussed above, we see that it fits and justifies some better than others. Starting with the negative, it does not fit the operation of three strikes laws well. Twenty-five years of lost status seems excessive if the third crime was simple theft.¹⁷² More clearly excessive is the way that three strikes laws ban parole for twenty-five years.¹⁷³ Such a ban conflates lost status with lost liberty. If the proper sentence for stealing golf clubs is, say, one year, and if the recidivist premium extends that to two years plus lost status for another twenty years, the prisoner should be released as soon as a less restrictive alternative provides adequate protection to society.

Arguably the lost status view provides a better fit for the practice of detaining sexually violent predators after having served their

170. This is similar to a thought expressed by Stephen Morse. Morse, *supra* note 117, at 152. But Morse’s suggestion is too focused on the person somehow posing a risk, even from his own point of view, of committing future crimes. *Id.* at 152–53. The point of reform is to change one’s intentions. It is only in degenerate cases of weakness of will that risk should be a factor.

171. See Robinson, *supra* note 22, at 1436 (“By committing an offense after a previous conviction, an offender might be seen as ‘thumbing his nose’ at the justice system.”).

172. See *id.* (suggesting that while “disregard” for the justice system “may justify some incremental increase in punishment over that deserved by a first-time offender,” it probably does not justify “doubling, tripling, or quadrupling of punishment”).

173. See *supra* note 148.

R

R

R

sentences. Under the current legal regime, sexually violent predators can be subjected to LTPD after having served their sentences if and only if they suffer “a mental abnormality” that results in “a special and serious lack of ability to control [their] behavior.”¹⁷⁴ As a matter of respecting their dignity, we ought to assume that even if they suffer from a “mental abnormality” they are autonomous and accountable persons and treat them as such, unless and until they have been diagnosed as having such a severe mental disease that they can be involuntarily committed for the sake of others.¹⁷⁵ But if a person violates the law in a serious way and has failed to take steps to guard against his mental disorder, then he might lose the benefit of the presumption of autonomy and accountability. This makes the significance of having committed a crime not so much epistemic (providing evidence that he is likely to commit the crime again) as punitive (grounding loss of his right to be treated as any other autonomous, accountable person).¹⁷⁶

A third application of the lost status view implies that using predictions of dangerousness in sentencing is unjustifiable but suggests a modification that might be defensible. Dangerousness predictions can have nothing to do with the magnitude of the wrong already committed or with culpability.¹⁷⁷ The practice of making predictions and using them to detain criminals might be adequately reformed, however, if courts distinguished the baseline sentence that a criminal de-

174. *Kansas v. Crane*, 534 U.S. 407, 412–13 (2002). There is good empirical reason to reject the idea that these criminals are more likely to reoffend than others and to treat the idea that they suffer “a mental abnormality” as a circular rationalization that serves as a cover for the desire to detain them. See Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search for a Limiting Principle*, 4 CARDOZO PUB. L., POL'Y & ETHICS J. 489, 494 (2006) (“The notion that sex offenders are a class of offenders with unusually high rates of recidivism is one that has great political and emotional appeal, but little empirical substantiation.”). In all likelihood, these laws are motivated by a special concern with vulnerable victims. This concern *might* justify longer sentences and LTPD but not the pretense that these criminals suffer from a special mental disorder.

175. See *infra* Part III.C.

176. Another problem with LTPD of sexual predators not addressed by the lost status view is the problem of holding sexual predators fully culpable for their crimes while also holding that they suffer from a “serious mental disorder” consisting in part “of a special and serious lack of ability to control behavior.” *Crane*, 534 U.S. at 412–13. If sexual predators suffer such a disorder, they should be less culpable for their initial act, except perhaps insofar as their culpability is expressed in lost status. See Morse, *supra* note 5, at 272 (recognizing as “paradoxical” the claim that a sexual predator “is sufficiently responsible to deserve the stigma and punishment of criminal incarceration” but not so responsible as “to be permitted the usual freedom from involuntary civil commitment”). I discuss this further in Part III.C.

177. See Robinson, *supra* note 22, 1438 (“Dangerousness and desert are distinct criteria that commonly diverge.”).

R

R

serves and then added a period of lost status time in which predictions of future dangerousness would be relevant. In that case, the main problem is simply having a sound basis for the predictions. This is a serious problem with moral dimensions,¹⁷⁸ but it is arguably less serious than the problem of punishing people for crimes not yet committed.

Finally, we should examine the lost status view in the context of terrorism. Lost status could allow LTPD of terrorists who have been convicted of a terrorism-related crime. This may seem to be a good result, but it comes with a danger as well, namely, that some terrorism-related crimes, such as material support, push the outer envelope of legitimate crimes.¹⁷⁹ If one has not done anything that should be counted as a legitimate crime, then one cannot be held to have lost one's status as an autonomous and accountable person. There is, however, a straightforward solution to this problem: (1) limit prosecutions for material support of terrorism to cases that really fit that label, and (2) use the notion of proportionality to limit the time for which a person convicted of a terrorism-related offense can be held to have lost his status as an autonomous and accountable person by making reference to the severity and number of crimes of which he has been convicted.

B. *Short-Term Preventive Detention*

Autonomous individuals can also be justifiably detained for the welfare of others if the deprivation of their liberty is relatively short and therefore relatively minor. The moral justifiability of STPD can be modeled on the difference between jury service and slavery: It is one thing to demand that a person make some short-term sacrifices for others and another to demand that he serve as a mere tool for the

178. As Robinson points out, employment history, age, and "family situation" (for example, whether there is a father in the home of a criminal) are "good predictors of future criminality." *Id.* at 1439. But not only should one agree with him that no one "deserve[s] more punishment for an offense because he has a poor employment history, is young, or has no father in his household," one should also be disquieted by the thought that a criminal can be detained in LTPD because of such factors. *Id.* at 1440. It is unclear, however, what other factors can be used. For example, "taking responsibility" for one's crime and repenting of it seems like a good factor, until one thinks about how it penalizes those who insist (rightly) that they are innocent. See Medwed, *supra* note 158, at 497 (describing the "prisoner's dilemma" faced by innocent inmates seeking parole because the parole system favors granting release to those who take responsibility for their crimes).

179. Justice Breyer, in my opinion, convincingly argues that these crimes, as currently applied, sometimes allow the prosecution of actions that should be protected by the First Amendment freedoms of speech and association. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2732–34 (2010) (Breyer, J., dissenting).

welfare of others. The former demand, but not the latter, is consistent with a respect for the dignity of autonomous individuals. This is not to say that the State should have *carte blanche* to subject people to STPD. STPD is morally justifiable only if there is good reason to think that it is necessary to achieve an important social good, such as protecting jurors and witnesses¹⁸⁰ or disrupting a terrorist plot. My point is that if the State's interest is great, then it can exact relatively small sacrifices from individuals if doing so is necessary for the sake of the greater good. Thus, the risk of wrongful detention is something that even the innocent can be expected to bear, for a short time, for the sake of the safety of all.¹⁸¹

What about the objection to LTPD raised above—that preventive detention involves treating the person like a mechanism rather than an autonomous and accountable being?¹⁸² Given that LTPD is less of a harm than death, it was *this* feature of LTPD that I argued made it unlike mere collateral damage.¹⁸³ Would not the same objection apply to STPD?

It would, but here the relative insignificance of the sacrifice makes a difference. It may help to explain this by thinking about what can be done to a person who is treated simply as a means. If the harm is relatively minor, a person can justifiably be treated simply as a means (assuming there is no opportunity to get consent or he refuses to give it) in order to bring about a significant good.¹⁸⁴ This is because he can be held to have a positive duty to make small sacrifices if they are necessary to secure others from large harms, and because extracting a service from him, at the cost of a small harm to him, is essentially enforcing the performance of his duty.¹⁸⁵ Preventively detaining an autonomous and accountable person is analogous to using a person simply as a means because, in a straightforward sense, it targets him and treats him in a way that is at least in tension with respecting his status as an autonomous and accountable person. But as with treating a person simply as a means, this tension can be re-

180. Relatively short pretrial detention is legally and morally permissible if there is clear and convincing evidence that there is “a serious risk” that the detainee will flee or that he “will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.” 18 U.S.C. § 3142(f)(2)(B) (2006).

181. *See supra* Part II.C.1.

182. *See supra* Part II.C.2.

183. *See supra* text accompanying notes 124–28.

184. Walen, *supra* note 128, at 2.

185. *See id.* at 15 (asserting that an individual should “have to make the kinds of small sacrifices for others that can be demanded of agents as a matter of positive duty”).

solved if the harm to the person is relatively small, and the expected benefits to others are large.

It is hard to put a number on what would count as “short-term” detention. Benjamin Wittes and Colleen Peppard suggest that the executive should have “broad short-term detention authority” to detain STs for up to fourteen days, a time they think is sufficient to disrupt terrorist plots.¹⁸⁶ They distinguish fourteen days from repeatable six-month periods, which would, they suggest, serve the purpose of incapacitation and are considered long term.¹⁸⁷ In between these alternatives is the single six-month period, which would have “consequences to the detainee’s liberty . . . [that], though far from trivial, are significantly less severe than in the current habeas litigation.”¹⁸⁸

This six-month period seems to reflect some sort of consensus outer limit for short-term detention. For example, the Fourth Geneva Convention states that if an occupying power detains civilians, which it may do for “imperative reasons of security,” the decision to detain “shall be subject to periodical review, if possible every six months.”¹⁸⁹ Likewise, the U.S. Supreme Court held that aliens who are subject to deportation can be detained for up to six months while the United States looks for a country willing to take them and respect their rights, but beyond that time they must be released and policed unless the government can show either (1) that there is a significant likelihood that it can remove them to another country in the foreseeable future,¹⁹⁰ or (2) that they can be detained not only because they are dangerous but also because their dangerousness is “accompanied by some other special circumstance, such as mental illness, that helps to create the danger.”¹⁹¹ Additionally, the Court set six months as the maximum authorized punishment for a “petty” offense, for which the right to a jury trial does not attach.¹⁹² While there are other laws with shorter periods meant to mark the limit of acceptable STPD—the Speedy Trial Act, for example, requires that trials commence within seventy days of “the filing date (and making public) of the informa-

186. WITTES & PEPPARD, *supra* note 8, at 7, 15.

187. *Id.* at 1.

188. *Id.* at 16.

189. Geneva Convention Relative to Protection of Civilian Persons in Time of War art. 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

190. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

191. *Id.* at 691. I return to the mental illness prong in Part III.C. I should acknowledge that the *Zadvydas* Court also made, in dicta, an exception for detaining terrorists in LTPD. *Id.* at 691. Insofar as the United States cannot find a country willing to take these aliens and police them, then this dicta is, as I argue below, morally sound. But insofar as it licenses the LTPD of all alien STs, it is too sweeping and as such is morally unsound.

192. *Baldwin v. New York*, 399 U.S. 66, 69 (1970).

tion or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs”¹⁹³—six months seems to reflect a reasonable outer limit on what can count as “short-term” detention.

C. *Preventive Detention of Those with Diminished Autonomous Capacity*

The Supreme Court has held that those whose autonomous capacity is so far below normal that it would be unjust to punish them for their choices—because they have a mental illness as a result of which they cannot understand and appreciate the consequences of their actions or cannot control their behavior¹⁹⁴—can be preventively detained to protect others and themselves.¹⁹⁵ This Supreme Court holding is fully consistent with the AR Model.

The difficult question is whether those whose autonomous capacity is not *that* compromised can be subjected to LTPD for the sake of themselves and others. A principle source of pressure to address this question arises from cases of sexual predators who suffer from “mental abnormalities” or “personality disorders”¹⁹⁶ that affect their ability to control themselves but do not rise to the level of a mental illness that would allow involuntary civil commitment.¹⁹⁷ They seem to lack the normal autonomous capacity to govern themselves, but are

193. 18 U.S.C. § 3161(c)(1) (2006). Despite this limit, some defendants are held much longer pretrial. Ali Saleh Kahlah Al-Marri’s case illustrates the point. Before being subjected to LTPD, Al-Marri faced criminal charges. He waited eighteen months for his trial to start, and was still one month from trial, before being removed from the civilian criminal system. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 280 (4th Cir. 2008) (Gregory, J., concurring in the judgment), *vacated sub nom.* *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.). *But see* *Demore v. Kim*, 538 U.S. 510, 529 (2003) (emphasizing that the majority of potentially deportable criminal aliens are detained, prior to the completion of their removal hearings, “for less than the 90 days we considered presumptively valid in *Zadvydas*”).

194. This is the traditional two-part, disjunctive definition of legal insanity. Corrado, *supra* note 5, at 101–02.

195. *See* *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 272 (1940) (upholding a Minnesota statute that provided for the institutionalization of persons suffering from “‘conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons’” (emphasis added)); *see also* *Addington v. Texas*, 441 U.S. 418, 432–33 (1979) (adding the requirement that mental illness be established by “clear and convincing” evidence).

196. “Mental abnormality” and “personality disorder” were the terms of art used in the Kansas statute allowing postconviction detention of sexually violent predators that was upheld by the U.S. Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

197. The Supreme Court of Kansas, for example, found that a finding of a “mental abnormality” was not adequate to establish a “mental illness” of the sort presupposed for involuntary civil commitment. *Id.* (internal quotation marks omitted).

not far below it, and they can accordingly still be punished for criminal actions. Moreover, they can be subjected to LTPD after they complete their sentences.¹⁹⁸ Is this combination justifiable under the AR Model?

I argued above that we do not need to appeal to diminished autonomous capacity to defend the postconviction LTPD of sexually violent predators; their detention can be justified as a matter of lost status.¹⁹⁹ One might think that the reduced autonomous capacity of sexually violent predators would provide an alternative framework for justifying their detention. But there are two reasons why their reduced autonomous capacity should not be taken to justify subjecting them to LTPD by itself.

First, if their reduced autonomous capacity justified their preventive detention, then there would be no need to obtain a conviction. But no one is arguing that the conditions for involuntary commitment should be expanded to include those who *merely* suffer from a “mental abnormality” or a “personality disorder” under which they have “serious difficulty in controlling behavior.” Rather, the predicate for considering their involuntary commitment is their having those mental traits *and* their having received and served a sentence for a sexually violent crime.²⁰⁰

Second, their reduced autonomous capacity seems consistent with their taking responsible action to prevent themselves from actually harming others. They could seek psychotherapy, enter a rehabilitation program, or take preventive measures to avoid situations in which their abnormality or disorder would tempt them to do something harmful to others.²⁰¹ In other words, their problem is not that

198. This was the Supreme Court’s holding in both *Hendricks* and *Crane*. *See id.* (upholding a Kansas statute that “establishes procedures for the civil commitment of persons who, due to a ‘mental abnormality’ or a ‘personality disorder,’ are likely to engage in ‘predatory acts of sexual violence’”); *Kansas v. Crane*, 534 U.S. 407, 410–12 (2002) (holding that although the State is not required to prove that a dangerous individual has a total or complete lack of control in order to obtain their civil commitment, some “lack-of-control determination” must be made).

199. *See supra* notes 174–76 and accompanying text.

200. For example, the Kansas statute that was the basis for *Hendricks*’s detention required that he be a “‘sexually violent predator,’” which the act defined as “‘any person *who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.*’” *Hendricks*, 521 U.S. at 352 (emphasis added) (citing KAN. STAT. ANN. § 59-29a02(a) (1994)). It would contradict my claim above if people were subject to LTPD simply because they were *charged* with a sexually violent offense. I am unaware of any case upholding LTPD on that basis.

201. *See generally* Corrado, *supra* note 5, at 105–06 (“[W]e want to salvage responsibility where possible, and we cannot do that by treating people as if they are not responsible.”);

R

R

they are constantly operating at a sub-par level as autonomous agents; they are intermittently so operating. In their fully functional periods, we can expect them to take adequate steps to improve their conditions or tie themselves to the mast for those times when the Sirens' song will be too tempting to resist.²⁰² Respect for their autonomy requires us to allow them the chance to take these responsible actions for themselves and to hold off on LTPD until such time as they fail to take the necessary measures and can be convicted of a sexually violent crime—hopefully one that is inchoate and has not caused actual harm.²⁰³

An interesting challenge to the claim that sexually violent predators should be subject to LTPD only if they have first committed a crime is presented by the first case to reach the Supreme Court on this topic, *Kansas v. Hendricks*.²⁰⁴ Hendricks claimed that he did not simply have difficulty controlling his impulses: "He explained that when he 'get[s] stressed out,' he 'can't control the urge' to molest children."²⁰⁵ Furthermore, he found "that despite having [sought and] received professional help for his pedophilia, he continued to harbor sexual desires for children."²⁰⁶ He reached the conclusion "that the only sure way he could keep from sexually abusing children in the future was 'to die.'"²⁰⁷

If Hendricks's self-description was accurate, then his was the type of case for which the insanity defense, based on lack of control, *should* apply. As Michael Corrado said, "[I]n the case of the offender who cannot control his behavior, punishment is a pointless infliction of pain."²⁰⁸ In other words, if Hendricks was right about his impulses being uncontrollable, then the only thing he could do to guarantee that he would not molest little children, short of suicide or causing himself to be permanently severely physically disabled, would be to

Morse, *supra* note 117, at 152 (asserting that a dangerous criminal's "failure to commit [himself] voluntarily or to take other reasonably effective steps to avoid causing future harm" "justifies criminalization and punishment").

R

202. Morse, *supra* note 117, at 152 ("No one has a right to harm others unjustifiably and people who are consciously aware of an extremely high risk that they will do so have a moral duty to avoid unjustifiable harmdoing by taking preventive action. Like Odysseus, they must tie themselves to the mast.")

R

203. Morse suggests that one crime for which they might be convicted, which would not cause a harm, is "recklessly fail[ing] to take the steps necessary to avoid harmdoing." *Id.* at 152. It is hard to see, however, how such a reckless failure could be the predicate for lost status; in fact, lost status would seem to be a disproportionate penalty.

204. 521 U.S. 346.

205. *Id.* at 355 (alteration in original).

206. *Id.* at 354.

207. *Id.* at 355.

208. Corrado, *supra* note 5, at 105.

R

arrange to have himself permanently subjected to LTPD. It would therefore be no injustice to someone like Hendricks to subject him to LTPD, even without a conviction. It would do for him what he should choose to do himself to avoid harming others.²⁰⁹ But if we suppose that Hendricks had sufficient ability to control himself, to tie himself to the mast to ensure that he would not molest children—say by recognizing when the temptation was becoming strong and entering a mental hospital that would detain him short term until the urge had subsided—then he could be held criminally liable for any acts of molesting children, and subjected to LTPD after his term was up. What we still do not have, however, is a case of someone who can be held criminally liable for the choice to commit crimes and *also* be subject to LTPD even if he has not yet committed any crimes and lost his status as an autonomous and accountable person.

Two other types of persons may fit that category: the mentally retarded and juveniles. As the Court pointed out in *Atkins v. Virginia*,²¹⁰ “[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction.”²¹¹ The Court then went on to draw what I take to be the correct lesson with regard to these deficiencies: They “do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”²¹² In *Roper v. Simmons*,²¹³ the Court echoed these points with regard to juveniles (those who committed their crime before they were eighteen-years-old) facing the death penalty.²¹⁴ The point of contrast

209. I revisit this point in the context of quarantines, *infra* Part III.D. Here, I want to note that an issue that Morse raises falls into this category. He considers the theoretical possibility that we might be able to predict violent, wrongful behavior with great accuracy and concedes that in such cases what he calls pure preventive detention—LTPD of autonomous individuals—would, with sufficient procedural protections and guarantees of humane treatment, be justifiable. Morse, *supra* note 5, at 297. I believe that for such a prediction to be sufficiently reliable that the State could justifiably detain someone, it must be the case that he suffers a condition that fundamentally interferes with his autonomy in the way that Hendricks thought his autonomy was compromised. (Morse has indicated in personal communication with me that he thinks such predictions of violent, wrongful behavior are simply not going to be possible in the foreseeable future.) In other words, he may be autonomous in many ways, but when it comes to certain crucial decisions, he must be unable to avoid doing what he ought not to do. The AR Model holds that such a person can be subjected to LTPD under the quarantine prong.

210. 536 U.S. 304 (2002).

211. *Id.* at 318.

212. *Id.*

213. 543 U.S. 551 (2005).

214. *See id.* at 563–64, 567 (applying the reasoning of *Atkins* to juvenile offenders and specifically noting that, like the mentally retarded, juveniles are “‘categorically less culpable than the average criminal’” (quoting *Atkins*, 536 U.S. at 316)).

with sexually violent predators is this: The retarded and the young (at least until they mature) suffer reduced autonomous capacity all the time, and thus, unlike sexually violent predators, they are never in a position to be required to use their judgment to control themselves so that they will not harm others in times when their judgment is impaired. They live in a state of constantly impaired judgment.

The question is, should the mentally retarded and the young be subject to LTPD if they are judged to be sufficiently dangerous and the State's interest in security outweighs their interest in liberty? I do not see why not. The important line to protect is that which prohibits LTPD for those whose autonomous capacity meets the threshold for adult normalcy. If they have not reached that threshold, then they do not have the status of one who must be treated as an autonomous being. One might object that "it is difficult to imagine what adequate conception of justice would justify blaming and punishing an agent too irresponsible to be left at large."²¹⁵ This objection fails to see the grey area in which some people live, as agents who are not fully autonomous, not so compromised that they may not justly be punished, and yet compromised enough that their condition mitigates and lessens their culpability. It is important in helping to provide as much dignity as possible to such people that they be treated as worthy of punishment if they do break the law, and yet such aspirational dignity is not the same as the established dignity of fully autonomous people and does not require that they be free from LTPD if they pose too great a threat to others.²¹⁶

D. Preventive Detention to Enforce a Quarantine

Quarantines involve preventive detention of individuals for the welfare of others who might be harmed if the quarantined individuals are allowed to move about as they please.²¹⁷ The justification of quarantines reflects the fact that those who are quarantined, no matter what they do, simply by moving about with others, impose an unacceptable risk of harm to others.²¹⁸ The paradigmatic reason one

215. Morse, *supra* note 5, at 272.

216. This aspirational conception of dignity corresponds roughly to the ascriptive sense of autonomy described by Fallon. Fallon, *supra* note 6 at 890–93.

217. See 39 AM. JUR. 2d *Health* § 61 (2008) ("[T]he purpose of a statute providing for involuntary commitment for having a communicable disease is to prevent the person suffering from the active communicable disease from becoming a danger to others.").

218. *Id.*

might impose such a risk is that they carry a dangerous, infectious disease.²¹⁹

Normally, as the word suggests—“quarantine” comes from the Italian *quaranta*, which means forty, the number of days a ship suspected of carrying contagious diseases would be kept isolated upon coming to port²²⁰—quarantines involve a short-term deprivation of liberty. But the time *can* stretch from weeks to years. The question is then how this can be reconciled with the AR Model, as the detainees normally are fully autonomous.

The answer is that we all have a duty not to harm others. One who has a dangerous, infectious disease, or even one who merely has reason to think there is a good chance he has such a disease, can ensure he does not harm others only by staying away from them. If this is true, then he has a duty to isolate himself from others. Moreover, the State has a legitimate interest in enforcing this duty. The State’s requiring someone to do what he has a moral duty to do—at least if the duty concerns respecting the welfare of others²²¹—is respectful of his autonomy. He should freely agree to do it, so the State’s enforcing the duty should make him no worse off. Thus, if properly enforced, the quarantine would impact him only if he planned on violating his duty to others, and if that is his intention, he can have no complaint that the State interfered with his liberty.

Respect for autonomy requires that the State not restrict the liberty of those who might carry a dangerous, infectious disease more than necessary. This requires two accommodations on the part of the State. First, the State should take reasonable measures to determine who truly has or carries an infectious disease. Those whom the State determines neither have nor carry an infectious disease should not have their liberty needlessly restricted. Second, the State should design the least restrictive set of rules consistent with providing sufficient protection to others. Thus if someone who has an infection can be safely allowed to mingle with others as long as, for example, he takes a

219. See *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997) (“A State could hardly be seen as furthering a ‘punitive’ purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease.”); see also *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 387 (1902) (“[S]tate quarantine laws and state laws for the purpose of preventing, eradicating or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution . . .”).

220. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 956 (10th ed. 1993).

221. This qualification is introduced to avoid the illiberal implication that the State can paternalistically or moralistically enforce moral duties that do not concern others.

drug on a regular basis, then he should be allowed to mingle with others as long as he regularly takes his drug.²²²

E. Preventive Detention Based on Inadequate Policing Capacity

The last category is a sort of complement to the third category. Those with insufficient autonomous capacity are *intrinsically* incapable of being held accountable as a normal autonomous person for their actions.²²³ Those who cannot be adequately policed are *extrinsically* incapable of being held adequately accountable for their actions. The moral relevance of both is the same: One who cannot adequately be held accountable can be subjected to LTPD if doing so is necessary to ensure he does not pose a risk to others that outweighs the loss of his own liberty. This sort of balancing is appropriate when a person is not accountable because accountability is a precondition of treating someone as an autonomous agent who should be released and policed rather than subjected to LTPD.

The most significant category of detainees whose detentions are justifiable because they are extrinsically inadequately accountable is POWs. The typical POW is, and will remain until the war is over or he is released from military service, privileged to engage in combat with the detaining power.²²⁴ If he is released or escapes from detention, he has the right to take up arms again.²²⁵ This means that not only can the detaining power not hold him criminally responsible for his past violent actions—at least as long as those acts do not violate the laws of war that require him, for example, not to target noncombatants²²⁶—but also that the detaining power may not hold him criminally responsible for any *future* acts of violence that conform to the law of war. The State is not required to allow itself to be attacked. Therefore, it can subject POWs to LTPD to prevent them from attacking.

222. Some people will abuse their right to mingle with others by not taking the precautions they are required to take as a condition of this freedom. These people can then be respectfully subjected to long-term detention under one of two justifications. They can be punitively restricted for violating the conditions of their freedom to mingle, or they can be detained as people lacking the autonomous capacity to regulate their behavior in a responsible fashion. For an example of the latter, see *City of New York v. Antoinette R.*, 630 N.Y.S.2d. 1008, 1011 (App. Div. 1995) (ordering the detention of a woman who failed to take her tuberculosis medication as required, and who thereby “exhibited a pattern of behavior which is consistent with one who does not understand the full import of her condition nor the risks she poses to others, both the public and her family”).

223. As discussed previously, persons with insufficient autonomous capacity may be held accountable, but only in a diminished way. See *supra* Part III.C.

224. THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT, *supra* note 124, at 361.

225. *Id.*

226. AP I, *supra* note 90, art. 48.

And it can do so without disrespecting them as autonomous people because their legal status makes them unaccountable.

Because POWs can, at least sometimes, shed their legal status as privileged combatants, there is more that needs to be said about them, and I return to the topic in Part IV below. What I want to suggest here is that some STs can also be justifiably subject to LTPD under this same heading. On the assumption that the United States has no obligation to release and police alien STs in its own territory,²²⁷ the question is whether STs can be adequately policed if released to their home country or to some other country willing to take them. The answer in some cases—Yemen, for example²²⁸—is no. The problem is not that the detainees have the legal *status* of being beyond criminal prosecution for future acts of terror. The problem is (1) that the detainees have no legal claim on the United States that it release them in its own territory and police them there, and (2) that where they do have a legal claim to be taken in, there is too large a chance that they would not be held accountable for any future acts of terror.²²⁹ As a result, they are effectively unaccountable and can be

227. This assumption seems sound as a general matter of immigration law, but there might be exceptions for cases in which the United States is responsible for depriving a detainee of the opportunity to make a decent life for himself elsewhere. That is arguably the case for the Uighur detainees held in Guantánamo. *See Kiyemba v. Obama*, 555 F.3d 1022, 1028 (D.C. Cir. 2009) (“An undercurrent of petitioners’ arguments is that they deserve to be released into this country after all they have endured at hands of the United States.”), *vacated*, 130 S. Ct. 1235, *reinstated as amended* by 605 F.3d 1046 (2010), *cert. denied*, 2011 WL 1457627 (U.S. Apr. 18, 2011). The D.C. Circuit found, however, that “their detention at Guantanamo for many years” does not “entitle them to enter the United States.” *Id.* at 1029.

228. *See* FINAL REPORT, *supra* note 76, at 18 (explaining that the “security situation in Yemen had deteriorated” in such a way that the release of the Yemeni detainees at Guantánamo Bay represented a “unique challenge”).

229. One might object that the world is full of terrorist safe havens, that borders are so porous that it is easy to slip from a territory where terrorist activities are policed to one where they are not, and that, as a result, anyone can be subject to LTPD because anyone can slip out of a country that will police him into a safe haven that will not. Obviously, this objection turns on an empirical claim about the porosity of borders. I think, as a matter of fact, many borders are well policed. The police may fail to put certain people on watch lists who *should* be on watch lists, but this does not mean that they cannot keep tabs on those who they *do* put on watch lists. Likewise, if the government takes steps to remove or put limits on one’s passport, then it would be hard to get into countries where the government does not want to allow one to go. But as with the notion of the adequacy of policing in general, this is a matter of degree. If the borders are so porous that one who wants to find his way into a terrorist safe haven can easily do so, then I concede that LTPD is much more easily justified than this Article otherwise suggests.

subjected to LTPD without disrespecting them as autonomous people.²³⁰

This last claim reveals that the basic right with regard to LTPD is the right not to be detained for an illegitimate reason. This right is more limited than the right not to be detained, which is too unconditional. This Part broadly argues that a range of reasons justify detention, all of which concern autonomy, accountability, and the kinds of sacrifices that can be demanded of autonomous people. This Section argues that unaccountable individuals fall within this general pattern. For example, LTPD may be warranted in situations where (1) the United States has no duty to police or prosecute a detained Yemeni, (2) neither the United States nor any other country able to police him consents to his release and volunteers to police him, and (3) Yemen, which has a duty to police him, cannot be trusted to carry out its police duties. LTPD would then be warranted if he is judged too dangerous to release without policing.²³¹

What about LTPD for U.S. citizens who are also STs? There, the argument regarding the State's obligation to police is different. While the State can justifiably deny accepting the responsibility of policing (most) aliens, it cannot circumvent its responsibility to police its own citizens because its very *raison d'être* is to serve its citizens. Of course, even if a state has an obligation to police its own citizens, there may still be questions about whether it can adequately do so at a reasonable cost, given the available technologies and the political situation at the time. Congress's ability to suspend the writ of habeas corpus reflects the fact that there are situations—times of rebellion or invasion—when it cannot.²³² In those situations, the State must be free to subject seemingly dangerous people to LTPD.

The interesting question is whether Congress could effectively suspend habeas for individual citizen STs because of the peculiarly

230. In this regard, it makes sense that roughly forty percent of the detainees left in Guantánamo as of 2010 are from Yemen. See FINAL REPORT, *supra* note 76, at 14.

231. This justification also justifies LTPD for illegal immigrants or other deportable aliens for whom no country can be found that is willing to accept and police them. If there is no reason to think they represent a particular threat, the morally and legally required course of action is to use supervised release. See *Zadvydas v. Davis* 533 U.S. 678, 701 (2001). *Zadvydas* goes too far, however, insofar as the decision implies that even dangerous aliens have a constitutional right to be released after a period of STPD. Constitutional rights, when not based strictly on the text of the Constitution, should track basic requirements of justice, and justice does not require the United States to release and police aliens for whom no country can be found. This is not to deny that resident aliens have due process rights that are the same as citizens. But due process rights should not be confused with a substantive right to be allowed to stay in the country.

232. U.S. CONST. art I, § 9.

great threat they pose. The question is not whether Congress can literally suspend habeas for particular individuals because there should still be procedural requirements for holding a citizen ST in LTPD, and habeas rights would help ensure that those requirements are met.²³³ The question is only whether Congress might have the power to strip autonomous citizens of their normal right not to be subject to LTPD because of the special danger they pose, a danger so great that no amount of policing could adequately protect the public.

To answer this question, it is important to distinguish two ways in which the State might not be able to adequately police certain individuals: They might be especially hard to monitor and, if necessary, bring to justice, or they might pose an especially great risk to others. The AR Model handles these concerns in different ways. If someone was especially hard to monitor or bring to justice, then he would be in the same situation as someone who would be released into a territory where no state would adequately police his activities. Outside of a science fiction or fantasy context, however, it is hard to see how one person can have special powers that make him especially hard to monitor.²³⁴ The more realistic possibility is that someone would be especially hard to bring to justice. This could happen in two ways. First, the police and/or courts might be corrupt in such a way as to make him untouchable. If this is so completely the case that the federal government cannot override whatever local corruption makes him untouchable, then this individual must have a great deal of political influence and would therefore not be subject to LTPD. Thus, this first possibility moots the use of LTPD. Second, an individual might be protected by a militia, a criminal organization, or a tight knit community that would ensure that even if he was captured, he could not be successfully prosecuted because no witness would dare testify against him. Such a case presents a small scale version of the problem with invasion and insurrection: In a certain community, the policing power of the State is not effective. But again, realistically, it is hard to see how the United States, using all of the tools at its disposal, could be incapable of sufficiently protecting the witnesses it needs to bring a

233. See generally *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that a U.S. citizen had the right to habeas corpus to ensure that he received adequate procedural protections before being detained long-term as an enemy combatant).

234. For one of the oldest examples of this idea, consider the myth of the Ring of Gyges. As reported by Plato in Book II of the *Republic*, a shepherd found the ring, realized that he could become invisible by turning the collet of the ring toward his palm and used that power to kill the king, marry the queen, and take over the kingdom. PLATO, *REPUBLIC*, reprinted in *THE COLLECTED DIALOGUES* 575, 607 (Edith Hamilton & Huntington Cairns eds., 1961).

successful prosecution. And even if it did, as a matter of fact, have a problem protecting its witnesses, this kind of problem should be addressed by providing better resources and training to the police, not by holding U.S. citizens in LTPD. In sum, there is no realistic case to be made for using LTPD on U.S. citizens on the ground that they are especially hard to monitor and, if necessary, bring to justice.

Turning to the idea that certain people might pose an especially great risk to others, it is crucial to see how this idea connects to the notion of adequate policing. The connection might seem to be that what constitutes “adequate” policing is that which provides “adequate” protection. Furthermore, what counts as adequate protection depends on the magnitude of the threat. As the magnitude of the threat increases, the need for policing capable of stopping the threat before it leads to harm also increases. If this is the right way to think about adequate policing, however, then we seem to have simply returned to the utilitarian balance between liberty and security.²³⁵ In other words, we seem to have returned, via the idea of adequate policing, to the thought that if the security threat is great enough, then that would license LTPD.²³⁶

If the dignity protected by the AR Model is to mean anything, however, it has to mean that the State must allow its residents to face threats before it takes the positive step of treating an autonomous person, who has not lost his status as such, as if he is simply a dangerous animal. In making this point, I do not mean to imply that the deontological work is done by the distinction between doing and allowing. What matters is not simply that the State does not *cause* harm; the justifiability of proportional collateral damage shows that the significance of not causing harm is easily outweighed.²³⁷ What matters is that the State may not treat a person as less than a fully autonomous being when he is as accountable for his actions as any other criminal. Doing so, like treating him simply as a means, is a kind of violation of his dignity not justified by a balance of harms.

The implication of this deontological point is that the adequacy of policing, as relevant to the notion of extrinsic accountability, concerns the State’s ability to monitor a person and bring him to justice if he commits a crime (preferably only an inchoate crime), but does not

235. As described above, I reject a simple utilitarian balancing approach. See *supra* notes 27–30 and accompanying text.

236. This notion leads us back to the reluctant pragmatism of David Cole. See *supra* text accompanying note 110.

237. See generally THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 124, at 111–13.

concern the magnitude of the threat he poses. And this means U.S. citizen STs should be treated like any other suspected criminal.²³⁸

IV. PROBLEM CASES FOR THE AUTONOMY RESPECTING MODEL

Having described the AR Model and explained how it accounts for a wide range of detention practices, I turn now to discussing three problem cases for the AR Model: (1) POWs and parole, (2) citizen STs who threaten to commit huge terrorist attacks, and (3) citizen STs who express an intent to engage in terror. I argue that the AR Model can handle all three.

A. *Prisoners of War and Parole*

The LTPD of POWs fits the AR Model because combatants are privileged to use force, and thus they are extrinsically unaccountable for its use as long as they do not violate the rules of *jus in bello*.²³⁹ They are unaccountable not only because they cannot be prosecuted for their use of force in the past, but also because if they should be released or should escape, they cannot be prosecuted for their use of force in the future.²⁴⁰ It is to prevent them from using force in the future—force which, while not illegal, is still unacceptable to the State—that the State can hold them in LTPD until the cessation of active hostilities.²⁴¹

To test the consistency of the LTPD of POWs with the AR Model, we should examine a little discussed feature of the law of war: the possibility of a POW renouncing his privileged combatant status by giving his word that if released he will not again take up arms against the detaining power. This possibility, known as giving parole, is provided for in the Third Geneva Convention.²⁴² Giving parole changes a POW's status such that if he is captured again, having violated his word, he is subject to criminal penalties.²⁴³ The prospect of giving parole creates the legal possibility of policing a former POW's future actions. This provides a test for the AR Model because it opens up the

238. I examine the limits of this point in Part IV.B.

239. See Berman, *supra* note 13, at 10 (“Ordinary combatants . . . cannot be prosecuted for violations of *jus ad bellum*, though they can be prosecuted for violations of *jus in bello*.”).

240. See *supra* notes 225–26 and accompanying text.

241. See *supra* notes 11–14 and accompanying text.

242. GC III, *supra* note 11, art. 21; see also Berman, *supra* note 13, at 9 n.14 (“This practice may now seem somewhat quaint, but it effectively highlights the purpose of the detention of prisoners of war.”).

243. GC III Commentary, *supra* note 89, at 181 (“[A] prisoner of war who is released on parole and is recaptured bearing arms may be tried and sentenced by the Detaining Power.”).

R

R

R

R

R

possibility that a detaining state is obligated to release POWs who give parole. Clearly, the United States would not grant parole to all POWs offering it; doing so would be too dangerous. Although this appears to challenge my assertion that the AR Model is consistent with the practice of subjecting POWs to LTPD, there are two reasons consistent with the AR Model that demonstrate why the option of giving parole should not be made widely available to POWs. And in the few cases that could conceivably fall outside those reasons, a state *should* allow POWs to give parole and be released.

The first reason parole is not widely available is that the POWs' home state may not allow its soldiers to give it.²⁴⁴ If the home state does not allow its soldiers to give parole, it would be unreasonable for the United States to treat the released soldiers as having abandoned their privileged *legal status* to use force.²⁴⁵ Because those specific POWs would be legally barred from acquiring a duty *not* to fight again—thus retaining their privileged combatant status after release—they would, for that reason, not be accountable for any future use of force against the United States. Therefore, insofar as the United States is holding POWs from a state that does not allow its captured soldiers to give parole, parole is not an option for those POWs.

Second, even if an enemy would *allow* its soldiers to give parole, finding an enemy that would *enforce* on its released soldiers their duty to refrain from fighting is unlikely. I am not denying that countries who allow their soldiers to be released on parole assume this duty. The Third Geneva Convention is clear that “the Power on which [POWs released on parole] depend is bound neither to require *nor to accept* from them any service incompatible with the parole or promise given.”²⁴⁶ What I am suggesting is that it is unreasonable to expect

244. GC III, *supra* note 11, art. 21, ¶ 2 (“Prisoners of war may be partially or wholly released on parole . . . in so far as is allowed by the laws of the Power on which they depend.”). Parole seems to have been used in World War II for those who might need to be released from a detention facility temporarily “for reasons of health or hygiene.” GC III Commentary, *supra* note 89, at 179.

245. The United States does not allow its own soldiers to give parole. Code of Conduct for Members of the Armed Forces of the United States, Exec. Order No. 10,631, 3 C.F.R. 82 (1955) (“I will accept neither parole nor special favors from my enemy.”), *as amended by* Exec Order No. 12,017, 3 C.F.R. 162 (1977), *and* Exec. Order No. 12,633, 3 C.F.R. 561 (1988). A 1988 directive from the Department of Defense also provides that “[t]he United States does not authorize any military service member to sign or enter into any such parole agreement.” Dep’t of Def. Directive 1300.7, Training and Education Measures Necessary to Support the Code of Conduct, Enclosure 2, E.2.2.3, at 13. This policy makes sense insofar as soldiers might seek to use capture and parole as a way of evading their military duty.

246. GC III, *supra* note 11, art. 21, ¶ 3 (emphasis added).

R

R

R

any enemy nation to be scrupulous about enforcing this duty during war. The commentary to the Geneva Conventions supports this skepticism, noting that the text of the Conventions does not “specify the attitude to be taken by that Power, from the penal or disciplinary point of view, in regard to breach of parole by a member of its armed forces.”²⁴⁷

Assuming the United States cannot rely on its enemies to enforce a parolee’s duty to stay out of the fight, it is then clear why it cannot allow POWs to give their word and regain their status as accountable agents. The United States can threaten to punish POWs whom it releases on parole and subsequently recaptures using force against the United States. But that is a very tenuous form of accountability, given that these former POWs would be outside of U.S. jurisdiction. In reality, only a former POW’s honor could truly compel him to refrain from fighting. If a former POW lacks honor, there is little that the former detaining power can do to stop him from fighting it again after release.

I am not denying that released POWs can be held accountable in one sense: It would be just to punish them *if* they are caught, tried, and convicted. My point is that recapture is very unlikely. This fact makes the situation of released POWs similar to the situation of STs from Yemen²⁴⁸: The effectiveness of policing to provide for security does not reach the threshold level required for the United States to be obliged to release them. Therefore, LTPD would be justified in this context.

If, however, the United States could trust an enemy nation to enforce a parolee’s duty to stay out of the fight, then it is plausible that the United States *would be* obliged to give that enemy’s POWs the option of giving parole. The United States cannot simply *choose* to treat someone as unaccountable—except insofar as it can choose not to assume responsibility to police aliens. Long-term preventive detention is justified only if the United States confronts a POW who does not have a state that is willing to accept responsibility for him and hold him accountable. Under the supposition—unrealistic as it may be—that an enemy nation, or some third-party nation, would enforce the duty of parolees to stay out of the fight, they would be held accountable for any failure to respect their duty, and the United States would be obliged to release them and let the other state police

247. GC III Commentary, *supra* note 89, at 182.

248. *See supra* notes 228–31 and accompanying text.

them.²⁴⁹ The reason this might seem like an unrealistic scenario is not that a POW's claims for liberty are lost during times of war; it is that the conditions for holding paroled POWs accountable if they breach their duty have not existed and are unlikely ever to exist.

In sum, the detention of POWs fits the AR Model. Moreover, the AR Model provides plausible normative guidance to hypothetical conditions.²⁵⁰

B. *Citizens Who Pose a Huge Threat*

One might object to the idea with which I ended Part III—that the size of the threat does not matter for the notion of accountability—by saying that surely, at some magnitude, the threat is too great to allow a person to retain his liberty. To that I might respond that, as I showed above, terrorists are not, on the whole, *that* dangerous.²⁵¹ They are, on average, dangerous on the same scale as “normal” criminals. But one might respond that *some* terrorists pose a greater threat than “normal” criminals. Some terrorists, like the 9/11 hijackers, kill thousands. Surely if the United States had such a terrorist in its grasp, and the Department of Justice believes it cannot obtain a conviction, or it tried to prosecute the terrorist and failed to obtain a conviction, then the United States should be able to choose to subject him to LTPD.

I am willing to concede this point in the abstract. The right of autonomous and accountable people to be treated as such is not absolute. The relevant claim can be outweighed if the threat is big

249. Note the implications of this line of reasoning for the case of Yasir Hamdi. I have already noted that it is unjustifiable for the United States to subject citizens to LTPD. *See supra* Part III.E. But if another country was willing to release and police him, then the United States would have had a duty to allow him to go there. As a matter of fact, what happened fit that requirement. Hamdi gave up his U.S. citizenship and moved to Saudi Arabia, promising to have nothing more to do with the Taliban or Al Qaeda. Adam Liptak, *A Case of Buyer's Remorse That Could Linger for Years*, N.Y. TIMES, Apr. 23, 2007, at A12.

250. One might object that the law of war was not designed to respect liberal notions of autonomy. In fact, the law of war was negotiated over generations between States, many of which were in no way liberal. As its alternative name—humanitarian law—suggests, it was designed simply to minimize the brutality of war while also allowing the warring parties to take those steps essential to their security. *See In re Yamashita*, 327 U.S. 1, 15 (1946) (stating that the purpose of the law of war is “to protect civilian populations and prisoners of war from brutality”). Military necessity, one might say, surely provided the only reason for not releasing POWs before the cessation of active hostilities. In response, I am happy to admit that the AR Model was not in play in devising the law of war. Nonetheless, I think it is an important moral fact that the LTPD of POWs is *consistent* with respecting the liberty of autonomous agents. That is why we, as citizens of a liberal country, should be willing to accept the practice going forward.

251. *See supra* Part II.A.1.

enough,²⁵² but the claim cannot be outweighed by a simple projection of greater expected utility if the person is subjected to LTPD. It can, however, be outweighed if the projected disutility of not subjecting him to LTPD overwhelms his liberty interest by orders of magnitude. I would simply say two things about this possibility. First, it does not undermine the AR Model; it simply shows its limits. Second, these limits are not particularly pressing because they seem to refer to a kind of case that is more a theoretical than a realistic possibility.²⁵³

On the second point, consider the most significant type of weapon of mass destruction (“WMD”), a nuclear bomb. A number of writers have pointed out that “production of a nuclear weapon is relatively simple once nuclear materials are obtained.”²⁵⁴ The real challenge for a terrorist group is getting a hold of nuclear materials and having the resources to build and deliver a bomb.²⁵⁵ No individual at this point in time, however, can make *that* much of a difference in a terrorist group having that ability.²⁵⁶ At best, someone operating inside the United States might possess huge financial resources or inside information regarding the security at a nuclear installation. If the

252. Some rights are very robust and might never be fully overridden. Such rights are candidates for threshold deontology. See *supra* note 114. It is not clear, for example, that it would ever be fully justifiable to torture a person known to be innocent to try to get another person to talk, even if it might sometimes be permissible to torture an ST to get him to talk.

253. Cf. David Luban, *Unthinking the Ticking Bomb* (Georgetown Law Faculty Working Papers, Paper No. 68, July 2008), available at http://scholarship.law.georgetown.edu/fwps_papers/68 (describing the unrealistic nature of the ticking time bomb scenarios that are used to establish that torture is *sometimes* justifiable).

254. Christopher C. Joyner & Alexander Ian Parkhouse, *Nuclear Terrorism in a Globalizing World: Assessing the Threat and the Emerging Management Regime*, 45 STAN. J. INT'L L. 203, 218 (2009). The authors continue: “Indeed, the simplest design for a nuclear weapon—the gun-type design used at Hiroshima—can be made after simply referring to literature available in the public domain.” *Id.*; see also Barry L. Rothberg, Note, *Averting Armageddon: Preventing Nuclear Terrorism in the United States*, 8 DUKE J. COMP. & INT'L L. 79, 94–95 (1997) (citing the views of Carson Mark, “former head of nuclear weapons development at Los Alamos,” for the proposition that the team of specialists needed to build a nuclear weapon “would need to be highly skilled, but not necessarily experienced in nuclear weapons design”).

255. See, e.g., Rothberg, *supra* note 254, at 95–96 (explaining that the isotopes required to build a nuclear weapon “are very difficult and expensive to create, do not travel well, and are hard to store”).

256. The contrast here is with Julius and Ethel Rosenberg, whose conduct, according to Judge Kaufman, the presiding judge at their trial, “in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused . . . the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of [their] treason.” W. Howard Mann, Book Review, 67 YALE L. J. 528, 536 (1958) (reviewing and quoting MALCOLM P. SHARP, *WAS JUSTICE DONE? THE ROSENBERG-SOBELL CASE* 1614–15 (1956)).

R

R

threat is that he will fund terrorists, his funds can be monitored without having to subject him to LTPD. If the concern is that he has knowledge about a nuclear installation he might pass on and the government subsequently came to suspect he is willing to work with terrorists but lacked information to proceed with prosecution for espionage, then the State should redesign the security system and thereby make his knowledge much less useful.²⁵⁷ This would be a less restrictive alternative than LTPD based on mere suspicion of a willingness to work with terrorists. Although such an alternative would not be cheap, it would not be so far beyond the State's ability to respond to a threat to its security as to license LTPD under the AR Model.

One might object that I presuppose too much competence on the part of the government. The government's record when it comes to discovering nefarious activities is notoriously spotty. Consider the inability of the military to take preventive action against Major Nidal Hasan, who was known to be exchanging e-mails with radical Muslim cleric Anwar al-Awlaki;²⁵⁸ or the government's inability to put Umar Farouk Abdulmutallab on a no-fly list despite warnings from his father that he was under "the influence of religious extremists based in Yemen";²⁵⁹ or the FBI's inability to notice that Robert Hanssen had been spying for Russia for fifteen years from within the FBI itself;²⁶⁰ or even the SEC's failure to take any actions against Bernie Madoff, despite numerous tips and indications that his investment business was a Ponzie scheme.²⁶¹ But this incompetence does not support LTPD because the worry it raises is not so much that the government might need to detain people whom it can identify as having both the knowledge or skills and the incentive to help a terrorist organization deploy a WMD; the worry is that the government would not have any idea whom to detain.

257. Weak security at nuclear sites may not be a substantial problem inside the United States, but it is in other parts of the world. See Joyner & Parkhouse, *supra* note 254, at 203–04, 212, 214–18 (describing the threat of nuclear terrorism and noting incidences of insufficient security at nuclear sites around the world).

258. *Muslim Clergyman Speaks*, N.Y. TIMES, Dec. 24, 2009, at A3.

259. Eric Lipton et al., *Review of Jet Bomb Plot Shows More Missed Clues*, N.Y. TIMES, Jan. 18, 2010, at A1 (internal quotation marks omitted).

260. David Johnston & James Risen, *U.S. Had Evidence of Espionage, but F.B.I. Failed to Inspect Itself*, N.Y. TIMES, Feb. 23, 2001, at A1. The FBI failed to identify Hanssen as a Russian spy despite the fact that he was once "caught at F.B.I. headquarters breaking into the computer of Ray Mislock, then a supervisor of a classified unit responsible for Russian counterespionage operations." *Id.*

261. Zachery Kouwe, *In Harsh Reports on S.E.C.'s Fraud Failures, a Watchdog Urges Sweeping Changes*, N.Y. TIMES, Sept. 30, 2009, at B10.

To be clear, I am not suggesting that the odds of a terrorist attack with a WMD are exceedingly low.²⁶² I am saying only that the circumstances in which using LTPD on a U.S. citizen would be required to prevent such an attack are very unlikely to arise. That is, it is very unlikely (1) for the government to know who is a threat; (2) for it to be unable to mount a successful prosecution, to wait to collect more evidence, or to detain him in STPD to interrogate him and/or disrupt an imminent attack; and (3) for the person to be an indispensable cog in WMD-level terrorist plans such that subjecting him to LTPD will prevent an attack that otherwise would have taken place.

In sum, while the AR Model allows theoretical space for subjecting U.S. citizens who are autonomous and accountable to LTPD, this space is unlikely to be occupied in practice unless the conditions for suspending habeas corpus apply. There may be individuals the government rightly suspects of being more or less likely to attempt to commit terrorist acts, but these individuals can almost always be adequately policed as any other criminal suspects are policed.²⁶³

*C. Suspected Terrorists and the Intent to Terrorize*²⁶⁴

The third problem case is that of a U.S. citizen ST who declares his intention to commit terrorist acts but who has not otherwise committed any crime for which he could be punished. It may seem incredible to suggest he must simply be released and policed. If he has *said* he will engage in terrorist acts, then it seems reasonable to say he should be detained. But then it seems the AR Model is mistaken because he cannot be detained under any of the five prongs.

As a model for this person, consider the case of Abdallah Saleh al-Ajmi, a Kuwaiti held in Guantánamo from January 2002 until November 2005.²⁶⁵ An officer at an administrative review board hearing testified: “In August of 2004, Al Ajmi wanted to make sure that . . . the tribunal members know that he is now a jihadist, an enemy combatant

262. See Joyner & Parkhouse, *supra* note 254, at 205 n.4 (discussing the wide range of estimates, from one to fifty percent, given by different experts on the likelihood of a nuclear terrorist attack in the next decade).

263. It may be that the policing of terrorists should be augmented with special liberty restrictions that fall short of LTPD. See *supra* Part II.C.1. How far these restrictions could go without offending the AR Model is beyond the scope of this Article.

264. I address this problem at length in Alec D. 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 (forthcoming 2011).

265. Chandrasekaran, *supra* note 47.

and that he would kill as many Americans as he possibly [sic] can.”²⁶⁶ Al-Ajmi was released in November 2005, and in March 2008 he carried out a suicide bombing mission, killing thirteen Iraqi soldiers and wounding forty-two others.²⁶⁷ Suppose that instead of being a Kuwaiti, al-Ajmi was a U.S. citizen, who would be released not in Kuwait (with easy access to Iraq) but in the United States. Suppose further that there was no evidence of a crime prior to his detention that could be used to convict him. Is it realistic to insist that he be released and policed? Given that policing is not perfect, can the United States really be required to release and police someone who has the stated intention of engaging in terrorism?

The answer to this challenge is that the criminal law could actually be brought to bear on a U.S. analog of al-Ajmi.²⁶⁸ Many overlook this fact,²⁶⁹ but the law of threats would cover his case. It is a crime under U.S. law to threaten to commit terrorist acts.²⁷⁰ The doctrine of threats is, unfortunately, a muddled doctrine, which fails to distinguish completed acts that cause fear or disruption to the victims of threats from inchoate acts that aim to cause fear or disruption and from inchoate crimes not aiming at causing fear or disruption but aiming at carrying out the threatened act. Nonetheless, all three concerns have been embraced by the Supreme Court, which has recognized that the government has three interests in preventing threats: “protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.”²⁷¹

Someone like al-Ajmi is presumably not aiming to cause fear or disruption to those to whom he communicates his threat. He is just announcing, in a tone of defiance, his intention to carry out his threat

266. *Id.* (alteration in original).

267. *Id.*

268. An alternative would be to expand the AR Model to allow detention of anyone who declares his intention to perform illegal acts—or, for privileged combatants, unacceptable acts. One could easily argue that this respects the autonomy of the individual just as much as punitive detention. The problem is that such a model would only allow detention for as long as the person does not declare that he has changed his mind or was only speaking in jest.

269. See, e.g., Morse, *supra* note 5, at 265–66. Morse imagines “a three-time convicted armed robber who threatens, completely believably, to commit a fourth crime.” *Id.* at 265. He concludes that “criminal conviction in the absence of at least attempted crime” would be impossible in this scenario. *Id.* at 266.

270. 18 U.S.C. § 2332b(a)(2) (2006).

271. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). The Court reiterated these interests in *Virginia v. Black*, 538 U.S. 343, 359 (2003).

given the chance.²⁷² Moreover, the idea of prosecuting someone for announcing his intention to commit terrorist acts while in detention is well established in the law. The defendant in *United States v. Parr*²⁷³ was convicted of threatening to use a WMD against a federal government building, in violation of 18 U.S.C. § 2332a.²⁷⁴ Parr communicated his threat to his cellmate in a Wisconsin prison, who then reported it to authorities.²⁷⁵ There is no reason to believe that Parr wanted or expected his cellmate to be personally afraid or to communicate the threat to anyone else. Thus this was not a threat in which the government had any interest in protecting people from fear or disruption. The government's only interest was in preventing the ultimate crime. In other words, the only criminal act Parr could have committed is that of stating his intention to commit a terrorist act.²⁷⁶

One might object that stating one's intention to commit a crime is too far removed from the ultimate crime to count as a legitimate inchoate crime. But there are good reasons to conclude that critique is unsound. First, intentions are not mere thoughts. They are choices that one makes with regard to how one will behave.²⁷⁷ Second, statements of one's intentions are acts. They may not be as close to the final act as the act relied upon by the Model Penal Code for attempts,

272. One might worry that there is a Fifth Amendment problem with prosecuting someone like al-Ajmi for making threats while in detention, given that he was not read his *Miranda* rights while detained in Guantánamo. But the making of a threat is a new crime, not evidence of past crimes. Even if one has not been read one's *Miranda* warning, one can be prosecuted for new crimes—such as making a threat or offering a bribe—committed in detention. See *United States v. Paskett*, 950 F.2d 705, 707 (11th Cir. 1992) (holding that bribes made during custodial interrogation but before *Miranda* warnings are given are admissible when the statement is not made in response to interrogation but is spontaneously volunteered). I am grateful to Julio Navarro for raising this issue to my attention.

273. 545 F.3d 491 (7th Cir. 2008).

274. *Id.* at 493.

275. *Id.* at 494–95.

276. The *Parr* court failed to come to terms with this feature of his case. But, at least one other court has dealt squarely with threats that were mere expressions of the intention to commit the threatened crime. See *United States v. Patillo*, 431 F.2d 293, 297–98 (4th Cir. 1970) (holding that where “a true threat against the person of the President is uttered without communication to the President intended, the threat can form a basis for conviction under the terms of Section 871(a) only if made with a present intention to do injury to the President”).

277. See ALEXANDER ET AL., *supra* note 119, at 200–02 (arguing that formation of an intention is an act in itself but that such intentions should not be considered culpable acts); Alec Walen, *The Doctrine of Illicit Intentions*, 34 PHIL. & PUB. AFF. 39, 47 (2006) (“To form an intention involves more than believing that one has a reason to act in pursuit of some goal. It also involves a kind of choice or decision, that of forming a kind of commitment to act on that reason in pursuit of that goal.”). But see DRESSLER, *supra* note 131, at 379 (treating the intention to commit a crime as a mere thought).

R

R

namely, a substantial step,²⁷⁸ but they serve the same basic function of providing evidence of the intention to commit the completed crime.²⁷⁹ As such, criminalizing threats as inchoate crimes is not fundamentally different from criminalizing any other inchoate crime in which the person has not yet done anything that would constitute a completed crime but has formed and acted on an intention to do something criminal. Third, on a subjectivist model of criminal liability, the model which fundamentally informs the Model Penal Code,²⁸⁰ the key to criminal liability is the choice to flout the criminal law.²⁸¹ This is what one does by forming and expressing the intention to perform terrorist acts.

Of course if the State is to allow freedom of conscience,²⁸² it must allow people to make whatever value judgments they want to make about any acts, even criminal acts. But criminalizing the threat to engage in terrorism—even if one does not aim to cause fear or disruption by communicating the threat—is not the same as creating a thought crime. Again, it is criminalizing a choice to form the intention to commit the crime and to communicate it to others. The Court has long held that “true threats” are not protected by the First Amendment.²⁸³

To convict someone of making a true threat, understood as an inchoate crime, the State would still need to prove beyond a reasonable doubt that the person was expressing a real intention rather than demonstrating his bravado, expressing his fantasies, or venting his rage.²⁸⁴ That would not be an easy case to make. But given evidence dealing with the circumstances of the threat and the character and motive of the speaker, it should be possible to establish such an intent.

278. MODEL PENAL CODE § 5.01 (1985).

279. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW*, § 3.3, at 138 (1978) (“The act of execution is important [only] so far as it verifies the firmness of the [actor’s] intent.”).

280. See DRESSLER, *supra* note 131, at 385.

281. Dressler mistakenly represents the core concern of subjectivists as an actor’s “dangerousness and bad character.” *Id.* These are not choices, and they may not be the basis for punishment.

282. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (stating that the First Amendment freedom of religion includes freedom of conscience).

283. See *Watts v. United States*, 394 U.S. 705, 707–08 (1969).

284. The Court in *Virginia v. Black*, 538 U.S. 343 (2003), specifically did *not* endorse the intent to commit a crime mens rea requirement but instead suggested that the State must prove only that the defendant specifically intended “to communicate a serious expression of an intent to commit an act of unlawful violence.” *Id.* at 359. A defendant could have such an intention even if he faked having the intention to commit an act of unlawful violence. But the Court in *Black* was dealing with a case of intimidation—a case in which the fundamental concern was causing fear and disruption—and did not distinguish between the different types of threats.

The same challenge would confront military authorities trying to decide whether to continue to detain a particular detainee who expresses himself as al-Ajmi did. The burden of proof is higher for a criminal case, but the higher standard is appropriate as long as the State's capacity to police him, should he not be convicted, is adequately present.

V. CONCLUSION

Subjecting an autonomous person to LTPD is deeply problematic. If he can be held adequately accountable for his actions, then suspicion that he intends to take actions that will cause unlawful harm to others may justify STPD to disrupt any plots he may be part of and to ensure more generally that he does not inflict such a harm. But if the State cannot prove, at a criminal trial, that he has such an intention, then LTPD exacts too great a cost from him and is inconsistent with respecting his dignity as an autonomous and accountable person. Such disrespect for the dignity of the individual is unjustifiable in a liberal society.

This Article does not cover all the moral issues that concern LTPD. I have said almost nothing about the procedures that should be used to prove that someone *can* justifiably be subjected to LTPD. While many others have focused on these procedural issues,²⁸⁵ no one has provided an in depth analysis of what, in a liberal society, could justify detention in the first place. Others have argued in one of two ways. Some argue by analogy to established practices of LTPD.²⁸⁶ This is helpful as a first step, but moral philosophy and legal practice cannot rest there. Others have adopted a fundamentally utilitarian framework,²⁸⁷ but this is inadequate for a liberal society because it does not appropriately account for the need to respect the dignity of autonomous individuals.

The AR Model fills a gap by providing a coherent account of all arguably defensible practices of detention, meaning those that respect the dignity of the individual. It does so by distinguishing those who are autonomous and accountable from those who are not. Those who are autonomous and accountable can be subject to detention for only three reasons: (1) the just punishment for their crime calls for either

285. See, e.g., Chesney & Goldsmith, *supra* note 9; Hakimi, *supra* note 9.

286. See generally, e.g., WITTES, *supra* note 5 (drawing on many different practices of LTPD); see also George J. Terwilliger, III, "Domestic Unlawful Combatants": A Proposal to Adjudicate Constitutional Detentions, ENGAGE, Oct. 2006, at 55, 58 (2006) (analogizing from the treatment of the mentally ill).

287. See *supra* note 5 (listing authors who take a fundamentally utilitarian approach).

punitive detention or loss of the right not to be subject to LTPD; (2) the detention is short term; or (3) the detention enforces a duty that they independently have not to interact with others. With regard to those who are not autonomous and accountable, either intrinsically or extrinsically, the AR Model holds that they can be subject to LTPD because the prospect of holding them accountable for wrongful (or, in the case of POWs, unacceptable) choices is either not an option at all or is not adequately available as an option.

Importantly, the AR Model has a critical and jurigenerative dimension. In particular, it provides guidance for developing more defensible and coherent policies with regard to LTPD for STs. The AR Model does not provide a simple formula for determining when an ST can be subject to LTPD. Rather, it provides a framework for thinking about that question. Reasonable people will still surely disagree about how to apply this framework. But the AR Model should narrow the gap between such people by helping them to agree on the relevant questions.

I end therefore with a brief review of the relevant questions. For a given ST, we should ask: (1) Has he been convicted of a crime a part of the punishment for which is loss (for some period of time) of the right not to be subjected to LTPD? (2) Does the State have an obligation to release and police him, or is some other state willing to take responsibility for him? (3) If released, can he be adequately policed by the detaining power or by another state?

If the answer to the first question is yes, then LTPD may be justifiable, as long as the danger to the community outweighs the harm to the detainee. If the answer to the first question is no, then move on to the second question. If the answer to the second question is no, then LTPD may be justifiable, as long as the danger to the community outweighs the harm to the detainee. If the answer to the second question is yes, then move on to the third question. If the answer to the third question is yes, then LTPD is not justifiable. If the answer to the third question is no, then LTPD may be justifiable, as long as the danger to the community outweighs the harm to the detainee.