

Trending Toward Precaution at What Cost? Reconciling Positive and Negative Human Rights Obligations in the Use of Neuro Intervention for Sex Offenders

Dr. Mark D. Kielsgard and John Khiatini Vinod

This article argues that while domestic criminal justice theory must balance positive and negative state obligations under the international human rights framework, the proactive risk-based approach, and incumbent precautionary principle, defeats states negative obligations by intruding on fundamental concepts of human dignity and autonomy which invites greater breeches. It elevates security as a meta-right in the human rights regime displacing liberty, human dignity and non-discrimination. The use of neuro intervention in sex offender cases, even when offered as a choice for reduction of sentences, highlight this trend and represent not only a threat to negative obligations but also a facially invalid protocol for positive rights obligations. Toward these ends, the ECtHR went astray in the Mastromatteo case which gave license to risk penology when it shifted from the “identifiable individual” standard established in Osman to a general public security approach, and in Dvoracek where the precautionary principle was impliedly operative in extending medical necessity to court ordered neuro intervention in sex offense cases.

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DR. MARK D. KIELSGARD[†] AND JOHN KHIATINI VINOD[‡]

“They, who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.”¹ - Benjamin Franklin, *Works of Benjamin Franklin*

I. INTRODUCTION

The use of neuro intervention, or chemical castration, and physical castration has been introduced as a response to sex offenses in many jurisdictions² and has continued trending toward wider use over the years. These initiatives have not gone unchallenged. The European Committee on Torture and Cruel, Inhumane and Degrading Treatment and Punishment issued a report in 2013 which argued that this practice was violation of the European Convention of Human Rights, Articles

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The authors would like to acknowledge the University Grants Council of Hong Kong for funding of the GRF grant used for the research of this article.

¹ Objections to Barclay’s Draft Articles of February 16, in 7 WORKS OF BENJAMIN FRANKLIN (J. Bigelow ed., 1904), <https://founders.archives.gov/documents/Franklin/01-21-02-0269>.

² It is noted that various states employing neuro interventions can be largely divided into those which offer it on a voluntary and a mandatory basis. See Hal Tilemann, *Review of Laws Providing For Chemical Castration in Criminal Justice* 13–28 (May 2016) (Institute for Criminal Justice Reform Research Note); note also that there are numerous states that are considering adopting this measure, see Harry Yorke, *Ministers Considering Roll Out of ‘Chemical Castration’ Treatment for Sex Offenders as Reoffending Rate Surges*, THE TELEGRAPH (Apr. 11, 2018), <https://www.telegraph.co.uk/politics/2018/04/11/ministers-considering-roll-chemical-castration-treatment-sex/>; *Turkey Considers Chemical Castration for Child Abusers*, DAWN (Feb. 21, 2018), <https://www.dawn.com/news/1390749>; Ana Maria Luca, *Romanian MPs to Debate Chemical Castration Legislation*, BALKANINSIGHT (Feb. 7, 2018), <http://www.balkaninsight.com/en/article/romania-to-renew-chemical-castration-debate-02-06-2018>; Ashleigh Raper, *‘I Would Take Their Nuts Off’, but Chemical Castration for Sex Offenders ‘Appropriate’ NSW Minister Says*, ABC NEWS (May 8, 2017), <http://www.abc.net.au/news/2017-05-09/changes-to-nsw-sentencing-laws-chemical-castration/8510426>.

3.³ This conclusion has not been adopted by the jurisprudence of the European Court of Human Rights (hereinafter “ECtHR”) and countries continue to rely on chemical castration in many jurisdictions. Proponents of this measure argue that neuro intervention is a necessary safeguard for their citizens and elude to states positive human rights obligations to protect and ensure the rights of citizens to be free from sexual predators. Others see these measures as incompatible with human rights negative obligations and argue that the character of mainstream penal theory is shifting from retroactive fact-based adjudications and sentencing to preventative state rationales.

Rainey and Harrison highlight this tension between the shifts in penal policy from welfarism to public protection.⁴ They analyze how this shift in policy has affected the treatment and management of sex offenders in the United Kingdom and further articulate that this shift is incompatible to the human rights discourse.⁵ They claim that the rights based model has influenced professionals’ model of intervention, making it more inclusive and respectful of the offender’s dignity⁶ and thus anticipate the tensions between this risk penology and the rights-based model of intervention. They argue that a public protection agenda shifts the subjective view of the offender who can be transformed and instead objectifies the offender by focusing on the

³ CPT Report and Moldova Constitutional Court (the CPT took a strong position against the practice of surgical castration, especially since medical alternatives are available. In relation to the treatment of sex offenders via chemical castration, they have just argued for “safeguards” to be present – implying that otherwise the states would be contravening the convention. The CPT and Moldova Constitutional Court in 2013 declared unconstitutional a domestic law that mandatorily imposed the medical intervention. The Moldova Court did acknowledge the positive obligations and negative obligations of the state, and came to the conclusion that a mandatory regime of chemical castration would contravene the European Convention of Human Rights, and various other conventions. The CPT’s reports from the visits to the Czech Republic were also cited and had an influence on the conclusion of the court.) See FINDING OF UNCONSTITUTIONALITY ON THE SAFETY MEASURER OF “CHEMICAL CASTRATION” (COMPLAINT NO. 11A/2013), CONSTITUTIONAL COURT (2013), <http://www.constcourt.md/libview.php?l=en&id=471&idc=7>; see also REPORT TO THE GOVERNMENT OF THE SLOVAK REPUBLIC ON THE VISIT TO THE SLOVAK REPUBLIC CARRIED OUT BY THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT) FROM 24 MARCH TO 2 APRIL, 2009, HUDOC CPT (Feb. 11, 2010), [⁴ Bernadette Rainey & Karen Harrison, *Consent, Compulsion and Sex Offenders: An Ethical and Rights Based Approach to the Treatment and Management of Sex Offenders*, in LEGAL PERSPECTIVES ON STATE POWER: CONSENT AND CONTROL \(Chris Ashford et al. eds., 2016\).](https://hudoc.cpt.coe.int/eng#{}%22fulltext%22:[%22chemical%20castration%22],%22sort%22:[%22CPTDocumentDate%20Descending,CPTDocumentID%20Ascending,CPTSectionNumber%20Ascending%22],%22CPTSectionID%22:[%22p-svk-20090324-en-38%22]”, ¶125-126.</p></div><div data-bbox=)

⁵ Tony Ward & Gwenda Wills, *Ethical Issues in Sex Offender Research*, in THE WILEY-BLACKWELL HANDBOOK OF LEGAL AND ETHICAL ASPECTS OF SEX OFFENDER TREATMENT AND MANAGEMENT (Karen Harrison & Bernadette Rainey eds., Wiley-Blackwell 2013).

⁶ *Id.*

assessment of risk as a reason for treatment and control in the community.⁷ They reference the ideas of the German sociologist, Ulrich Beck. Beck posits that in the ‘risk society,’ members are increasingly preoccupied with risks and this compels regulators to adopt a precautionary approach to deal with such uncertainties.⁸ This precautionary principle is prevalent and has its roots in Environmental Law.⁹ The principle is grounded in risk management of subjects that are seen to pose a risk of harm to the public and/or environment and, in the absence of scientific proof, the burden of proof that the subjects are not harmful falls on the subject.¹⁰

However, there are critics who are raising warning flags over certain measures that are taken in the face of uncertainty and see its’ expanded use in areas other than environmental cases such as responses to terrorism and sexual and violent offenders.¹¹ This approach, they argue, is consistent with traditional criminal law models in which uncertainties result in upholding the offender’s presumption of innocence, burdens of proof, concepts of *nullum crimen sine lege* and *nummun poena sine lege*.¹²

Predicting future risk to society is a speculative process when compared to judging past actions. Therefore, precaution as the litmus for punishment provides an inadequate justification, and reshapes fundamental notions of criminal justice. Commenting on precautionary logic, Heberton and Seddon warns that this uncertainty “[I]s no longer an excuse and becomes the engine for ever increased surveillance. Assessed against the ‘worse-case’ scenario, rather than risk probabilities, all are responsabilized in doing their part...”¹³

The ECtHR’s jurisprudence has led it to find both negative and positive obligations in the text of the European Convention on Human

⁷ See Rainey & Harrison, *supra* note 4.

⁸ ULRICH BECK, *WORLD AT RISK* (2009).

⁹ BERNADETTE MCSHERRY, *MANAGING FEAR: THE LAW AND ETHICS OF PREVENTATIVE DETENTION AND RISK ASSESSMENT* (2014).

¹⁰ *Id.*

¹¹ Peter Ramsey found the precautionary principle at work behind the English legislation under the Criminal Justice Act of 2003, as amended by the Criminal Justice and Immigration Act of 2008. Under the legislation, any offender convicted of a number of violent and/or sexual offenses would receive an “imprisonment for publication order” against them. See Peter Ramsey, *Imprisonment Under the Precautionary Principle*, in *SEEKING SECURITY: PRE-EMPTING COMMISSION OF CRIMINAL HARMS* (G.R. Sullivan & Ian Dennis, eds., 2012).

¹² Which translates to “no crime without law,” and “no punishment without law,” respectively.

¹³ Bill Heberton & Toby Seddon, *From Dangerous to Precaution: Managing Sexual and Violent Offenders in an Insecure and Uncertain Age*, 49 *BRIT. J. CRIMINOLOGY* 343, 346 (2009).

Rights (the “Convention”)¹⁴ and reflects mainstream international human rights obligations.¹⁵ With regard to the development of positive obligations in which states are obligated to take an active approach to safeguarding the rights of its’ citizens against non-state offenders, precautionary policies are displacing conventional understanding of states’ negative obligations in an evolving culture of risk society or preventative state.¹⁶ Moreover, the jurisprudence of the ECtHR has impacted this balancing trending toward precautionary logic. In modern society, the right to security has taken on the role of an absolute, or meta-right, and correspondingly led to the priority of positive rights over negative rights.

This article argues that while domestic criminal justice theory must balance positive and negative state obligations under the international human rights framework, the proactive risk-based approach, and incumbent precautionary principle, defeat states’ negative obligations by intruding on fundamental concepts of human dignity and autonomy, which invites greater breaches. It elevates security as a meta-right in the human rights regime, displacing liberty, human dignity and non-discrimination. The use of neuro intervention in sex offender cases even when offered as a choice for reduction of sentences, highlights this trend and represents not only a threat to negative obligations, but also a facially invalid protocol for positive rights obligations. Toward these ends, the ECtHR went astray in the *Mastromatteo*¹⁷ case, which gave license to risk penology when it shifted from the “identifiable individual” standard established in *Osman*,¹⁸ to a general public security approach, and in *Dvoracek*¹⁹ where the precautionary principle was impliedly operative in extending medical necessity to court ordered neuro intervention in sex offense cases.

This article will first trace the evolving concepts of states’ positive obligations established in the jurisprudence of the ECtHR, and then

¹⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos. 11 & 14, Nov. 4, 1950), 213 U.N.T.S. 222 [hereinafter ECHR].

¹⁵ See generally ALASTAIR R. MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS (2004); see also LAURENS LAVRYSEN, HUMAN RIGHTS IN A POSITIVE STATE: RETHINKING THE RELATIONSHIP BETWEEN POSITIVE AND NEGATIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2016).

¹⁶ See generally Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998).

¹⁷ *Mastromatteo v. Italy*, 2002-VIII Eur. Ct. H.R. 151.

¹⁸ *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. 3124.

¹⁹ *Dvoracek v. Czech Republic*, App. No. 12927/13, Eur. Ct. H.R. (2014).

describe the parameters of preventative state penology to analyze how the trending jurisprudence of the ECtHR enables the precautionary principle. Thereafter, it will scrutinize the concept of security as a meta-right under the international human rights regime to objectify it and establish how overreliance on this right diminishes other rights. Then, it will examine the application of the legal concept of human dignity from both an individual and collective perspective, and critically analyze the role of autonomy in human under the lens of the trending use of neuro intervention in sex offense cases to conclude that the balance has tilted toward precautionary state penology and has impermissibly intruded upon the rights-based model.

II. TRACKING THE ECtHR JURISPRUDENCE ON POSITIVE RIGHTS OBLIGATIONS

Human rights instruments, like the European Convention of Human Rights, are used, *inter alia*, to limit the power of the majority.²⁰ However, this is not necessarily incompatible with security interests and the rights of others. An example of Articles that are fundamental but not absolute include Articles 8 and 11 of the Convention.²¹ Thus, it is possible for the ECtHR to uphold the actions of the state to employ preventive measures on the basis of risks posed to its citizens. Additionally, some articles can be derogated in times of national emergency (*see* Article 15 of the Convention). These components are mirrored in other human rights instruments.²²

Human rights ideology has evolved into negative and positive obligations providing that states refrain from violating human rights and to ensure and protect human rights from violation by non-state parties, respectively. A positive obligation is defined simply as “requiring member states to . . . take action”²³ in the prevention of non-state party human rights violations. The query becomes to what extent a state is justified by its positive obligations to take steps without violating its negative obligations.

Merrills observed that the Convention contains mainly negative obligations with some exceptions that explicitly required the state to

²⁰ Klaus Günther, *Responsibility to Protect and Preventive Justice*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 69, 89–90 (Andrew Ashworth et al. eds., OUP Oxford 2013).

²¹ ECHR, *supra* note 14, at art. 8, 9, 10 & 11.

²² *See, e.g.*, International Covenant on Civil and Political Rights, art. 4, Dec. 16, 1996, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, 993 U.N.T.S. 3 [hereinafter ICESCR].

²³ *Gül v. Switzerland*, 1996-1 Eur. Ct. H.R. 159.

act, such as Article 6, which requires the state to provide legal assistance to defendants.²⁴ However, he further opined that the “principle of effectiveness” obliges the finding of positive obligations by implication in Articles that otherwise emphasize negative obligations.²⁵ The principle is “a means of giving provisions of a treaty the fullest weight and effect consistent with the language used and with the rest of the text in such a way that every part of it can be given meaning.”²⁶ This principle guides the courts to find a positive state obligation by taking preventive and protective measures. These measures to “secure respect” for the Articles of the Convention go beyond merely providing post-violation remedies for the damage suffered by the citizens.²⁷ The measures suggested by the ECtHR “[m]ean actual expenditure and deployment of resources to ensure that the right can be freely exercised ‘without interference from private individuals’.”²⁸

The broad-based positive obligations founded by the ECtHR suggest that states are obliged to dedicate resources to prevention and assumes a compatibility of the rights-based regime with the preventive state or risk penology. This compatibility presumes that state prevention measures will not be justified to the extent they violate state negative obligations, or at least non-derogable negative obligations. Thus, a state would not be entitled to torture terrorist suspects, under Article 3, regardless of the preventative value of information they could gather,²⁹ even the prevention of Article 2 violations. In this scenario, the prevention of an absolute positive violation would not justify an absolute negative violation. For derogable negative obligations, the balance between negative and positive becomes more problematic. Using this formula in the context of neuro intervention in sex offense cases, if chemical castration is determined to be torture or cruel, degrading or inhumane treatment or punishment, a non-derogable obligation, it is a *prima facie* positive violation. Concerns over balancing state obligations consist of fears that heightened state responsibility (positive obligations) would lead

²⁴ J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS (Manchester Univ. Press, 1988).

²⁵ *Id.* at 103.

²⁶ *Id.* at 98.

²⁷ ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993).

²⁸ *Id.* at 345.

²⁹ See *Gafgen v. Germany*, App. No. 22978/05 Eur. Ct. H.R. (2009); *Gafgen v. Germany*, App. No. 22978/05 Eur. Ct. H.R. (2008).

to states adopting new coercive powers against its citizens, contravening negative obligations.

In “The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights,” Mowbray surveys the case law of the ECtHR where the Court found states were under a positive obligation.³⁰ He analyzes ECtHR jurisprudence for rationales and limitations in establishing a positive state obligation.

Mowbray notes that the Court had failed to provide an adequate general theory regarding positive obligations and highlights the work of Shue, who provides a general explanation for states positive obligations through a reading of the Convention.³¹ Shue distinguishes between negative and positive rights and their correlative duties by stating that “the complete fulfillment of each kind of right involves the performance of multiple kinds of duties.”³² He proposes that all rights in the convention have three types of duties. These are: the duty to avoid deprivation, to protect from deprivation, and to aid the deprived.³³ Shue claims it is “[i]mpossible for any basis right – however negative it has come to seem to be fully guaranteed unless all three types of duties are fulfilled.”³⁴ Shue elaborates, “[n]o right can, if one looks at social reality, be secured by the fulfillment of only one duty, or only one kind of duty,”³⁵ and “it is impossible . . . meaningfully and exhaustively to split rights into two kinds based upon the nature of their implementing duties, because the duties are always a mixture of positive and negative ones.”³⁶ Shue warned against attempting to woodenly uncover the exact number of duties that are attached to any one right, as the concept was not “[s]upposed to become a new frozen abstraction to occupy the same rigid conceptual space previously held by ‘negative rights’ and ‘positive rights’.”³⁷ The critical point is that the implementation of any right cannot usefully be summed up as either exclusively positive or exclusively negative.

³⁰ MOWBRAY, *supra* note 15.

³¹ Henry Shue, *The Interdependence of Duties*, in THE RIGHT TO FOOD 83 (P. Alston & K. Tomaševski eds., 1984).

³² HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 52–53 (2d ed., Princeton Univ. Press 1996).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 155.

³⁶ *Id.*

³⁷ *Id.* at 160.

Under this general caveat, Mowbray surveys the relevant ECtHR cases concerning positive obligations. Mowbray examines *Z v. UK* (2001), which dealt with a negative obligation under Article 3 and found the state had a corollary positive obligation to take children into public care when found to be under the care of abusive caretakers.³⁸ The case of *Mahmut Kaya v. Turkey* (2000),³⁹ sounding in Article 2, led to the positive state obligation to deploy more police and security officers to protect individuals of real and immediate risks. Other cases dealt with the right to a [civil] remedy when states violated positive rights obligations.⁴⁰

Prior to the *Osman* case,⁴¹ the state, specifically the police, were generally immune from victim allegations on the grounds of negligence. In the UK case of *Hill v. Chief Constable of West Yorkshire*,⁴² the parent of the “Yorkshire Ripper’s” latest victim launched a tort claim for negligence against the police. The House of Lords ruled there was no duty of care owed from the police to the victim(s).⁴³ The Court ruled in favor of immunity, concluding that if the claimants had succeeded, the state’s resources would shift in focus from the general aim of suppressing crime for all to placing increased emphasis on individual victims who claim to be at risk.⁴⁴ The Court argued this would be against the public interest. *Hill* was reaffirmed in *Brooks v. Commission of the Police of the Metropolis*.⁴⁵

However, state immunity for violation of positive obligations was modified in the *Osman* case, where a former pupil was known to be at risk by a teacher that was obsessed with the child. Multiple complaints have been made to the police, yet the police failed to arrest the teacher. Thereafter, the teacher killed the pupil’s father and seriously injured the pupil leading to a suit against the police for negligence.⁴⁶ Like *Hill*, the Court ruled in favor of the police. However, it was brought to the ECtHR, which disagreed on a legal point (as well as reaching a similar conclusion in *Z v. UK*).⁴⁷ While the Court found against liability (an alleged violation of Convention, Article 2) on factual grounds, they

³⁸ See *Z. v. United Kingdom*, 34 Eur. Ct. H.R. 3 (2002).

³⁹ *Kaya v. Turkey*, App. No. 22535/93, Eur. Ct. H.R. 129 (2009).

⁴⁰ See, e.g., *infra* note 39 and note 40.

⁴¹ *Osman*, *supra* note 18.

⁴² *Hill v. Chief Constable of West Yorkshire*, 1 AC 53 (1989).

⁴³ *Id.*

⁴⁴ *Id.* See judgment written by Lord Keith of Kinkel.

⁴⁵ *Brooks v. Comm’n of the Police of the Metropolis*, UKHL 24 (2005).

⁴⁶ *Osman v. Ferguson*, 4 All E.R. 344 (1994).

⁴⁷ *Osman*, *supra* note 18; *Z v. United Kingdom*, *supra* note 38.

ruled States are required under Article 2 to protect a persons' right to life by "(a) creating effective criminal measures, (b) providing policing and criminal justice systems to enforce those measures, and (c) taking reasonable operational measures where there is a 'real and immediate risk' to the life of a particular individual from the criminal acts of another person" (emphasis added).⁴⁸ Of these obligations, the first is subject to the vagaries of what is acceptable as "effective" criminal law measures, and the second is a given as it provides for the routine administrative function of law enforcement. The third obligation quantifies the positive obligation as it is limited to an immediate risk to the life of an identifiable individual.

Thus, in relevant part, the jurisprudence iterated a positive obligation for the state to act when the police "knew or ought to have known" of a "real and immediate risk to the life of an identifiable individual."⁴⁹ Thus, the Court established the "identifiable individual" standard to positive obligations vis-à-vis law enforcement activities. By implication, the third obligation limits states to refrain from overzealous law enforcement measures on the pretext of a generalized threat to society or a rise, real or anticipated, in criminal activity. It also emphasizes specific threats to an "at risk" individual.⁵⁰ Moreover, this carries a high standard of proof, as shown in the case of *Van Colle*⁵¹ considered by the UK House of Lords. In *Van Colle*, the victim was supposed to testify against a man that would eventually be his murderer.⁵² The victim and other witnesses had "received threats and experienced damage to their property" and they had reported these incidents to the police.⁵³ However, the House of Lords found no Article 2 violation, despite an identifiable individual, because the police could not have realized that there existed a "real and immediate" risk to the deceased's life.⁵⁴ Burton M. states that this emphasis limits the potential liability of the police considerably.⁵⁵

Thereafter, in *Mastromatteo v. Italy* (2002), "the Grant Chamber developed the application of protection in the context of a scheme for

⁴⁸ ALASTAIR R. MOWBRAY, CASES, MATERIALS, AND COMMENTARY ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 122 (3d ed. 2012).

⁴⁹ See *Smith v. Chief Constable of Sussex Police*, UKHL 50 (2008).

⁵⁰ *Osman*, *supra* note 18.

⁵¹ *Hertfordshire Police v. Van Colle*, EWCA (Civ) 325 (2007).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Mandy Burton, *Failing to Protect: Victims' Rights and Police Liability*, 72 MODERN L. REV. 283 (2009).

the early release of prisoners.”⁵⁶ In *Mastromatteo*, the applicant’s son received a fatal show from a bank robber.⁵⁷ At the time of the robbery, the accused had recently been granted prison leave by the local Italian judiciary.⁵⁸ The applicant initiated an action against the state alleging a breach of Article 2.⁵⁹

The Court acknowledged *Mastromatteo* differed from *Osman* and *Paul & Audrey Edwards v. UK* (2002)⁶⁰ and held that the

Responsibility of the authorities [were] engaged for failing to provide personal protection to [the applicant’s son]; what is at issue is the obligation to *afford general protection to society* against the potential acts of one or of several persons serving a prison sentence for a violent crime and the determination of the scope of that protection.⁶¹

This represents a shift in the jurisprudence from the “identifiable individual” standard to a general protection duty. Indeed, this shifted the focus from an identifiable victim to an identifiable perpetrator and the risk they pose to society generally. Acknowledging this shift, the Court argued that while the purpose of the criminal justice system was to imprison criminal to protect society,⁶² it is also observed “[t]he legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment.”⁶³ In assisting in their analysis, the Court surveyed key actuarial data of the prisoners release scheme and this included the need for eligible prisoners to have served a minimum period of imprisonment, to have a record of good behavior whilst in prison, and for a judge to assess the danger to society if a particular prisoner was to be released, together with statistical evidence on the criminal behavior of prisoners given early release (showing, e.g., that the percentage of prisoners on leave who absconded was only about 1 percent).⁶⁴ The Court unanimously

⁵⁶ MOWBRAY, *supra* note 48, at 123; *Mastromatteo*, *supra* note 17.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Edwards v. United Kingdom*, 46477/99, Eur. Ct. H.R. 303. This case involved the murder of the applicant’s son while in prison by a fellow prisoner. The Court ruled the *Osman* duty was specifically apparent here due to the vulnerable state of the son being in prison.

⁶¹ *Mastromatteo*, *supra* note 17, at 69.

⁶² *Id.*

⁶³ *Id.* at 72.

⁶⁴ *Id.*

concluded that the scheme was compatible with the state's obligations under Article 2.⁶⁵ Thus, because the risk actuarial data compiled by the state showed minimal risk, the Court found the early release in conformity with Article 2 obligations.⁶⁶

In *Mastromatteo*, the statistical likelihood of the offender reoffending was one of the key factors as to whether the state was found to be in compliance with its obligation. The significance of this case is twofold, one as a discernable retreat from the specific "identifiable individual" standard in *Osman* to a general risk of reoffending by the perpetrator, and two, the focus on actuarial data for assessing risk.

Monika asserts the view that the ECtHR has established a "[r]ather high threshold as to the probability of the occurrence of the risk, the Court limits the scope of claims that will be admissible, leaving individuals helpless with regard to certain future scenarios that have been anticipated in one way or another."⁶⁷ After *Osman*, there are commentators who nonetheless acknowledge that the *Osman* requirement has changed considerably.⁶⁸

Another issue in determining the propriety of state action in the fulfillment of its' positive obligation to protect is the necessity of the state coercive measure. In *Herczeglafvy v. Austria*,⁶⁹ an offender convicted of fraud and violence claimed that the medical treatment he received amounted to degrading treatment under Article 3 of the Convention.⁷⁰ He was suffering from mental illness. The medical authorities had forcibly fed him, administered neuroleptics, and had handcuffed him to his bed for several weeks.⁷¹ The European Commission overhearing the case found a violation of Article 3 established on lack of necessity,⁷² but the ECtHR came to an opposite conclusion and found sufficient medical necessity.⁷³ The Commission

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Monika Ambrus, *The European Court of Human Rights as Governor of Risk*, in *RISK AND THE REGULATION OF UNCERTAINTY IN INTERNATIONAL LAW* 99, 115 (Monika Ambrus et al. eds., Oxford Univ. Press 2017).

⁶⁸ Franz Christian Ebert & Romina I. Sijniensky, *Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention?*, 15 *HUM. RTS. L. REV.* 343–68 (2015).

⁶⁹ *Herczeglafvy v. Austria*, Ser. A. No. 242-B, 15 *Eur. Ct. H.R.* 437 (1993).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² David Feldman, *Human Dignity as a Legal Value: Part 1*, *PUBLIC LAW: THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE COMMONWEALTH* 7 (Stevens 1999).

⁷³ Ambrus, *supra* note 67.

reasoned that the treatment was not strictly necessary, and the treatment had lasted longer than necessary to serve its purpose.⁷⁴

Another case that has come under criticism in the ECtHR is *Dvoracek v. Czech Republic* (2014).⁷⁵ In *Dvoracek*,⁷⁶ a sex offender diagnosed to have pedophilia was sent to a hospital under a protective treatment order by the local court.⁷⁷ Dvoracek alleged he was pressured into taking antiandrogen treatment (chemical castration) and maintained the intervention amounted to inhumane or degrading treatment under Article 3 (and that the hospital/state had denied him an effective remedy to make his complaints under Article 13 of the Convention).⁷⁸ The Chambers found the protective order did not amount to a punishment.⁷⁹ Without elaborating on the voluntariness of the state's offer of undergoing antiandrogen treatment or prolonged confinement in exchange for a reduced sentence, the Chamber concluded that antiandrogen treatment was permissible because it was deemed therapeutically necessary.⁸⁰ Additionally, reports from expert opinions were mentioned and reflected the view that the decision was justified on medical grounds and that the antiandrogen treatment was "[p]articularly recommended in the present case because it was more effective than psychotherapy, which would not have prevented him from reoffending."⁸¹ Additionally, the treatment was backed up with occupational therapy and psychotherapy.⁸² This was the first time use of chemical castration was brought before the ECtHR. Harrison and Rainey disagreed with the judgment because considerations of the offender's likelihood to reoffend weighed into the decision-making process of the Court.⁸³ In this way, *Dvoracek* extended the doctrine of medical necessity from what was obviously necessary for insuring the immediate safety of the prisoner, such as force feeding and binding, to future dangerousness of the offender to the greater community at

⁷⁴ *Id.*

⁷⁵ *Dvoracek*, *supra* note 19.

⁷⁶ It is noted that the judgment from the chambers was not published in English. Regards was had to the press release of the case that was reported in English and the secondary commentaries on the case. See Press Release, Judgement, *Dvoracek v. Czech Republic – Protective Sexological Treatment in a Psychiatric Hospital* (Nov. 6, 2014), <https://hudoc.echr.coe.int/eng?i=003-4925298-6028423>. Additionally, see Information Note on *Dvoracek v. Czech Republic* (Nov. 2014), <https://hudoc.echr.coe.int/eng?i=002-10335>.

⁷⁷ *Dvoracek*, *supra* note 19.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 102. Alternatively, one can also reference the summary of *Dvoracek*, *supra* note 76.

⁸² *Id.* at 103.

⁸³ Rainey & Harrison, *supra* note 4.

large – for the foreseeable future – a precaution against a less certain risk. This shift in the rigor of the proofs of necessity presumed the ineffectiveness of psychotherapy, an available and significantly less intrusive measure, against a more speculative threat.

This emphasis on the preventive principle and the challenge to the absolute nature of Article 3 was also evident in the case of *Jalloh v. Germany*,⁸⁴ where the state had insisted on treatment for evidence purposes.⁸⁵ However, the court has not formed a coherent approach when it comes to risk because of the apparent switch in position relating to the absolute nature of Article 3. Scholars have argued the ECtHR has moved away from the *Jallah* approach as illustrated by the case of *Saadi v. Italy*,⁸⁶ where the Grand Chamber “rejected the argument that, in considering whether a person should be returned to a country where he or she faced a real possibility of being subjected to a violation of Article 3, weight should be given to the interests of the community in which he was currently residing and the risks presented.”⁸⁷ The Court provided “it is not possible to weigh the risk of ill-treatment against the reasons for the expulsion in order to determine whether the responsibility of the state is engaged under Article 3, even where such treatment is inflicted by another state, . . . the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account . . .”⁸⁸ *Saadi* tilted the balance in favor of the absolute protection of Article 3 without consideration of community safety interests. Specifically, it found that the state’s negative obligation to refrain from violating Article 3 trumped consideration of its’ positive obligation to protect from the risk that *Saadi* would violate other absolute rights to the community at large. This judgment contradicts the *Jallah* formulation which entertained a balancing exercise between the rights of the offender and public interest and affirms the absolute character of Article 3.

⁸⁴ *Jalloh v. Germany*, App. No. 54818/00, Eur. Ct. H.R. 721 (2006).

⁸⁵ Natasha Simonsen, ‘Is Torture Ever Justified?: The European Court of Human Rights Decision in *Gargen v. Germany*, EJIL Talk (Jun. 15, 2010), <https://www.ejiltalk.org/%E2%80%98is-torture-ever-justified%E2%80%99-the-european-court-of-human-rights-decision-in-gafgen-v-germany/>; *Id.* (in addition, in Article 6 the privilege against self-incrimination was also raised). The Court did a balancing exercise, the more serious the offense, the more the state could force treatment? This needs to be better clarified and looks like it goes against well-established criminal law common law principles. In other words, official compulsion may be permissible without the violation of Article 6!

⁸⁶ *Saadi v. Italy*, App. No. 37201/06, 48 Eur. Ct. H.R. Rep. 13 (2009).

⁸⁷ Andrew Ashworth, *Eroding the Structure of the Convention? The Public Interest in Prosecutions for Serious Crimes*, in CURRENT PROBLEMS IN THE PROTECTION OF HUMAN RIGHTS: PERSPECTIVES FROM GERMANY AND THE UK 31, 38 (Katja S. Ziegler & Peter M. Huber eds., Hart 2013).

⁸⁸ *Saadi*, *supra* note 86, at ¶ 138.

Another corroborating case, illustrating the shift from *Jollah*, is *Gafgen v. Germany*.⁸⁹ That Court opined:

In view of the absolute prohibition of treatment contrary to Article 3 irrespective of the conduct of the person concerned and even in the event of a public emergency threatening the life of the nation – or, a fortiori, of an individual – the prohibition on ill-treatment of a person in order to extract information from him applies irrespective of the reasons for which the authorities wish to extract a statement, be it to save a person’s life or to further criminal investigations.⁹⁰

Thus, the Court reinforced the absolute negative character of Article 3, “irrespective of how dangerous the applicant is thought to be or how serious or detestable the applicant’s conduct has been.”⁹¹ Moreover, this appears to be a throwback to the *Osman* standard of identifiable individual as it references “an individual”⁹² and/or the life of the nation which has a specific national security meaning under international law⁹³ and gravity threshold⁹⁴ distinct from mere public safety considerations applied to ordinary criminality.

However, the jurisprudence of the ECtHR has trended toward a net increase in state positive obligations in the exercise of domestic police powers. While absolute rights such as Article 3 may remain protected from encroachment under *Saadi* and *Gafgen*, that is, state negative obligations for absolute rights are not subject to a balancing test (calculated on the offender’s risk of future dangerousness), the Court has opened a Pandora’s box to balancing positive and negative obligations for other protections in the ordinary criminal law context. The Court’s retreat from the “identifiable individual” standard of *Osman*, its embrace of actuarial data to assess future dangerousness, its uneven application of medical necessity in *Herczeglafvy* as compared to *Dvoracek* reflect the ideology of the preventative state society. In the context of neuro interventions in sex offense cases, the Court ruled in *Dvoracek* that the court mandated chemical castration

⁸⁹ *Gafgen*, *supra* note 29.

⁹⁰ *Id.* at ¶ 69.

⁹¹ Ashworth, *supra* note 87, at 39.

⁹² *Gafgen*, *supra* note 29.

⁹³ *Id.*

⁹⁴ *Id.*

treatment is medical treatment and not punishment because the court agreed with the court of first instance, that it was for the offenders protection and was in his interest to undergo the “protective sexological treatment,”⁹⁵ sidestepping the Article 3 question and arguably applied a diluted necessity test as is compared to the Commission’s conclusion in *Herczeglafvy* as well as woodenly rejected the notion that castration is punishment. Particularly relevant to a preventative state ideology, the Court’s jurisprudence has shifted to allowance for state conduct that would otherwise constitute a negative right violation grounded on generalized risk to society and based on actuarial evidence on the offender’s potential risk to society and thereby providing a relatively free license for state violations in the name of public safety.

III. THE PREVENTATIVE STATE MODEL

At its core, the preventative model of domestic law enforcement is designed to promote the greatest utility of enforcement, sentencing and investigation techniques which yield the greatest safety to society. It is ostensibly predicated on state’s positive obligations to protect citizens from victimization by other members of the community based on future dangerousness. In a society that is obsessed with identifying and avoiding risks, states have been encouraged to tap into the fear of the masses and prioritize the reduction of harm.⁹⁶

Preventative state penology evolved from the concept of the risk society.⁹⁷ Ulrich Beck, a German sociologist, conceptualized the “risk society” in 1986 as a shift toward controlling unintended modern manifestations of scientific and technological development.⁹⁸ Along with Anthony Giddens,⁹⁹ Beck theorized that risk can be quantified by its global reach and its character of uncertainty.¹⁰⁰ According to Beck, risk is “a systematic way of dealing with hazards and insecurities induced and introduced by modernization itself.”¹⁰¹ He concluded that the preoccupation

⁹⁵ See *Dvoracek*, *supra* note 19, at ¶ 92.

⁹⁶ Mark D. Kielsingard, *Myth-Driven State Policy: An International Perspective of Recidivism and Incurability of Pedophile Offenders*, 47 CREIGHTON L. REV. 247 (2013).

⁹⁷ MCSHERRY, *supra* note 9.

⁹⁸ ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (Mark Ritter trans., 1992).

⁹⁹ See ANTHONY GIDDENS, *MODERNITY AND SELF-IDENTIFY: SELF AND SOCIETY IN THE LATE MODERN AGE* (Stanford Univ. Press 1991); see also ANTHONY GIDDENS, *THE CONSEQUENCES OF Modernity* (Stanford Univ. Press 1990).

¹⁰⁰ BECK, *supra* note 8.

¹⁰¹ BECK, *supra* note 98, at 260.

with fear, or societal uncertainty,¹⁰² prioritizes security such that it “[i]s displacing freedom and equality from the highest position on the scale of values”¹⁰³ leading to a “totalitarianism of defense against threats.”¹⁰⁴

The preoccupation with security supposes certain homogeneity of interests under Becks theory. Majoritarian culture homogeneity of interests in keeping societal uncertainty under control arguably informs governmental embrace of this phenomenon and the trappings of the risk society.¹⁰⁵ O’Malley concluded:

There is no necessary hiatus between governmentality and cultural approaches to risk, for the latter provide insight into value bases out of which the governmental rationalities and technologies of risk are produced, or that create an environment in which they receive political support.¹⁰⁶

Another point of review opines that government is driving societal fear in order to promote preconceived ambitions of augmenting state control. Nonetheless, whether Beck’s theory is governmentally manipulated or a reflection of culturally specific uncertainties, risk has come to significantly influence criminological literature particularly with the growing acceptance of the “pervasiveness of surveillance techniques”¹⁰⁷ and policies aimed at controlling the risk of harm from specific individual via, *inter alia*, sentencing protocols and assumptions including preventive detention and supervision schemes.¹⁰⁸

In the criminological context, risk society inures to the preventative state model as a means of initiatives directed at reducing future risk by taking coercive state action in anticipation of prohibitive conduct. The preventative state model prioritizes risk based on predicative assumptions of future dangerousness over just desserts or past conduct. It is characterized by preventative and precautionary logic, grounded in actuarial data collection, and results, *inter alia*, in preventative detention and precautionary sentencing.

A. Preventative Logic and Precautionary Logic

Preventative logic is grounded in the assumption that future risk must be

¹⁰² The study of the impact of “uncertainty” on society as a sociological concept has assumed a significant role in the scholarly literature on extremism, and by extension, the measures people will take to offset uncertainty. *See infra* note 118.

¹⁰³ BECK, *supra* note 8 at 8–9.

¹⁰⁴ *Id.*

¹⁰⁵ For a different viewpoint on this these, *see* Nikolas Rose, *Governing Risky Individuals: The Role of Psychiatry in New Regimes of Control*, 5 PSYCHIATRY, PSYCHOL. & L. 177, 180 (1998).

¹⁰⁶ PAT O’MALLEY, CRIME AND RISK 16 (Sage 2010).

¹⁰⁷ *Id.*

¹⁰⁸ MCSHERRY, *supra* note 9, at 19.

managed to prevent future acts of violence and ensure public safety¹⁰⁹ in accordance with states' positive rights obligations.¹¹⁰ Kemshall and Wood provide two typologies of prevention: A 'community protection model,' in which the appropriate containment and effective management of high-risk offenders is paramount, and a 'public health approach,' with an emphasis on public awareness and educative campaigns to extend the remit of public protection to local communities and the general public.¹¹¹

They opine that these two approaches are applied to serious and less serious offenders and acknowledge the role of both offenders and the public under one rubric.¹¹² It underscores the nexus between preventative logic and societal uncertainty with community protection serving security goals, and public health reinforcing insecurity and enabling enhanced community protection initiatives.¹¹³ O'Malley points out that, "The community protection approach is an attempt at prevention by incapacitating dangerous persons, whereas the public health approach employs the preventive logic 'to govern risky conditions, rather than categorically risky types of persons.'"¹¹⁴ The consequences of 'preventive logic' can be seen in its strongest form in precluding future offenders particularly with dangerous sexual and violent offenders or, as Rose suggests, to "seek to bring the future into the present."¹¹⁵ Rose argues that governments accomplish this by the "naturalization of risk itself within the body of the dangerous person."¹¹⁶ Rose further observes that, "the option of acting in the present in order to manage the future rapidly mutates into something like an *obligation*"¹¹⁷ (emphasis added). The obligatory character referenced by Rose applies to both the community protection model and the public health approach as states undertake increasingly precautionary measures, ostensibly consistent with their positive obligations under the rights regime, and owing to increased public demands as they reflect societal uncertainty/insecurity fueled, in part, by the public health approach.

However, a distinction can be made between preventative and precautionary initiatives as one of degree, though at its margins the distinction is subtle. Preventative logic should be looked upon as referring

¹⁰⁹ ANDREW ASHWORTH & LUCIA ZEDNER, *PREVENTIVE JUSTICE* 49 (Oxford Univ. Press 2014).

¹¹⁰ Günther, *supra* note 20, at 69–73. According to Klaus Günther, the promotion of preventive justice and emphasis on public safety leads to the "hijacking" of Human Rights by Governments and Majorities. *Id.* at 809.

¹¹¹ Hazel Kemshall & Jason Wood, *Beyond Public Protection: An Examination of Community Protection and Public Health Approaches to High-Risk Offenders*, 7 *CRIMINOLOGY* J.L. 203 (2007).

¹¹² Heberton & Seddon, *supra* note 13, at 346.

¹¹³ *Id.*

¹¹⁴ Pat O'Malley, *The Uncertain Promise of Risk*, 37 *AUSTL. & N.Z.J. CRIMINOLOGY* 323, 328 (2004).

¹¹⁵ Nikolas Rose, *At Risk of Madness*, in *EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY* 209, 212 (Tom Baker & Jonathan Simon eds., Univ. of Chicago Press 2002).

¹¹⁶ *Id.* at 212.

¹¹⁷ *Id.*

to the significant likelihood of future victimization, while precautionary logic addresses mere potentiality of future victimization. This corresponds conceptually to the distinction between the identifiable individual standard in *Osman* and the greatly enlarged general security model of *Mastromatteo*. The discussion can be framed as erring on the side of community protection from dangerous individual as opposing to erring on the side of community protection from abusive state coercive powers. The basis for the difference between prevention and precaution can be calculated on a scale of the likelihood of risk, and invites the question of the character of uncertainty *per se*.

B. The Precautionary Principle and Uncertainty

In this context, uncertainty can be characterized in two ways. First, from a social psychology perspective of societal uncertainty,¹¹⁸ which lends to public demands for more effective law enforcement and law and order politics,¹¹⁹ and two, ordinary judicial uncertainty in decision making, sounding in the speculative process of predicting future dangerousness of specific offenders/suspects. Ashworth concludes that in recent years there has been considerable focus on understanding “uncertainty” and why governments operationalize responses to “threats that are unknown and unknowable.”¹²⁰

Though the precautionary principle had its genesis from environmental science, its application has been adopted to criminology.¹²¹ Sunstein posits that the principle refers to the situation where the risk of harm is both unpredictable and uncertain and where the danger wrought will be

¹¹⁸ Significant research in the field of social psychology points to uncertainty as a key factor in group development of extreme views and taking extreme measures to secure a sense of righteous virtue, security and certainty. These applications can be applied to extremist groups or in extreme measures for both minority and majoritarian populations. In majoritarian populations, it can take the form of state sanctioned law and order politics leading to public safety politics primacy over conventional rights safeguards. Two related social psychology theories include the Social Identity Theory and the Uncertainty-Identity Theory. See Michael A. Hogg & Danielle L. Baylock, *Preface: From Uncertainty to Extremism*, in *EXTREMISM AND THE PSYCHOLOGY OF UNCERTAINTY X* (Michael A. Hogg et al. eds., 2012). Social identity theory was first theorized by Henri Tajfel and John Turner in the 70s and 80s. See, e.g., Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, in *THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 33* (William G. Austin et al. eds., Brooks/Cole Pub. Co. 1979) (describing the group process and accompanying shift in self-perception); Donald T. Campbell, *Common Fate, Similarity, and Other Indices of the Status of Aggregates of Persons as Social Entities*, 3 *BEHAV. SCI. & L.* 14 (1985).

¹¹⁹ Law and order politics is a pejorative term meaning tougher sentencing measures and an arguably exaggerated focus on order over law at least for non-heterogeneous groups, and has been associated with social dominance orientation and right-wing authoritarianism. It is considered by some scholars as asymmetrical to rule of law. See generally Nick Cheesman, *Law and Order as Asymmetrical Opposite to the Rule of Law*, 6 *HAGUE J. RULE OF L.* 96 (2014); Anthony M. Platt, *The Politics of Law and Order*, 21 *SOC. JUST.* 3 (1994).

¹²⁰ Andrew Ashworth, *Criminal Law, Human Rights and Preventative Justice*, in *REGULATING DEVIANCE: THE REDIRECTION OF CRIMINALISATION AND THE FUTURES OF CRIMINAL LAW 87* (Bernadette McSherry et al. eds., Hart 2009).

¹²¹ RICHARD V. ERICSON, *CRIME IN AN INSECURE WORLD* (Polity Press 2007).

irreversible, any lack of scientific certainty in relation to the nature of the harm or its consequences should not prevent action being taken.¹²² Using the Kemshall/Wood matrix above, the application of the precautionary principle is likely to be attributed to the public health approach, self-generating by societal uncertainty/insecurity, which calls for action, perhaps any action, and the accountability of government officials who are perceived as failing to ensure public safety.¹²³ Precautionary logic presupposed the *knowability* of unknowable potential future dangerousness and calls for action nonetheless. Political speech replicating this approach is manifested in so-called ‘law and order’ politics, such as elaborated by former Australian Prime Minister, John Howard (2007), who stated in response to preventive detention of suspected terrorists, “it’s better to be safe than sorry.”¹²⁴ Thus, precautionary logic errs on the side of coercive state action in fulfillment of its’ positive obligations, despite foreseeable reversals in its’ negative obligations, for threats and risks that may be comparatively speculative, unknown and/or unknowable. It situates the extreme (safety/security) end of the scale in a preventative logic matrix. Trowborst stipulates that the “[u]nambiguous dividing line”¹²⁵ between preventative and precautionary rationales uses “[u]ncertainty as the defining criterion.”¹²⁶ French academic, Francois Ewald, described precautionary logic as a reasoning that “takes into account the unseen threats that lie in wait.”¹²⁷ Criminologist Richard Ericson refers to “precautionary logic as the logic of uncertainty that fuels suspicion.”¹²⁸

Ericson concludes this logic leads to the erosion of traditional principles against preemptive government measures leading to “suspension of normal legal principles and procedures,”¹²⁹ including new surveillance infrastructures.¹³⁰ He argues that the new [societal] uncertainty and insecurity energizes “these precautionary steps [and] is now a dominant political strategy.”¹³¹

¹²² CASS SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (Cambridge Univ. Press 2005).

¹²³ Kemshall & Wood, *supra* note 111.

¹²⁴ *Howard Rules Out Apologizing to Haneef*, THE AGE (Jul. 31, 2007), <https://www.theage.com.au/national/howard-rules-out-apologising-to-haneef-20070731-ge5gvg.html>.

¹²⁵ Arie Trouwborst, *Prevention, Precaution, Logic and Law: The Relationship Between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions*, 2 ERASMUS L. REV. 105, 116-17 (2009).

¹²⁶ *Id.*

¹²⁷ MCSHERRY, *supra* note 9, at 22; see François Ewald, *The Return of Descartes’s Malicious Demon: An Outline of a Philosophy of Precaution*, in *EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY* 273 (Tom Baker & Jonathan Simon eds., Univ. of Chicago Press 2002).

¹²⁸ Ericson, *supra* note 121, at 23.

¹²⁹ As a result of perceived dangerousness “because of a state of emergency, extreme uncertainty, or threat to security with catastrophic potential . . .” *Id.* at 26.

¹³⁰ *Id.*

¹³¹ *Id.* at 31.

The evolving positive state obligations in ECtHR jurisprudence not only reflect preventative approaches in domestic law enforcement application, but it obliquely enables states to take ever more precautionary measures. It exemplifies uncertainty in modern society. The shift from the identifiable individual standard in *Osman* to a more generalized concept of social risk in *Mastromatteo* legitimizes state justification claims to take more intrusive steps in the fulfillment of their positive obligations even when risk cannot be objectively weighed. This, in turn, allows for a balancing test between the rights and fair treatment of the accused and the suspected dangerousness of the accused. *Mastromatteo* implies a widening of the net of those subject to the balancing test as juxtaposed to society as a whole, instead of a specific articulable target victim. This is a precautionary measure and falls under the rubric of what Wood and Kemshall describe as the ‘community protection model’.

In *Dvoracek*, the Court counterintuitively deemed that castration was not punishment but rather medical treatment to avoid a balancing test for the absolute right of Article 3. However, the underlying logic was precaution, as it was based upon the subject’s risk of reoffending.¹³² Moreover, the Court relied on actuarial data as a scientific basis for state decision-making, particularly in preventative sentencing such as the use of neuro intervention in sex offense cases.¹³³ This opens the door to violation of negative obligations on untested and uncertain evidence – perhaps even speculation.

C. Actuarial Justice

Beck characterized the risk society as becoming increasingly reliant on scientific data and observed, “As risk becomes dominant in the arrangement of society, so science comes to play a central defining role in the way that society is governed.”¹³⁴ Malcolm Feeley and Jonathan Simon use the term ‘actuarial justice’¹³⁵ to mean scientific data used by the government that includes “techniques for identifying, classifying and managing groups assorted by levels of dangerousness.”¹³⁶ They argue that the government is increasingly reliant on actuarial data, such as it amounts to a “new penalty”¹³⁷ predicated not on what the offender has done but what they might do. Accordingly, criminal justice has witnessed a shift in priorities.¹³⁸ This new perspective objectifies the individual offender as a means of scientifically controlling future risk and inures to a form of “status

¹³² Rainey & Harrison, *supra* note 4. See *Dvoracek*, *supra* note 19, at ¶ 102.

¹³³ *Dvoracek*, *supra* note 19.

¹³⁴ BECK, *supra* note 98.

¹³⁵ MALCOLM FEELEY & JONATHAN SIMON, ACTUARIAL JUSTICE: THE EMERGING NEW CRIMINAL LAW, IN THE FUTURES OF CRIMINOLOGY (David Nelken ed., Sage 1994).

¹³⁶ *Id.* at 173.

¹³⁷ *Id.*

¹³⁸ *Id.*

offenders,¹³⁹ sounding in actuarial data and bases decision making on the actions of broad categories of offenders sharing [some] common attributes. This can be accomplished either in the investigation stage with use of so-called “profiling” techniques, or at sentencing in assessing future dangerousness.

Actuarial data used for sentencing protocols can be conceptualized as consisting of two types: *general offender data* and *offender specific data*. General offender data predicts future dangerousness (when assessed for sentencing of specific offenders) based on general criminology information such as the collection of general recidivism rates. Such tools are blunt instruments as specific predictive measures of future conduct for specific offenders or classes of offenses. Over-reliance on such data tends to create “status offenders” based on the conduct of other members of the class and fuels assumptions that may be ungrounded or simply false. It also inures to a form of collective punishment¹⁴⁰ whereby the quantum of coercive state measures offenders who have committed like-kind offenses. Thus, precautionary measures are taken against specific offenders predicated on the misconduct of the group. This predictive enterprise is rationalized by the legitimacy of (social) science and empirical studies. Yet, even assuming the propriety of this action, the data can and often is used in a purely anecdotal, misleading or self-serving way. For instance, many decision-makers, including judges, subscribe to the high recidivism rates of pedophile sex offenders¹⁴¹ and take sometimes extreme precautionary sentencing steps to manage future risk.¹⁴² Yet, studies have repeatedly shown that pedophiles have among the lowest recidivism rates of any criminal actors.¹⁴³ Studies have shown that these low rates are fairly consistent throughout the (common law) world.¹⁴⁴ Some have argued that this indicium of decision-

¹³⁹ “Status Offender” refers to one who commits a status offense, which is defined as “a conduct that is unlawful only because the offender is a minor.” See generally Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception That Swallowed the Rule*, 7 SEATTLE J. FOR SOC. JUST. 555 (2008). In this context the status of the offender, in sentencing orders, is defined by their similarity to other offenders with similar attributes as determined by actuarial data.

¹⁴⁰ “Collective Punishment,” also known as “collective sanctions,” occurs when a single member of a group is found to have violated a rule and is punished alongside the members of the group collectively by an external agent. See generally Douglas D. Heckathorn, *Collective Sanctions and the Creation of Prisoner’s Dilemma Norms*, 94 AM. J. SOC. 535 (1998)

¹⁴¹ See Kielsgard, *supra* note 96, at 259.

¹⁴² Examples include “[t]ougher sentencing, open-access sex offender registers, mandatory chemical castration, and indefinite (post-incarceration) mental commitment.” *Id.* at 247.

¹⁴³ According to the finding of a large 2003 U.S. Department of Justice study, sex offenders had a very low recidivism rate of 3.5% when calculated on re-conviction for sex offenders. See Patrick A. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994*, U.S. DEP’T. OF JUSTICE (Nov. 2003), <http://bjs.gov/content/pub/pdf/rsorp94.pdf>.

¹⁴⁴ Low recidivism rates for non-U.S. jurisdictions for sex offenders reconvicted for sex crimes is consistent with the U.S. DOJ study. Similar studies conducted in Australia by the New South Wales Department of Corrective Services found an 11% re-arrest rate with approximately half of them being technical parole violations. See Karen Gelb, *Recidivism of Sex Offenders Research Paper*, SENTENCING ADVISORY COUNCIL 22 (2007), available at <https://www.sentencingcouncil.vic.gov.au/sites/default/>

making is politically or policy driven such that judges forego careful scrutiny of empirical data to harmonize their decisions with public misconceptions.¹⁴⁵ Thus, the use of actuarial data as a litmus test not only fails to rationally guard against future risk, but is subject to community myth-driven and counterintuitive applications.¹⁴⁶ Additionally, flaws in design models for many recidivism studies tend to overstate future dangerousness such that many are predicated on future arrests instead of convictions,¹⁴⁷ arrests for minor probation violations¹⁴⁸ or other non-serious violations like traffic offenses.¹⁴⁹

The second genus of actuarial information consists of *offender specific data*. This includes, *inter alia*, the offender's personal criminal history, neurosis or mental disease (including drug, gambling or sex addictions), or specific motives to re-offend (e.g., obsession with an identifiable individual). Offender specific data more closely tailors the predictive element of managing risk from a specific offender viewpoint and shrinks the collective punishment element, but raises two additional vagaries in judgment.

First, the offender specific data is or may be considered in light of general offender data such that punishment will be predicated on studies of general offenders with the same specific characteristics as the offender. This again defaults to group punishment. Moreover, there are no guidelines on which type of data is applied or emphasized, leaving that to the proclivities of individual judges. Second, diagnosing mental health conditions and making predictions on future dangerousness therefrom is also subject to the differing expert medical opinions, is not an exact science and is subject to the proclivities of individual mental health professionals. The danger of reliance on these opinions are that they are imbued with a sheen of reliability that does not comport with the legitimacy attached to them as applied to the dubious predictive enterprise of future dangerousness. Mental health professionals also have motivations to err on the side of precaution as they run the risk of backlash if an optimistic diagnosis does not ultimately comport with the future actions of the offender. In the end, precaution

files/publication-documents/Recidivism%20of%20Sex%20Offenders%20Research%20Paper.pdf. Denise Lievore of the Australian Institute of Criminology affirmed that the various studies showed low rate of sexual recidivism. See Denise Lievore, *Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy*, AUSTL. INST. OF CRIMINOLOGY 29 (May 2004), <http://www.aic.gov.au/documents/C/7/5/%7BC75FBED3-38E3-4FB2-AA62-5E94CE775717%7D2003-06-recidivism-.pdf> (cited in Kielsingard, *supra* note 96, at 258); see also Mark D. Kielsingard & Jack Burke, *Post-Incarceration Supervision of Pedophile Offenders: An International Comparative Study*, 51 CRIM. L. BULL. 1, 3–9 (2015).

¹⁴⁵ See generally *id.*

¹⁴⁶ *Id.*

¹⁴⁷ Kielsingard, *supra* note 96, at 257.

¹⁴⁸ Several common special provisions for probation for sex offenders, particularly in the U.S., create conditions that ultimately set the offender up for failure and result in probation violations, which further lead to perceived higher recidivism rates for sex offenders. *Id.* at 9–11.

¹⁴⁹ Gelb, *supra* note 144, at 22.

foreseeably is operationalized as neither judges nor mental health professionals seek to assume responsibility for the future conduct of convicted offenders. In this way, framing the decision-making process predicated on future dangerousness and risk inevitably defaults to precaution and therefore more coercive state measures.

Considering the criminal history of the accused is a better barometer of future dangerousness to a point, particularly when an offender has themselves committed similar crimes repeatedly. However, this intuitive approach rightly stands on its own without resort to other actors with similar records as such an approach contradicts basic assumptions of human autonomy. Moreover, repeat offenders already routinely merit enlarged punishments under most sentencing guidelines and protocols, not based on future dangerousness, but on retributive just desserts.

McSherry observes that, “the risk society,” the growth of “actuarial justice” and the shift from managing risk towards the necessity to take “radical prevention” in curtailing liberty before harm results, all offer explanations of the current emphasis on preventive detention and supervision schemes.¹⁵⁰ Moreover, precautionary logic has solidified in the psyche of citizens as Barbara Hudson observes “[r]isk society theory, cultural studies of risk and blame, new right policies and the rationalities of governance all contribute to an understanding of the way in which risk matters in contemporary western democracies.”¹⁵¹

Rainey and Harrison, citing Feeley and Simon, note actuarial justice would be prevalent in a risk based society.¹⁵² In such an era, states engage in “[t]he management of crime opportunities and risk distribution rather than the management of individual offenders and behaviors.”¹⁵³ Kemshall summarized the literature on actuarial justice to conclude that the United Kingdom has not reached the point where the actuarial justice is real.¹⁵⁴ However, she acknowledges the logic of risk has been prevalent.¹⁵⁵

D. Precautionary Sentencing

Coercive state preventative measures may be categorized into many typologies, as argued by Andrew Ashworth and Lucia Zedner.¹⁵⁶ Of

¹⁵⁰ MCSHERRY, *supra* note 9, at 19.

¹⁵¹ BARBARA HUDSON, *JUSTICE IN THE RISK SOCIETY: CHALLENGING AND RE-AFFIRMING JUSTICE IN LATE MODERNITY* 60 (Sage 2003).

¹⁵² Malcom M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 *CRIMINOLOGY* 449 (1992); *see also* FEELEY & SIMON, *supra* note 135.

¹⁵³ HAZEL KEMSHALL, *UNDERSTANDING RISK IN CRIMINAL JUSTICE I* (McGraw-Hill Educ. 2003).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*; *see also* Hazel Kemshall, *Risk, Actuarialism, and Punishment*, OXFORD RES. ENCYCLOPEDIA OF CRIMINOLOGY AND CRIM. JUST. (2017), available at <http://criminology.oxfordre.com/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-243>.

¹⁵⁶ ASHWORTH & ZEDNER, *supra* note 109. They conclude preventative measures can be categorized into seven forms: preventive powers in policing and criminal procedure, civil preventive

particular concern is “preventative sentencing”, which has been largely employed for sexual and violent offenders. As Kemshall, Harrison, and Rainey point out, generalized risk of future dangerousness is a significant departure from traditional sentencing aims.¹⁵⁷ Offenders are denied liberties, not because of prior acts, but for the future risk they pose to society. This makes risk assessments tools, particularly actuarial data, exceedingly important to the sentencing process under precautionary logic.

Illustrative of measures of precautionary logic include the New Zealand Public Safety (Public Protection Orders) Act of 2014.¹⁵⁸ Harrison and Rainey posit that the development of sexual offender registrations, sexual harm prevention orders, sexual risk orders, and the use of polygraphs on sex offenders are driven by these assumptions of preventative governance.¹⁵⁹ They point to the notification requirements in England and Wales of the sex offender registration and the disclosure duties of police officers following the enactment of the Criminal Justice and Immigration Act 2008.¹⁶⁰ Other examples include the National Offender Management Service, the sex offender notification requirements, the Disclosure of Duties of Police Officers, and the imposition of neuro interventions.¹⁶¹

In the United States a variety of risk prevention measures have been employed with regard to sex offenses. These include, inter alia, the Adam Walsh Safety and Protection Act (AWA),¹⁶² which includes the Sex Offender Registration and Notification Act (SORNA)¹⁶³ – perfecting public sex offender registries in terms of personal data collected, expansion of qualifying offenses, updating requirements, etc. – and has come under considerable criticism.¹⁶⁴ Other U.S. measures include impossibly restrictive probation requirements for released sex offenders,¹⁶⁵ the Sexually Violent Predator laws that provide for indefinite civil commitment and treatment of sex offenders after they have served their prison sentences,¹⁶⁶ and various

orders, preventive criminal offenses, preventive sentences, preventive counter-terrorism measures, preventive aspects of public health law, and preventive aspects of immigration law.

¹⁵⁷ Rainey & Harrison, *supra* note 4; KEMSHALL, *supra* note 153; Kemshall, *supra* note 155.

¹⁵⁸ Kris Gledhill, *Book Reviews*, 48 AUSTL. & N.Z. J. CRIMINOLOGY 591 (2015) (reviewing Karen Harrison, *Dangerousness, Risk and the Governance of Serious Sexual and Violent Offenders*, 14 AUSTL. & N.Z. J. CRIMINOLOGY 620 (2011)).

¹⁵⁹ Rainey & Harrison, *supra* note 4.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Press Release, The White House, President Signs H.R. 4472, the Adam Walsh Child Protection and Safety Act of 2006 (Jul. 27, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-6.html>.

¹⁶³ U.S. Dep’t Just., *The Dru Sjodin National Sex Offender Public Website*, <http://www.nsopw.gov/Core/Portal.aspx?AspxAutoDetectCookieSupport=1> (last visited Aug. 20, 2018).

¹⁶⁴ See, e.g., Stephanie Buntin, *The High Price of Misguided Legislation: Nevada’s Need for Practical Sex Offender Laws*, 11 NEV. L.J. 770 (2011); Amy Baron Evans, *Still Time to Rethink the Misguided Approach of the Sex Offender Registration and Notification Act*, 20 FED. SENT’G REP. 357 (2008).

¹⁶⁵ Kielsingard & Burke, *supra* note 144, at 9-11.

¹⁶⁶ *Id.*

iterations of chemical and (voluntary) physical castration.¹⁶⁷

The rise of new technologies – neuro interventions¹⁶⁸ like “chemical castration” used to combat the risks posed by sex offenders – are only one of the trends of risk management.¹⁶⁹ Typically they are employed as sentencing measures¹⁷⁰ or voluntarily,¹⁷¹ but come with an implied or express promise of early release.¹⁷² Thus, their voluntariness has raised grave ethical questions.¹⁷³

The continued rise of technology supports the thesis that in certain sectors of the criminal justice system there is significant movement toward employing the states coercive sentencing power predicated on the future risk offenders pose to society. However, according to Kris Gledhill, criminal laws preventing the commission of crimes have always existed.¹⁷⁴ He cites the Bushranging Act of the 1830s¹⁷⁵ and points to criminal offenses that have a forward-looking feature such as inchoate and possession of weapons offenses.¹⁷⁶ On the other hand, he notes distinct features of new preventive measures in the name of public protection: “These new preventive detention statutes are not based on the commission of a specified offence that reveals a danger. Rather, they are based on an assessment of being a dangerous person; generally to be proved on balance, rather than being the subject of the higher criminal standard of proof.”¹⁷⁷ It should also be noted that inchoate offenses are distinguishable from risk prevention in the sense that while they are forward looking regarding the *actus reus*, they are designed to punish the completed *mens rea*. Precautionary logic is forward looking in regards to both the *actus reus* and *mens rea*, to enlarge punishment of those

¹⁶⁷ Mandatory physical castration is prohibited in the U.S. in accordance with the decision of *State v. Brown*, 284 S.C. 407, 326 S.E.2d 410 (1985), where the Court opined that this practice was a “form of mutilation” and void under the 8th Amendment to the U.S. Constitution. Nonetheless, the state of Texas offers voluntary physical castration. See Stacy Russell, *Castration of Repeat Sexual Offenders: An International Comparative Analysis*, 19 HOUS. J. INT’L L. 425, 431 (1997). Many European states have used forced physical castration. See Ariel Rösler & Elizer Witzum, *Pharmacotherapy of Paraphilias in the Next Millenium*, 18 BEHAV. SCI. & L. 43, 44 (2002).

¹⁶⁸ “Neuro interventions” like chemical castration can be defined as “interventions that exert a direct biological effect on the brain,” while some other possible interventions include “deep brain stimulation,” “transcranial magnetic stimulation,” and “neuro feedback.” See Jonathan Pugh & Thomas Douglas, *Neuro Interventions as Criminal Rehabilitation: An Ethical Review*, in THE ROUTLEDGE HANDBOOK OF CRIMINAL JUSTICE ETHICS 95 (Jonathan Jackson & Jonathan Jackson eds., Routledge 2017).

¹⁶⁹ Kielsingard & Burke, *supra* note 144, at 27-31.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Among the critiques of voluntary chemical castration is the voluntariness of the offender and whether their choice is the product of coercion. See William Green, *Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues*, 12 U. DAYTON L. REV. 1 (1986); Kari A. Vanderzyl, *Castration as an Alternative to Incarceration: An Impotent Approach to the Punishment of Sex Offenders*, 15 N. ILL. U. L. REV. 107 (1994).

¹⁷⁴ Gledhill, *supra* note 158.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 592.

who have neither committed the act nor formed the specific intent to do so.

IV. CRITIQUING THE PRECAUTIONARY APPROACH

The rise of the risk adverse community, sounding in state positive obligations, is conceptually grounded in the human right to security. It can be traced to the “marked decline in confidence in liberal crime management strategies, together with economic pressures on crime management and concern over how to manage the most dangerous and habitual offenders, and has led to a focus on risk management over rehabilitation.”¹⁷⁸ The risk adverse society has also buttressed assumptions concerning the key role security plays as a human right, evolving not only from a right to be secure from government interference, but the right of protection from third party violators. Thus, in modern society, security has arguably taken center-stage as a new meta-right.

A. The Right to Security as a Meta-Right

State positive obligations habituate to the right to security. These obligations can be described as the State’s obligation to provide for the security of citizens’ human rights from third party non-state violators. It is consistent with preventative state ideology as a new paradigm of the right to security. This inevitably leads to the issue of what weight the right to security should be accorded in the human rights regime generally, and what is lost by this weight in other protections afforded.

The right to security has been characterized not only as an individual right but as an end for Human Rights.¹⁷⁹ Sandra Fredman argues that the right to security includes more than merely the duty to limit the state’s coercive powers and the duty to protect, but also includes the duty to “[p]rovide for basic needs of individuals.”¹⁸⁰ Under this theory, the right to security exceeds the status of individual right and inures into a meta-right from which other rights are legitimized.

¹⁷⁸ Hazel Kemshall & Jason Wood, *Risk and Public Protection: Responding to Involuntary and ‘Taboo’ Risk*, in *LIVING IN DANGEROUS TIMES: FEAR, INSECURITY, RISK AND SOCIAL POLICY* 53, 57-78 (David Denney ed., Wiley-Blackwell 2009).

¹⁷⁹ Sandra Fredman, *The Positive Right to Security*, in *SECURITY AND HUMAN RIGHTS* 307 (Benjamin J. Goold & Liora Lazarus eds., Hart 2007).

¹⁸⁰ *Id.* at 308.

The status of a meta-right is distinct from other rights specifically laid out in human rights instruments, even absolute rights. The property of being a meta-right is one which is operative in the balancing of state obligations to other rights. In the current context, a meta-right serves as a guiding principle whereby the balancing tests between positive and negative features of other stipulated rights or imbedded together within a single right can be conceived.

Of course, the ECtHR follows other guiding principles such as the general principles of necessity, proportionality and the margin of appreciation, but these are mechanical applications that provide for a means of looking at issues but do not inform as to the value judgment of the test(s). It pushes the analysis to a different level without providing needed insight. In the balancing of a negative and positive obligation to determine necessity and proportionality, the conclusion will ultimately depend on vagaries of the value set of the judicial institution or officer. To use the torture example alluded to earlier, if the state sought to torture information from a terrorist (violation of absolute right under Article 3) in order to gain information that could save many lives (absolute right under Article 2), then the necessity and proportionality analysis would depend on the guiding principle adhered to by the institution, security vs. human dignity. In the more difficult case of castration, physical or chemical, this analysis takes a more nuanced focus.

As observed by Merrill above,¹⁸¹ many/most rights have both negative and positive obligations attached, and the issue becomes whether the contested state conduct, either to refrain from violation or to ensure and protect, is not only necessary and proportionate but in balance in accordance with guiding non-mechanical principles. Precautionary logic presumes the guiding principle is security, which generally tilts the balance toward operative state positive obligations.

While the right to security is widely perceived as a human rights norm,¹⁸² in 'Public Safety and Private Security: Are They Reconcilable?',¹⁸³ Adam Crawford warns of the inherent dangers of inflating the concept of the right to security. He cites Lazarus Liora to conclude construing the "right to security" as a fundamental or meta-

¹⁸¹ See Merrills, *supra* note 24.

¹⁸² Liora Lazarus, *Mapping the Right to Security*, in SECURITY AND HUMAN RIGHTS 325, 332-33 (Benjamin J. Goold & Liora Lazarus eds., Hart 2007).

¹⁸³ Adam Crawford, *Public Safety and Private Security: Are They Reconcilable?*, CONSTITUZIONI E SICUREZZA DELLA STATO 507 (Alessandro Torre ed., Maggioli Editore 2013).

human right¹⁸⁴ can lead to deleterious consequences as it leads to political exploitation to default to more coercive and intrusive state powers justified as risk prevention.¹⁸⁵ Crawford observes "[w]e may become preoccupied with the quest for security as the precondition to liberty to such an extent that we end up with enhanced security but with meagre liberty."¹⁸⁶ Crawford identifies two types of balancing exercises, intra-personal tradeoffs and interpersonal tradeoffs:

[Intra-personal is] where individuals accept certain constraints on their own liberty in order to render themselves (and possibly others) more safe and secure; where each of us bears the costs of security whilst simultaneously each of us reaps the benefits. By contrast, interpersonal trade-offs - more problematically- occur where we sacrifice not our own liberty but the liberty of others in order that the rest of us may be (or feel) more safe.¹⁸⁷

Crawford takes issue with the unequal distribution of security that so often occurs in societies which contains groups of various relative economic and political standing. It is also relevant to racial, gender, ethnic and religious groups. This concern is apparent in the conflation of various meanings associated with the word "security" in the context of describing and analyzing social problems. This conflation has come to extend security to include virtually anything from external and internal threats to physical safety to "fears, perceptions, assurances, and a sense of well-being."¹⁸⁸

Lazarus reasons that the evolving positive obligation judgments from the ECtHR reinforces states use of security to incorporate into the political rhetoric in order to further the state's coercive powers.¹⁸⁹

¹⁸⁴ Lazarus, *supra* note 182; Liora Lazarus, *The Right to Security*, The Philosophical Foundations of Human Rights 423 (Rowan Cruft et al. eds., Oxford Univ. Press 2015); Liora Lazarus, *Positive Obligations and Criminal Justice: Duties to Protect or Coerce?*, PRINCIPLES AND VALUES IN CRIMINAL LAW AND CRIMINAL JUSTICE: ESSAYS IN HONOUR OF ANDREW ASHWORTH 135 (Lucia Zedner & Julian v. Roberts eds., 2012); Liora Lazarus, *The Right to Security – Securing Rights or Securitising Rights*, in EXAMINING CRITICAL PERSPECTIVES ON HUMAN RIGHTS 87 (Rob Dickinson et al. eds., 2012).

¹⁸⁵ Crawford, *supra* note 183.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 17.

¹⁸⁹ Lazarus, *supra* note 182.

Thus, the right to security must be construed narrowly.¹⁹⁰ Lazarus observes:

The rhetorical and political appeal of security and rights has within it a potentially explosive combination, not only to erode the protections of competing rights such as liberty, but also to undermine accepted understandings of the foundations of fundamental rights reasoning.¹⁹¹

Drawing upon this scholarship, the expansion of the positive obligations to include “collective” security is subject to rationally foreseeable abuse for uneven use against non-elite society members and the predictable manipulation of ever increasing security initiatives by states to further unrelated paternalistic agendas, sacrificing negative obligations such as the use of torture techniques against terrorism suspects. As the dialog of risk increasingly gains traction, greater acceptance by majoritarian populations to forego essential human rights increases, particularly if those reversals are perceived as targeting minority populations. Functionally, this inures to a utilitarian tactic providing the greatest security and access to human rights to the greatest number at the cost of essential liberty to the few. However, this is fundamentally opposed to negative state obligations, human rights anti-majoritarian character, and the basic precepts of human rights ideology against discrimination with its mandate of equal distribution of rights to all.¹⁹²

Moreover, Sanders and Young observe that the interests of victims and suspects run parallel as “all applications of state power reduce freedom, at least in the short run ..., [p]lacing greater weight on victims' freedom would be counter-productive for the overall freedom of all (including victims).”¹⁹³ They concluded “the application of state power is as damaging to the freedom of suspects and defendants as crime is to the freedom of victims.”¹⁹⁴

The inflation of security as a meta-right or guiding principle for human rights is ill advised and self-defeating within the human rights

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 344.

¹⁹² ANDREW ASHWORTH, HUMAN RIGHTS, SERIOUS CRIME AND CRIMINAL PROCEDURE 43 (2002).
See also Günther, *supra* note 20.

¹⁹³ ANDREW SANDERS & RICHARD YOUNG, CRIMINAL JUSTICE 46-47 (3d. ed., 2007).

¹⁹⁴ *Id.*

regime. It disproportionately enables precautionary penology, and incumbent judicial uncertainty, insofar as it misdirects criminological priority to ensure against perceived future dangers and detracts from punishments focus on just desserts, deterrence¹⁹⁵ and rehabilitation. Its prioritization foreseeably fuels state justification for violation of negative rights in the name of public safety, is instrumental in the deprivation of all society members' human rights and disproportionately discriminates against non-majoritarian population clusters.¹⁹⁶

Indeed, non-discrimination serves as a more appropriate meta-right as it can be viewed as the source of all human rights violations and occupies a most prominent position in virtually all international human rights instruments.¹⁹⁷ Non-discrimination norms are equally relevant in civil/ political and cultural/social and economic rights.¹⁹⁸ On at least one level, precautionary penology and incumbent actuarial decision-making presupposes established classes of actors for the purposes of inflicting discriminatory treatment and collective punishment based on what Crawford describes as inter-personal tradeoffs. However, non-discrimination as a standalone justification in the context of a guiding principle lacks sufficient content to serve as a pervasive standard because some calculations balancing negative and positive state obligations are not conducive or applicable to this analysis. More conventionally, the concept of human dignity, which subsumes non-discrimination, serves as a better guiding principle.

On another level, the right to security, if viewed as a meta-right under precautionary logic, trumps negative rights leading down a path of hyper-securitization and progressively unchecked government control – in the name of public safety – that is antithetical to

¹⁹⁵ Though it is admittedly an effective initiative for specific incapacitation.

¹⁹⁶ See, e.g., enhanced penalties for “crack” cocaine in the US over powder cocaine, with the former as proportionately more often used by African American minorities of modest means while the latter was typically used by white Americans. Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?* 45 WASH. U. J. URB. & CONTEMP. L. 121, 123 (1994).

¹⁹⁷ See Universal Declaration of Human Rights, art.2, Dec. 8, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) [hereinafter UDHR]; Convention on the Rights of the Child, art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989) [hereinafter CRC]; Convention on the Rights of Persons with Disabilities, art. 5, May 3, 2008, A/RES/61/106, Annex I [hereinafter CRPD]; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195, 212 [hereinafter ICERD]; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) [hereinafter CEDAW]. See also *The Right to Equality and Non-Discrimination*, ICELANDIC HUMAN RIGHTS CENTRE, <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-equality-and-non-discrimination> (last visited Aug. 16, 2018).

¹⁹⁸ See ICESCR, *supra* note 22, art. 2(2); ICCPR, *supra* note 22, art. 2 & art. 26.

conventional assumptions of the rights regime. Security as a meta-right contradicts many basic assumptions of human dignity because it objectifies the offender, imposes sanctions for uncertain future conduct and, following onto its natural course, leads to inhumane sentencing practices.

B. Objectification, Uncertainty and the Slippery Slope of Precautionary Logic

One critique of precautionary logic in criminology claim that state coercive measures objectify the offender,¹⁹⁹ dehumanizing them by placing them in a distinct and separate category which fuels discriminatory treatment particularly regarding the methods and justifications for state coercion applied against them. Critics also focus on the uncertainty of precautionary logic methodology. They argue that risk assessment models are unreliable indicators of future conduct and thus are unethical if used for future punishment,²⁰⁰ weakens individual rights, contradicts traditional assumptions grounded in constitutionality and rule of law,²⁰¹ and that non-judicial measures may be employed in communities steeped in precautionary logic that sidestep normal judicial constraints.²⁰² It inevitably leads to a slippery slope to an extent that the endpoint of the preventative state takes criminology to a point of no return, characterized by authoritarian politics and punitive measures long abandoned by basic precepts of human dignity. Moreover, showcase measures of the precautionary state, such as neuro intervention, lead to state sanctions which fail necessity and proportionality scrutiny.

Criminal Law has generally been a backward-looking institution (with the possible exceptions of prevention offences like inchoate offences and possession offences). This backward-looking feature has its utility as it places a definite limit on the state's use of coercive power, assuages the uncertainty incumbent to the predictive process, and gives the offender a chance to reform by exercising the ability to

¹⁹⁹ Rainey & Harrison, *supra* note 4.

²⁰⁰ See David Cole, *The Difference Prevention Makes: Regulating Preventive Justice*, 9 CRIM. L. & PHIL. 501 (2015); see MCSHERRY, *supra* note 9.

²⁰¹ Richard L. Lippke, *No Easy Way Out: Dangerous Offenders and Preventive Detention*, 27 L. & PHIL. 383 (2008).

²⁰² See J.Q. La Fond, *Sexually Violent Predator Laws and the Liberal State: An Ominous Threat to Individual Liberty*, 31 INT'L J. L. & PSYCHIATRY 158 (2008). La Fond discusses how various states have manipulated the civil commitment process in order to indefinitely detain sex offenders.

choose appropriate socialized behavior.²⁰³ Risk prevention or precautionary measures deny the offender the chance to make that personalized choice.²⁰⁴ For example, neuro interventions like chemical castration are given, in some countries mandatorily or voluntarily, to the offender in order to reduce their sexual drive.²⁰⁵ In doing so, the state is sending a message that it is not concerned with developing the offender's ability to reform through employing rational faculties and will power.²⁰⁶ The narrative is rather that society cannot tolerate the risk and therefore for the sake of security, freedoms are biologically removed. This inures to the objectification of individual society members.

Rainey and Harrison opine that the preventive measures that the state (England) takes against sexual and violent offenders reflect a greater and general shift of penal policy.²⁰⁷ Citing the works of Garland, they note that the implications of this shift is that instead of viewing the offender as a person who could be transformed by the system, the offender is seen as the "other".²⁰⁸ The "others" are seen to be separate from the conventional polity, who pose substantial danger and risk, while citizens are seen as being "at risk."²⁰⁹ This perspective is "dehumanizing" and contrary to the (human) rights-based approach as antagonistic to human dignity.²¹⁰

Using Crawford's scheme, dehumanization of offenders is an essential ingredient in so-called inter-personal trade-offs. It is far easier to impose harsh protocols on those who have been demonized and figuratively striped of their humanity. At its most extreme, such trends in popular perception have historically fueled the worst state sanctioned crimes including genocide.²¹¹ Certainly, accused pedophiles for example, are popularly dehumanized and are easily subject to what would normally be considered cruel, inhumane and

²⁰³ It is the idea of affording choice to the citizen, and the belief that he or she would learn from their own crimes. Connected to the ideas of a welfare state. See Rainey & Harrison, *supra* note 4, at 360.

²⁰⁴ *Id.* It sends the message that offenders are beyond saving.

²⁰⁵ Pugh & Douglas, *supra* note 168, at 95.

²⁰⁶ Farah Focquaert & Maartje Schermer, *Moral Enhancement: Do Means Matter Morally?* 8 NEUROETHICS 139, 145 (2015).

²⁰⁷ Rainey & Harrison, *supra* note 4.

²⁰⁸ David Garland, *The Culture of High Crime Societies*, 40 BRIT. J. CRIMINOLOGY 347 (2000). The treatment of individuals as the "other" can be seen as going against Kant's categorical imperative which entails that a person should not be treated as a means to an end. See generally, IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* (1981).

²⁰⁹ Garland, *supra* note 208.

²¹⁰ Rainey & Harrison, *supra* note 4.

²¹¹ See generally, MARK KIELSGARD, *RESPONDING TO MODERN GENOCIDE: AT THE CONFLUENCE OF LAW AND POLITICS* 77–81 (Routledge 2016).

degrading treatment or punishment in the form of chemical or physical castration.

Aside from the objectification claim, Kemshall surveys other problematic areas under discussion in relation to preventive sentencing.²¹² Citing the works of David Cole, the fact that future offending must always contain a risk of uncertainty, this can be seen as morally and ethically troublesome to the implementation of preventive sentencing.²¹³ Uncertainty here refers to pragmatic uncertainty in the determination of future dangerousness as distinct from the generalized sociological concept of uncertainty (or insecurity) that pervades society and motivates greater emphasis on precaution and, by extension, of perceived expanded positive state obligations.

Although there has been improvement in the development of risk assessment technologies,²¹⁴ McSherry argues they are not reliable enough to be used for the purposes of sentencing.²¹⁵ Uncertainty results from current technology deficiencies and requires the state and/or court to offer different justifications than sentencing decisions made on future predictions alone.²¹⁶ This is particularly true with the use of general offender data, lack of coherent guidelines for the use of actuarial data, and predictable manipulation of data and/or opinions erring on the side of precaution.

A second critique is the weakening of individual rights with community based preventive measures like the sexual offender registration list.²¹⁷ This tips the balance in favor of the victim (prospective victim) over the rights of the offender. Kemshall notes a balance ought to be struck, which presumes victim's interest should not be the primary reason for enacting legislation or precautionary sentencing for the purposes of crime control.²¹⁸

A third critique argues that preventive sentencing is considered contrary to traditional jurisprudence that supports individual rights and the rule of law.²¹⁹ The problematic aspect being that the preventive state is characterized with the use of the precautionary principle.

²¹² Kemshall, *supra* note 155.

²¹³ Cole, *supra* note 200.

²¹⁴ MCSHERRY, *supra* note 9.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Terry Thomas & David Thompson, *Applications to Come off the UK Sex Offender Register: The Position After F and Thompson v. Home Office 2010*, 51 HOWARD J. CRIM. JUST. 274 (2012).

²¹⁸ Kemshall, *supra* note 155.

²¹⁹ Lippke, *supra* note 201.

Under this principle, the user is justified in intervening with another's liberties if the risk posed by the other is seen to be intolerable, regardless of culpability or if risk will materialize in the future.

A fourth critique argues that because legislation and policies are not easily transferable across jurisdictions or inter-jurisdictions due to differing criminal justice models (e.g., public protection model of the United Kingdom and the rights based approach of European Countries) and because of the possible tension between the judiciary and the state, the state may engage in backdoor prevention.²²⁰ Kemshall provides an exemplar in the 2011 case in the German High Court which ruled that preventive detention of prisoners was unconstitutional.²²¹ However, the German Government employed a different theory to avoid the taint of preventive detention, by labeling it preventive "treatment" detention under the relevant Mental Health Legislation.²²² Likewise, Germany was also warned by the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Punishment ("CPT") to halt the practice of surgical castration in the management of individuals convicted of sexual offenses.²²³ The German Government's rebuttal was such intervention was not to be construed as a form of punishment but should be looked upon as a form of medical intervention.²²⁴ The effectiveness of framing their argument in this way was to evade the allegation of an Article 3 or Article 8 violation of the Convention as indeed the rationale of the ECtHR subsequently concurred with in the *Dvoracek* case.²²⁵ This is mirrored in the United States practice of "indefinite detention," whereby prisoners of sexual crimes may be ordered into indefinite medical detention after serving their prison terms on the basis that they suffer from a neurosis and pose a risk to themselves or others.²²⁶ In some cases this amounts to a life sentence.²²⁷

²²⁰ Kemshall, *supra* note 155.

²²¹ Roxanne Lieb et al., *Post-release Controls for Sex Offenders in the U.S. and UK*, 34 INT'L J. L. & PSYCHIATRY 226 (2011).

²²² *Id.*

²²³ Jamie Reese, *Council of Europe Criticizes Germany Castration Law*, JURIST (Feb. 23, 2012), <https://www.jurist.org/news/2012/02/council-of-europe-publishes-report-on-german-castration-practices/>.

²²⁴ *Id.*

²²⁵ *Dvoracek*, *supra* note 19.

²²⁶ See *Sullivan v. The Government of the United States*, [2012] E.W.C. (Admin) 1680 (C.A.).

²²⁷ Note the US/UK extradition case where the UK refused extradition because indefinite detention was practically permanent and the failure of the US to release those in indefinite detention in the State of Minnesota in denial of Article 5.1 of the Convention. See *Id.*

It is suspect whether the intent is to provide the best rehabilitative treatment to such offenders or whether it is done to segregate offenders from society. Some scholars have grappled with the issue of whether a medical intervention set in the context of the criminal justice system should be seen as treatment or punishment.²²⁸ This is especially warranted since pedophilia, for example, is characterized as a mental health issue.²²⁹ In their work, Harrison and Rainey discuss the value of consent, in the sense that it is valid consent or coerced consent obtained under these circumstances, and recently have been raising warning flags for cases like *Dvoracek*.²³⁰ In addition, they question considerations of the offender's risk of re-offending, which were taken into account when deciding whether an invasive procedure was permissible under the therapeutic necessity medical principle.²³¹ Indeed, in the US indefinite detention scheme, future risk plays a prominent role in court decisions²³² basing their rulings on medical doctor's opinion that the offender is likely to reoffend.²³³ The reported concern of rehabilitation is disingenuous in as much as prisoners in the U.S. have scant access to treatment while serving their prison sentences,²³⁴ victims concerns are given great deference by the court (though they lack objective basis for their opinions), and presupposes that doctors have the ability to predict future behavior.²³⁵ Some scholars have suggested that the diagnosis in these cases are principally made based on the subjects arrest history and the consequences of their crime,²³⁶ a consideration that is outcome determinative and is more appropriately made by a court.

Another consideration is the nature of the neurosis. Medical handbooks include thousands of different types of neuroses²³⁷ and health care professionals concede that virtually all people suffer from some type of neurosis of one sort or another.²³⁸ Indefinite detention

²²⁸ Rainey & Harrison, *supra* note 4.

²²⁹ Karen Harrison et al., *Pedophilia: Definitions and Aetiology*, in *MANAGING HIGH-RISK SEX OFFENDERS IN THE COMMUNITY 3* (Karen Harrison ed., Willan 2010).

²³⁰ *Dvoracek*, *supra* note 19.

²³¹ Rainey & Harrison, *supra* note 4.

²³² *Kansas v. Hendricks*, 521 U.S. 346 (1997); *see also* JULIA DAVIDSON & PETER GOTTSCHALK, *INTERNET CHILD ABUSE: CURRENT RESEARCH AND POLICY 18* (2011).

²³³ DAVIDSON & GOTTSCHALK, *supra* note 232.

²³⁴ *See* DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 578-79* (Kathleen Maguire & Ann L. Pastore eds., 1995).

²³⁵ Kielsingard & Burke, *supra* note 144.

²³⁶ *Id.* at note 270.

²³⁷ *Id.* at note 264.

²³⁸ Speaking of the DSPD mental commitment system in England, criteria for medical detention contains "an amalgam of clinical disorders that makes no sense as a diagnostic category" as observed by

proceedings require courts to first consider whether the offender suffers from a neurosis, an easy hurdle given the pervasiveness of neuroses,²³⁹ and then find whether the subject is a threat to themselves or others.²⁴⁰ This two prong test is also outcome determinative as the first prong is a given, in as much as all members of society suffer from neuroses and anyone convicted of a sex offense will be pro forma diagnosed with a sexual deviancy neurosis, and the second prong is grounded entirely in precautionary logic also largely presumed by the offenders prior conviction(s).

Another consideration is medical necessity. In the European Commission decision of *Herczeglafvy* a violation was found based on lack of necessity.²⁴¹ In *In the Interest of C.J.R.*, a U.S. Colorado Court of Appeals case, the Court came to a similar conclusion when medical officials gave a morbidly insane inmate of a medical detention facility chemical castration to control his sexually explicit conduct while in the ward.²⁴² By contrast, in *Dvoracek* the ECtHR sidestepped the Article 3 issue altogether by determining that chemical castration was medically necessary (in addition to declaring it treatment instead of punishment).²⁴³ Yet, it failed to engage in a robust necessity determination as it neglected to sufficiently survey modern advances in cognitive behavioral psychotherapy techniques without the use of chemical castration.²⁴⁴ Such techniques have shown significant success in recent years.²⁴⁵

Necessity is not a defense to non-derogable norms such as freedom from torture or cruel, inhumane or degrading treatment or punishment²⁴⁶ in Article 3 of the Convention. Having framed the chemical castration in *Dvoracek* as medical treatment rather than punishment the ECtHR avoided this consideration but still had to address medical necessity. This consideration is essential as the procedure is court ordered, or state imposed, beyond merely medical ethics requirements. The doctrine of necessity requires states to use

Professor Robert Hare. Martin Gosling, *The DSPS Programme – Prison and Probation*, CRIM. L. & JUST. WKLY., Oct. 2, 2009.

²³⁹ *Id.*

²⁴⁰ Kielsingard & Burke, *supra* note 144.

²⁴¹ *Herczeglafvy*, *supra* note 69.

²⁴² *People v. In the Interest of C.J.R.*, C.O.A. 133 (2016).

²⁴³ *Herczeglafvy*, *supra* note 69.

²⁴⁴ Though it did observe that another less invasive treatment, psychotherapy, was also employed.

²⁴⁵ See Kielsingard, *infra* note 248.

²⁴⁶ Art. 15(2) of ECHR does not permit “derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7,” see ECHR, *supra* note 14.

the least intrusive means available to effectively address the risk.²⁴⁷ Chemical castration is a less intrusive procedure than physical castration or death, but the analysis failed to take account of advances of modern psychotherapy techniques addressing sexual deviancy and pedophilia in particular. Empirical studies have demonstrated significant success with cognitive-behavioral psychoanalytical therapy reducing sexual reoffending (an already low figure) from treated offenders by approximately half over untreated offenders.²⁴⁸ This leads to the issue of whether the gains of modern psychoanalytical protocols are sufficiently robust to achieve the state ends and if neuro intervention is proportionate to the remaining risk.

The proportionality requirement is a demanding consideration as chemical castration precludes subjects from engaging in lawful conduct (e.g., right to privacy, right to a family life, freedom from cruel, inhumane and degrading punishment) and biologically alters them as balanced against potential future offending of subjects who receive the less intrusive cognitive behavioral psychotherapeutic treatment. What tilts the balance against the measure is uncertainty of future dangerousness. Statistically, states can predict general future dangerousness of the class of offenders, a low figure compared to other crimes, through actuarial data but is unable to predict the actions of any single offender with certainty. Considering the grave consequences of the measure, individualized offender uncertainty renders the practice disproportionate to the state objective.

This begs the question of how much risk society is prepared to accept and how far is the state willing to go to offset the risk, however slight. Thus, is the state willing to engage in violation of negative absolute rights violations in order to insure against potential, but uncertain, positive absolute rights violations in a very small subset of offenders? It also raises the question of overkill or whether the state

²⁴⁷ Klaus Günther, *supra* note 20, at 88–89. “[One] has to look very closely at the facts which are presented to justify the demand for criminal protection, whether there is an actual or potential violation of a fundamental right by a third party, and it has to apply the principle of proportionality, which requires consideration of less intrusive alternatives to criminal law, and the balancing of rights which could be infringed by criminal law protection.”

²⁴⁸ See, e.g., Keith Soothill, *Sex Offender Recidivism*, 39 CRIME & JUST. 145, 177 (2010) (the 2009 Hanson study showing treated sex offenders recidivism rates in Canada for sexual crimes dropped from 19.2% to 10.9%); *id.* at 182–83 (a ten-year Canadian study by Looman, Abracen and Nicholaichuk found more than a 50% drop in recidivism between untreated and treated offenders); *id.* at 181 (in a 2005 study, Losel and Schmucker found a 37% drop in recidivism rates of treated subjects); Caroline Friendship et al., *Evaluation of a National Prison-based Treatment Program for Sexual Offenders in England and Wales*, 18 J. INTERPERSONAL VIOLENCE 744, 752 (2003) (in England the Sex Offender Treatment Plan (“SOTP”) using cognitive-behavioral therapy resulted in a drop of reconvictions by nearly 50%).

will (or has) routinely applied neuro intervention woodenly to a larger subset of offenders who pose little risk. The proportionate use of neuro intervention for sex offenders who are unamenable to cognitive-behavioral psychoanalytical therapy, and therefore pose a heightened risk, is speculative as identification of that subset of offenders is largely unknowable. This renders a proportionality conclusion tending toward neuro intervention untrustworthy. Under normal assumptions this inures to no negative rights violations while under precautionary logic it assumes negative rights violations for greater security pursuant to positive right obligations.

The *Dvoracek* case eluded this necessity evaluation and opted for a synthetic precautionary analysis, which provided for states parties to engage in “backdoor” prevention, to use Kemshall’s terminology, to preclude Article 3 analysis by labeling punishment as medical treatment. In this way, the Chambers deftly shifted the dialectic argument between the balancing of negative and positive state obligations to a synthetic argument of whether neuro intervention is punishment or treatment. This ultimately failed to provide much needed insight into competing state’s obligations in a trending precautionary criminology environment as well as declined to engage in a robust proportionality test regarding medical necessity.

This also leads to profound slippery slope arguments such as whether this reasoning can be applied at some future date to precautionary initiatives for other offenses (e.g., medical detention for theft offenses, as the offenders could be diagnosed with kleptomania, or non-sexual assault offenses, as the offenders suffer from aggression disorder, and so forth) and whether neuro-intervention will eventually be over-applied to those convicted of any sex offense on a pro forma basis as is currently common for the less intrusive provision of drug counseling for those convicted of drug offenses. This explicates the risk, or endpoint, of the slippery slope of precautionary criminology and exposes the risk of further opening the door to neuro intervention for offenders.

First, the slippery slope of precautionary sentencing potentially consists of an endpoint that approaches Orwellian realities. For example, it is foreseeable that neuro intervention could morph into mandatory physical castration, which is currently offered on a

voluntary basis in such jurisdictions as Germany,²⁴⁹ the state of Texas in the United States²⁵⁰ and was established protocol for some European countries in the early 20th century.²⁵¹ Inasmuch as neuro interventions can be counteracted by the subject's illegal use of testosterone²⁵² (easily obtained on the black market) or simply absconding probation and going off the drug - it is logical that under a precautionary model the only safe protocol (from society's point of view) would be irreversible physical castration. Additionally, at the risk of seeming alarmist, this methodology could progressively be applied to other offenses. Foreseeably, offenders convicted of non-sexual assaultive offenses, easily diagnosed with aggression mental disorders, could be medically incapacitated through drugs or eventually, amputation. Expanding upon the justifications of chemical castration such penalties could be grounded in medical necessity based on aggression disorder. Additionally, these measures could rest on future dangerousness given that assaultive conduct risks homicide,²⁵³ generally considered the worst of offenses. Applied to its logical conclusion this devolves sentencing penology to an archaic posture of stocks, brandings, floggings, physical dismemberment and death, grounded in medical necessity, actuarial legitimacy, and the surety of public safety such measures provide. No doubt precautionary procedures are transferable to other infractions of increasingly less gravity. Such an endpoint of precautionary logic obviously contradicts core assumptions of the human rights regime and human dignity.

Second, the introduction of neuro intervention for sex offenders will foreseeably lead to its inappropriate over use for all sex offenders with mandatory [neuro intervention] sentencing provisions including those convicted of more minor offenses such as unlawful touching,

²⁴⁹ *Germany Praised for Ending Sex-Offender Surgical Castration*, CTV NEWS (Jun. 1, 2017), <https://www.ctvnews.ca/health/germany-praised-for-ending-sex-offender-surgical-castration-1.3438688>.

²⁵⁰ Sean Murphy, *Oklahoma Might Join Seven Other States in Opting to Chemically Castrate Offenders*, NATIONAL POST (Feb. 3, 2018, 11:16 AM), <https://nationalpost.com/news/world/oklahoma-considers-chemical-castration-for-sex-offenders>.

²⁵¹ Tilemann, *supra* note 2.

²⁵² WILLIAM E. PRENDERGAST, *TREATING SEX OFFENDERS: A GUIDE TO CLINICAL PRACTICE WITH ADULTS, CLERICS, CHILDREN, AND ADOLESCENTS* 123 (2d ed., Haworth Press 2004).

²⁵³ To a certain extent, precautionary medical opinions are already in use in determining sentences in death penalty cases with various personifications of "Dr. Death," mental health experts who testify for prosecutions in sentencing hearings as to the certainty of the defendant committing future murders. See John F. Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: is it Time to "Disinvent the Wheel?"*, 29 L. HUM. BEHAV. 55 (2005). See also RON ROSENBAUM, *TRAVELS WITH DR. DEATH* (Penguin Books 1991).

possession of (often photo-shopped) child pornography, exhibitionism, statutory rape of victims under the age of sixteen when the offender's age is within a few years of the victim and there is [non-legal] consent, sexual intercourse when both the offender and victim are under the influence of alcohol precluding valid consent, living off the proceeds of prostitution, etc. In these cases, the offender has demonstrated a lack of impulse control such that they were reckless as to consent, sometimes alcohol induced, as compared to sexually violent offenders and/or those who have significant psychological disorders leading to intentional perpetration of non-consensual sexual conduct. Currently, these types of offenses typically do not normally merit neuro intervention, except perhaps for repeat offenders, but inasmuch as sentencing for sex offenders is a highly politically charged issue, expanded use of this protocol for minor offenses gains currency and popular support. It is consistent with past law and order trends for sex offenders such as the broad-based qualification of virtually all sex offenders for various iterations of sex offender registration lists, onerous probation requirements and indefinite preventative detention. Moreover, this is consistent with precautionary logic under the reasoning that people who commit relatively minor sex offenses are more likely to commit graver offenses and pose significant future dangerousness.

Slippery slope arguments in this context are also applicable to the concept of human dignity and autonomy.

V. HUMAN DIGNITY AND AUTONOMY AS GUIDING PRINCIPLES

According to Andrew Clapham, human rights do not in itself resolve competing interests.²⁵⁴ Human rights do not provide us with a definitive answer for how the world should run. Instead it is better thought of as a "vocabulary for arguing about which interests should prevail and how to create the conditions for constraining attacks on dignity."²⁵⁵

Human dignity is an overarching concept and a core assumption of the human rights regime. It is a more appropriate guiding principle for determinations between negative and positive rights obligations than security as the latter leads to obtrusive government conduct and tilts the balance toward positive rights. However, human dignity as a

²⁵⁴ ANDREW CLAPHAM, HUMAN RIGHTS: A VERY SHORT INTRODUCTION viii (2d ed., Oxford Univ. Press 2015).

²⁵⁵ *Id.*

legal concept faces significant hurdles. In the final analysis, consideration must be given to security, non-discrimination and human dignity such that security considerations should be tempered with human dignity constraints. A useful model for human dignity as a guiding principle hypothesizes objective or collective human dignity and subjective human dignity.

In "Human Dignity as a legal value," Feldman observes that using human dignity as a legal principle is difficult because of its malleable property.²⁵⁶ Douglass observes that human dignity is open to many different interpretations across cultures.²⁵⁷ Still other scholars contend that dignity as a concept is too vague to be of practical value or is otherwise reducible to autonomy.²⁵⁸ Alternatively, some claim that in defining human dignity, a common denominator can be found.²⁵⁹ Rainey and Harrison draw on the jurisprudence of the ECtHR, for example, to illustrate the influence of Human Dignity as a legal concept.²⁶⁰ Feldman theorizes that depending on the circumstances two types of human dignity may be articulated, objective and subjective dignity.²⁶¹ The latter places emphasis on the autonomy and self-determination of the individual,²⁶² while the former refers to the dignity of the community as a collective.²⁶³ State actions have been defeated based on the need to respect citizen's autonomy.²⁶⁴

The *Manuel Wackenheim v. France* (2002), a case involved the banning of dwarf tossing, was brought to the United Nations Human Rights Committee which upheld the state's ban.²⁶⁵ Dwarf tossing is a practice in which dwarfs are used as throwing projectiles for the entertainment of audiences.²⁶⁶ The state's ban was not seen as abusive and was necessary for the protection of the public.²⁶⁷ In the earlier

²⁵⁶ Feldman, *supra* note 72; David Feldman, *Human Dignity as a Legal Value: Part 2*, PUB. L. 61 (2000).

²⁵⁷ MARY DOUGLAS, *RISK AND BLAME: ESSAYS IN CULTURAL THEORY* (Routledge 1992).

²⁵⁸ Foster writes in his book about the views of Dworkin, Beyleveld, and Brownsword of Human Dignity being reducible to autonomy, *see* CHARLES FOSTER, *HUMAN DIGNITY IN BIOETHICS AND LAW* 43, 56, 62–65 (Hart 2011).

²⁵⁹ LIORA LAZARUS ET AL., *REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT* (Bloomsbury 2014).

²⁶⁰ *Pretty v. United Kingdom*, 35 Eur. Ct. H.R. 1 (2002).

²⁶¹ Feldman, *supra* note 72.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Manuel Wackenheim v. France*, 10 I.H.R.R. 16 (2002).

²⁶⁶ Stefanie Nebehay, *Projectile Dwarf Case Thrown Out*, *The Independent: Europe* (Sep. 28, 2002), <https://www.independent.co.uk/news/world/europe/projectile-dwarf-case-thrown-out-178426.html>.

²⁶⁷ *Id.*

French court, it was reported that they found that the consent given by the dwarfs to participate in the activity could not legitimize the behavior that undermined the dignity of human beings as a whole.²⁶⁸

The *Wackenheim* case provides an example of the court protecting the objective or collective dignity of the society despite the subjective autonomy exercised by the voluntariness of the participants. In this sense collective dignity can be seen under two lenses. One, the type of conduct the society is willing to accept as lawful, even if it diminishes the overall dignity of the community, including participants, spectators or those who tolerate it – whether it is dwarf tossing, prostitution, pornography, or intoxication. Such bans can lead to paternalistic governance or be criticized as legislating morality or, it can be viewed as distinct from morality as sounding in the involuntariness of the participants. The ultimate legitimacy of banning such practices rests on the often unspoken, but operative, implication that the conduct diminishes the dignity and self-respect of community as a whole to an unacceptable level. Usually, such conduct is subject to administrative controls and limits in accordance with community standards.

A second way to consider collective human dignity are the sanctions the community is willing to impose on offenders on behalf of the community for violating core societal norms, even if the offender is given a choice between alternatives. This is state sanctioned control of state punitive measures or state conduct. In so far as law is the arbitrator of the body politic and reflects the collective core cultural norms of the society, all members take a measure of responsibility in coercive state action. This is seen in states that practice the death penalty whereby abolitionists argue that the state should not be empowered to take the life of another, however heinous the offenders conduct, in their name. This resonates with all forms of castration or other physical disfigurement or corporal sanctions imposed as punishment in accordance with law. Citizens are left to grapple with the question of whether this practice is “who we are.” The ban on dwarf tossing for entertainment demonstrates the ceiling for acceptable conduct as a collective; it was not just the dignity of the subject dwarves or even the grotesque spectacle of the spectators but a community or collective dignity standard that came into play. The autonomy of the individual actors, and their voluntary acquiescence,

²⁶⁸ *Id.*

was secondary to the collective society. Similarly, the abolition of the death penalty represents the ceiling of state sanctioning conduct in many countries that have banned that form of punishment. With reference to neuro intervention or physical castration the collective dignity of the community is similarly challenged.

A. Subjective Dignity

Subjective human dignity presumes autonomy: voluntary decision making by the individual in the control of their own lives. It means freedom of choice. Though he concedes differing culturally specific distinctions,²⁶⁹ Feldman articulates subjective dignity as being “linked to beliefs about what is involved in living a good life.”²⁷⁰ Carrying on from that, Schroeder provides four stratifications of dignity including Kantian dignity²⁷¹. She concludes that Kantian dignity is “an inviolable property of all human beings, which gives the possessor the right never to be treated simply as a means, but always at the same time as an end.”²⁷² This alludes to Rainy and Harrison’s conclusions of the objectification of the offender as “other” and the implied censure of precautionary logic as a dehumanizing component to enable stripping the offender of human dignity. Neuro intervention and physical castration removes the capability of the offender to exercise subjective dignity in otherwise lawful norms in fulfillment of procreative or [lawful] consensual sexual gratification and/or in self-reformation from anti-social behavior. These protocols are in place based on perceived future dangerousness and serve to make the subject a means to an end (i.e. public safety).

Autonomy as a key component of subjective human dignity presupposes the ability of the individual to make their own choices in accordance with their own values to live their lives the way they choose.²⁷³ It presumes the right of the individual to take control and direct their own cognitive rational processes. There are limitations on how an individual may exercise autonomy such as John Stuart Mill’s observation that “individual liberty can be constrained only by the

²⁶⁹ Feldman, *supra* note 72.

²⁷⁰ *Id.* at 3.

²⁷¹ See Doris Schroeder, *Dignity: Two Riddles and Four Concepts*, 17 CAMBRIDGE Q. HEALTHCARE ETHICS 230 (2008). In the article, Schroeder identifies four concepts of human dignity: Kantian Dignity, Aristocratic Dignity, Compartment Dignity, and Meritorious Dignity.

²⁷² *Id.* at 233.

²⁷³ ERIN NELSON, LAW, POLICY, AND REPRODUCTIVE AUTONOMY 13 (Hart 2013).

liberty of others and by the obligation not to harm others.”²⁷⁴ Misconduct can obviously be punished, but not, under a theory of autonomy, by removing the ability to exercise rational processes of the offender. Other well-grounded limitations on subject’s free exercise of autonomy are competency. Infancy, morbid insanity or comatose states biologically preclude individuals from exercising rational properties and thus bar their access to autonomy. Nelson observes that in bioethics, competency requirements for the free exercise of autonomy include an arguably larger net of conditions such as freedom from debilitating pathologies, systematic self-deception, etc. which otherwise prevent the individual from living their life “consistent with the values they have adopted.”²⁷⁵ Essentially, this still adopts a biological divide as to those who can physically or mentally exercise cognitive judgment.

In bioethics the solution for those who have a minimum threshold of competence, who are still biologically capable of exercising judgment, is informed consent.²⁷⁶ Many theorists have criticized this fallback procedure as “informed consent does not exhaust the rich concept of autonomy,”²⁷⁷ because it does not address the concept of autonomy beyond the patient health care provider context.

Moreover, informed consent is inadequate for legal sanctioning scenarios as legal standards of conduct invite arguably greater scrutiny. This scrutiny is predicated on the understanding that the state is the acting agent of the harm that will befall the subject, not a health care condition like a disease or debilitating mental condition. Amongst competent subjects, court ordered neuro intervention biologically creates conditions that impede the subjects cognitive rational process instead of generic mental disease. It sets up a slippery slope of court ordered biological coercion instead of disease instigated coercion. It also sets a precedent for neuro intervention in response to other sanctioned anti-social behavior. It is biological punishment with the consequential slippery slope ramifications that entails.

²⁷⁴ *Id.* at 17; see generally JOHN STUART MILL, ON LIBERTY (2d ed., 1863).

²⁷⁵ NELSON, *supra* note 273, at 14.

²⁷⁶ See generally RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT (Oxford Univ. Press 1986). Informed consent is more concerned with the circumstances in which a person makes a decision as opposed to focusing on whether the subject is autonomous. The former is more easily assessed and is more practical than the latter.

²⁷⁷ TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (7th ed., Oxford Univ. Press 2016); James Stacey Taylor, *Autonomy and Informed Consent: A Much Misunderstood Relationship*, 38 J. VALUE INQUIRY 383 (2004); Rebecca Kukla, *Conscientious Autonomy: Displacing Decisions in Health Care*, 35 HASTINGS CTR. REP. 34 (2005).

Borrowing the mechanism of informed consent from bioethics, proponents of neuro interventions point to the voluntariness of the subject in cases that allow offenders to choose between neuro intervention and lengthy incarceration.²⁷⁸ Putting involuntary chemical or physical castration aside, this raises the issue of the voluntariness of a subject who has to choose between two coercive alternatives. It raises the issue of whether free choice is viable under such coercive conditions and illuminates the inadequacy of informed consent in the legal context. By analogy, it would be as if the physician coerced a patient to take a preventative flu shot by threatening the patient with injecting them with a viral form of the infection. Obviously, with mandatory neuro intervention or physical castration even this pretext to voluntary decision-making would be invalidated. Vanderzyl articulates on the voluntariness of the choice between neuro intervention and long incarceration:

The doctrine of informed consent requires a knowledgeable and voluntary decision to undergo treatment, yet offering a convicted offender castration as an alternative to a lengthy prison sentence constitutes an inherently coercive practice rendering truly voluntary consent impossible.²⁷⁹

The irony of the *Dvoracek* case, and similar arguments identifying neuro intervention as medical protocol instead of punishment, is that under any theory of bioethics the procedure would be invalid as informed consent cannot be achieved in such a coercive environment. This creates a catch-22 scenario as under legal ethics this form of punishment is a violation of the subject's absolute right under Article 3 and under medical ethics it is void as failure to obtain non-coercive informed consent. In neither scenario does the subject's voluntary autonomy have primacy nor is human dignity (collective or subjective) observed. This highlights the tension between precautionary logic with security as a guiding principle and the human rights regime with human dignity and autonomy as guiding principles.

²⁷⁸ Especially given the transformative effect that consent has to make an unacceptable practice acceptable. See Pugh & Douglas, *supra* note 168, at 100–03; For an argument against the claim that the castration offer is coercive, see also A. Wertheimer & F.G. Miller, *There Are (STILL) No Coercive Offers*, 40 J. MED. ETHICS. 592 (2014).

²⁷⁹ Vanderzyl, *supra* note 173, at 140.

In a representative defense of chemical castration, Forsberg and Douglas advance several arguments that this measure is viable.²⁸⁰ They draw a distinction between patient autonomy and the autonomy of criminal defendants articulating that doctors act in the best interests of their patient alone while a state's legitimate purpose(s) is to protect the public.²⁸¹ These distinctions are superficial inasmuch as medical professionals do have criminal justice obligations directed at public interests ethics such as isolation of those with pandemic disease conditions, reporting requirements for abused spouses and children, etc. It also ignores health official's role in assessing future dangerousness either as experts in sentencing procedures²⁸² or for release from indefinite preventative detention.²⁸³ It is beyond the scope of this article to fully extrapolate on medical ethics per se but one observation often overlooked is when a health care professional recommends a particular curative protocol the patients choice is either accept the protocol or suffer the consequences of the disease (an external agency), while with state sanctioned neuro intervention the doctor acts de facto as the threatening agent of the state – either accept the protocol or the health care professional will in essence bring about the consequences by recommending further incarceration based on future dangerousness.

Forsberg and Douglas urge the abandonment of the autonomy debate altogether by framing the issue according to “the ethical standards of criminal justice” which is permissive of non-consensual measures.²⁸⁴ Taken in this light they paint criminal justice ethics with an overly broad brush. The criminal justice ethos is coercive but it has limitations, set for policy reasons and common notions of the collective human dignity of the community.²⁸⁵ These concepts are premised on constitutional protections, well-grounded human rights norms, and to assuage the slippery slope issues laid out above. The voluntariness of the offender is not a particularly relevant point,

²⁸⁰ Katrien Devolder, *Video Series: Tom Douglas Defends the Chemical Castration of Sex Offenders*, PRACTICAL ETHICS (Apr. 24, 2008), <http://blog.practicaethics.ox.ac.uk/2018/04/video-series-tom-douglas-defends-the-chemical-castration-of-sex-offenders/>.

²⁸¹ Pugh & Douglas, *supra* note 168.

²⁸² Edens et al., *supra* note 253.

²⁸³ See Samuel Brakel & James Cavanaugh, *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 80–81 (2000).

²⁸⁴ Lisa Forsberg & Thomas Douglas, *Anti-Libidinal Interventions in Sex Offenders: Medical or Correctional?*, 24 MED. L. REV. 453, 472 (2016).

²⁸⁵ Feldman, *supra* note 72.

Forsberg and Douglas conclude,²⁸⁶ because of the overall coercive character of the criminal justice system.²⁸⁷ However, this begs the question as to why the choice (between long incarceration and neuro-intervention) is even offered to the offender. If criminal justice ethics is purely coercive, as they suggest, then the provision of choice is superfluous if not disingenuous. There must be an ethical issue, or the state would merely impose the protocol without pushing the decision-making onto the offender. The offer reflects the intuitive notion that the court or legislature obliquely recognizes the act as unethical, to disavow the action and make the defendant take responsibility for the [neuro intervention] sanction to create the illusion of voluntariness. The ethics of criminal justice is well grounded in constitutional protections, not only for the accused but also for the convicted,²⁸⁸ and is governed under international human rights standards.²⁸⁹ Aside from Article 8 considerations,²⁹⁰ instituting medical procedures that render men to a prepubescent condition,²⁹¹ or physical dismemberment, is ipso facto cruel, inhumane or degrading punishment, an absolute prohibition under the Convention.²⁹² This is recognized in courts and legislatures²⁹³ otherwise there would be little necessity for employing backdoor mechanisms such as labeling it medical treatment instead of punishment - to avoid a robust Article 3 determination, as witnessed in the German legislative history,²⁹⁴ and the ECtHR's avoidance of the issue in *Dvoracek*.²⁹⁵ Forsberg and Douglas seek to remove the issue from medical ethics but that would fail to serve their purpose as it would likely demark the practice as an Article 3 violation. In other words, but for the ECtHR's declaration that neuro intervention was a medical protocol rather than a punitive protocol the necessity

²⁸⁶ Forsberg & Douglas, *supra* note 284; see also Thomas Douglas, *Criminal Rehabilitation Through Medical Intervention: Moral Liability and the Right to Bodily Integrity*, 18 J. ETHICS 101 (2014).

²⁸⁷ Forsberg & Douglas, *supra* note 284.

²⁸⁸ See, e.g., U.S. CONST. AMEND. XIII.

²⁸⁹ See, e.g., ECHR, *supra* note 14, art. 3 & art. 8; see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, 113 (1988).

²⁹⁰ *Id.*

²⁹¹ See generally Florence Thibaut et al., *The World Federation of Societies of Biological Psychiatry (WFSBP) Guidelines for the Biological Treatment of Paraphilias*, 11 WORLD J. BIOLOGICAL PSYCHOL. 604 (2010).

²⁹² ECHR, *supra* note 14, art. 3.

²⁹³ It was also recognized by the European Committee on torture, cruel, inhumane and degrading treatment or punishment on its reports on the practices in the Czech Republic and Germany; and is recognized by the Moldova Court.

²⁹⁴ Lieb et al., *supra* note 221; Reese, *supra* note 223.

²⁹⁵ *Dvoracek*, *supra* note 19.

justification would not have been available for this absolute [non-derogable] right violation in accordance with *Saadi v. Italy*²⁹⁶ and *Gafgen v. Germany*²⁹⁷ and the Court would presumably have been obligated to ban the practice as cruel, inhumane and degrading punishment. This is a well-defined limitation on the state's coercive powers recognized under the human rights regime.

Forsberg and Douglas provide an exemplar suggesting that if a certain paint color was conducive to non-aggression then the state would face little criticism for housing criminal defendants in facilities painted that color.²⁹⁸ They point to lack of voluntariness because the color of the paint does not engage the rational faculties of the defendant.²⁹⁹ However, this scenario misses the point; paint color is not an invasive procedure, doesn't constitute cruel, inhumane or degrading punishment and would not offend customary norms of the community. It is also an esoteric example that fails to parallel neuro intervention because paint color fails to adequately address the certainty that voluntariness is usurped with anything approaching precision as compared to medically implemented biological intervention. Furthermore, paint color doesn't carry with it other associated health risks as with chemical castration³⁰⁰ and does not preclude the offenders ability to engage in future lawful conduct, otherwise, it too would be unacceptable. A better example would be forced lobotomy,³⁰¹ which does offend community standards of human dignity and has been long abandoned by modern society.³⁰² Their exemplar also provides another slippery slope of what impacts voluntariness, which could be as easily applied to counseling or even advertising and is content neutral. It becomes an issue of degree, paint

²⁹⁶ *Saadi*, *supra* note 86.

²⁹⁷ *See Gafgen*, *supra* note 29.

²⁹⁸ *See* Jonathan Pugh, *Neuro Interventions for Criminal Rehabilitation – Do They Differ from Existing Penal Methods in a Morally Significant Manner?*, NEUROETHICS & L. BLOG (Feb. 1, 2016), http://kolber.typepad.com/ethics_law_blog/2016/02/neurointerventions-for-criminal-rehabilitation-do-they-differ-from-existing-penal-methods-in-a-moral.html.

²⁹⁹ *Id.*

³⁰⁰ For the health risks associated with undergoing chemical castration, *see generally* Luois J. Gooren, *Ethical and Medical Considerations of Androgen Deprivation Treatment of Sex Offenders*, 96 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3628 (2011).

³⁰¹ For the definition of lobotomy, which is “also known as leucotomy, is a neurosurgical operation that involves severing connections in the brain's prefrontal lobe” *See* Tanya Lewis, *Lobotomy: Definition, Procedure & History*, LIVE SCIENCE (Aug. 28, 2014), <https://www.livescience.com/42199-lobotomy-definition.html>.

³⁰² *See generally* ELLIOT S. VALENSTEIN, *GREAT AND DESPERATE CURES: THE RISE AND DECLINE OF PSYCHOSURGERY AND OTHER RADICAL TREATMENTS FOR MENTAL ILLNESS* (Basic Books 1986); *see also* Hugh Levinson, *The Strange and Curious History of Lobotomy*, BBC NEWS (Nov. 8, 2011), <https://www.bbc.co.uk/news/magazine-15629160>.

color, advertising etc. may impact decision-making and therefore voluntariness to a certain degree, but medical intervention removes it altogether.

Next, Forsberg and Douglas resort to necessity and argue that in a pandemic disease scenario, individuals would be isolated from the community and involuntary medical procedures would be justifiable.³⁰³ This is an unfortunate illustration for their arguments as it contradicts their contention of the separation of medical and criminal justice ethics laid out above, but more importantly, the dialectic upon which it is premised assumes certainty in determining future dangerousness – for the inherently uncertain prospect of predicting individual future behavior. In a pandemic disease scenario, future communication of the disease is a certainty obliging isolation and is not predicated on the voluntary decision-making of the afflicted individual. They do declaim that this would only be viable if the risk was a certainty.³⁰⁴ However, such a claim is largely rhetorical, particularly with the inherent uncertainty of actuarial decision-making in a landscape of precautionary logic. This genus of reasoning also logically leads to slippery slope realities of ever widening coercive government control, lowering the bar of what constitutes a security risk, and a return to comparatively barbaric involuntary sanctioning techniques long abandoned and offensive to the collective human dignity of modern society or the ethics of either medical or criminal justice organs.

VI. CONCLUDING THOUGHTS

Scholars acknowledge that risk and rights are interrelated.³⁰⁵ They illustrate this by pointing to various Convention's rights (Article 8 in particular) which contain qualifications.³⁰⁶ Article 8 of the Convention contains a proportionality test and entails a balancing exercise in which measures taken for the sake of public protection can be taken into account as long as the state's measure is in accordance with law and necessary in a democratic society.³⁰⁷ The *Osman* case places responsibility on states to protect vulnerable identifiable individuals

³⁰³ Jonathan Pugh & Thomas Douglas, *Justifications for Non-Consensual Medical Intervention: From Infectious Disease Control to Criminal Rehabilitation*, 35 CRIM. JUST. ETHICS 205 (2016).

³⁰⁴ *Id.*

³⁰⁵ Rainey & Harrison, *supra* note 4.

³⁰⁶ *Id.*

³⁰⁷ ECHR, *supra* note 14, art. 8.

from "real and immediate risk of serious harm."³⁰⁸ Accordingly, when a state is aware of a risk it is obliged to take reasonable precautionary measures, but the ECtHR has not objectively defined "risk,"³⁰⁹ and in the criminology context, has subscribed to actuarial justice while simultaneously given too little deference to the inherent uncertainty in predicting future dangerousness. Regarding positive obligations, Laurens Lavrysen put forth that the court should seek to create a consistent step-by-step formula for finding a positive obligation, because as the jurisprudence of the ECtHR currently stands, there is too much uncertainty surrounding the methodology in which the courts find a positive obligation arising from an article.³¹⁰

In *Mastromatteo*, the Court extended the positive obligation to create an equally unquantifiable standard of general security. This furthers the ambiguity as risk can be more efficiently assessed, to the extent it can be assessed at all, against an individual than a community at large. It shifts the focus from potential victims who are at risk to offenders who pose danger. This jurisprudence gives free reign to precautionary penology and punishes offenders, in part, for what they might do rather than what they have already done. It also objectifies the offender to create a separate and inferior subset population within the community striped of humanity.

These decisions presuppose security as the chief guiding principle in making the determination in balancing the oftentimes competing positive and negative state obligations. It shifts the balance away from human dignity, liberty and non-discrimination to default to security. Precautionary logic is dangerous because of the slippery slope potential under this approach and the eventual erosion of states negative obligations in a majoritarian context that retreats from human rights anti-majoritarian grounding. The decisions in *Mastromatteo* and *Dvoracek* give credence to precautionary logic by first shifting the focus onto the offender and, second by opening the door to a new dialectic in finding neuro intervention is not punishment and thus tacitly allowing for uncertain future dangerousness to sufficiently justify an absolute negative right violation. As Sandra Chakrabarti

³⁰⁸ MOWBRAY, *supra* note 48.

³⁰⁹ Rainey & Harrison, *supra* note 4.

³¹⁰ Laurens Lavrysen, *The Scope of Rights and the Scope of Obligations: Positive Obligations*, in *SHAPING RIGHTS IN THE ECHR: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS* 182 (Eva Brems & Janneke Gerards eds., Cambridge Univ. Press 2013).

observed, “Human rights were not designed to keep us comfortable, they were designed to keep us free.”³¹¹

Chemical castration is the perfect litmus test for precautionary logic as sex offenders are among the least sympathetic members of the community and, along with terrorist, the most likely to invigorate law and order politics and public approval of the most draconian sentencing protocols. The ECtHR should have applied a human dignity standard as a guiding principle to evaluating the *Dvoracek* case, taking cognizance of where precautionary logic ultimately leads, and addressed it as a punitive measure to conclude that it was a violation of Article 3.

The introduction of neuro intervention into criminal justice under the backdrop of precautionary logic is a bridge too far down a path from which there is no return. It shapes criminal justice into a perverted pseudo-scientific reality which retreats from humane practices, human rights, the primacy of non-discrimination and human dignity in exchange for a mechanical balance sheet of risk factors characterized by unreliable actuarial justice, pervasive and disproportionate sanctions including biological intrusion, and woodenly applied on the assumption that it is better to be safe than sorry.

³¹¹ Oxford Union, *Liberty & Security Debate*, Shami Chakrabarti, Proposition, YOUTUBE (Nov. 21, 2015), <https://www.youtube.com/watch?v=3SmfVfBiE8M>.