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## GETTING EVEN: RESTITUTION, PREVENTIVE DETENTION, AND THE TORT/CRIME DISTINCTION

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In *Blame and Danger: An Essay on Preventive Detention*,<sup>1</sup> Professor Stephen Morse examines the implications of what he calls the “standard account” of criminal law for the goal of preventively detaining those who would commit crimes against others:

[T]he moral legitimacy of the criminal law requires that offenders receive punishments that are proportionate to their culpability. If punishments are too harsh or excuses too restrictive, harmdoers may be punished more than they deserve, thus undermining the criminal law’s legitimacy. The criminal sanction should apply only to those who are blameworthy, and then strictly in proportion to the offender’s desert. Preventive detention of nonresponsible, blameless agents should therefore be solely the province of the civil justice system.<sup>2</sup>

By this account, which Professor Morse “subscribe[s] to . . . fully,”<sup>3</sup> the purpose of criminal law is to punish harmdoers “strictly in proportion to [their] desert.”<sup>4</sup>

Preventive detention is in conflict with the standard account because it appears to justify the imprisonment of persons who have committed no crime, and who are therefore blameless, on the strength of a prediction that they *will* commit a crime in the future, thus undermining the legitimating conditions of the criminal law. The same objection can be made against imprisoning an offender longer than he “deserves” to be imprisoned on the basis of his “culpability” for the offense, solely on the ground that he may commit another offense in the future.

According to the standard account, the civil justice system is the only place in the legal system where preventive detention is warranted. The civil justice system bases detention on a person’s lack of responsibility for his actions—his inability either to appreciate the nature of his actions or

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<sup>1</sup> Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113 (1996).

<sup>2</sup> *Id.* at 121.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

to conform his conduct to the requirements of the law. Thus, as Professor Morse explains:

[S]ome unfortunate people are so irrational, so grossly out of touch with reality, that ascribing responsibility to them is a travesty according to any but the most extravagantly libertarian account of human agency. . . . If their irrational practical reasoning increases the risk that they will cause harm to others—or perhaps to themselves—the usual liberty and autonomy justifications for allowing people to pursue their projects, to make wrong and foolish choices, are not present. . . . Consequently, the state is theoretically justified in intervening if the consequential benefits of the intervention outweigh the costs: permitting people incapable of rationality to cause harm irrationally does not enhance liberty and autonomy.<sup>5</sup>

In his Paper, Professor Morse seeks to examine how an expansion of the practice of preventively incarcerating people before they commit a crime might be justified within this standard account. My quarrel is not so much with his efforts, including his “modest proposal” to extend the crime of reckless endangerment, as it is with the standard account within which he seeks to remain. For Professor Morse begins his presentation by describing two cases that the standard account seems, perversely, unable to handle: the convicted criminal who announces as his term of imprisonment expires that he intends to resume his predation on the innocent upon his release, and the civilly committed “harmdoer” who will, if past experience is any guide, cease to take his medication upon his release and will then continue to harm the innocent. The standard account just described seems to be unable to justify continued incarceration of these two persons. And I can attest that, in my experience as a criminal prosecutor, Professor Morse is correct when he tells us that these cases “are surely not fanciful hypotheticals.”<sup>6</sup>

Indeed, I find Professor Morse’s modest proposal altogether too modest. In this Comment I will identify an alternative to the standard account that involves an entirely different understanding of the tort/crime distinction. This alternative grows out of the restitutive theory of criminal justice that I first presented in my *Ethics* article nearly twenty years ago.<sup>7</sup> Let me briefly summarize the *really* “modest” proposal I made back then and have occasionally defended since.<sup>8</sup>

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<sup>5</sup> *Id.* at 123.

<sup>6</sup> *Id.* at 114.

<sup>7</sup> See Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977).

<sup>8</sup> See Randy E. Barnett & John Hagel III, *Assessing the Criminal: Restitution, Retribution, and the Legal Process*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 1 (Randy E. Barnett & John Hagel III eds., 1977); Randy E. Barnett, *The Justice of Restitution*, 25 AM. J. JURIS. 117 (1980); Randy E. Barnett, *Pursuing Justice in a Free Society: Part Two—Crime Prevention and the Legal*

A restitutive approach shares the following in common with the standard retributivist account of criminal law: A crime creates an imbalance between a criminal and his victim, or, according to some accounts, between a criminal and an aggregation referred to as "society." Justice consists of "getting even"—that is, restoring the balance between the offender and either the victim, society, or both. Where restitution and retribution differ is with respect to how this balance should be obtained. According to a retributivist approach, we get even by *punishing* a criminal according to his desert, thereby, in effect, lowering him to the level at which he placed his victim. In contrast, a restitutive account focuses not on the desert and punishment of the criminal, but on the right of the victim to be made whole. It would compel a criminal to make reparations—often, but not necessarily, consisting of monetary compensation—to raise the victim up to some semblance of her *ex ante* position. In sum, according to the retributive approach, any benefits that improve the condition of the victim of a crime are incidental to our punishing the criminal in proportion to his desert; according to the restitutive approach, any punishment to the criminal is incidental to the process of improving the lot of the victim.

Now a great many criticisms can and have been made of the restitutive theory of criminal justice.<sup>9</sup> Nevertheless, I will not offer a substantive defense of this position here, just as Professor Morse did not offer a substantive defense of the standard approach—though I think that arguments on behalf of restitution in addition to those I have made elsewhere are both possible and would be useful. Instead, I shall take this opportunity to consider whether a commitment to the restitutive paradigm of criminal justice would collapse the distinction between crimes and torts.

George Fletcher has referred to me as an "abolitionist" with respect to criminal law. Indeed, in my original presentation I asked: "If one accepts a restitutionary standard of justice, what sense does it make to distinguish between crime and tort, since both call for payment of damages?"<sup>10</sup> The answer I gave then was: "For most purposes I think the distinction collapses."<sup>11</sup> Although I allowed that the power to coerce criminals to make restitution by, for example, committing them to an employment project

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*Order*, CRIM. JUST. ETHICS, Winter/Spring 1986, at 30; see also Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937 (1983) (assessing the deterrent effects of a restitutive alternative to the exclusionary rule).

<sup>9</sup> See, e.g., Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969 (1986); Margaret R. Holmgren, *Punishment as Restitution: The Rights of the Community*, CRIM. JUST. ETHICS, Winter/Spring 1983, at 36; Roger Pilon, *Criminal Remedies: Restitution, Punishment, or Both?*, 88 ETHICS 348 (1978).

<sup>10</sup> Barnett, *supra* note 7, at 299.

<sup>11</sup> *Id.*

where their wages would be used to pay restitution to victims might differ from the means we could use to collect damages from tortfeasors, I did not pursue the justification for such disparate treatment.

In this Comment, I will argue that the principle of restitution requires supplementation, though I hasten to add that, as those who teach the parol evidence rule in contract law well know, to supplement a principle is not to contradict or refute it. I shall argue that when supplemented by another principle, the crime/tort distinction reemerges, though it does so in a way that is precisely the opposite of the standard account sketched above.

Let me begin by clarifying my earlier claims about restitution. I have claimed and continue to claim that: (1) injustice arises when one person violates the rights of another; (2) justice requires the rectification of this rights violation; and (3) rectification should consist of forcing the offender to raise the victim up—restitution—rather than lowering the criminal to the level of his victim—punishment. The shift of the criminal law's focus away from punishment removes the need for an inquiry into the desert or blameworthiness of the offender of the kind that is needed to justify the imposition of punishment.

Yet the restitutive approach shares the following feature in common with the standard account: In Professor Morse's words, "[w]hen an offender has served the sentence for a crime, the 'slate is wiped clean.'" <sup>12</sup> So too with restitution: when restitution for a previous rights violation has been accomplished, the "slate is wiped clean." So it would seem that a conception of rectificatory justice as restitution is not better able to deal with preventing *future* crimes than is the standard account.

In the liberal conception of justice, of which the principle of restitution is simply a part, restitution describes, in my view, the appropriate response to a rights violation. Doing justice requires restoration of the victim, not punishment of the offender. But the problem of crime prevention is not the same as the problem of rectification. The liberal conception of justice does not require that we wait for injury to occur before we deem a right to have been violated. The liberal conception of justice prohibits not only the unjustified use of force against another, but the unjustified *threat* of force as well. For example, the crime of assault occurs when one person "engages in conduct which places another in reasonable apprehension of receiving a battery."<sup>13</sup> Still, the prohibition of threats to use force does not suggest that such threats must be rectified by punishment or incarceration rather than by restitution.

There is, however, another principle of justice that bears on the question of preventing future crimes. It is the principle of self-defense, which permits persons to use force to repel a threat of harm before the harm occurs. In the words of the Illinois statute providing for the use of force

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<sup>12</sup> Morse, *supra* note 1, at 146.

<sup>13</sup> See, e.g., ILL. ANN. STAT. ch. 720, para. 5/12-1 (Smith-Hurd 1993).

in defense of person, "[a] person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against [the] imminent use of unlawful force."<sup>14</sup> Similarly, the Illinois statute for the use of force in defense of dwelling states that "[a] person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon a dwelling."<sup>15</sup> Finally, the Illinois statute for use of force in defense of other property states that "[a] person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate [the] trespass on or other tortious or criminal interference with either real property (other than a dwelling) or personal property."<sup>16</sup>

Of course, each of these statutory embodiments of the right of self-defense is limited to *imminent* attacks, or attacks and trespasses already in progress.<sup>17</sup> This limitation is well founded, I think, because of the enormous knowledge problem that would arise if we were to permit self-defense actions prior to a threat becoming imminent. Moreover, serious problems of interest would also arise when those who are not facing threats falsely assert a right of self-defense to escape responsibility for their own rights violations against others.

Still, the principle of self-defense is intriguing and revealing for three reasons. First, it sanctions the use of force *prior* to the infliction of harm in order to prevent its infliction instead of simply permitting the collection of restitution *ex post* for any harm that may have been inflicted. Second, it does not legitimate the use of force to *punish* a prospective injurer for a harmful action he has yet to commit, but rather to prevent that person from committing an injurious act. Third, to determine whether or not a threat exists we require a showing that an unlawful threat is imminent, and to show this, we inquire into *conduct* that reveals the manifested intent of the aggressor. For example, the brandishing of a weapon in such a manner as to suggest an intention to fire it at another would justify the use of self-defense by the intended victim or by another going to her defense. Thus, while the principle of self-defense is preventative, not punitive, the intention of the person against whom force is being used is highly relevant to determining the reasonableness of a self-defense action.<sup>18</sup>

The question then arises: What theory best accounts for the principle of

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<sup>14</sup> *Id.* para. 5/7-1.

<sup>15</sup> *Id.* para. 5/7-2.

<sup>16</sup> *Id.* para. 5/7-3.

<sup>17</sup> Advocates of a battered woman's defense would extend the right of self-defense much further.

<sup>18</sup> Note that self-defense may also be warranted against some accidental or nonintentional threats.

self-defense, and would this same theory also account for some other forms of preventative uses of force, such as preventive detention? Let me briefly suggest one possible theory. I concede that I cannot deliver a complete elaboration and defense of this theory in this Comment; my objective instead is to identify for discussion a fundamental, if not truly “modest,” alternative to the standard account of the distinction between crime and tort—an alternative account that sees prevention as lying at the very heart of criminal law.

Let me begin by posing a series of hypotheticals. Suppose I take out a gun and move towards Professor Morse, stating “I’m going to kill you!” Would he or anyone else in the room be justified in using force to restrain me or even possibly to kill me as a means of protecting him from my harm? Of course, the answer is yes. He need not wait until after I have shot him to use force in pursuit of restitution or to punish me. In addition to any right of rectification he may have should I harm him, he and others may also use force to prevent the harm from occurring.<sup>19</sup>

What is it about my actions that create in him and others a right of self-defense? I suggest that self-defense is justified because my conduct objectively manifests or *communicates* my intention to violate his rights. We are accustomed to the claim that criminal laws be used to “send a message” to potential criminals. I suggest that self-defense is a justifiable response to a message communicated by a potential criminal.

Now, suppose we modify the hypothetical a bit by eliminating the statement “I’m going to kill you!” What result? In the absence of my explicit statement, the meaning of my conduct—taking out a gun and moving towards Professor Morse—is somewhat less clear, but surely

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<sup>19</sup> Third parties sometimes stand in a different relationship to victims in asserting the right to use force in defense of others. For example, whereas a person who has previously committed a criminal act may know that the person afterwards confronting him is acting in self-defense, bystanders may reasonably assume that the victim is actually an aggressor. Those engaging in self-defense assume the risk that their actions will manifest an intention to violate the rights of another, even though this is not the case. As George Smith writes:

[T]he user of unidentified violence, innocent or not, sends the message of “Invader” to the public in general. A Third Party, therefore, acting on the signal generated by the apparent Invader, is justified in exercising his primary right of defensive violence. Again, it is not just the reasonableness of the Third Party that exonerates him, but the fact that his belief is triggered by the violent actions of the apparent Invader.

George H. Smith, *A Reply to Critics*, 3 J. LIBERTARIAN STUD. 453, 458 (1979). This notion is akin to the objective theory of assent in contract law and to apparent authority in agency law. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 855-59 (1992) (discussing the basis of the objective theory); Randy E. Barnett, *Squaring Undisclosed Agency Law With Contract Theory*, 75 CAL. L. REV. 1969, 1994-97 (1987) (discussing apparent authority in agency law).

clear enough to find that I am communicating the very same message and that self-defense would still be justified. Suppose now that I am no longer brandishing a gun and make no statement. When I step towards Professor Morse, my subjective or inner intention may be the same, and I may have a weapon concealed beneath my jacket. However, the message being communicated is far from clear, and probably is not a clear enough threat to justify his using self-defense. But notice how contextual this judgment is. Consider the following additional fact. Suppose that yesterday, I sent Professor Morse a letter stating that I would kill him sometime within the next forty-eight hours. Now a sudden movement in his direction, even absent a gun or an explicit statement of intention, might seem to communicate a threat.

The point of these hypotheticals is to reveal that a threat is a form of *communication*, the message of which is, "I intend to violate the rights of another." When the message is sufficiently unambiguous, we may conclude that preventative actions in the form of self-defense are warranted. When an individual sends such a message, we are justified to act, not to punish *or* to compensate, but to *prevent* a communicated threat from being carried out. To understand what bearing this theory might have on the distinction between tort and crime, let us consider some further variations on this hypothetical.

Suppose now that I take out a full page ad in the *New York Times* in which I declare my intention to kill Professor Morse within the next week. Suppose further that there is reason to believe that this threat is serious, not a parody or joke, and that I have the means to carry it out. When I approach Professor Morse on the street, does he have to wait until I produce a weapon of some kind before he or another may use force to restrain me? Indeed, need he wait passively until I choose the time and place for my attack? Or would he be justified in seeking me out in order to protect himself from my threat? I am not now asking what current doctrine involving self-defense would permit, nor what "rule of law" constraints we might wish to place on such behavior, but whether any preventive actions by him would be morally permissible. Would he be acting immorally if he took steps to protect himself from me? Had I threatened his children, would he be acting unjustly if he sought me out to use force to prevent my announced attack?

Finally, suppose that my ad does not specify Professor Morse as my victim and, instead, I assert that within the next week I will kill another human being. Would not every potential victim be entitled without acting unjustly to take steps to prevent my attack? Would not others be entitled to use force in the aid of whoever the victim might turn out to be? If the answers to these questions are all yes, it is because I have credibly communicated to the victim or to the world my intention to violate the rights of another, in which case the principle of self-defense becomes applicable. According to this analysis, while intentions are not relevant to the

rectification of a prior injustice, the communication of an intention to violate rights is one circumstance that justifies the use of self-defense.

We are now in a position to reconsider Professor Morse's example of the robber who announces his future intention to commit armed robbery. True, we might not be sure of his intentions simply on account of his statements alone. But given his past demonstration of his willingness to commit armed robberies, need we wait for him to rob again before we take steps to stop him? Has he not communicated a general threat that would justify, at least morally, the use of force against him? And can we not imagine situations in which, even in the absence of an explicit statement, the actions of a person speak louder than his words? Are potential victims not entitled to take his message seriously?

According to Aristotelians, while all persons share a common "nature," some persons can acquire by engaging in habitual behavior something like a "second nature" that is as much a determinant of their actions as is their "first" nature.<sup>20</sup> Could we not conclude that, though human beings

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<sup>20</sup> See, e.g., H.H. JOACHIM, ARISTOTLE: THE NICOMACHEAN ETHICS 85 (1951) ("If you attribute to a man, for example, knowledge or bravery, you are qualifying him under that type of quality which Aristotle calls [*hexis*]. For to be learned, or to be brave, implies that certain natural capacities . . . have become established conditions—a second nature, or habit, of the soul."); see also Martin Ostwald, *Glossary of Technical Terms*, in ARISTOTLE, NICOMACHEAN ETHICS 308-09 (Martin Ostwald trans., 1962):

*hexis* [ ]: CHARACTERISTIC, also TRAINED ABILITY, CHARACTERISTIC CONDITION, CHARACTERISTIC ATTITUDE. A noun . . . designating a firmly fixed possession of the mind, established by repeated and habitual action. Once attained, it is ever present, at least in a potential form. . . . '[H]abit' has often been used as an English equivalent.

The idea of a "second" nature that some persons acquire by habitual action, in contrast with a "first" nature that is common to all human beings by virtue of their being human, derives from Aristotle's analysis of virtue and vice in the *Nicomachean Ethics*. According to Aristotle, virtues—and their opposites, vices—are not part of our natures. "[T]he virtues are implanted in us neither by nature nor contrary to nature: we are by nature equipped with the ability to receive them, and habit brings this ability to completion and fulfillment." *Id.* at 33. These virtuous or vicious habits are a type of skill or characteristic that can be acquired only by action.

[I]t is from playing the lyre that both good and bad lyre-players are produced. And the corresponding statement is true of builders and of all the rest; men will be good or bad builders as a result of building well or badly. . . . This, then, is the case with the virtues also; by doing the acts that we do in our transactions with other men we become just or unjust, and by doing the acts that we do in the presence of danger, and being habituated to feel fear or confidence, we become brave or cowardly. The same is true of appetites and feelings of anger; some men become temperate and good-tempered, others self-indulgent and irascible, by behaving in one way or the other in the appropriate circumstances. Thus, in one word, states of character [*hexis*] arise out of like activities. This is why the activities we exhibit must be of a certain kind; it is because the states of character correspond to the differences between these.



are not by nature cannibalistic or vampirish, Jeffery Dahmer had by his own habitual actions become a cannibalistic threat to others? Could we not be as certain that, should he be released from confinement, John Wayne Gacy was also a genuine threat to some as yet unknown young men, as we would if he had taken out an ad to that effect in the *Chicago Tribune*?

Of course, we might be wrong about Jeffrey Dahmer, John Wayne Gacy, or Professor Morse's armed robber, but if we reach the wrong conclusion, whose fault is it? Is it not reasonable to say that a person who has been convicted of repeatedly violating the rights of others has assumed the risk that, when this becomes known, others will reasonably take him to be communicating a threat to them? This is not to claim that, in Professor Morse's words, "they waive the moral right to proportionate criminal punishment."<sup>21</sup> It is instead merely to claim that they have communicated a message that they will violate the rights of others and have assumed the risk that others might take their communication seriously.

But what about the mentally ill person who refuses to take his medication? Can we say that such a person communicates his intention to violate rights in the future? Can we say that he too has assumed the risk of such a communication? In thinking about this question, consider whether the mental state of the aggressor negates one's right of self-defense.<sup>22</sup> Must you desist from self-defense if your attacker is mentally incompetent? Hardly. Indeed, if a person is so incompetent as to be unable to control his conduct, he becomes a *greater* threat, not a lesser threat, and therefore, by the approach I am suggesting, even more the appropriate object of criminal law.

So there may be not one, but two circumstances that give rise to threats sufficient to justify some form of individual and collective self-defense: (1) the communication of an intention to violate rights by persons who are otherwise mentally normal; and (2) a mental abnormality that would make it highly likely that a person will violate the rights of another.<sup>23</sup>

With this analysis in mind, let me offer the following distinction be-

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Aristotle, *Nicomachean Ethics* (W.D. Ross trans.), in *THE BASIC WORKS OF ARISTOTLE* 952-53 (Richard McKeon ed., 1941). The idea that action begets virtue is perhaps clearer in Ostwald's translation of the last two sentences: "In a word, characteristics [*hexis*] develop from corresponding activities. For that reason, we must see to it that our activities are of a certain kind, since any variations in them will be reflected in our characteristics." Ostwald, *supra*, at 34.

<sup>21</sup> Morse, *supra* note 1, at 147.

<sup>22</sup> Recall that "[a] person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against [the] imminent use of unlawful force." ILL. ANN. STAT. ch. 720, para. 5/7-1 (Smith-Hurd 1993).

<sup>23</sup> To this might be added the person who recklessly endangers another, as suggested by Professor Morse. See Morse, *supra* note 1, at 152-54.

tween crime and tort, though I would not necessarily use those terms. The principle of rectification by which victims or their heirs may claim a right to restitution for a past rights violation conforms to what we now think of as the civil law category of "tort," though, prior to the development of criminal law, these were simply conceived of as offenses. In contrast, criminal law deals with what we might call the principle of extended self-defense. In sum, tort law involves using force to obtain justice for victims, while criminal law involves using force to respond to threats of future rights violations. Criminal law only incidentally concerns the use of punishment to deter others from committing crimes in the future. Its primary concern is the use of force to protect against those who have communicated a threat to harm others.

Having identified criminal law with prevention and the principle of extended self-defense, let me hasten to discuss very briefly the limits of this principle. Taken as a principle, extended self-defense would seem to justify restricting the liberty of any person who we conclude constitutes a threat to the rights of others in the future. I think here, as elsewhere, justice needs to be tempered by the requirements of the rule of law. These are not ad hoc limitations. The formal and procedural constraints provided by the rule of law represent an essential partner of the liberal conception of justice.<sup>24</sup>

There are two reasons why the principle of self-defense must be tempered by rule of law constraints. The first and best known concerns the *overenforcement* that arises from the pervasive problems of knowledge and interest. The problem of knowledge reflects our inability to predict future behavior, which leads to "false positives." The problem of interest stems from the willingness of some to exploit this uncertainty to incarcerate persons who they dislike or wish to persecute or oppress. The second and generally neglected reason for rule of law constraints on the exercise of self-defense is what Professor Dale Nance has called the "principle of

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<sup>24</sup> See Randy E. Barnett, *Foreword: Can Justice and the Rule of Law Be Reconciled?*, 11 HARV. J.L. & PUB. POL'Y 597, 623 (1988) (contending that adherence to the liberal conception of the rule of law disseminates knowledge of what the liberal conception of justice requires so that people can act justly).

civility”.<sup>25</sup>

One ought to presume, until sufficient evidence is adduced to show otherwise, that any given person has acted in accordance with serious social obligations. As a corollary, how much evidence is “sufficient” depends upon the nature and severity of the alleged breach, as well as the nature and severity of the contemplated consequences of a determination of breach.<sup>26</sup>

What the principle of civility specifies for condemning past behavior is even more applicable to predictions of future conduct.

What rule of law constraints are appropriately applied to an extended right of self-defense embodied in what some would call a criminal law? First and foremost, I would limit the use of preventive detention to those persons who have demonstrated their intent to commit crimes by their *past criminal behavior*—that is, to those who have been convicted, perhaps more than once, of a crime. I would wager that the odds of a crime being committed by someone who has already committed a crime greatly exceed the odds of a crime being committed by one who has never committed a crime. This is, I think, the impetus behind the “three strikes and you’re out” statutes now being advocated. Second, I would limit its application to those who have been proved to have committed a crime by a *heightened standard of proof*. This is, I think, part of the impetus behind the traditional proof beyond a reasonable doubt standard in criminal cases. Third, the means taken to prevent future criminal conduct should be *proportionate to the threat communicated* by prior conduct. At the extremes, we would be justified in taking stronger preventive measures

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<sup>25</sup> Professor Nance notes:

The substantive norms that form the corpus of criminal law represent a collective judgment, however misguided at particular points, about the most serious duties whose breach must be suppressed. It is this fact that justifies both the severity of the sanctions associated with criminal conviction and—by way of the principle of civility—the allocation of a strenuous burden of proof to the prosecution. If this were not so, it would be much harder to explain the significant doctrinal divergences from the proposition that criminal proof burdens apply if and only if sanctions involving loss of liberty are at stake. Even those cases that draw upon the nature and severity of the sanction to be applied in determining the applicable burden of proof emphasize not only the defendant’s potential loss of “life, liberty, or property,” the relevant constitutional terms, but also the *stigma* associated with a determination of criminal behavior. This stigma, to be independently significant, must be attributable not to the severity of the formal sanctions but rather to the seriousness of the alleged criminal acts and to ancillary consequences attached thereto *because* of their seriously wrongful character. It is, in part, the need to be reasonably sure before we impose this kind of stigma, together with the material sanctions, that serves to justify the peculiarly high burdens of proof on the prosecution.

Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J.L. & PUB. POL’Y 647, 656-57 (1994) (emphasis added) (footnotes omitted).

<sup>26</sup> *Id.* at 648 (footnote omitted).

against a repeat violent criminal than, for example, against a career auto thief.

Finally, I should note a potential tension between the principle of restitution and the principle of extended self-defense. The principle of extended self-defense might well be used to justify life imprisonment for some violent offenders who have communicated by their past actions the intent to commit violence again. However, criminals who are incarcerated in employment facilities where they may earn money to pay for their keep as well as for their debt to their victims would have little incentive to do so should they be sentenced for life. Therefore, some "out date" is needed if we hope, as a practical matter, to obtain restitution for victims. To the extent that we prevent future misconduct by lifetime incarceration, we will not only incur the costs of incarceration, but the victim will likely lose her compensation as well. This tension may require some radical changes to the structure of our criminal justice system so that crime victims themselves are involved in making such trade-offs. But I will leave *this* "modest proposal" for another time.