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## Book review: preventive justice

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**Andrew Ashworth and Lucia Zedner, *Preventive Justice*, Oxford: Oxford University Press 2014; £50.00; 306pp.**

In a world in which criminal law and criminal justice appear to be driven to an ever greater extent by concerns with security, the expedient of preventive justice has assumed a new and, to many, worrying salience in the policy repertoire of the United Kingdom and a number of other western democracies. Preventive criminalization is, of course, not a new phenomenon: inchoate offences; offences of possession; and the binding over power attendant on an anticipated breach of the peace are long-standing examples of the preventive impulse in English criminal law. But this preventive turn appears to have taken on a new intensity in the last two decades. Among the many scholars who have turned their attention to this phenomenon, Andrew Ashworth and Lucia Zedner are probably the most influential. In particular, their analysis of no fewer than nine families of preventive measures, many of them combining civil and criminal modes of enforcement in what have been widely regarded as troubling ways, has quite rightly attracted widespread attention.<sup>1</sup> Their monograph has accordingly been awaited eagerly; and it does not disappoint. Conceptually elegant, beautifully written, it not only maps out the contours of this emerging field of criminalisation, but also sets the recent developments within a much-needed historical context. Setting out from a careful conceptualisation of preventive justice and its relationship to the 'preventive state', the book goes on to trace its historical evolution, before presenting a meticulous account and analysis of a range of preventive measures in contemporary criminal law and criminal justice (particularly in the field of counterterrorism), in public health law, and in immigration law. It also sets out some of the issues, both empirical and normative, which are raised by the practices of risk-assessment which typically go hand in hand with the implementation of preventive justice; and it develops a critique of these developments which is strongly grounded in the tradition of human rights and an associated ideal of criminal law as founded on core liberal values.

The book is a considerable achievement; and, like any important book, it raises more questions than it can answer. In the rest of this review, I will focus on four of these questions.

First, in the fascinating historical chapter, Ashworth and Zedner acknowledge the lengthy history of preventive measures, while advancing the interesting idea that prevention in its current form is contingent on a developed idea of individual criminal responsibility as founded in cognitive and volitional capacities. But this is open to question from two different directions. Early legal practices

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<sup>1</sup> L Zedner and A Ashworth, 'Preventive Orders: A case of under-criminalization?' in RA Duff, L Farmer, SE Marshall, M Renzo, and V Tadros (eds) *The Boundaries of the Criminal Law (Criminalization)* (Oxford: Oxford University Press, 2010). See also A Ashworth and L Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21–51; L Zedner, 'Security, the State, and the Citizen: The changing architecture of crime control' (2010) 13 *New Criminal Law Review* 379–403. A Ashworth and L Zedner, *Preventive Justice* (OUP 2014); see also P Ramsay, 'What is anti-social behaviour?' (2004) *Criminal Law Review* 908; P Ramsay, *The Insecurity State: Criminal Law after the ASBO* (Oxford: Oxford University Press 2012), ch 2.

such as binding over, as well as many provisions relating to vagrancy, arguably relied on an idea of subjectivity analogous to, say, the conception of agency underling the Anti-Social Behaviour Order (ASBO). Conversely, the category of preventive justice spans some importantly different practices which may themselves deploy varying conceptions of responsibility. For example, many of the practices which Ashworth and Zedner include in preventive justice – deportation of illegal migrants, various aspects of terrorism legislation – might be seen as not so much individualised preventive justice but rather a form of group-based justice founded in ideas of ‘bad character’, or ‘dangerousness’ and reminiscent of phenomena such as early vagrancy laws, or the criminal classification statutes of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. This, I would suggest, helps to explain why governments have been much more interested in the empirical evidence and in developing sophisticated risk assessment tools in some areas than in others: rather than an overall drift to prevention, perhaps, we have seen developments driven by the perceived electoral gains to be made from stigmatising/excluding certain groups. So I wonder whether we need some further conceptual differentiation *within* the preventive justice terrain which Ashworth and Zedner mark out. This also raises questions about the robustness of the distinction between preventive and punitive justice, which is fundamental to the structure of the book (even though Ashworth and Zedner themselves acknowledge in their second, historical, chapter some muddiness about it).

Second, it is worth considering certain aspects of the principles approach which Ashworth has so successfully developed, and which very much underpins this book. This methodology of eliciting principles immanent but inchoate within legal practices, teasing them out, refining them and projecting them back onto legal doctrine has been central to the practice of middle order legal theory in the English-speaking world from H.L.A. Hart<sup>2</sup> on. In criminal law theory, Ashworth has brought this technique to new levels of refinement, drawing productively on the resources provided by the European Convention of Human Rights.<sup>3</sup> The approach, however, raises some tricky issues. In the first place, within this method, what is the relevance or status of examples from other jurisdictions (which are relatively frequent in the book)? Are the principles system-independent, with those examples simply illustrative of deeper issues? If US or German principles are not truly immanent in English law, how can they be appealed to? Secondly, how constraining are the principles thus elicited? Ashworth and Zedner give a caveat on this at the end of the book, conceding that the principles are both open-textured and controversial (267). It seems likely that the principles with the greatest constraining capacity are those which have become most fully institutionalised – and that that process has been a social and political as much as a legal process. So I would have liked to hear a bit more about the political and institutional context in which these principles might be expected to get a foothold.

Third, certain questions are raised by the authors’ use of the concept of proportionality. This central idea seems to be used in two senses; as an aspect of one of the ‘principles of criminal law’ –

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<sup>2</sup> *Punishment and Responsibility* (OUP 1968; second edition 2008)

<sup>3</sup> *Principles of Criminal Law*, (OUP: first edition 1999; seventh edition, with Jeremy Horder, 2013); *Serious Crime, Human Rights and Criminal Procedure* (Hamlyn Lecture Series) Hardcover – 30 May 2002

criminalisation should only be used where proportionate to the wrongs, harms or, perhaps, risks at issue; and as an aspect of the desert theory on which Ashworth and Zedner found their distinction between punitive and preventive justice. Proportionality in the first sense is one of the most fully legally worked out 'principles of criminal law'. But is it as distinct from balancing as they argue? Conversely, proportionality in the second sense can be argued to be much more vulnerable to charges of indeterminacy than desert theorists are willing to acknowledge.<sup>4</sup> Given that many of the book's normative arguments stand independent of an espousal of desert theory, one may question whether it was a good move to tie the analysis of preventive justice to it.

Perhaps inevitably, given that the authors are confronting a world in which preventive justice is unlikely to be displaced, yet one in which it threatens various tenets of liberal democracy and human rights, there is some ambivalence in the book's argument. At certain points, Ashworth and Zedner argue as if preventive justice was ruled out in principle, as offending absolute values intrinsic to liberal legality;<sup>5</sup> but more often, they argue that prevention is acceptable within limits and on the basis of the best evidence. Most of the book, then, is about normative limits. And here, like all important contributions to an emerging field, their work is a timely provocation to further analysis: of the empirics of risk assessment, in light of the very uneven findings across different areas; and towards an interpretation of how the re-emergence of preventive justice as a salient form of criminalisation relates to broader social, economic and political changes in particular countries. In *Preventive Justice*, Ashworth and Zedner have provided not only an excellent piece of scholarship in its own right, but a compelling case for an analytic focus on preventive criminalisation which illustrates the inextricable links between criminological and criminal-legal concerns.

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<sup>4</sup> Nicola Lacey and Hanna Pickard: 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) *Modern Law Review* (forthcoming)

<sup>5</sup> Pp. 132, 137