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Preventive Detention, Character Evidence, and the New Criminal Law

Ted Sampsell-Jones
Mitchell Hamline School of Law, ted.sampselljones@mitchellhamline.edu

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Abstract
A new criminal law has emerged in the last quarter century. The dominant goal of the new criminal law is preventive detention-incarceration to incapacitate dangerous persons. The emergence of the new criminal law has remade both sentencing law and definitions of crimes themselves. The new criminal law has also begun to remake the law of evidence. As incapacitation has become an accepted goal of criminal punishment, the rationale of the character rule has become less compelling, and the rule itself has begun to wane in criminal practice. These changes have been subtle, but they have also been both radical and fairly rapid. There is no indication that the law will reverse course. Indeed, the law's response to the threat of terrorism has only accelerated the move toward the new criminal law. In coming years, the Supreme Court will be forced to address a variety of difficult constitutional questions that the new criminal law presents. Ironically, the safest solution may be to embrace preventive detention as an accepted function of the criminal law. Doing so would alter the Supreme Court doctrines which distinguish the civil from the criminal-doctrines that limit the reach of the Bill of Rights. The procedural protections guaranteed by the Bill of Rights should be extended to more citizens faced with incarceration regardless of whether the purpose of incarceration is incapacitation rather than punishment or deterrence. As the new criminal law remakes the American justice system, the Court must recognize that preventive detention is now a core function of the criminal law. That recognition will have the counterintuitive effect of expanding the constitutional protections given to citizens facing imprisonment.

Keywords
preventive detention, incarceration, imprisonment, character evidence, Bill of Rights

Disciplines
Constitutional Law | Criminal Law

PREVENTIVE DETENTION, CHARACTER EVIDENCE, AND THE NEW CRIMINAL LAW

Ted Sampsell-Jones[*]

I. INTRODUCTION

The criminal law is changing in a profound way. Anglo-American criminal law has traditionally focused on deterring and punishing discrete acts of misconduct. In the last few decades, however, American criminal law has shifted its focus from deviant acts to dangerous individuals. Incapacitation, which once played only a peripheral role in the criminal law, has moved to center stage. To a substantial extent, it has supplanted the two formerly dominant theories of punishment—deterrence and retribution. This dramatic change has been noted, often with some dread, by both legal scholars[1] and sociologists.[2]

The shift toward preventive detention has also begun to remake the law of criminal evidence. As the criminal law increasingly focuses on the characteristics of the offender rather than the characteristics of the offense, evidence law is bending to allow juries access to more information about a defendant's personality and personal history, especially his or her criminal history. In other words, as the criminal law focuses increasingly on the incapacitation of dangerous individuals rather than the deterrence and punishment of dangerous acts, the character evidence rule is giving way. While evidence scholars have noted the decline in the character evidence rule for some time,[3] they have typically explained the decline by reference to competing personality theories in psychology. But the true reason for the decline has less to do with any shifts in prevailing personality theories than

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 Associate Professor of Law, William Mitchell College of Law. Thanks to David Fontana and Gregory Duhl for their comments on earlier drafts. Thanks to Craig Smith and Jenna Yauch for their research assistance.

[1] *See generally* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007); FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME (1995); Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321 (2008); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121 (2005).

[2] *See generally* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990 (1993); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992).

[3] *See* Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, The Doctrine of Chances*, 40 U. RICH. L. REV. 419, 423 (2006); Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 512 n.176 (1996); Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CALIF. L. REV. 2437, 2467–70 (2000).

it does with the more fundamental shift in the substantive criminal law—the shift toward preventive detention.[4]

These changes in the criminal law and the law of evidence have important constitutional implications. In coming years, courts will likely be faced with increasing constitutional challenges to both substantive laws aimed at preventive detention and evidence rules used to admit character evidence. These challenges, which will necessarily be grounded in the slippery world of substantive due process, are unlikely to gain much traction. For both criminal and civil forms of detention, the Supreme Court has held that detention may not be based on dangerousness alone—some additional finding is required.[5] But this "dangerousness plus" formulation has been easily evaded by legislatures, and there is no realistic way to stop the evasions. Constitutional law does not, and cannot, impose meaningful substantive limits on the state's ability to incapacitate dangerous individuals.

But the shift toward preventive detention in the criminal law will force the Supreme Court to reconsider what procedural protections are required when incapacitation is the basis for incarceration. In the past, the Supreme Court has attempted to define a line between criminal and civil laws that depends on maintaining the traditional theories of punishment.[6] The Court has suggested that criminal law is paradigmatically about deterrence and punishment, while preventive detention is civil in nature.[7] But as criminal law has embraced and absorbed the function of preventive detention, the Court's distinction has come to seem increasingly fictional. Its jurisprudence in the area has already been destabilized, and the foundation will erode further in the coming years. The Court should allow the façade to fall.[8]

Jack Balkin recently discussed the rise of the "National Surveillance State," largely in the context of the federal government's war on terrorism.[9] He argued that the rise of the National Surveillance State poses several dangers: first, "that

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[4] *See infra* notes 91–93 and accompanying text.

[5] *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (holding that an individual found not guilty by reason of insanity cannot be confined unless they are both (1) mentally ill and (2) dangerous); Robinson v. California, 370 U.S. 660, 666–67 (1962) (holding that criminal punishments cannot be imposed for mere status or involuntary acts).

[6] *See* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 819 (1997); Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 81–82 (1996).

[7] *See, e.g.*, Addington v. Texas, 441 U.S. 418, 428 (1979); Allen v. Illinois, 478 U.S. 364, 368–69 (1986).

[8] Somewhat ironically, the increasing use of preventive detention in criminal law means that those subject to detention currently deemed "civil" would be entitled to greater procedural protections—the same protections that criminal defendants are afforded.

[9] Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1 (2008).

government will create a parallel track of preventative law enforcement that routes around the traditional guarantees of the Bill of Rights," and second, "that traditional law enforcement and social services will increasingly resemble the parallel track."[10] In fact, both issues have been developing in American criminal law for a quarter century, and have only been accelerated by the war on terrorism.

Once rejected as incompatible with American norms of criminal justice, preventive detention is now becoming an accepted feature of the criminal law.[11] Its acceptance has changed both the substantive criminal law and the law of evidence. In light of this trend, is time for the Supreme Court to recognize the change and alter its jurisprudence accordingly.

II. THE RISE OF PREVENTIVE DETENTION AND THE DECLINE OF THE CHARACTER EVIDENCE RULE

Over the last several decades, the theory animating American criminal law has changed dramatically. The "traditional" rationales of retribution and deterrence have given way to incapacitation.[12] That underlying conceptual shift has produced myriad concrete reforms in the substantive criminal law and the law of evidence.

A. Preventive Detention in the Substantive Criminal Law

The use of preventive detention has grown in both criminal and quasi-criminal legal systems. In quasi-criminal systems, which are currently denominated "civil" by the Supreme Court,[13] American law has recently developed or expanded legal institutions that employ preventive detention openly. The most widely used of these is the system of civil commitments for sexual offenders, which often result in the incarceration of an offender after he has completed his criminal sentence.[14] To some extent, the civil commitment system resembles the older systems of institutionalization of the mentally ill.[15] But civil commitments of sex offenders

[10] *Id.* at 15–16.

[11] Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 1–3 (2003); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429 (2001) ("[D]uring the past several decades, the justice system's focus has shifted from punishing past crimes to preventing future violations through the incarceration and control of dangerous offenders.").

[12] *See* HARCOURT, *supra* note 1, at 32–34; ZIMRING & HAWKINS, *supra* note 1, at 3.

[13] *See infra* Part IV.

[14] *See generally* United States v. Comstock, 130 S. Ct. 1949 (2010) (concluding that Congress has the power under the Necessary and Proper Clause to create a federal civil commitment regime); ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE (2006).

[15] Raquel Blacher, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 897 (1995).

resemble criminal punishment in that incarceration is usually dependent on some initial finding of criminal liability and offenders are typically detained in prison.[16]

Some jurisdictions also use short-term preventive detention for cases of domestic violence.[17] As with civil commitments, the Supreme Court has upheld the constitutionality of such systems.[18] Finally, and most recently, the federal government has begun the creation of a system of preventive detention for suspected and potential terrorists.[19] The Supreme Court has held the indefinite preventive detention of citizens labeled as enemy combatants is lawful, although it also found that due process requires procedural safeguards for this type of incapacitation to be constitutional.[20]

But even within the criminal law proper, where preventive detention is less openly espoused, there are several areas where the theory of selective incapacitation has reshaped the law. First and foremost, incapacitation has reshaped sentencing.[21] To a substantial and increasing extent, the length of a defendant's sentence is a function of his criminal history rather than being solely dependent on his discrete offense.[22]

Nearly all American jurisdictions now have some form of a "Three Strikes" sentencing law.[23] These laws have exploded in popularity in the last two decades.[24] A jurisdiction-by-jurisdiction list of statutes is attached as Appendix A. These

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[16] Peter C. Pfaffenroth, *The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of* Kansas v. Crane, 55 STAN. L. REV. 2229, 2239–42 (2003).

[17] *See, e.g.*, 18 U.S.C. § 3142(e) (2006); 725 ILL. COMP. STAT. 5/110-6.3 (2009); MASS. GEN. LAWS ch. 276, § 58 (2008).

[18] *See, e.g.*, United States v. Salerno, 481 U.S. 739, 741 (1987).

[19] Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1881 (2004); Yung Tin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 155–56 (2005) (proposing a noncriminal system of detention analogous to procedures for pretrial detention for dangerousness, quarantine, and civil commitment).

[20] Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).

[21] *See* HARCOURT, *supra* note 1, at 96; *see also* Carissa Byrne Hessick & Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 98 CALIF. L. REV. (forthcoming 2010) ("Because most criminal defendants plead guilty rather than proceeding to trial, sentencing has become the most important judicial phase of the criminal justice system for determining the punishment a defendant will receive.").

[22] *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2009); *see also* Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1110–11 ("At sentencing, prior convictions are not only considered relevant to determine the proper punishment, but are treated as one of the most important pieces of sentencing information.").

[23] *See infra* Appendix A.

[24] Almost two-thirds of the "Three Strikes" laws have been passed since 1990. *See generally infra* Appendix A; Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1 (1998).

laws, many of which were passed during the 1990s,[25] impose punishments based primarily on criminal history rather than the present offense.[26] Many such laws impose massive punishments even where the present offense is relatively minor.[27] In such cases, lengthy incarceration is said to be justified not by any need to punish or deter the offense, but rather by the need to incapacitate the offender.[28]

Even where special recidivism statutes do not apply, sentencing is largely a function of criminal history.[29] Guideline systems, first used in the 1980s, rely heavily on criminal history scores in setting punishment.[30] Since they were first enacted, some have been amended to make criminal history weigh even more heavily. And in more indeterminate sentencing systems, a judge's sentencing discretion is often guided by some sort of parole department report, which tends to rely heavily on criminal history in making recommendations.[31] Criminal history functions mostly as a proxy for dangerousness, on the assumption that past behavior is a good predictor of future criminality.[32] The emphasis on criminal history in sentencing reflects the growing influence of incapacitation rationales.[33]

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[25] For an older overview of legislative changes during the 1990s, see John Clark et al., *"Three Strikes and You're Out": A Review of State Legislation*, NAT'L INST. JUST.: RES. BRIEF (U.S. Dep't of Justice, Office of Justice Programs, Washington, D.C.), Sept. 2007, at 1, 9–10, *available at* http://www.ncjrs.gov/pdffiles/165369.pdf.

[26] For instance in Vermont, judges have the discretion to sentence a defendant to life in prison upon a third felony conviction for a crime of violence when the defendant has two previous violent crime convictions. VT. STAT. ANN. tit. 13, § 11 (1995). In Connecticut judges look for "persistent dangerous felony offender[s]" for application of their three strikes law. CONN. GEN. STAT. § 53a-40 (2008).

[27] *See generally* Lockyer v. Andrade, 538 U.S. 63 (2003) (sentencing defendant to two consecutive terms of twenty-five years to life for stealing $150 worth of video tapes); Ewing v. California, 538 U.S. 11 (2003) (sentencing defendant to a term of twenty-five years to life for stealing three golf clubs from a country club).

[28] *See generally* FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001) (noting that California's Three Strikes law was justified both by arguments of incapacitation and deterrence).

[29] *See generally* MICHAEL TONRY, SENTENCING MATTERS (1996); 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 83–87 (Alfred Blumstein et al. eds., 1983).

[30] *See* Markus D. Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 711 (1995); Michael E. O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. REV. 291, 305 n.52 (2001); *see generally* Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303 (1997).

[31] *See generally* Sharon M. Bunzel, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933 (1995).

[32] Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1216 (1985); Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 590–91 (2003).

[33] *See* Michael H. Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link*, 1 OHIO ST. J. CRIM. L. 671, 675–76 (2004) (arguing that while many academics disparage incapacitation, "[i]t is appropriate to impose a sentence on an offender convicted of a serious crime based on a risk of serious future victimization").

Prison release practices also reflect, even more obviously, a focus on selective incapacitation and preventive detention. The use of parole-based systems has declined dramatically in American law,[34] but actual release dates remain flexible, and partly discretionary, in some jurisdictions.[35] Officials may release some prisoners but not others, and in making that choice, they attempt to release those least likely to re-offend. Once again, predictions are often mostly based on a prisoner's criminal history.[36] Once again, past acts justify preventive detention.

The increased focus on recidivism has affected not just the institutions that determine the extent of liability, but also those that determine the initial fact of liability. Aside from the deterioration of the character evidence rule, there are other ways that offender-based information has infiltrated criminal trials.

Substantive criminal statutes increasingly define liability, in part, based on a defendant's past. Traditionally there have been some crimes based in part on a criminal's past status—such as crimes for felons possessing firearms.[37] More recently, however, legislatures have created novel crimes based partly on history or patterns of behavior. In the late 1990s, federal homicide laws were amended to define a new species of murder: homicide after a pattern of child abuse.[38] Several states have followed suit, and more are considering doing the same.[39] Some jurisdictions created similar provisions for homicides involving a past pattern of domestic abuse.[40]

Child abuse, domestic abuse, and elder abuse statutes themselves often define crimes not simply in terms of discrete acts, but rather in terms of repeated patterns of behavior.[41] In recent years, such statutes have been passed or amended to increase penalties. Prosecution of such crimes involves evidence not just of a single discrete crime but also of some history of behavior.[42] It thus invites, or even requires, the jury to focus more on the defendant and his personality than on a single instance of conduct.

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[34] KATE STITH & JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 1–2 (1998); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1360 (2008).

[35] *See generally* Jennifer M. McKinney, *Washington State's Return to Indeterminate Sentencing for Sex Offenses: Correcting Past Sentencing Mistakes and Preventing Future Harm*, 26 SEATTLE U. L. REV. 309 (2002) (discussing Washington's use of indeterminate sentencing and preventive detention for sex offenders).

[36] *See* HARCOURT, *supra* note 1, at 47–76 (discussing how criminal history scores came to play an increasing role in parole decisions).

[37] 18 U.S.C. § 922(g)(1) (2006).

[38] *See* 18 U.S.C. § 1111(a).

[39] *See* DEL. CODE ANN. tit. 11, § 633(a)(2) (1999); MINN. STAT. § 609.185(a)(5) (2005); OR. REV. STAT. § 163.115(c)(A) (2010); WASH. REV. CODE § 9A.32.055 (1987); *see also* S.B. 1093, 106th Gen. Assemb., Reg. Sess. (Tenn. 2009).

[40] MINN. STAT. § 609.185(a)(6).

[41] *See, e.g.*, COLO. REV. STAT. § 18-6-401 (2009).

[42] *See, e.g.*, People v. Hamlin, 89 Cal. Rptr. 3d 402, 417 (2009) (discussing "course of conduct" crimes such as child abuse).

Finally, new norms of preventive detention have also altered traditional concepts of excuse and responsibility. Traditionally, the criminal law excused the acts of some defendants, such as children and the insane, who lacked full adult mental capacities.[43] Punishment was withheld because such offenders were nondeterrable and undeserving of the moral condemnation that attends retribution.[44] But even if deterrence and retribution cannot justify incarceration of subadult offenders, incapacitation can. And as the criminal law has embraced incapacitation, it has also expanded to cover more of the deviants who were formerly in separate legal systems—systems designed solely for juveniles and the mentally ill. In the last few decades, nearly all American jurisdictions have expanded criminal liability for juvenile offenders,[45] and many have also narrowed or abolished the insanity defense.[46]

These changes all demonstrate the increasing extent to which incapacitation is a primary theory animating the criminal law.[47] Of course, the case should not be overstated. Incapacitation has always played some role, and the traditionally dominant theories of deterrence and retribution still play an important role today. But in the last few decades, incapacitation has risen dramatically in importance, and its ascendance continues.

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[43] *See* Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 262–63 (1987).

[44] *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 160–62 (J. Burns & H.L.A. Hart eds., 1970); H.L.A. HART, *Legal Responsibility and Excuses*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28, 41–43 (1968).

[45] *See* BARRY FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 189–244 (1999); PATRICIA TORBET ET AL., U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME, at xii (1996), *available at* http://www.ncjrs.gov/pdffiles/statresp.pdf; Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 722–25 (1991); *see generally* DEAN J. CHAMPION & G. LARRY MAYS, TRANSFERRING JUVENILES TO CRIMINAL COURTS: TRENDS AND IMPLICATIONS FOR CRIMINAL JUSTICE (1991); Eric L. Jensen, *The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change*, 31 IDAHO L. REV. 173 (1994); David Yellen, *What Juvenile Court Abolitionists Can Learn From the Failures of Sentencing Reform*, 1996 WIS. L. REV. 577.

[46] HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 13–15, 149–50 (1993); Michael L. Perlin, *"The Borderline Which Separated You From Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1376–77 (1997); *see* Act of Mar. 14, 1996, ch. 225, § 1, 1996 Idaho Sess. Laws 737, 737 (codified at IDAHO CODE ANN. § 18-207 (2004)); Act of May 13, 1995, ch. 251, § 20, 1995 Kan. Sess. Laws 1187, 1213–14 (codified at KAN. STAT. ANN. § 22-3220 (2007)); Act of May 17, 1991, ch. 800, § 150, 1991 Mont. Laws 3011, 3074 (codified at MONT. CODE ANN. § 46-14-102 (2009)); Act of Feb. 4, 1999, ch. 2, § 1, 1999 Utah Laws 2, 2 (codified at UTAH CODE ANN. § 76-2-305 (2004)).

[47] It is now routine for modern commentators to refer to incapacitation as one of several (typically four) primary theories of punishment. *See, e.g.*, Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1543–44 (2009).

One possible reason for its rise relates to the decline of institutions for the mentally ill. As Bernard Harcourt has shown, while the American prison population rose dramatically in the late twentieth century, the overall level of forced confinement remained fairly stable.[48] The prison population rose, in other words, as the mental institution population fell. To some extent, the criminal justice system was forced to take in the class of people who were formerly handled by the mental health system.[49] The criminal law adapted to this change by shifting its focus to incapacitation.

Another possible reason relates to the resurgence of trait theory and related social science. The theory behind actuarial methods of punishment had its origins in the Progressive Era of the 1920s, and it experienced a massive resurgence in the late twentieth century.[50] As Harcourt says, the use of actuarial methods rose exponentially.[51] These changes were fueled in part by a new body of social science research suggesting that crime could be reduced by employing new methods to predict future criminality.[52] Whatever the underlying reasons, the political demand for increased use of preventive detention of dangerous persons has produced a variety of legal reforms that have altered the shape of the criminal justice system.

B. The Decline of the Character Evidence Rule

The rise of preventive detention has also begun to alter one of the most fundamental features of criminal evidence law: the character evidence rule.[53] As incapacitation has risen in prominence, the character evidence rule has declined. The story of its decline is by no means straightforward, in part because the character evidence rule has a long and somewhat confused history in criminal trials.[54] Its rationale has shifted over time, and its acceptance by judges has ebbed and flowed. It is not the case that there was, at any point, a golden age where the

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[48] HARCOURT, *supra* note 1, at 166–68.

[49] Paul F. Stavis, *Why Prisons Are Brim-Full of the Mentally Ill: Is Their Incarceration a Solution or a Sign of Failure?*, 11 GEO. MASON U. C.R. L.J. 157, 157–58, 202 (2000) (identifying a direct relationship between the closing of mental institutions over the last forty years and the corresponding increase of the mentally ill in the prison population).

[50] Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 513–16 (1991).

[51] HARCOURT, *supra* note 1, at 16, 77.

[52] *See* Thomas R. Litwack, *Actuarial Versus Clinical Assessments of Dangerousness*, 7 PSYCHOL. PUB. POL'Y & L. 409, 409 (2001).

[53] The rule, which dates back several centuries, is now codified in Federal Rule of Evidence 404 and similar state rules.

[54] *See* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 190–203 (2003); Colin Miller, *Impeachable Offenses?: Why Civil Parties in Quasi-Criminal Cases Should Be Treated Like Criminal Defendants Under the Felony Impeachment Rule*, 36 PEPP. L. REV. 997, 1002–04 (2009); Thomas J. Reed, *Trial By Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 716–18 (1981).

character evidence rule was either well-understood or rigorously enforced.[55] The story of its decline has no straightforward linear narrative.

Nonetheless, the recent history is a history of decline.[56] Legislatures have created several new exceptions to the rule, and judges have interpreted the rule in a way that allows the admission of a great deal of character evidence. Evidence law scholars have noted the rule's decline, and a few have even called for its outright repeal.[57] During the Reagan administration, the Department of Justice also called for its abolition.[58] While proposals for total repeal have gained little traction, the rule has been besieged by a series of smaller, incremental acts of reform.

The most obvious of the recent narrowing reforms are the explicit exceptions for sex cases. In 1994, Congress circumvented the normal rulemaking process to add Rules 413, 414, and 415, which allow character evidence against defendants in cases of sexual assault and child molestation.[59] Despite the objections of academic commentators, several states—including California—followed suit.[60] More states are considering similar exceptions; for instance, Alaska and California have also

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[55] *See* Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 988–89, 1033–34 (1938) (discussing the inconsistencies in then-current doctrine of the character evidence rule).

[56] *See* Steven K. Erickson, *The Myth of Mental Disorder: Transsubstantive Behavior and Taxometric Psychiatry*, 41 AKRON L. REV. 67, 74 n.31 (2008) (noting the ongoing erosion of the character prohibition); Imwinkelried, *supra* note 3, at 423 ("Paradoxically, in the past decade, the tables have turned. The character evidence prohibition is no longer considered sacrosanct."); Mosteller, *supra* note 3, at 512 n.176 ("We may have seen the beginning of the end of the character rules as they have been understood for most of this nation's history."); Swift, *supra* note 3, at 2468–71 (discussing various doctrines that have loosened the strictures of the character prohibition).

[57] David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 35 (1994); Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1620–26 (1998); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 890 (1982) ("[C]haracter evidence cannot and should not be banished from the field of proof.").

[58] *See* OFFICE OF LEGAL POL'Y, REPORT TO THE ATTORNEY GENERAL ON THE ADMISSION OF CRIMINAL HISTORIES AT TRIAL: 'TRUTH IN CRIMINAL JUSTICE' REPORT NO. 4 (1986), *reprinted in* 22 U. MICH. J.L. REFORM 707, 709–10 (1989); William P. Barr, *"Combating Violent Crime: 24 Recommendations to Strengthen Criminal Justice": Recommendations for State Criminal Justice Systems*, 51 CRIM. L. REP. 2315, 2326 (1992) (noting that the Attorney General's Recommendation 13 suggested ways to "[r]eform evidentiary rules to enhance the truth-seeking function of the criminal trial").

[59] *See* FED. R. EVID. 413–15 (enacted as part of Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(a), 108 Stat. 1796, 2135–37 (1994)).

[60] ARIZ REV. STAT. ANN. § 13-1420 (2010); ARK. CODE ANN. § 16-42-103 (Supp. 2007); CAL. EVID. CODE § 1108 (West 2009); FLA. STAT. ANN. § 90.404(2)(b) (West Supp. 2010); 725 ILL. COMP. STAT. ANN. 5/115-7.3 (West 2008); IND. CODE ANN. § 35-37-4-15 (LexisNexis 1998); LA. CODE EVID. ANN. art. 412.2 (2006); ALASKA R. EVID. 404(b)(2)–(3).

created similar exceptions for cases of domestic violence.[61] In addition, the Federal Rules of Evidence have been amended to limit the scope of the character prohibition. In 2000, Rule 404(a)(1) was amended to provide that when a defendant attacks a victim's character, the prosecution may respond with an attack on the defendant's character.[62]

In addition to the explicit limitations created by legislatures, courts have weakened the character evidence rules in several less obvious ways. First, the growing acceptance of syndrome evidence has allowed a sort of backdoor entry for character evidence.[63] When the jury hears evidence that an accuser may suffer from Battered Women's Syndrome, for example, it is only a small inferential leap to the conclusion that the defendant has committed not just the charged act but also a series of past crimes. Syndrome evidence was once widely excluded, but in the last two decades, courts have begun to admit it freely.[64] Along with syndrome evidence, some courts have even begun to admit profile evidence, which is in essence the flip side of the same coin.[65]

Second, liberal interpretations of Rule 609(a)(1) have led to the widespread admission of prior crimes for impeachment.[66] When it was passed, Rule 609(a)(1) was a compromise between extreme positions of categorical admission and categorical exclusion of prior felonies—the rule sought to admit some and exclude others based on a probative-prejudice balancing test.[67] In practice, however, courts have tilted the scale in favor of admission.[68] Of course, in theory, such evidence is admitted only to show character for truthfulness and not to show other character traits,[69] but it is doubtful that juries are able to cabin relevance in the way that the rule demands.[70]

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[61] CAL. EVID. CODE § 1109 (West 2009); ALASKA R. EVID. 404(b)(4).

[62] *See* FED. R. EVID. 404 advisory committee's note.

[63] *See* Mosteller, *supra* note 3, at 463–65 (discussing how certain uses of syndrome evidence are essentially "group character" evidence).

[64] *See id.* at 486–91 (discussing the recent trends toward admissibility of syndrome evidence, especially Battered Women's Syndrome evidence).

[65] *See, e.g.*, United States v. Romero, 189 F.3d 576, 587 (7th Cir. 1999) (upholding the admission of child molester profile evidence against the defendant).

[66] *See* Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants With Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 293 (2008).

[67] 1 MCCORMICK ON EVIDENCE § 42, at 186 (Kenneth S. Broun ed., 6th ed. 2006) ("The Federal Rule governing impeachment by proof of conviction of crime is the product of compromise.").

[68] *See* Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 10, 12 (1999); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 EMORY L.J. 135, 145, 196–200 (1989).

[69] United States v. Harding, 525 F.2d 84, 89 (7th Cir. 1975) (Stevens, J.).

[70] H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 790–92 (1993); *see also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 6.29, at 492 (3d ed. 2003) (discussing the

Third, and most importantly, courts have accepted expansive interpretations of the "other purposes" doctrines of Rule 404(b).[71] To be sure, the line between the impermissible propensity inference and other permissible inferences has always been hazy, to say the least.[72] Prior to the enactment of the rules, courts often interpreted the "other purposes" doctrines broadly to admit evidence of prior crimes.[73] Since the passage of the rules, however, courts have expanded those doctrines of admissibility even further, and thus contracted the basic rule of exclusion. Courts have, for example, expanded the plan doctrine to adopt what Professor Imwinkelried has called the "unlinked act" theory.[74] In 1994, reversing a previous ruling, the California Supreme Court effectively adopted the unlinked plan theory.[75] Several other states have done the same. Courts have also revived the "doctrine of chances" to admit evidence of other crimes to show a defendant's mental state.[76]

For these reasons and others, evidence scholars generally agree that the character evidence rule is declining.[77] But there is less agreement, or even discussion, about the reason for its decline. The simple answer would be to say that courts and legislatures find the rationale for the character evidence rule less compelling than they once did. But that answer begs the question: *which* rationale?

When the character evidence rule developed in the seventeenth and eighteenth centuries, it was justified primarily by concerns of notice and surprise.[78] With the development of modern pleading and discovery standards, however, those concerns largely evaporated. The rule, in a sense, went searching for a new

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difficulties with Rule 609 impeachment and relevancy); Alan D. Hornstein, *Between* Rock *and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 3–4, 9 (1997) (same); Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes* 4–7 (Cornell Legal Studies, Research Paper No. 07-012, 2007), *available at* http://ssrn.com/abstract=998529 (summarizing social science literature demonstrating that jurors routinely misuse Rule 609 evidence as general propensity evidence rather than just evidence on truthfulness).

[71] *See* Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 228, 233–34, 248 (2005); Susan Stuart, *Evidentiary Use of Other Crime Evidence: A Survey of Recent Trends in Criminal Procedure*, 20 IND. L. REV. 183, 197–98 (1987); Swift, *supra* note 3, at 2470–71 (2000).

[72] *See* Ordover, *supra* note 68, at 135–36; Stone, *supra* note 55, at 1005–06.

[73] *See* M.C. Slough & J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 327 (1956), *cited in* FED. R. EVID. 404 advisory committee's note.

[74] 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 3:24 (2006) (criticizing the "unlinked act" doctrine).

[75] Miguel A. Méndez & Edward J. Imwinkelried, People v. Ewoldt*: The California Supreme Court's About-Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 28 LOY. L.A. L. REV. 473, 479, 490–92 (1995).

[76] Imwinkelried, *supra* note 3, at 422–23.

[77] *See id.* at 423.

[78] LANGBEIN, *supra* note 54, at 190–91 (2003).

rationale.[79] It found two: (1) the risk that juries would overweigh the propensity inference, and (2) the risk that juries would engage in preventive detention.[80]

The Supreme Court described the two modern rationales in *Old Chief v. United States*:

> Such improper grounds certainly include the one that [the defendant] points to here: generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily). As then-Judge Breyer put it, "Although . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance."[81]

The two modern rationales are related but still quite distinct. The propensity rationale is based on a concern that juries will find the defendant guilty of the discrete charged act, but that they will do so relying too heavily on the inference that because he did something bad in the past, he probably did this as well. The preventive detention rationale, by contrast, is based on a concern that juries will return a guilty verdict in order to incapacitate the defendant regardless of whether he actually committed the discrete charged act. As Roger Park explained, the former concern is that juries will find guilt for the wrong reasons, while the latter concern is that jurors will convict without actually finding guilt.[82]

Most debates about the normative validity of the character evidence rule focus on the propensity rationale. These debates are often informed by personality theories drawn from the field of psychology.[83] Trait theory suggests that people generally act in accordance with personality traits,[84] while situationism suggests

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[79] *Cf.* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1339–46 (2000) (discussing the evolving justifications for homosexual sodomy laws); Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, 75 U. CIN. L. REV. 87, 141–43 (2006) (discussing and critiquing the Supreme Court's shifting rhetoric on colorblindness).

[80] 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 194 (1904).

[81] Old Chief v. United States, 519 U.S. 172, 180–81 (1997) (quoting United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982)).

[82] Roger C. Park, *Character Evidence Issues in the O.J. Simpson Case—Or, Rationales of the Character Evidence Ban, with Illustrations from the Simpson Case*, 67 U. COLO. L. REV. 747, 767–71 (1996).

[83] *See* Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1239–41 (2001).

[84] *See* GORDON W. ALLPORT, PERSONALITY: A PSYCHOLOGICAL INTERPRETATION 287, 330–32 (1937); *see also* H.J. EYSENCK, THE STRUCTURE OF HUMAN PERSONALITY 3 (3d. ed. 1970) (describing trait theory).

that people generally act in response to external stimuli.[85] Interactionism is a dialectical middle ground.[86] These psychological theories have played an important role in the evidence law literature. Indeed, it is not an exaggeration to say that the psychological literature has dominated the legal academic debate about the normative validity of the character evidence rule for the last twenty-five years.[87]

Situationism in psychology lends support to the character prohibition in evidence law. Situationism probably reached its apex of influence in the late 1970s or early 1980s; it has since ebbed.[88] It makes some sense that the character evidence prohibition would decline as situationism declined.

But as an explanation for the decline of the character evidence rule, the rise of trait theory is not entirely satisfying. First, it is doubtful whether most legislators and judges are aware of the differences between trait theory and situationism. Perhaps some ambient acceptance of trait theory has filtered throughout society, but there no empirical evidence to support (or refute) such a claim. Second, the character evidence rule is said to be justified not by the risk that jurors will rely on the propensity inference, but rather by the risk that jurors will *overweigh* the propensity inference. Nearly everyone admits that the propensity inference is valid to some extent.[89] The concern is that lay jurors believe the inference is more valid than it actually is.[90] If ambient acceptance of trait theory has spread beyond the

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[85] WALTER MISCHEL, PERSONALITY AND ASSESSMENT 177 (1968).

[86] *See* LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY, at xiv (1991); Walter Mischel & Yuichi Shoda, *A Cognitive-Affective System Theory of Personality: Reconceptualizing Situations, Dispositions, Dynamics, and Invariance in Personality Structure*, 102 PSYCHOL. REV. 246, 259–60 (1995).

[87] *See, e.g.*, David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 561–62 (1994); David Crump, *How Should We Treat Character Evidence Offered to Prove Conduct?*, 58 U. COLO. L. REV. 279, 282–84 (1987); Davies, *supra* note 50, at 513–23; Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 745–47 (2008); Miguel Angel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1005, 1050–60 (1984); Miguel A. Méndez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 234 (1996); Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 146–56 (1993); Charles H. Rose III, *Caging the Beast: Formulating Effective Evidentiary Rules to Deal with Sexual Offenders*, 34 AM. J. CRIM. L. 1, 16–18 (2006).

[88] *See* Sanchirico, *supra* note 83, at 1240.

[89] *E.g.*, Michelson v. United States, 335 U.S. 469, 475–76 (1948) ("The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant."); Old Chief v. United States, 519 U.S. 172, 180–81 (1997); 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 55, at 1157–59 (Tillers rev., 1983).

[90] *See* Park, *supra* note 82, at 768.

psychological literature, this might lead jurors to overweigh the inference even more. The difference between perceived and actual value might be stable even if the absolute values have both risen.

A better explanation links the decline of the character rule to the growing use of preventive detention. The character rule reflects discomfort with preventive detention,[91] but as the criminal law increasingly grows accustomed to various forms of incapacitation, the need for the character rule no longer seems pressing. Put differently, the decline of the character evidence rule should be understood not simply as an indication that the aversion to propensity reasoning is disappearing, but also as an indication that the aversion to preventive detention is disappearing. To courts and legislatures, both reasons for the character evidence rule seem less persuasive than they once did.

To be sure, the twin rationales for the character evidence rule cannot be neatly separated. Part of the story of the rule's demise is that, in the age of actuarial methods for predicting punishment, character evidence seems like a decent way to determine whether the defendant committed the particular crime. But the darker and more important part of the story is that character evidence seems like a decent way to predict future crimes—and thus to justify imprisonment—regardless of whether the defendant committed the particular crime.

As a formal matter, such reasoning still counts as nullification when a jury engages in it.[92] But in the age of incapacitation, even if preventive detention by juries is still technically illegal, it does not seem as bad. When judges are deciding to admit character evidence, they must weigh the probative value of the evidence against the potential for prejudice.[93] The latter side of the scale, in theory, includes the potential for preventive detention. In the age of incapacitation, that concern weighs less heavily. Indeed, the potential for preventive detention might even migrate to the other side of the scale.

III. SUBSTANTIVE DUE PROCESS LIMITATIONS ON PREVENTIVE DETENTION AND CHARACTER EVIDENCE

In sum, criminal law is shifting toward increased use of preventive detention, while evidence law is shifting to accommodate increased use of character evidence. The various reforms catalogued above represent a fundamental—and highly controversial—change in the theory animating the criminal justice system. Many (though not all) of the reforms have been legislative, and both academic commentators and litigators have argued that courts must develop constitutional doctrines to halt the move toward a regime based on incapacitation.

In coming years, courts will be faced with increasing questions about whether, and to what extent, these reforms can be reconciled with the Constitution. Because the Constitution is largely silent on these matters, many legal challenges will be

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[91] *See* Robinson, *supra* note 11, at 1432.
[92] *See* Sanchirico, *supra* note 83, at 1246.
[93] *See* FED. R. EVID. 403, 404.

grounded in notions of substantive due process. For a variety of reasons, however, it is doubtful whether courts can or should develop more robust substantive due process doctrines to limit preventive detention. As a predictive matter, it is unlikely that courts will develop such doctrines.

A. Substantive Due Process and Preventive Detention

Many have warned that the use of preventive detention poses grave threats to constitutional values, and indeed, the Supreme Court has held that the Constitution does impose some limitations on the use of preventive detention. But as currently drawn, those limitations have little bite, and they are unlikely to halt (or even slow) the rise of the new criminal law. In order to place meaningful limitations on legislative regimes of incapacitation, the Court would have to develop a vast new substantive due process architecture. That is neither likely nor feasible.

Under current doctrine, the nature of the constitutional limitations depends in the first instance on whether the detention is "criminal" or "civil."[94] As the Supreme Court explained in *Zadvydas v. Davis*,[95]

> 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. And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and "narrow" nonpunitive "circumstances," where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint."[96]

In each realm, there are substantive and procedural limitations. Substantive limitations govern who can be detained, for what reasons, and for how long. Procedural limitations dictate what process the state must follow before detaining an individual. The former will be discussed in this section, the latter in the next.

In both the criminal and civil realms, the Supreme Court has suggested that detention based on dangerousness alone is unconstitutional; in other words, the state may only detain a person if it demonstrates dangerousness plus some additional finding.[97] But a close examination of these doctrines reveals that they do not and cannot place meaningful limitations on the state's ability to engage in preventive detention.

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[94] In Part IV, *infra*, I will examine the line between these two realms.
[95] 533 U.S. 678 (2001).
[96] *Id.* at 690 (citations omitted).
[97] *See supra* notes 5, 131 and accompanying text.

1. Substantive Constitutional Limitations on Preventive Detention: Criminal Law

Traditionally, imposition of criminal liability in Anglo-American law has required a showing of some bad act. Opponents of preventive detention have argued, and the Supreme Court has suggested, that this tradition is inherent in the Constitution.[98] They argue, in other words, that it is unconstitutional to impose criminal punishment based solely on future dangerousness because criminal liability requires some bad act.[99] No such limitation is explicit in the Constitution, so such constitutional limitations are typically derived from either the Due Process Clause—in its "substantive" incarnation[100]—or on the Eighth Amendment.[101] The Constitution, it is argued, contains an implicit act requirement that prohibits "pure" preventive detention in the criminal law.[102]

These arguments have shortcomings. Neither the Eighth Amendment nor the Due Process Clause can be seen as an unproblematic source of a constitutional act requirement. Whether the Due Process Clause is properly interpreted as having a substantive component at all remains a controversial issue of constitutional law.[103] The Eighth Amendment, moreover, speaks more to the nature and amount of punishment imposed than it does to the question of what persons or conduct may be punished.[104]

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[98] *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

[99] *See, e.g.*, ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 18 (2006) (stating that the Constitution forbids legislatures "from imposing criminal punishment based simply on the 'status' of being dangerous, or for the punishment of future predicted crimes").

[100] *See* Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 321–22 (2003) (arguing that preventive detention of sex offenders may violate principles of substantive due process). *But see* Mays v. City of E. St. Louis, 123 F.3d 999, 1001 (7th Cir. 1997) (calling substantive due process an "oxymoron").

[101] *See infra* note 104.

[102] *See* Slobogin, *supra* note 11, at 2 (defining pure preventative detention as "a deprivation of liberty that is based on a prediction of harmful conduct and that is not time-limited by culpability or other considerations"); *see also supra* note 5, 131 and accompanying text.

[103] *Compare* Peter J. Rubin, *Square Pegs And Round Holes: Substantive Due Process, Procedural Due Process, And The Bill Of Rights*, 103 COLUM. L. REV. 833, 892 (2003) (supporting the doctrine of substantive due process), *with* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 494–95 (1997) (criticizing the doctrine). *See also* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 75 (1999) (suggesting that the Court should embrace a limited version of the substantive due process doctrine).

[104] *See* Harmelin v. Michigan, 501 U.S. 957, 979–86 (1991) (arguing that the Eighth Amendment was primarily aimed at limiting certain *modes* of punishment); *see also* Rhodes v. Chapman, 452 U.S. 337, 345–47, 346 n.12 (1981) (discussing the primary purposes of the Eighth Amendment, but also reaffirming that the Eighth Amendment has a "substantive" component).

Nonetheless, arguments against pure preventive detention in the criminal law find some support in the case law, most notably from *Robinson v. California*.[105] *Robinson* held that it was constitutionally impermissible to impose criminal punishments based on mere status or involuntary acts.[106] *Robinson* was based on the Eighth Amendment,[107] but commentators have since suggested that the *Robinson* rule should be regrounded in the Due Process Clause.[108]

But *Robinson* is a shaky foundation for any constitutional doctrine. The rationale of *Robinson* was difficult to understand.[109] The opinion generated immediate controversy,[110] and it was quickly limited by the Court in *Powell v. Texas*.[111] Over the years, lower courts have upheld a variety of criminal statutes against *Robinson*-based attacks.[112] *Robinson* may be *sui generis* and unable to generate any meaningful body of case law.[113]

Nonetheless, *Robinson* at least arguably stands for a constitutional principle that criminal punishment must be tied to some past act (or omission).[114] Even if that is true, however, it has limited significance—the *Robinson* rule, by itself, accomplishes nearly nothing. At the most abstract level, it is meaningless because every person engages in some conduct. If *Robinson* only means that crimes must include some past act, then legislatures could evade the *Robinson* rule by drafting criminal laws that require the proof of some status and some additional, trivial conduct element—breathing, for example, or walking. Perhaps it would be unconstitutional to criminalize walking, but reaching that conclusion requires some additional constitutional doctrine quite independent of *Robinson's* act requirement.

In short, a constitutional act requirement does nothing unless it is supplemented by some additional doctrine describing what acts may be punished

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[105] 370 U.S. 660 (1962).

[106] *Id.* at 666–67 ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

[107] *Id.*

[108] Martin R. Gardner, *Rethinking* Robinson v. California *in the Wake of* Jones v. Los Angeles*: Avoiding the "Demise of the Criminal Law" by Attending to "Punishment,"* 98 J. CRIM. L. & CRIMINOLOGY 429, 486 (2008).

[109] *See* WAYNE R. LAFAVE, CRIMINAL LAW § 3.5(f), at 180 (4th ed. 2003) ("The basis of the court's decision in *Robinson* is not entirely clear, as emphasis was placed on three different considerations . . . .").

[110] *See* Dale W. Broeder & Robert Wade Merson, Robinson v. California: *An Abbreviated Study*, 3 AM. CRIM. L.Q. 203, 203–07 (1965); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 147 n.144 (1962); *see also* Hugh R. Manes, Robinson v. California, *A Farewell to Rationalism?*, 22 LAW TRANSITION 238 (1963).

[111] 392 U.S. 514, 531–34 (1968).

[112] *See, e.g.*, Gardner, *supra* note 108, at 443–45.

[113] *See id.* at 431 ("*Robinson* thus had little impact and certainly did not result in radical doctrinal change.").

[114] Legislatures have the power to punish at least certain omissions, such as the failure to pay taxes, and the failure to register as a sex offender. *See* LAFAVE, *supra* note 109, § 6.2(e), at 319–20.

and those that may not. A few such limitations are found in the Bill of Rights, such as the First Amendment.[115] Beyond those limited areas, other limitations must again be derived from the doctrine of substantive due process. The *Lochner*-era Court was fairly aggressive in striking down criminal statutes as substantive due process violations.[116] But with a few notable exceptions such as *Lawrence v. Texas*,[117] the modern Supreme Court has been much more restrained.[118] The doctrine of substantive due process survives today, but it imposes only very limited restrictions on the ability of legislatures to criminalize a wide variety of conduct.[119] Thus, legislatures can incapacitate dangerous individuals simply by tying detention to some conduct, so long as the conduct is not one of the very narrow classes of conduct protected by substantive due process. To be sure, as a political matter, legislatures are unlikely to tie criminal punishment to conduct as trivial and innocent as, say, walking. And if legislatures were to try such a strategy, courts might respond by developing a more robust substantive due process doctrine.

Thus, legislatures are left with a more practical strategy for incapacitation of dangerous persons: they may simply impose lengthy sentences based on fairly trivial crimes. That is, after all, precisely how "Three Strikes" and other recidivist sentencing regimes work—dangerousness (measured by criminal history) plus a minor current offense justifies lengthy incarceration.[120] As the Supreme Court wrote in *Ewing v. California*,[121]

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[115] *See, e.g.*, *id.* § 3.5, at 161–66.

[116] *See* Lochner v. New York, 198 U.S. 45, 64–65 (striking down a statute limiting the number of hours that bakers could work) (1905); *see also* Coppage v. Kansas, 236 U.S. 1, 26 (1915) (holding that Kansas could not criminally punish employers for requiring employees to agree not to join a labor union); Allgeyer v. Louisiana, 165 U.S. 578, 590–593 (1897) (striking down a statute regulating transactions with out-of-state insurance companies); LAFAVE, *supra* note 109, § 3.3(a), at 142 (noting that the Court struck down over a hundred statutes, many of which were criminal, on due process grounds during the first third of the twentieth century).

[117] 539 U.S. 558, 578–79 (2003) (holding unconstitutional a Texas statute outlawing certain sexual conduct between two individuals of the same sex).

[118] *See* LAFAVE, *supra* note 109, § 3.5(a), at 144 (noting that the Supreme Court has "all but abandoned the practice of invalidating criminal statutes on the basis that they bear no substantial relation to injury to the public"); *see also* Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 94 n.440 (2003) (noting that the Court's recent cases have "reduce[d] substantive due process into a doctrine that is for all practical purposes toothless.").

[119] Some academic commentators have proposed a more robust substantive due process doctrine that would limit the state's ability to punish "victimless" conduct, but such proposals face insurmountable difficulties, both doctrinal and conceptual. *See, e.g.*, Marcus Dirk Drubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 833, 839 (2001).

[120] *See supra* notes 23–28 and accompanying text.

[121] 538 U.S. 11 (2003).

> When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice. To the contrary, our cases establish that "States have a valid interest in deterring and segregating habitual criminals." *Parke v. Raley*, 506 U.S. 20, 27, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992); *Oyler v. Boles*, 368 U.S. 448, 451, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962) ("[T]he constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge."). Recidivism has long been recognized as a legitimate basis for increased punishment.[122]

What this means is that even a reinvigorated *Lochner*-style due process doctrine could not halt the march of the new criminal law without help from a much more robust Eighth Amendment proportionality doctrine.

The Supreme Court has said that, outside the capital punishment context, proportionality doctrine has only limited applicability.[123] Academic commentators have criticized the Court's deferential approach, but fashioning a better doctrine is not easy.[124] (If a twenty-five year sentence for a third strike is too much, how much is permissible? twenty years? fifteen?). Moreover, when it comes to recidivist sentencing, it is hard to fault *Ewing's* conclusion that incapacitation is a legitimate goal of detention, and thus longer sentences for repeat offenders make sense.

In sum, developing meaningful substantive limitations on the use of preventive detention in the criminal law would involve not just (1) maintaining *Robinson's* (somewhat dubious) conclusion that the constitution contains an act requirement, but also (2) developing a new substantive due process doctrine defining which acts may be criminalized, and (3) developing a new proportionality doctrine defining to what extent various acts may be punished. It would involve the creation of new constitutional doctrines defining both what conduct may be proscribed by the criminal law and how much punishment is allowed. It is hard to see how any theory of constitutional interpretation could justify such a massive intrusion by the courts into substantive criminal law.

Incapacitation is one legitimate function of criminal punishment. In recent years, it has become a dominant function, and in the process, it has begun to

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[122] *Id*. at 25.

[123] *See* Graham v. Florida, 130 S. Ct. 2011, 2021 (2010) (stating that for many non-capital criminal cases, the Eighth Amendment prescribes only a "narrow proportionality principle, that does not require strict proportionality between crime and sentence but rather forbids only extreme sentences that are grossly disproportionate to the crime") (internal quotation marks omitted).

[124] *See Harmelin*, 501 U.S. at 985 ("While there are relatively clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are 'cruel and unusual,' *proportionality* does not lend itself to such analysis.").

reshape the criminal law. With few exceptions, the Supreme Court cannot, and will not, interfere with that process.

2. Substantive Constitutional Limitations on Preventive Detention: Civil Law

Unlike criminal detention, civil or nonpunitive detention is (purportedly) only allowed in "certain special and 'narrow'" circumstances.[125] The Court has identified three primary circumstances where such detention is allowed:[126] (1) temporary detention during pending criminal or immigration proceedings,[127] (2) detention of dangerous and mentally ill persons,[128] and (3) detention of enemy combatants during wartime.[129] The Court has also additional "exceptions," outside these main categories, where civil preventive detention may be allowed.[130]

As in the criminal realm, the Court's precedents in the civil realm suggest that it is unconstitutional for the state to detain a person based on a finding of dangerousness alone.[131] But as in the criminal realm, those limitations are, in reality, fairly minimal. Requiring "dangerousness plus something" does not amount to much where the *something* is conceptually underdetermined and thus easily established.

The very concept of mental illness—which can provide the "plus something" that justifies detention—is both fluid and deeply contingent. Over the past century, new mental illnesses have been created and definitions of existing mental illnesses have been expanded.[132] The process of medicalization of any deviant behavior is relentless, and it is ongoing.

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[125] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[126] David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 708 (2009).

[127] United States v. Salerno, 481 U.S. 739, 755 (1987); Carlson v. Landon, 342 U.S. 524, 541 (1952).

[128] Kansas v. Hendricks, 521 U.S. 346, 358 (1997); Addington v. Texas, 441 U.S. 418, 426 (1979).

[129] Hamdi v. Rumsfeld, 542 U.S. 507, 518–19 (2004).

[130] *See* Cole, *supra* note 126, at 715–18.

[131] Foucha v. Louisiana, 504 U.S. 71, 80–83 (1992); *see also* Cole, *supra* note 126, at 710 ("Commitment for dangerousness alone is not constitutionally permitted."); Janus & Logan, *supra* note 100, at 325; Rinat Kitai-Sangero, *The Limits of Preventive Detention*, 40 MCGEORGE L. REV. 903, 907 (2009); Slobogin, *supra* note 11, at 35 ("The majority opinion in *Kansas v. Hendricks* indicated, more than once, that dangerousness alone is an insufficient basis for long-term preventive detention.").

[132] *See* PETER CONRAD, THE MEDICALIZATION OF SOCIETY: ON THE TRANSFORMATION OF HUMAN CONDITIONS INTO TREATABLE DISORDERS 3–4 (2007); PETER CONRAD & JOSEPH W. SCHNEIDER, DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS, at xi (1980); CHRISTOPHER LANE, SHYNESS: HOW NORMAL BEHAVIOR BECAME A SICKNESS 2–3 (2007).

The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*[133] (DSM) is considered the authoritative standard for definitions of mental illness in the United States. But the definitions and diagnostic criteria are often indeterminate, which has led to persistent criticisms regarding the validity and reliability of diagnoses.[134] Over time, moreover, with each new edition of the DSM, the scope of what counts as a "mental illness" has grown.[135] (That growth may be tied, at least in part, to the pharmaceutical industry's influence on the DSM.)[136] In short, broad and vague definitions of mental illness make it relatively easy for states to engage in preventive detention based on mental illness.[137]

That problem will not disappear. The fifth edition of the DSM is currently under construction. Among the proposed changes are expanded definitions of sex-related "disorders," including "pedohephebilia," "hypersexuality disorder," and "paraphilic coercive disorder."[138] The expansive definitions of paraphilia could mean that anyone with a persistent desire to engage in nonconsensual sex would be considered disordered, and thus eligible for civil commitment.[139]

The expanding scope of recognized mental disorders means that nearly all people who are highly dangerous are also likely to be disordered in some way. Thus, while it remains formally true that dangerousness alone is insufficient for civil commitment, that limitation has a significance that is already limited and is continually waning. Ultimately, there are few meaningful substantive limitations on the state's ability to engage in preventive detention of dangerous individuals.

B. Substantive Due Process and Character Evidence

Courts will continue to face challenges to preventive detention regimes and as additional reforms erode the character evidence rule, courts will also face questions

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[133] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (text rev. 4th ed. 2000).

[134] Enrique Baca-Garcia et al., *Diagnostic Stability of Psychiatric Disorders in Clinical Practice*, 190 BRIT. J. PSYCHIATRY 210, 216 (2007); Robert Kendell & Assen Jablensky, *Distinguishing Between the Validity and Utility of Psychiatric Diagnoses*, 160 AM. J. PSYCHIATRY 4, 11 (2003); Harold Alan Pincus et al., Letter to the Editor, "*Clinical Significance" and DSM-IV*, 55 ARCHIVES GEN. PSYCHIATRY 1145, 1145 (1998).

[135] *See, e.g.*, Steven K. Erickson, *The Myth of Mental Disorder: Transsubstantive Behavior and Taxometric Psychiatry*, 41 AKRON L. REV. 67, 77 (2008) (noting that the fourth edition of the DSM listed 300 mental disorders compared to about 100 disorders listed in the first edition).

[136] *See* Lisa Cosgrove et al., *Financial Ties Between DSM-IV Panel Members and the Pharmaceutical Industry*, 75 PSYCHOTHERAPY & PSYCHOSOMATICS 154, 156–57 (2006).

[137] *See* Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. COLO. L. REV. 73, 133–37 (1999) (discussing the difficulties in incorporating DSM definitions into legal standards).

[138] *See* Allen Frances, Commentary, *Opening Pandora's Box: The 19 Worst Suggestions for DSM5*, PSYCHIATRIC TIMES, 2–3 (Feb. 11, 2010), http://www.psychiatrictimes.com/dsm/content/article/10168/1522341.

[139] *See id.*

about whether the use of character evidence is constitutionally permissible. Several scholars have argued that the character rule has constitutional underpinnings.[140] A few lower federal courts have agreed that the rule might be grounded in due process,[141] and two state supreme courts—Iowa and Missouri—have struck down state analogues to Federal Rule 413 under their state Due Process Clauses.[142] For its part, the United States Supreme Court has left the question open.[143] Most other courts have rejected constitutional challenges to the use of character evidence.[144] The argument for constitutionalizing the character evidence rule is colorable but ultimately unpersuasive, and in any event, it is difficult to imagine any workable constitutional rule restricting character evidence.

The Constitution does not explicitly mention the character evidence rule, so arguments about its constitutional underpinnings are necessarily based on the Due Process Clause.[145] The usual argument is that the character evidence rule is so firmly rooted in Anglo-American jurisprudence, and so central to our notions of criminal justice, that it must be maintained as a matter of fundamental fairness.[146]

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[140] *See* Louis M. Natali, Jr. & R. Stephen Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1, 3 (1996); Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1517 (2005); William E. Marcantel, Note, *Protecting the Predator or the Prey? The Missouri Supreme Court's Refusal to Allow Past Sexual Misconduct as Propensity Evidence*, 74 MO. L. REV. 211, 230–31 (2009); Jason L. McCandless, Note, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 WM. & MARY BILL RTS. J. 689, 714 (1997).

[141] *See, e.g.*, Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991); Tucker v. Makowski, 883 F.2d 877, 881 (10th Cir. 1989).

[142] State v. Cox, 781 N.W.2d 757, 762–63, 769 (Iowa 2010); State v. Ellison, 239 S.W.3d 603, 607–08 (Mo. 2007).

[143] *See* Estelle v. McGuire, 502 U.S. 62, 75 n.5 (1991) ("Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime.").

[144] *See* United States v. Julian, 427 F.3d 471, 487 (7th Cir. 2005); United States v. LeMay, 260 F.3d 1018, 1022 (9th Cir. 2001); United States v. Mound, 149 F.3d 799, 800–01 (8th Cir. 1998); United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998); People v. Falsetta, 986 P.2d 182, 184 (Cal. 1999).

[145] *See* Drew D. Dropkin & James H. McComas, *On a Collision Course: Pure Propensity Evidence and Due Process in Alaska*, 18 ALASKA L. REV. 177, 190 (2001); James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 107–08 (1994) (arguing that the admission of propensity evidence violates the Due Process Clause); Natali & Stigall, *supra* note 140, at 3; *see also* 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE 404-14 to -18 (Joseph M. McLaughlin ed., 2d ed. 2010) (suggesting that the character evidence rule has constitutional underpinnings).

[146] *See* State v. Cox, 781 N.W.2d 757, 768 (Iowa 2010) ("Based on Iowa's history and the legal reasoning for prohibiting admission of propensity evidence out of fundamental conceptions of fairness, we hold the Iowa Constitution prohibits admission of prior bad acts

As a historical matter, the due process argument is shaky. It is true that the character evidence rule predates the Bill of Rights, by nearly a century.[147] It is approximately as old as the "beyond a reasonable doubt" standard, which is also not mentioned in the Constitution, but which the Supreme Court has read into the Due Process Clause.[148] There is thus a decent argument that because the character evidence rule has a roughly equal historical pedigree, it too should be granted constitutional status.[149]

But while it is true that the character evidence rule is old, its scope, content, and rationale have shifted over time.[150] The original rationale had to do mostly with notice and surprise.[151] But with modern procedural devices, including rules of discovery, those concerns no longer seem at all pressing. The modern rationale for the character evidence rule—the concerns of propensity overweighing and preventive detention—were not clearly articulated until the late nineteenth or early twentieth century.[152] The lack of congruence between the original and modern rationales makes the historical argument for constitutionalizing the character evidence rule more complicated. The scope of the rule has varied widely as well, and for as long as courts have (purportedly) enforced the character evidence rule, they have also recognized a bewildering variety of "exceptions."[153]

History aside, arguments for a due process-based character evidence rule typically rest on more abstract conceptions of "fundamental fairness." But the phrase "fundamental fairness" is nothing more than a label—there are limitless rules that could arguably be called necessary for fundamental fairness. Applying the Due Process Clause requires courts to give some reason why the character evidence rule, is truly necessary for "fundamental fairness," and therefore

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evidence based solely on general propensity."); *see also* Aviva Orenstein, *Honoring Margaret Berger with a Sensible Idea: Insisting that Judges Employ a Balancing Test Before Admitting the Accused's Convictions Under Federal Rule of Evidence 609(a)(2)*, 75 BROOK. L. REV. 1291, 1303–07 (2010) (suggesting that the admission of prior convictions to show character for truthfulness can be unfairly prejudicial).

[147] *See* LANGBEIN, *supra* note 54, at 190–91.

[148] *See In re* Winship, 397 U.S. 358, 361–64 (1970).

[149] *See* Natali & Stigall, *supra* note 140, at 13 ("Applying the foregoing historical test, it is clear that the exclusion of propensity evidence at trial constitutes due process.").

[150] Moreover, the "historical approach" to interpreting the Due Process Clause has inherent limitations. *See* United States v. LeMay, 260 F.3d 1018, 1024 (9th Cir. 2001) ("The Constitution does not encompass all traditional legal rules and customs, no matter how longstanding and widespread such practices may be."); United States v. Enjady, 134 F.3d 1427, 1432 (10th Cir. 1998) (rejecting a constitutional challenge and stating "[t]hat the practice is ancient does not mean it is embodied in the Constitution").

[151] *See* LANGBEIN, *supra* note 54, at 191; Reed, *supra* note 54, at 716–19 (discussing the rule's early history).

[152] *See* 1 WIGMORE, *supra* note 80, § 194.

[153] *See* DAVID LEONARD, THE NEW WIGMORE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS § 4.4 (2009); *see also LeMay*, 260 F.3d at 1025 (pointing out that since at least the nineteenth century, courts have admitted character evidence in cases of sex crimes).

constitutionally-based, while many other rules are not. Unfortunately, the arguments regarding the constitutional footing of the character evidence rule seldom venture beyond sloganeering.

In striking down its sex crimes provision, for example, the Iowa Supreme Court used the word "fundamental" over a dozen times, as if repeating the claim over and over could make it true.[154] It reasoned "[a] concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is."[155] Even if it is true that a defendant may only be tried for what he did—something that is at least doubtful in an age when incapacitation dominates the criminal law—the court offered no satisfying explanation as to why past acts may not be used to prove "what he did" in this case. Perhaps it is true that juries overweigh the propensity inference, and perhaps it is true that when given access to past bad acts, juries engage in (too much) preventive detention. But those points are far from self-evident. If the character evidence rule is to be written into the constitution, then its underlying twin rationales require substantial support and justification. The Iowa Supreme Court offered none.

But even its supporters are correct that the character evidence rule is grounded in the Due Process Clause, it remains unclear what a constitutional rule would look like. Any effort to ground the character evidence rule in the Constitution faces significant conceptual difficulties. Academic commentators have long criticized the immense body of case law attempting to enforce the character rule.[156] The character evidence rule has spawned a wide variety of legal fictions, primarily, but not solely, the fictions of Rule 404(b), which admit character evidence (or something very much like it) for other purposes.[157] Indeed, the admission of other acts evidence has been so widespread that some commentators have suggested that the character evidence rule itself is entirely fictional.[158] Even the Iowa Supreme Court, after extolling the virtues of the character evidence rule and striking down a sex crimes exception, was quick to note that bad acts may be admitted for other

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[154] State v. Cox, 781 N.W.2d 757 *passim* (Iowa 2010).

[155] *Id.* at 767 (quoting State v. Sullivan, 679 N.W.2d 19, 23–24 (Iowa 2004)).

[156] *See, e.g.*, Slough & Knightly, *supra* note 73; Stone, *supra* note 55; Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933).

[157] For example, the widely used "unlinked plan" doctrine has long been criticized as a rank fiction. 1 IMWINKELRIED, *supra* note 74, § 3.24 (criticizing the unlinked plan doctrine); 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4.35, at 668 (3d ed. 2010) (criticizing the "thin fiction" of "spurious plan cases"); Bryden & Park, *supra* note 87, 546–51 (discussing the "spurious plan" doctrine of Rule 404(b)); Méndez & Imwinkelried, *supra* note 75, *passim* (same); Reed, *supra* note 71, at 233–34 (same); Stuart, *supra* note 71, at 197–98 (same); Swift, *supra* note 3, at 2470–71 (same).

[158] *See generally* Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181 (1998); *see also* Melilli, *supra* note 57, at 1558–62 (arguing that courts routinely admit propensity evidence and always have).

404(b)-type purposes.[159] But across American jurisdictions, the line between permissible 404(b) evidence and impermissible propensity evidence is maddeningly hazy.

It might be that the rule itself is simply conceptually flawed, indeterminate not just at the margins but at its core. Even among evidence scholars, it is hard to find any basic agreement about what exactly "character" means, or what exactly the "propensity inference" entails.[160] The most sophisticated evidence law commentators disagree about whether certain uses of evidence even constitute character-based uses.[161] The Herculean efforts of academics to make sense of the rule,[162] even to the (unclear) extent that they are conceptually successful, are largely ignored by courts. The rule spawns thousands of appellate cases each year,[163] and courts continue to produce doctrine that is roundly criticized by academics as unprincipled and careless.[164]

The rule, in its current form, has been unable to resist attacks. There is no reason to think that the rule would fare much better if it were incorporated into the Due Process Clause. Constitutionalization would defeat any efforts for outright repeal of Rule 404, but it would do little or nothing to heal the thousand small cuts

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[159] *Cox*, 781 N.W.2d. at 768 ("Such evidence may, however, be admitted as proof for any legitimate issues for which prior bad acts are relevant and necessary, including those listed in rule 5.404(b) and developed through Iowa case law.").

[160] *See* Peter Tillers, *What is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 813 (1998) ("There is no meaningful sense (except in a 'technical' and arid legal sense) in which it can be said that the law prohibits the use of evidence of a person's 'character' to show conduct.").

[161] *Compare* Edward J. Imwinkelried, *The Evolution of the Use of the Doctrine of Chances as Theory of Admissibility for Similar Fact Evidence*, 22 ANGLO-AM. L. REV. 73, 94–96 (1993) (concluding that the "doctrine of chances" provides a legitimate noncharacter inference), *with* Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1268–70 (1995) (concluding that the "doctrine of chances" violates the character evidence rule).

[162] This single area of evidence law spawned entire treatises. *See generally* EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE (2006); LEONARD, *supra* note 153.

[163] *See also* 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5239 (1st ed. 1978) ("There is no question of evidence more frequently litigated in the appellate courts than the admissibility of evidence of other crimes, wrongs, or acts.").

[164] *See* MUELLER & KIRKPATRICK, *supra* note 157, § 4:28 ("Perhaps because the issue so inundates courts hearing criminal appeals, published opinions often give it but passing mention, and it is lamentably common to see recitations of laundry lists of permissive uses, with little analysis or attention to the particulars."); WEINSTEIN & BERGER, *supra* note 145, § 404.20[3] ("[C]ourts on occasion have admitted other-acts evidence almost automatically, without any real analysis, if they find it fits within one of the categories specified in Rule 404(b)."); WRIGHT & GRAHAM, *supra* note 163, § 5239 ("Yet despite the recurrence of the issues, the [appellate] opinions are often poorly reasoned and provide little guidance to trial judges.").

that are bleeding the rule to death. The evidence law fictions that courts embrace today would simply be translated into constitutional fictions.

In sum, arguments for constitutionalizing the character evidence rule stand on shaky ground, and even if they were to succeed, the victory would be pyrrhic. Substantive due process doctrine is both textually and conceptually ill-equipped to stem the rising tide of preventive detention.

IV. REDRAWING THE CONSTITUTIONAL BOUNDARY BETWEEN CIVIL AND CRIMINAL LAW

The rise of preventive detention and corresponding decline of the character evidence rule will not be abated by any doctrine of substantive due process, but they do have one critically important constitutional implication. The growing influence of incapacitation theory in the criminal law destabilizes the Supreme Court's jurisprudence on the distinction between civil and criminal sanctions.

Drawing the line between "civil" and "criminal" sanctions is a constitutional necessity because several provisions of the Constitution turn on the distinction.[165] The procedural rights contained in the Sixth Amendment apply only in "criminal cases."[166] Several provisions of the Fifth Amendment—the Grand Jury Clause, the Double Jeopardy Clause, and the Self-Incrimination Clause—likewise limit their own applicability to the criminal sphere.[167] Still other constitutional provisions, including the Ex Post Facto Clauses[168] and the Eighth Amendment,[169] lack explicit textual limitations but are nonetheless understood as applying solely or primarily to criminal cases.[170] Thus, in determining the scope of these provisions, the Supreme Court has no choice but to distinguish between criminal and civil laws.[171]

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[165] United States v. Ward, 448 U.S. 242, 248 (1980) ("The distinction between a civil penalty and a criminal penalty is of some constitutional import."); Mary C. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1348–49 (1991). For a discussion of the different modes of procedure in the two realms, see generally David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683 (2006).

[166] U.S. CONST. amend. VI.

[167] *See* U.S. CONST. amend V. The Grand Jury Clause is limited to "capital, or otherwise infamous crime[s]." *Id.* The Double Jeopardy Clause protects successive punishments for the "same offence." *Id.* The Self-Incrimination Clause applies "in any criminal case." *Id.*

[168] U.S. CONST. art. I, §§ 9–10.

[169] U.S. CONST. amend. VIII.

[170] *Ward*, 448 U.S. at 248 ("Other constitutional protections, while not explicitly limited to one context or the other, have been so limited by decision of this Court.").

[171] Analysis of the distinction, moreover, raises policy concerns about the proper scope of the criminal law. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712–19 (2005).

A. The Current Doctrine and Its Critics

While constitutionally necessary, the task of drawing the line between civil and criminal has been notoriously difficult.[172] The Court's doctrine has been somewhat shifty,[173] so even describing the doctrine accurately is challenging, but the Court has (for now) more or less settled on a two-prong test.[174]

The first prong focuses on the facial statutory label or classification. It asks whether the statute is labeled "civil" or "criminal": "Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.'"[175]

The second prong is a multi-factor balancing test, drawn from *Kennedy v. Mendoza-Martinez.*[176] It examines:

> (1) "whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment - retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."[177]

If the first-prong analysis indicates that the legislature intended the statute to be civil in nature, the Court will only deem the statute criminal if the second-prong analysis clearly indicates that the statute is punitive in its purposes and effects.[178]

The Court's doctrine has been justifiably criticized on a number of grounds.[179] The operation of the first prong allows legislatures to evade constitutional rights

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[172] *See* Kim Strosnider, *Anti-Gang Ordinances After* City of Chicago v. Morales*: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 103 (2002) (discussing the "fading line" between the criminal and civil realms).

[173] *See* Cheh, *supra* note 165, at 1358.

[174] Smith v. Doe, 538 U.S. 84, 95 (2003); *see also id*. at 107 (Souter, J., concurring) ("[O]ur cases have adopted a two-step enquiry to see whether a law is punitive for purposes of various constitutional provisions including the *Ex Post Facto* Clause.").

[175] Hudson v. United States, 522 U.S. 93, 99 (1997) (citation omitted) (quoting *Ward*, 448 U.S. at 248).

[176] 372 U.S. 144 (1963).

[177] *Hudson*, 522 U.S. at 99–100 (quoting *Mendoza-Martinez*, 372 U.S. at 168–69).

[178] *Smith*, 538 U.S. at 95–96.

[179] *See* Cheh, *supra* note 165, at 1358 ("Although this comparative factor [i.e., *Mendoza*] test has been invoked repeatedly, it is doubtful whether the Court is prepared to apply it seriously.").

with mere labels.[180] The first prong is particularly difficult to justify in light of *Apprendi v. New Jersey* and its progeny.[181] If legislatures are not allowed to evade the Constitution's procedural requirements simply by labeling something a "sentencing factor" rather than an "element," it is hard to see why they should be able to evade those same requirements by attaching a civil label to a sanction.[182]

The seven-factor second prong is wildly indeterminate.[183] It is difficult to apply certain factors in particular cases, and when different factors point different directions, it is difficult to combine them.[184] The Court has not clarified the matter much by asserting that the seven factors are nonexclusive and merely "useful guideposts."[185] In short, the general problems that plague all multifactor tests also plague the *Mendoza* test.[186]

But as always, it is easier to criticize the Court's failings than construct a better doctrine. A decade ago, for example, Carol Steiker wrote an intelligent and

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[180] Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1288–89 (1998); *cf.* Richard H. Fallon, Jr., *The Supreme Court 1996 Term: Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 61 (1997) ("The indispensable function of constitutional doctrine . . . is to implement the Constitution.").

[181] 530 U.S. 466, 494 (2000) ("'[L]abels do not afford an acceptable answer.' That point applies as well to the constitutionally novel and elusive distinction between '"elements'" and 'sentencing factors.'" (citations omitted) (quoting New Jersey v. Apprendi, 731 A.2d 485, 492 (N.J. 1999))); *see also* United States v. Booker, 543 U.S. 220, 241–42 (2005) ("[T]he Commission's authority to identify the facts relevant to sentencing decisions and to determine the impact of such facts on federal sentences is precisely the same whether one labels such facts '"sentencing factors'" or '"elements'" of crimes."); Blakely v. Washington, 542 U.S. 296, 306 (2004) (rejecting the view that "the jury need only find whatever facts the legislature chooses to label elements of the crime"); Ring v. Arizona, 536 U.S. 584, 602 (2002) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.").

[182] *See* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1545 (2001) ("Just as the continuing stream of newly minted civil penalties necessitated a more specific standard for distinguishing which penalties labeled 'civil' must nevertheless be treated as criminal, innovative offense definitions following *Apprendi* will require the development of some method of distinguishing elements from non-elements under the Constitution.").

[183] *See* Logan, *supra* note 180, at 1282 ("The *Mendoza-Martinez* factors over the years have been applied in a highly selective and ultimately inconsistent manner.").

[184] Bell v. Wolfish, 441 U.S. 520, 565 (1979) (Marshall, J., dissenting) (criticizing the multi-factor test as "lack[ing] any real content").

[185] Smith v. Doe, 538 U.S. 84, 97 (2003) (quoting Hudson v. United States, 522 U.S. 93, 99 (1997)).

[186] *See* Frank H. Easterbrook, *What's So Special About Judges?*, 61 U. COLO. L. REV. 773, 781 (1990) (criticizing multi-factor tests); *see also* Crawford v. Washington, 541 U.S. 36, 63 (2004) ("Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them.").

incisive article criticizing the Court's then-recent jurisprudence.[187] She proposed a different test: that criminal punishments are those that are intended to express blame.[188] But who can say whether the civil commitment of sex offenders, for example, constitutes "blaming"? Such a characterization seems plausible,[189] but contrary characterizations seem equally plausible.[190]

Other commentators have suggested that the Court should rely less on the legislative label and more on the legislative purpose.[191] Any proposed doctrine that turns on divining the true legislative purpose of some incapacitating regime faces all of the usual conceptual difficulties in explaining what "legislative purpose" even means, not to mention the evidentiary difficulties of unearthing the real purpose beneath the pretext.[192] In short, both the Supreme Court and its academic critics have struggled to fashion a sensible doctrinal line between criminal and civil enforcement regimes.

B. Re-examining the Fourth Factor

Putting some of the larger questions about the two-prong test aside, there is one small, but important, aspect of the Supreme Court's doctrine that should be modified in light of the rise of preventive detention in the criminal law: the fourth *Mendoza* factor should be modified or discarded.

The fourth factor asks whether the sanction operates to promote one of the two traditional aims of punishment: deterrence or retribution.[193] It thus assumes that other purposes, including incapacitation, are paradigmatically civil.[194] At times, the Court has given this factor more weight than the other *Mendoza* factors. In *Kansas v. Hendricks*, for example, the core of the Court's analysis of the second

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[187] Steiker, *supra* note 6.

[188] *Id*. at 805–06.

[189] Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 71 (1996).

[190] Steiker, *supra* note 6, at 818 ("[O]verall, schemes to commit 'sexually violent predators' and schemes to commit the violent mentally ill both seem to speak much more clearly the language of prevention than that of blame.").

[191] *See* Logan, *supra* note 180, at 1295–1312 (arguing for a more robust and less deferential inquiry into the legislative purpose of sexual offender commitment statutes); *see also* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1875–93 (1992) (arguing that the distinction should depend on whether the statute seeks to outlaw conduct altogether, rather than simply force the actor to internalize the costs).

[192] ANTONIN SCALIA, A MATTER OF INTERPRETATION *passim* (1997); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 846 (1992); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

[193] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

[194] *See id.*

prong was its insistence that the goal of the sexual offender commitment regime was preventive detention, and therefore the regime was civil.[195]

The Court's occasional insistence that incapacitation is para-digmatically civil cannot be maintained. In other contexts, the Court has recognized that incapacitation is a legitimate and important goal of the criminal justice system.[196] To be sure, the Supreme Court still occasionally seems to deny, as a descriptive matter, that incapacitation is goal of criminal punishment,[197] but such denials are patently false, and increasingly so. Incapacitation is now a dominant force in criminal law. It shapes actual punishment practices as much as deterrence and retribution do.[198]

C. An Originalist Approach – "Traditional Aims" Reconsidered

Of course, the fourth *Mendoza* factor focuses not on contemporary penal theory but rather on the "traditional" aims of punishment.[199] It might be argued that even if incapacitation is *now* a dominant goal of criminal law, it was not *traditionally* a dominant goal. Put differently, an originalist might argue that when the framers wrote the word "criminal," they meant "laws with goals of deterrence and retribution."

Even if the originalist approach is the proper approach, however, *Mendoza*'s assumption that deterrence and retribution have traditionally been the primary or sole goals of punishment is simply wrong as a matter of historical fact. An examination of eighteenth-century penal theory suggests that retribution was *not* considered a valid goal of punishment, while incapacitation *was*, at least by many of the most influential theorists.

At the outset, it must be admitted that there is no easy way to determine what the "true" aims of punishment were in the eighteenth century. Our best evidence is from the writing of eighteenth-century commentators, but their views may not represent the values that animated actual punishment practices at the time. The commentators were elites, after all, many of whom were writing precisely to criticize contemporary practices in general—and in particular, contemporary

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[195] 521 U.S. 346, 360–63 (1997).

[196] *See* Ewing v. California, 538 U.S. 11, 24–25 (2003); Carol S. Steiker, Panetti v. Quarterman*: Is There a "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 290–91 (2007). At other times, however, the Court has continued to exclude incapacitation from the menu or permissible punishment goals.

[197] *See, e.g.*, Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008) (stating that the "three principal rationales" of punishment are retribution, deterrence, and rehabilitation); *see also* Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1212–14 (2009) (arguing that the Court's decision in *Panetti v. Quarterman* implicitly excludes incapacitation as a legitimate rationale for punishment).

[198] HARCOURT, *supra* note 1, at 26–31.

[199] *Mendoza-Martinez*, 372 U.S. at 168.

imposition of the death penalty. Moreover, eighteenth-century penal theorists held wildly divergent views on the proper aims of criminal punishment.[200]

Nonetheless, an examination of eighteenth-century penal theory undermines *Mendoza's* historical assumption in two ways. First, it is not true that retribution was considered a valid function of the criminal law.[201] The death penalty dominated arguments of the day, and neither supporters nor opponents made their arguments in terms of retribution.[202] In fact, even the conservative supporters of the death penalty tended to explicitly *disclaim* that retribution was a goal.[203] The prevailing view at the time was that retribution was a task for God and God alone, while human punishment had different ends.[204]

Second, many eighteenth-century penal theorists recognized incapac-itation as a legitimate goal of punishment. Commentators of all political stripes tended to focus on crime prevention as the chief aim of punishment,[205] and many recognized incapacitation as one form of prevention, at least implicitly.[206] Others, like

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[200] *See* FRANK MCLYNN, CRIME AND & PUNISHMENT IN EIGHTEENTH-CENTURY ENGLAND 243 (1989) ("The entire subject of the impact of Enlightenment thought on English penal theory in the eighteenth century is problematical. And no one view ever held predominance at any one time.").

[201] The operation of medieval criminal law, by contrast, may have been more obviously motivated by principles of vengeance. *See* David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 80–83 (1996).

[202] *See* MCLYNN, *supra* note 200, at 249 (stating that the primary theoretical debate was between those who viewed deterrence as the goal of punishment and those who viewed rehabilitation as the goal of punishment).

[203] WILLIAM EDEN AUCKLAND, PRINCIPLES OF PENAL LAW 6 (1771) ("It is from an abuse of language that we apply the word 'punishment' to human institutions: Vengeance belongeth not to man."); WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 373 (Liberty Fund Inc. 2002) (1752) ("The proper end of human punishment is not the satisfaction of justice, but the prevention of crimes. By the satisfaction of justice, I mean the retribution of so much pain for so much guilt; which is the dispensation we must expect at the hand of God . . . .").

[204] *Cf.* 4 WILLIAM BLACKSTONE, COMMENTARIES *1, *11 (stating that the goal of "human punishments" was not "atonement or expiation for the crime committed; for that must be left to the just determination of the Supreme Being").

[205] HENRY FIELDING, THE JOURNAL OF A VOYAGE TO LISBON 31 (1752) ("Example alone is the end of all public punishments and rewards. Laws never inflict disgrace in resentment, nor confer honour from gratitude."); MARTIN MADAN, THOUGHTS ON EXECUTIVE JUSTICE, WITH RESPECT TO OUR CRIMINAL LAWS 11 (1785) ("The prevention of crimes is the great end of all legal feverity . . . ."); *see also* SAMUEL ROMILLY, OBSERVATIONS ON THE CRIMINAL LAW OF ENGLAND 23 (1810) ("The sole object of human punishments, it is admitted, is the prevention of crimes; and to this end, they operate principally by the terror of example.").

[206] *See* PALEY, *supra* note 203, at 373 (arguing that if criminals were not punished, they would "repeat the same crimes, or . . . commit different crimes"); *cf.* Madan, *supra* note 205, at 10 ("[T]he sooner the malefactor is removed from out of the society the better . . . .").

Blackstone and Bentham, made the point quite explicitly. Blackstone wrote that the goal of punishment was to serve as:

> a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporal punishments, fines, and temporary exile or imprisonment are inflicted: or, by deterring others by the dread of his example from offending in the like way, . . . which gives rise to all ignominious punishments, and to such executions of justice as are open and public: or, *lastly, by depriving the party injuring of the power to do future mischief*; which is effected either by putting him to death; or condemning him to perpetual confinement, slavery, or exile.[207]

Put in modern terms, Blackstone thus described three purposes: (1) reformation and specific deterrence of the individual offender, accomplished primarily by minor sanctions; (2) general deterrence, accomplished primarily by shaming sanctions; and (3) incapacitation, accomplished primarily by death or other permanent sanctions.[208]

Bentham's views were similar. He argued that the goal of punishment was to prevent future crimes in two ways: "*[p]articular prevention*, which applies to the delinquent himself; and *general prevention*, which is applicable to all the members of the community without exception."[209] He argued that general prevention should be the "chief end of punishment,"[210] but he nonetheless recognized incapacitation as a wholly legitimate function.[211]

> With respect to any particular delinquent, we have seen that punishment has three objects,—incapacitation, reformation, and intimidation. *If the crime committed is of a kind calculated to inspire great alarm, as manifesting a very mischievous disposition, it becomes necessary to take from him the power of committing it again*. But if the crime, being less dangerous, only justifies transient punishment, and it is possible for the

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[207] 4 BLACKSTONE, *supra* note 204, at *11–12.

[208] Like Blackstone, many other contemporary commentators argued that prisons and workhouses should be used in part of reformation and rehabilitation. *See, e.g.*, THOMAS ALCOCK, OBSERVATIONS ON THE DEFECTS OF THE POOR LAWS 70–72 (1752).

[209] JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 61 (James T. McHugh ed., Prometheus Books 2009) (1830).

[210] *Id*. at 62.

[211] *Id*. at 61–62; *see also* JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 170–71 n.1 (Prometheus Books 1988) (1781) (stating that the "principle end of punishment is to control action," and that one mechanism by which punishment control's action is by restraint on the offender's "physical power, in which case it is said to operate by *disablement*").

> delinquent to return to society, it is proper that the punishment should possess qualities calculated to reform or intimidate him.[212]

The views of Bentham and Blackstone were both influential,[213] and were both fairly typical of the time.[214]

Similar views endorsing incapacitation as a legitimate and necessary form of crime prevention were expressed throughout the nineteenth century as well.[215] In his magisterial history of English criminal law, Stephen noted that while the public has a desire for vengeance, the best aim of criminal punishment was prevention.

> Another object is the direct prevention of crime, either by fear, *or by disabling or even destroying the offender*, and this which is I think commonly put forward as the only proper object of legal punishments is beyond all question distinct from the one just mentioned [i.e., retribution] and of coordinate importance with it. The two objects are in no degree inconsistent with each other, on the contrary they go hand in hand and may be regarded respectively as the secondary and the primary effects of the administration of criminal justice.[216]

Like Blackstone and Bentham, Stephen saw incapacitation as an important means of crime prevention.

The Supreme Court's assertion that retribution and deterrence are the only two traditional goals of punishment was made for the first time in the mid-twentieth century.[217] The assertion was essentially apocryphal, made without

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[212] BENTHAM, *supra* note 209, at 62.

[213] *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1821–22, 1845 (1992). For discussions of the influence of "classical school" scholars such as Bentham and Becarria, see for example Edward M. Wise, *Foreword: The International Association of Penal Law and the Problem of Organized Crime*, 44 WAYNE L. REV. 1281, 1287–89 (1998).

[214] *See* COLEMAN PHILLIPSON, THREE CRIMINAL LAW REFORMERS: BECARRIA, BENTHAM, AND ROMILLY 295–97 (Patterson Smith Publ'g Corp. 1970) (1923) (noting that Romilly viewed incapacitation as one of the three legitimate functions of criminal punishment).

[215] Alexander Robertson, *Crimes and Punishments*, 16 LAW MAG. & REV. 95, 99 (1891) ("[T]he chief end of punishment is to punish the criminal by preventing him from doing the like again . . . ."); *On the Punishment of Death*,. 4 JURIST OR Q.J. JURISPRUDENCE & LEGIS. 44, 46 (1833) ("The *end* of punishment is prevention: prevention in two ways: we desire by its example to check society at large; and, by remembrance of it, to reform, or, through physical incapability, to restrain the criminal himself.").

[216] 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 83 (1883) (emphasis added).

[217] The phrase "traditional aims" first appeared in *Mendoza-Martinez* in 1963. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).

historical support.[218] In the eighteenth century, at least, retribution was not considered a legitimate goal of human punishment, but incapacitation was. While incapacitation has assumed a growing role in the criminal law in recent decades, for centuries it has been recognized as an important purpose of criminal punishment. The Court's repeated suggestion that deterrence and retribution were the only two "traditional" goals of punishment is false. It should no longer serve to define the boundary between civil and criminal law.

D. A Revised Doctrine

The recognition that incapacitation is a core function of the criminal law mandates a revision of the *Mendoza* multi-factor test. It can no longer be maintained that the regimes of preventive detention are necessarily or even generally civil in nature. A regime of preventive detention may be criminal or it may be civil. The fact that a law has a primary goal of incapacitation tells us little or nothing about whether the law should be classified as "civil" or "criminal."

There are at least two ways that the *Mendoza* test could be sensibly modified to account for the reality of incapacitation in the criminal law. First, the fourth factor could simply be removed from the *Mendoza* test, leaving the remaining six factors to control the analysis.

Second, in the alternative, a more nuanced application of the fourth factor could recognize that there are different types of incapacitation—some criminal and some civil. Paradigmatically civil forms of incapacitation, including everything from routine guardianships to more robust full commitments of the mentally ill, are often designed in large part to enable the individual to receive treatment, or to prevent the individual from harming himself. By contrast, when the criminal law incapacitates an individual, its primary goal is to prevent the individual from harming others. The fourth *Mendoza* factor could be modified to ask what type of preventive detention the statutory regime creates.[219] If the primary goal is preventing harm to others (that is, future crimes), then the fourth factor would cut in favor of a finding that the statute is criminal. If the primary goal is treatment and

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[218] In support of its claim that retribution and deterrence were the "traditional aims of punishment," the *Mendoza-Martinez* Court cited two earlier opinions: *Trop v. Dulles*, 356 U.S. 86 (1958), and *United States v. Constantine*, 296 U.S. 287, 295 (1935). *Mendoza-Martinez*, 372 U.S. at 168–70. Both cases involved at least tangential questions about the distinction between "civil" and "criminal" laws, but neither involved any historical discussion of the "traditional aims" of criminal punishment. *See Trop*, 356 U.S. 86 *passim*; *Constantine*, 296 U.S. 287 *passim*.

[219] Distinguishing various incapacitating regimes this way would not involve as much need to divine legislative "purpose." Application of the doctrine would depend instead on the actual operation of the incapacitating system. For example, if the imposition of deprivation were actually triggered by a finding of danger to self, the law would be civil, whereas if the imposition were actually triggered by a finding of danger to others, the law would be criminal.

prevention of self-harm, then the fourth factor would cut in favor of finding that the statute is civil.

The first alternative would be simpler to apply, while the second alternative would be more difficult to apply, but more analytically robust. Either alternative would be better than the current test, which falsely assumes that incapacitation is solely a civil function.

Admittedly, however, neither of these revisions would necessarily mandate a different result in any given case. The current doctrine is overdetermined. Even with the fourth factor altered, the balance of the test could remain unchanged. Even if the Supreme Court recognized incapacitation as criminal, it could continue to insist that legislatures have substantial power to make a law civil just by labeling it so. The Court could likewise continue to find in any given case that the remaining factors support a finding that a statute is civil even though it is aimed at incapacitation. Multi-factor tests are usually fluid enough to accommodate different results in any given case,[220] and the *Mendoza* test would remain fluid even with the fourth factor excised or altered.

Nonetheless, revising the test might tip the scales in at least some cases. Under a revised test, it would be much more difficult to maintain that the indefinite incarceration of sex offenders is civil rather than criminal. The first, second, and fifth factors weigh in favor of finding such statutes criminal.

Of course, to say that commitment of sex offenders is "criminal" is not to say that the state has no power to order such commitments. It would simply mean that individuals could not be committed without being afforded the panoply of enhanced procedural protections provided by the Constitution. For instance, an individual contesting commitment would have the right to remain silent,[221] the right to appointed counsel, and the right to a jury trial.[222] The facts necessary for commitment would have to be proven beyond a reasonable doubt, [223] rather than by some lower standard, such as "clear and convincing evidence."[224] In short, the basic procedural rights of the Fifth and Sixth Amendments would apply to proceedings to commit sex offenders.

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[220] *See* Easterbrook, *supra* note 186, at 780.

[221] The Court has held that the privilege against self-incrimination does not exist in civil proceedings. Allen v. Illinois, 478 U.S. 364, 374 (1986).

[222] *See, e.g.*, Steiker, *supra* note 6, at 777–78 (discussing some of the constitutional protections for criminal defendants that currently "are not required, and thus very rarely employed, in civil cases").

[223] *See In re* Winship, 397 U.S. 358, 364 (1970) (holding that due process in criminal cases requires that guilt be proved "beyond a reasonable doubt").

[224] This lower standard is currently all that is required in civil commitment proceedings. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 433 (1979) (holding that due process only requires a "clear and convincing" standard in cases of civil commitment).

Whether and how the Double Jeopardy and Ex Post Facto Clauses would apply to criminal commitment regimes is a much thornier question.[225] These provisions apply more easily to criminal laws whose enforcement focuses solely on proof of past acts. In a purely prospective commitment regime—one triggered only by a finding of future dangerousness, without a requisite finding of past crimes—it would be difficult or impossible to apply the Double Jeopardy and Ex Post Facto Clauses in any coherent way. But in the real world, commitment statutes typically require *both* the proof of some past crimes *and* also proof of future dangerousness. Because proof of past crimes is a necessary finding, actual commitment statutes function as a sort of extended sentencing provision—like reverse-parole.

Once again, conceiving of commitment as reverse-parole would preserve the state's ability to engage in commitment, subject to additional constitutional requirements. Commitment regimes could have only prospective application under the Ex Post Facto Clause, and the commitment would at least have to be authorized (if not actually imposed) at the time of initial sentencing, in the manner of an indeterminate sentence. In short, the particular result of a case like *Kansas v. Hendricks*[226] could not stand, but the state's basic power to detain sexually dangerous persons would remain.

Many traditionalists argue for a strict separation of the criminal and civil spheres—they argue that the criminal law should not be used for preventive detention.[227] Whatever the merits of those arguments, the fact remains that as a descriptive matter, criminal law today is based, to a large and growing extent, on preventive detention. The Supreme Court's jurisprudence cannot continue to rely on descriptive claims about a world that no longer exists, and probably never did.

V. CONCLUSION

A new criminal law has emerged in the last quarter century. The dominant goal of the new criminal law is preventive detention—incarceration to incapacitate dangerous persons. The emergence of the new criminal law has remade both sentencing law and definitions of crimes themselves. The new criminal law has also begun to remake the law of evidence. As incapacitation has become an accepted goal of criminal punishment, the rationale of the character rule has become less compelling, and the rule itself has begun to wane in criminal practice.

These changes have been subtle, but they have also been both radical and fairly rapid. There is no indication that the law will reverse course. Indeed, the law's response to the threat of terrorism has only accelerated the move toward the

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[225] *Cf.* Cheh, *supra* note 165, at 1370–73 (arguing that the applicability of pure procedural rights should differ from the applicability of the "substantive" rights, including double jeopardy).

[226] 521 U.S. 346, 395–96 (2007).

[227] *See, e.g.*, Stephen J. Morse, *Blame and Danger: An Essay on Preventative Detention*, 76 B.U. L. REV. 113, 116–22 (1996); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 206 (1996).

new criminal law. In coming years, the Supreme Court will be forced to address a variety of difficult constitutional questions that the new criminal law presents.

Ironically, the safest solution may be to embrace preventive detention as an accepted function of the criminal law. Doing so would alter the Supreme Court doctrines which distinguish the civil from the criminal—doctrines that limit the reach of the Bill of Rights. The procedural protections guaranteed by the Bill of Rights should be extended to more citizens faced with incarceration regardless of whether the purpose of incarceration is incapacitation rather than punishment or deterrence. As the new criminal law remakes the American justice system, the Court must recognize that preventive detention is now a core function of the criminal law. That recognition will have the counterintuitive effect of expanding the constitutional protections given to citizens facing imprisonment.

APPENDIX A – STATE BY STATE RECIDIVISM SENTENCING PROVISIONS

State	Statute/ Code	Effective date	Strikes	Judicial Discretion	Sentencing Provisions
Alabama	ALA. CODE § 13A-5-9 (2005).	1977	3 or 4	No judicial discretion for Three Strikes. Some judicial discretion for Four Strikes.	**Three Strikes**: For a Class A felony with two previous Class A convictions: life imprisonment or a term not less than 99 years. **Four Strikes**: For a Class A felony with three previous convictions: if no prior conviction was for a Class A felony, life imprisonment without the possibility of parole (at the discretion of the trial court); if one of the prior convictions was for a Class A felony, life imprisonment without the possibility of parole.
Alaska	ALASKA STAT. § 12.55.125 (2008).	1978	2 or 3	No judicial discretion.	**Two Strikes:** For murder in the first degree: 99 years (if (a) uniformed peace officer, fire fighter or corrections officer, (b) previously convicted of murder in the first or second degree, (c) victim was tortured, (d) convicted of murder and of personally causing death of person during robbery, or (e) used authority as peace officer to facilitate murder). **Three Strikes:** For

					sexual assault in the first, second or third degree: 99 years (if defendant has two prior convictions for sexual felonies).
Arizona	ARIZ. REV. STAT. ANN. § 13-708 (2010).	1993	3	No judicial discretion.	**Three Strikes**: For conviction of serious offense, first degree murder, or any dangerous crime against children: life imprisonment (no possible parole until 25 years have been served or the sentence is commuted).
Arkansas	ARK. CODE ANN. § 5-4-501 (2005 & Supp. 2007).	1975	2 or 3	No judicial discretion; mandatory sentencing.	**Two Strikes**: For a "serious felony involving violence": between 40-80 years, or life imprisonment. Not eligible for parole or community correction transfer until they reach the age of 55. **Three Strikes**: For a "felony involving violence," terms include: life imprisonment, 40 years to life, 30 to 60 years, 25 to 40 years, 20 to 40 years, and a term of not more than three times the maximum sentence for the unclassified offense. Not eligible for parole or community correction transfer until they reach the age of 55.

California	CAL. PENAL CODE § 667 (West 2010).	1982	3	Limited judicial and prosecutorial discretion.	**Three Strikes**: Minimum: the greater of three times the terms of imprisonment for each felony count, 25 years, or the term determined by the applicable regulation. Maximum: life imprisonment.
Colorado	COLO. REV. STAT. § 18-1.3-801 (2008).	2002	3 or 4	No judicial discretion. The governor may pardon or provide clemency on a case-by-case basis.	**Three Strikes**: Life imprisonment, eligible for parole after 40 years. **Four Strikes**: Four times the maximum presumptive range.
Connecticut	CONN. GEN. STAT. § 53a-40 (West 2007 & Supp. 2010).	1971	2 or 3	No judicial discretion. The sentencing provision is mandatory. The court may not accept any plea of guilty, not guilty or nolo contendere from a defendant unless the prosecuting attorney has investigated whether or not the defendant has been twice convicted and imprisoned.	**Two Strikes:** For a "persistent dangerous sexual offender": life imprisonment. For a "persistent dangerous felony offender": two times the minimum term for crime, up to 40 years. **Three Strikes:** For a "persistent dangerous felony offender": three times the minimum term for crime, up to life imprisonment.
Delaware	DEL. CODE ANN. tit. 11, § 4214 (2007).	1972	3 or 4	No judicial discretion for Three Strikes. Discretion permitted for Four Strikes offenses.	**Three Strikes**: For conviction a specific felony: life imprisonment without possibility of parole or probation, unless capital punishment is the mandatory sentence. **Four Strikes**. Up to life imprisonment.

District of Columbia	D.C. CODE § 22-1804a (LexisNexis 2010).	1901	3	Judicial discretion. The court may impose a sentence "as it deems necessary."	**Three Strikes**: For conviction of a felony, with two previous felony convictions: up to 30 years. For conviction of a crime of violence, with two previous convictions for crimes of violence: up to a life imprisonment without the possibility of parole.
Florida	FLA. STAT. ANN. § 775.084 (West 2010).	1971	3 or 4	Limited discretion. The court has some discretion if "it is not necessary for the protection of the public to sentence a defendant who meets the criteria for sentencing as a habitual felony offender, a habitual violent felony offender, or a violent career criminal." Otherwise, sentencing for "three-time violent felony offender" and "violent career criminal" is mandatory.	**Three Strikes:** Depending on the severity of the crime, for a "three-time violent felony offender": minimum of 5 years, maximum of life imprisonment. **Four Strikes:** Depending on the severity of the crime for a "violent career criminal": minimum of 10 years, maximum of life imprisonment.
Georgia	GA. CODE ANN. § 17-10-7 (2008 & Supp. 2010).	1851	2	No judicial discretion for "serious violent felony." Judicial discretion permitted for "felony" offense.	**Two Strikes**: For conviction of a "serious violent felony": life imprisonment without parole (unless sentence is for capital punishment). For conviction of a "felony": longest possible period of

					time for the offense.
Hawaii	2006 Haw. Sess. Laws, ch. 81, § 1.	Uncodified	3	Judicial discretion permitted. "This section shall apply only if the prosecuting attorney brings before the court a motion to sentence under this section that allows the court to advise the defendant of the defendant's eligibility for sentencing . . . ."	**Three Strikes**: For a "habitual violent felon": minimum of 30 years, maximum of life imprisonment.
Idaho	IDAHO CODE ANN. § 19-2514 (2004).	1923	3	Judicial discretion permitted.	**Three Strikes**: For conviction of a third felony (a "persistent violator of the law"): minimum of 5 years, maximum of life imprisonment.
Illinois	720 ILL. COMP. STAT. 5/33B-1 (2010) (repealed 2009).	1961	3	No judicial discretion.	**Three Strikes:** Life imprisonment.
Indiana	IND. CODE ANN. §§ 35-50-2-8, -8.5 (LexisNexis 2009).	1976	3	No mandatory sentences, but parameters set for "habitual offenders" and someone convicted of a "sex offense against a child."	**Three Strikes**: For a "habitual offender": not more than three times the sentence for the underlying offense. For conviction of "sex offense against a child": possible life imprisonment without parole.
Iowa	IOWA CODE ANN. §§ 902.8, 902.9 (West 2003 & Supp. 2010).	1976	3	No judicial discretion.	**Three Strikes:** For a "habitual offender" convicted of a third Class "C" or "D" felony: not eligible for parole for three years.

Kansas	KAN. STAT. ANN. § 21-4504 (2007) (repealed 2010).	1969	2 or 3	Limited judicial discretion. The bottom and top limits are set; court has discretion to sentence within given parameters.	**Two Strikes:** For conviction of a second specified felony (crimes against persons, sex crimes, and crimes affecting family relationships and family): minimum of not less than the least nor more than twice the greatest minimum sentence; maximum of not less than the least nor more than twice the greatest maximum available. **Three Strikes:** For conviction of a third specified felony (see above): minimum of three times the greatest minimum; maximum of three times the maximum sentence available. If the third felony is one not specified, it would follow the sentencing pattern above for two strikes.
Kentucky	KY. REV. STAT. ANN. § 532.080 (LexisNexis 1999 & Supp. 2007).	1974	2 or 3	Limited judicial discretion.	**Two Strikes**: For a "Persistent felony offender in the second degree": indeterminate term for the next highest degree than the offense of conviction. **Three Strikes**: For a "Persistent felony offender in the first degree": 20 to 50 years, or life imprisonment. For a sex crime against a minor: life without parole for

					25 years.
Louisiana	LA. REV. STAT. ANN. § 15:529.1 (2005 & Supp. 2010).	1956	3 or 4	Limited judicial discretion. The district court has authority to reduce any part of a mandatory minimum sentence when such a term would violate a defendant's constitutional protection against excessive punishment. State v. Pollard, 644 So. 2d 370, 371 (La. 1994).	**Three Strikes**: Life imprisonment without parole (dependent upon the previous sentences for prior convictions). **Four Strikes**: Life imprisonment without parole (dependent upon the previous sentences for prior convictions). Both Three & Four Strike rules stipulate that two of the previous felonies are "a crime of violence."
Maine	ME. REV. STAT. tit. 17-A, § 1252 (2006 & Supp. 2006).	1975	3	Limited judicial discretion. Some previous convictions "must be given serious consideration by the court when imposing a sentence."	**Three Strikes**: For a crime, other than murder (if there are two prior convictions for substantially similar conduct): sentencing class is one class higher than it would be otherwise.
Maryland	MD. CODE ANN., CRIM. LAW § 14-101 (LexisNexis 2002 & Supp. 2009).	1957	3 or 4	No judicial discretion. Statute says the sentence is "mandatory," for four strikes, and "the court may not suspend all or part of the mandatory 25-year sentence," for three strikes.	**Three Strikes:** For conviction of a crime of violence on two separate occasions (with at least one previous term of confinement): minimum of 25 years. **Four Strikes:** For three separate terms of confinement for three separate convictions of any crime of violence: life imprisonment without parole.

Massachusetts	MASS. ANN. LAWS ch. 279, § 25 (LexisNexis 2002).	1887	3	No judicial discretion.	**Three Strikes**: For a "habitual criminal" (defendant has been twice convicted, and has served at least three years in prison): maximum term provided by law for the felony for which he or she is sentenced.
Michigan	MICH. COMP. LAWS SERV.§ 769.12 (LexisNexis 2002 & Supp. 2010).	1927	4	Limited judicial discretion. The bottom and top limits are set; court has discretion to sentence within given parameters.	**Four Strikes**: For conviction of an offense punishable by a maximum of 5 years: life imprisonment or a lesser term. For conviction of an offense punishable by a maximum term that is less than 5 years: maximum term of not more than 15 years.
Minnesota	MINN. STAT. ANN. § 609.1095 (West 2009).	1998; 2005	3 or 6	Judicial discretion permitted in some cases, but sentences are mandatory in others.	**Three Strikes**: For conviction of a third violent crime: judge may impose an aggravated durational departure from the presumptive imprisonment sentence up to the statutory maximum sentence. For conviction of a third violent felony: court must impose a sentence of at least the presumptive sentence under the Sentencing Guidelines (and defendant is not eligible for parole, probation, discharge or work release). **Six Strikes**: For

					conviction of a sixth felony: court may impose an aggravated durational departure up to the statutory maximum sentence if the present offense "was committed as part of a pattern of criminal conduct."
Mississippi	MISS. CODE ANN. §§ 99-19-81, -83 (West 2006).	1976	3	No judicial discretion.	**Three Strikes**: For conviction of a felony, with two previous felonies or federal crimes involving a sentence of one year or more: maximum term prescribed for such felony (not eligible for sentence reduction or suspension, nor is defendant eligible for parole or probation). For conviction of a "crime of violence," with two previous felonies as described above: life imprisonment (not eligible for sentence reduction or suspension, nor is defendant eligible for parole or probation).

Missouri	MO. ANN. STAT. § 558.016 (West 1999 & Supp. 2010).	1977	3	Judicial discretion permitted. "Class" of the offense is given as a range, but specific sentence length does not appear in the statute.	**Three Strikes**: For a "persistent offender" (two or more prior felonies) or a "dangerous offender" (murder, attempted murder or threatened serious physical injury during commission of a felony): sentence will rise to the next class (Class B to Class A), or remain as is (Class A to Class A).
Montana	MONT. CODE ANN. § 46-18-219 (2009).	1995	2 or 3	No judicial discretion.	**Two Strikes:** Life imprisonment, unless the death penalty is imposed (strict guidelines provide for possible parole, but obtaining parole is unlikely).
Nebraska	NEB. REV. STAT. ANN. § 29-2221 (LexisNexis 2009).	1921	3	No judicial discretion.	**Three Strikes**: With two prior felony convictions (a "habitual criminal"): mandatory minimum of 10 years, maximum of 60 years. With two prior felony convictions where at least one of the felonies was a serious crime (as defined by the statute): mandatory minimum of 25 years, maximum of 60 years.

Nevada	NEV. REV. STAT. ANN. §§ 207.010, .012 (LexisNexis 2006 & Supp. 2009).	1911	3	Some judicial discretion. For a "habitual criminal," the trial judge may dismiss a count included in the indictment. For a "habitual felon," the trial judge may not dismiss a count.	**Three Strikes:** With two previous felony convictions: sentenced as a category B felon, imprisoned for a minimum of 5 years, maximum of 20 years. With three previous felony convictions: imprisoned for (1) life without the possibility of parole, (2) life with possible parole in 10 years, or (3) 25 years with eligibility for parole in 10 years. With two previous felony convictions that fall into the category defined by statute: either (1) life without possibility of parole, (2) life with possibility of parole in 10 years, or (3) 25 years with eligibility for parole in 10 years.
New Hampshire	N.H. REV. STAT. ANN. § 651:6 (LexisNexis 2007 & Supp. 2007).	1971		Judicial discretion permitted, but dependent upon factors available in the statute.	**Three Strikes:** With two previous felony convictions: may be sentenced to an "extended term of imprisonment." For a felony, other than murder or manslaughter: minimum of 10 years, maximum of 30 years. For two or more offenses of aggravated felonious sexual assault: life without parole. For a third felonious sexual assault offense: life imprisonment.

New Jersey	N.J. STAT. ANN. § 2C:43-7.1 (West 2005).	1995	3	No judicial discretion.	**Three Strikes:** Life imprisonment without parole.
New Mexico	N.M. STAT. ANN. § 31-18-23 (2010).	1994	3	No judicial discretion.	**Three Strikes**: For a third conviction for a violent felony: punishment imposed by that conviction, in addition to life imprisonment with the possibility of parole.
New York	N.Y. PENAL CODE LAW § 70.08 (McKinney 2009 & Supp. 2010).	1978	3	No judicial discretion.	**Three Strikes**: For a "persistent violent felony offender," with two or more predicate violent felony convictions: minimum of 25 years, maximum of life imprisonment.
North Carolina	N.C. GEN. STAT. §§ 14-7.7, -7.12 (2005).	1994	3	No judicial discretion at sentence. The State is not mandated to prosecute under this statute.	**Three Strikes**: Life imprisonment without parole.
North Dakota	N.D. CENT. CODE § 12.1-32-09 (1997 & Supp. 2009).	1973	3	Judicial discretion permitted.	**Three Strikes**: For convictin of a Class A felony, if defendant is proven to be a "dangerous special offender" or a "habitual offender" (two or more felonies): maximum of life imprisonment.
Ohio	OHIO REV. CODE ANN. § 2929.11 (LexisNexis 2006).	1996	N/A	Judicial discretion permitted, but judge must consider statutory factors.	Sentencing guided by overriding purposes of felony sentencing. "The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To

					achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."
Oklahoma	OKLA. STAT. tit. 21, § 51.1 (2002).	1999	2 or 3	Judicial discretion permitted, with range of sentences provided. District Attorney must seek to enhance punishment.	**Two Strikes:** For conviction of a violent offense that normally has a 5 year sentence: mandatory minimum of 10 years, maximum of life imprisonment. For conviction of a nonviolent crime punishable by a 5 year or longer sentence: minimum of twice the normal minimum sentence, maximum of life imprisonment. **Three Strikes:** For conviction of a violent offense, with two previous felony convictions: minimum of 20 years, maximum of life imprisonment. For conviction of a nonviolent crime, with two previous felony convictions: minimum of three times the normal minimum, maximum of life imprisonment.

Oregon	OR. REV. STAT. § 161.725 (2009).	1971	2	No judicial discretion.	**Two Strikes:** For "dangerous offenders" (1) convicted of Class A felony and "suffering from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another;" 2) convicted of felony that endangers life of another and a previous felony conviction; 3) convicted of felony that endangers another, has previously engaged in "unlawful conduct," and "is suffering from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another"): if applicable, indeterminate sentence, with a maximum of 30 years.
Pennsylvania	42 PA. CONS. STAT. ANN. § 9714 (West 2008).	1982	3	Limited judicial discretion. If court finds 25 years is not sufficient, it may increase sentence to life imprisonment without parole. Court may not give sentence less than 25 years.	**Three Strikes**: Minimum of 25 years, maximum of life imprisonment without parole.

Rhode Island	R.I. GEN. LAWS § 12-19-21 (2002).	1896	3	Judicial discretion permitted, with a range of sentences provided. District Attorney must seek to enhance punishment.	**Three Strikes:** With two or more prior convictions of felony offenses ("habitual criminal"): maximum of 25 years.
South Carolina	S.C. CODE ANN. § 17-25-45 (Supp. 2007).	1982	2	No judicial discretion.	**Two Strikes**: For a "serious offense": life without parole.
South Dakota	S.D. CODIFIED LAWS §§ 22-7-8, -8.1 (2006).	1939	2 or 3	No judicial discretion.	**Two Strikes**: With one or two previous felonies: sentence shall be enhanced to the next class, not to exceed life imprisonment. **Three Strikes**: With three or more prior felonies, and one or more of the prior felonies was a crime of violence: life imprisonment with a possible $50,000 fine. For three or more prior felonies, but with no previous crimes of violence: maximum of life imprisonment, but eligible for parole eligible if sentence is less than life imprisonment.

Tennessee	TENN. CODE ANN. § 40-35-120 (2006).	1994	2 or 3	The judge may not accept a plea agreement that fails to recommend that a defendant with a sufficient number of prior convictions be sentenced as a repeat violent offender. If the judge denies the plea agreement, the DA may still amend the offense to an offense that is not designated as a violent offense.	**Three Strikes**: Life imprisonment without possibility of parole.
Texas	TEX. PENAL CODE ANN. § 12.42 (West Supp. 2010).	1974	3	No judicial discretion.	**Three Strikes**: Life imprisonment. The statute does not address the issue of probation or parole.
Utah	UTAH CODE ANN. § 76-3-203.5 (West Supp. 2010).	1995	3	No judicial discretion. The Board of Pardons and Parole may look at "habitual violent offender status as an aggravating factor in determining the length of incarceration."	**Three Strikes**: Enhances the degree of second- and third-degree felony convictions to a first-degree felony.
Vermont	VT. STAT. ANN. tit. 13, §§ 11, 11a (1998).	1949	3 or 4	Judicial discretion permitted.	**Three Strikes:** For a third conviction, with two previous felony convictions for crimes of violence: may be sentenced to life imprisonment. **Four Strikes:** For a fourth conviction, with three previous felony convictions: may be sentenced to life imprisonment.

Virginia	VA. CODE ANN. § 19.2-297.1 (2008).	1994	3	No judicial discretion. The State is not mandated to prosecute under this statute.	**Three Strikes:** For conviction of a third act of violence, with previous convictions for two or more separate acts of violence: life imprisonment without parole.
Washington	WASH. REV. CODE § 9.94A.570 (2010).	2001	3	No judicial discretion.	**Three Strikes:** Life imprisonment without parole.
West Virginia	W. VA. CODE § 61-11-18 (2005).	1849	2 or 3	No judicial discretion.	**Two Strikes:** For a conviction of first degree murder, second degree murder, or sexual assault in the first degree, with a previous conviction for either of those crimes: life imprisonment without the possibility of parole. **Three Strikes:** With two prior convictions for a crime punishable by confinement in a penitentiary: life imprisonment.
Wisconsin	WIS. STAT. ANN. § 939.62 (West Supp. 2009).	1955	2 or 3	No judicial discretion.	**Two Strikes**: For conviction of a serious child sex offense, with a conviction for the same on at least one prior occasion: life imprisonment without the possibility of parole. **Three Strikes**: With previous convictions for a felony on two or more separate occasions: life imprisonment

					without the possibility of parole.
Wyoming	WYO. STAT. ANN. § 6-10-201 (2009).	1982	3 or 4	No judicial discretion.	**Three Strikes:** For conviction of a violent felony, with two or more previous felony convictions: minimum of 10 years, maximum of 50 years. **Four Strikes:** For conviction of a violent felony, with three or more previous convictions: life imprisonment.