

The Paradigm Shift and Risk Control in Preventive Criminal Legislation

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Abstract: In recent years, both domestic and foreign criminal legislation have exhibited a clear preventive turn. By criminalizing remote-risk conducts such as preparatory acts and possession acts, and by adopting auxiliary preventive measures such as custodial education and occupational prohibition, the function of criminal law has gradually shifted from post-offense punishment to ex ante prevention and control. Although this transformation contributes to addressing emerging risks such as terrorism and cybercrime, it also destabilizes the traditional outcome-oriented and objectivist foundations of criminal law, blurring the boundary between criminal law and police law, and giving rise to a dual crisis of expanding public power and intensifying social antagonism. Preventive criminal legislation entails both internal and external risks. The internal risk lies in the instrumentalization of criminal law and the excessive consumption of criminal justice resources; the external risk manifests in the expansion of state power under the pretext of risk prevention, through which prejudice may infiltrate judicial discretion, thereby aggravating selective enforcement and social injustice. Risk control should therefore be sought both within and beyond the normative framework of law: on the one hand, constitutional review of the necessity of criminal legislation should be strengthened, and reasonable punitive boundaries should be demarcated within the criminal law system; on the other hand, the exercise of public power should be constrained through mechanisms such as public access to information and public participation, so as to reduce the excessive reliance on criminal sanctions.

Keywords: Preventive Legislation; Risk; Principle of Necessity; Substantive Interpretation; Public Participation

Introduction

In the classical paradigm of *criminal law*, preventive punishment, as one of the means of crime prevention, primarily relies on the deprivatory pain inflicted upon the offender by the punishment. It expresses condemnation for the offender's serious deviation from the social order, aims to prevent the offender from re-offending, and serves to warn others against following the same path.^①

The object of *criminal law's* concern and judgment has always been the offender's consummated act. Prevention was an ancillary purpose of punishment, a derivative value. However, with the increasing prominence of various criminal risks such as terrorism, organized crime, sexual offenses, and crimes against humanity, states have begun seeking more effective preventive measures. These include both preventive legislation that criminalizes conduct and other freedom-restricting measures with a criminal character. Criminal legislation, both domestically and internationally, has concurrently exhibited a certain preventive turn. Its focus has extended from consummated acts to unrealized possibilities. The preventive effects it pursues go beyond the psychological coercion of negative general prevention, the normative recognition of positive general prevention, and the educational correction of special prevention; they lie more directly in preventing the occurrence of "this specific" harmful outcome.

Compared to earlier criminal legislation that also emphasized prevention, contemporary criminal legislation partially presents a facade of "prevention for prevention's sake."^② Current research has made some progress regarding the expansion of preventive criminal legislation and its associated risks, yet numerous issues remain. Further exploration is particularly needed on how to effectively limit the expansion of preventive legislation, how to balance security and liberty, and how to strengthen social prevention. This article will first delineate the preventive landscape of contemporary criminal legislation, then reveal the risks of preventive criminal legislation and explore pathways for its limitation.

1. Manifestations of the paradigm shift in preventive criminal legislation

The risk society has influenced the concept of criminal responsibility, shifting it from a traditional retrospective responsibility (emphasizing actual harmful consequences, subjective culpability, and retributive punishment) towards a prospective responsibility (emphasizing risk-conduct and crime prevention).^③ Currently, China's preventive criminal legislation is primarily manifested in several categories of crimes that pose significant social harm. China's *Criminal Law Amendment (IX)*, by adding crimes such as preparation for the commission of terrorist activities and illegal possession of items advocating terrorism, has criminalized preparatory acts as well as remote risk-behaviors such as possession and advocacy, significantly expanding the

^① Beccaria, C. (2003). *On Crimes and Punishments* (F. Huang, Trans.). China Legal Publishing House. (Original work published in Italian) (p. 53).

^② Wang, Q. (2019). Concerns over the Over-Criminalization in Social Governance. *Contemporary Law Review*, (2).

^③ Jiang, M. (2025). On the Prospective Responsibility of Preventive Legislation in Criminal Law and Its Practical Limitation. *Chinese Criminal Science*, (3).

criminal net to achieve risk prevention and control. Jurisdictions outside China, such as the United Kingdom, Germany, and Australia, have also criminalized behaviors like possessing suspicious items or disseminating terrorist speech, reflecting a global trend in preventive legislation.

1.1 The criminalization of preparatory acts: The preventive expansion of criminal legislation

The most salient feature of preventive criminalization legislation lies in the fact that the acts regulated by these offenses are not the ones that directly cause the harm intended to be prevented, but rather acts preceding them that merely carry a certain risk of harm, thereby enhancing the preventive potential of traditional criminal law.^①

Through measures such as creating abstract endangerment offenses, the criminalization of preparatory acts, the principal-ization of aiding acts, and adding incitement offenses, legislative practice has achieved a thorough preponement of the threshold of punishability, subverted the traditional model of self-responsibility in criminal law, and led to a blurring of the boundaries for initiating investigations in criminal procedure.^② The new terrorist offenses added by China's *Criminal Law Amendment (IX)* are a typical manifestation of preventive criminalization. The amended *Criminal Law* stipulates the crime of preparation for the commission of terrorist activities. Although China's *criminal law* in principle provides for the punishment of preparatory offenses, in practice, after comprehensively considering the evidence in a case, the social harmfulness of the act, and its degree, situations where judicial organs actually punish preparatory offenses are not common.^③ This provision criminalizing preparatory acts undoubtedly substantially expands the scope of punishment for preparatory offenses. Furthermore, *Criminal Law Amendment (IX)* also added the crimes of illegal possession of items advocating terrorism or extremism, advocating terrorism or extremism or inciting the commission of terrorist activities, and forcing others to wear clothing or symbols advocating terrorism or extremism in public places. Compared to perpetratory acts, traditional preparatory acts are already remotely connected to the harmful outcome one seeks to avoid. However, joining a specific organization, possessing specific items, and advocating certain speech are undoubtedly even more remotely connected to the harmful outcome. The criminalization of these acts demonstrates a clear preventive intent.

In combating organized crime, China adheres to the policy of "taking early and small-scale action" and has also enacted certain preventive criminalization legislation. Examples include the crime of organizing, leading, or participating in a mafia-style organization, and the crime of developing a mafia-style organization within the territory of China. In the realm of cybercrime, the crime of refusing to perform information network security management obligations and the crime of aiding information network criminal activities impose additional criminal obligations on network service providers. Compared to holding accomplices criminally liable under traditional complicity theories, their significance lies more in urging network service providers to promptly block the dissemination of unlawful information, thereby preventing the occurrence of cybercrimes. Furthermore, the acts regulated by the crime of illegal use of information networks, which involve using networks to publish information related to criminal activities, are typically at the preparatory stage of

^① Cornford, A. (2015). Preventive Criminalization. *New Criminal Law Review*, (1).

^② Jiang, M., & Li, G. (2023). Preventive Criminal Legislation: The Shift of Punishability Threshold and the Resolution of Its Risks to Criminal Rule of Law. *Journal of People's Public Security University of China*, (3).

^③ He, R. (2017). The Expansion of Preventive Criminal Law and Its Limits. *Chinese Journal of Law*, (4).

criminal acts. This legislation, which criminalizes these preparatory acts, is also a response to the characteristics of cybercrime, such as the rapid dissemination of information and the severity of social harmfulness.

In recent years, foreign jurisdictions have also enacted certain preventive criminalization legislation. The *Terrorism Acts* promulgated in the United Kingdom in 2000 and 2006 successively criminalized the possession of suspicious items likely to be for the purpose of committing terrorist offenses, the dissemination of statements that encourage terrorism, the distribution of terrorist publications, and "any preparatory acts." Among these, the possession offense stipulates a reversal of the burden of proof, while the punishment for the acts of disseminating statements and distributing publications does not require proof that actual encouragement has occurred. Articles 86 (Dissemination of Propaganda of Unconstitutional Organizations), 86a (Use of Symbols of Unconstitutional Organizations), and 89a (Preparation of Serious Acts of Violence Endangering the State) of the *German Criminal Code* also criminalize acts that precede the causal process leading to actual harm. Similarly, Australia's *Criminal Code Act* has criminalized a wide range of behaviors, including providing or receiving training related to terrorist acts, possessing items connected to terrorist acts, preparing or planning terrorist acts, joining a terrorist organization, and recruiting persons for a terrorist organization.^①

1.2 The preponement of sanction measures: The rise of non-custodial preventive means

Preventive measures attached to criminal convictions impose restrictions on the liberty of individuals released after serving their sentences. Article 30 of China's *Counter-Terrorism Law* stipulates that individuals convicted of terrorist offenses or extremist offenses who, after serving their sentence, are assessed as posing a social risk, are subject to placement and education measures. This is similar to preventive detention within the German system of preventive measures ("*Maßregeln der Besserung und Sicherung*"). The community notification system for sex offenders established by the 1994 *Megan's Law* in the United States, as well as the employment prohibition system added by China's *Criminal Law Amendment (IX)*, both restrict the rights of individuals released after serving their sentences. These measures no longer rely solely on the rehabilitative function of punishment to achieve the goal of special prevention. Instead, they proactively exercise preemptive control over dangerous individuals. They do not fall within the traditional sequence of punishments but directly restrict citizens' rights and freedoms, thus possessing a substantive criminal character.

The preventive expansion of substantive criminal law inevitably entails an expansion of police powers, intelligence agencies, and other related authorities. Part 7 to 44 of the UK's *Terrorism Act 2000* granted police more comprehensive powers of stop and search, arrest, and detention.^② In the 1970s, judges in the United States were still debating the constitutionality of "stop-and-frisk" procedures used against suspicious individuals from whom drugs or weapons were seized.^③ However, following the 9/11

^① Conte, A. (2010). *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* (pp. 124-125).

^② Ji, Y. (2014). Review and Enlightenment of "Preventive Justice in the UK": The Rise and Regulation of Security Demands in Modern Criminal Law. *Politics and Law*, (9).

^③ Fletcher, G. P. (2008). *Rethinking Criminal Law* (Z. Deng, Trans.). Huaxia Publishing House. (Original work published in English) (pp. 164-169).

attacks, "stop-and-frisk" has been applied extremely widely, with greater doubt cast on whether police possessed reasonable suspicion. Taking New York State as an example, in 2011 alone, the New York City Police Department reported 685,724 stops. 84% of those stopped were Black or Latino, and 88% of those stopped were neither arrested nor issued a summons.^① Furthermore, covert and clandestine investigative measures, once primarily the domain of intelligence agencies, have gradually become part of criminal procedure in various countries. Moreover, surveillance and monitoring measures can continue to be applied to risk individuals even after the criminal procedure has concluded.^②

2. The dual risks derived from the paradigm shift

Preventive criminal legislation possesses legitimacy and rationality; it is a product of modern rule-of-law societies and offers numerous advantages. However, many scholars have also criticized it. In terms of its internal risks, it tends to instrumentalize criminal law as a tool for risk management and control, while simultaneously consuming criminal justice resources. Regarding its external risks, it easily leads to an excessive expansion of power and exacerbates social biases, resulting in selective law enforcement and group antagonism. This is an unavoidable problem even for states governed by the rule of law.

2.1 Internal risks: The blurring of criminal law's function and resource dissipation

The blurring of criminal law and police law

Traditional criminal law does not only punish acts that cause harmful outcomes. On the contrary, the extensive existence of attempted offenses and concrete endangerment offenses demonstrates that traditional criminal law actively regulates acts possessing dangerous attributes. However, these acts must maintain a relatively close connection to the harmful outcome, generally residing within the same direct causal chain. The forward movement of the line of criminal defense maintained a restrained posture, adhering to an outcome-oriented philosophy. In contrast, preventive legislation aims to achieve control at an even earlier stage. Legislation defines the boundaries of criminalization using phrases such as "*any preparatory act*," enabling acts that are remotely connected and ambiguously related to the harmful outcome to potentially become subjects of criminal law regulation. A disconnect emerges between these acts and the outcome. Such legislation moves further towards an act-oriented approach. The justification for controlling or punishing these acts lies less in their objective dangerousness and more in the personal dangerousness of the offender they reflect, which, to some extent, also manifests a philosophy of subjectivism.

This further shift from an outcome-oriented to an act-oriented approach, coupled with the challenge posed by subjectivism to the dominant position of objectivism, signifies that the criminal justice system is gradually transforming from a system of censure

^① Center for Constitutional Rights. (2019). *Bloomberg Stop-and-Frisk Apology: Too Little, Too Late*. Retrieved July 30, 2025, from <https://ccrjustice.org/home/press-center/press-releases/bloomberg-stop-and-frisk-apology-too-little-too-late>

^② Albrecht, H. J., & Zhao, S. (2014). Security, Crime Prevention and Criminal Law. *People's Procuratorial Semimonthly*, (16).

focused on ex-post facto punishment into a system of danger management and control that prefers ex-ante prevention.^①

In traditional criminal legislation, the state, through a criminal justice system centered on punishment, purposefully expresses censure towards the offender and deprives them of their rights. The censuring nature of punishment is crucial to the theory of criminalization and also helps explain the principle of proportionality in sentencing.^② Conviction and sentencing depend, respectively, on whether the act committed by the offender deserves penal censure and the degree of that deserved censure. If it is accepted that an offender should not be censured merely for violating a norm, then the connection between the act and the potential actual harm must be taken into account when determining censure. In contrast, prevention-oriented criminal legislation leans towards an act-oriented approach and subjectivism. The acts it concerns are still remotely connected to actual harm, the hue of censure is exceedingly faint, and a strong desire to control social risk and prevent harm is laid bare. Generally, controlling social risk is the function of police law. Consequently, it is difficult to avoid the conclusion that, under the preventive approach in criminal legislation, criminal law and police law are gradually converging.

Overuse of criminal justice resources

Preventive criminal legislation aims to effectively prevent the occurrence of harm. Effective prevention is predicated on a full understanding of existing risks and the ability to accurately predict their future trajectory. However, such requirements entirely exceed the capabilities of legislators.^③ So long as the partial existence of human free will is acknowledged, it must be conceded that predicting future conduct is not only difficult but impossible. If the failure of the criminal justice system to intervene early, resulting in the occurrence of harm, constitutes a "false negative", an error that is vivid, tangible, and often shocking, then early intervention in situations where the individual chooses not to proceed to commit a harmful act represents a "false positive," an error that is invisible and unknowable. The assessment of legislative benefits and costs becomes systematically distorted within this imbalance.^④

Due to this failure in assessment, driven by the thirst for security, the state is compelled to intervene in and interfere with individual conduct at an ever-earlier stage to eliminate, as far as possible, the occurrence of "false negative" scenarios. This leads to over-policing, over-detention, and over-criminalization, resulting in the overuse of criminal justice resources.

2.2 External risks: Expansion of power and intensification of social antagonism

Expansion of power

The basis for initiating a preventive criminal justice procedure is a subjective assessment of risk, which creates room for arbitrary exercise of power. On one hand, to combat special and significant social risks, preventive criminalization legislation criminalizes abstract endangerment offenses and even earlier acts preceding

^① Lao, D. (2017). Risk Society and the Functionalist View of Criminal Legislation. *Law Review*, (6).

^② Husak, D. (2015). Overcriminalization: *The Limits of the Criminal Law* (M. Jiang, Trans.). China Legal Publishing House. (Original work published in English) (p. 146).

^③ Lao, D. (2017). Risk Society and the Functionalist View of Criminal Legislation. *Law Review*, (6).

^④ Cole, D. (2015). The Difference Prevention Makes: Regulating Preventive Justice. *Criminal Law and Philosophy*, (3).

preparatory acts. These early-stage acts can also be nested within one another, ultimately forming a parasitic extension of liability. In striving to provide more comprehensive protection, criminal law rules extend their reach as far as possible and retain room for flexible interpretation. This not only renders the theory of criminalization, which is intended to control penal power, increasingly complex and obscure but also breeds the risk of discretionary abuse. On the other hand, preventive policing, represented by "stop-and-frisk" and ubiquitous data surveillance, often does not manifest as overt conflict, making it difficult to attract public attention. The administrative coercive power used for crime control tends to expand silently and without oversight.

The proliferation of prejudice

As power is afforded increasingly broad discretionary space, subjective judgments find easier entry, and sentiments of antagonism and discrimination can proliferate among different social groups. Due to the complex political and religious roots of terrorist crimes, and because some perpetrators belong to specific groups, certain characteristics associated with them are extracted and equated with a higher risk. Stereotypes based on race, ethnicity, and gender often strongly influence our expectations and judgments of others. Legal frameworks pursuing equal protection do not permit the inclusion of these factors. However, because the very nature of preventive legislation is to impose punishment based on predicted events, the aforementioned subjective prejudices enter into the process of judicial practice, heightening the risk of selectively restricting the freedom of certain groups. The preventive logic reflects a "us-versus-them" dichotomy, which has spawned various restrictions, entry and immigration bans, the mandatory collection of citizens' personal information, and numerous bills hostile towards citizens from so-called "rogue states."^① Both the prejudiced legislation itself and the unequal enforcement of otherwise general laws intensify antagonism and even hatred between different social groups. Although, in form, both theoretical and practical circles firmly assert the need to demarcate a clear boundary from "enemy criminal law" (*Feindstrafrecht*), people often overlook the descriptive stance taken by Professor Günther Jakobs when he introduced this concept. In reality, the future trajectory of preventive criminal legislation carries, to some extent, the hue of "enemy criminal law" and also contains the risk of creating more "social enemies."

3. Constructing multiple pathways for risk control

Preventive legislation is inherently an expansive legislative model, carrying the risk of expanding state penal power, which consequently renders its legitimacy fragile and subjects it to challenges such as the collectivization of protected legal interests, the marginalization of regulated conduct, and the blurring of culpability requirements.^②

To prevent the improper expansion of state penal power, it is imperative to delineate reasonable boundaries for preventive criminalization legislation. Confronted with the dual risks of power expansion and rights erosion, there is an urgent need to construct a synergistic restraint system integrating constitutional constraints, criminal law norms, and social governance. At the constitutional level, the Principle of Necessity should

^① Hu, X. (2017). Research on the Preventive Approach of Criminal Law from the Perspective of National Security. *Chinese Criminal Science*, (5).

^② Zhang, Y. (2020). The Legitimacy and Boundaries of Preventive Criminalization Legislation. *Contemporary Law Review*, (4).

be introduced to require public power to prevent and control risks through the least restrictive means, while also refining the standard of criminal law's supplementary role (*Ultima Ratio*) by prioritizing non-criminal measures and comparing the intensity of rights restrictions within the penal system. At the level of criminal law norms, a dual restriction should be implemented: legislatively, by requiring an objective connection of "significant risk" between the conduct and the outcome and progressively raising the threshold of subjective fault based on the gradient of distance from the harm; and judicially, by employing Substantive Interpretation to exclude conduct that formally constitutes a crime but lacks substantive danger. At the social level, emphasis must be placed on oversight and co-governance through establishing a post-legislative assessment mechanism to check public power, promoting a shift in crime governance towards resolving root causes, improving criminogenic conditions such as poverty and discrimination, and fostering collaboration among multiple stakeholders to build a preventive network. These efforts aim to mitigate the value conflict between security and liberty and uphold the legitimate foundation of a criminal rule of law.

3.1 Constitutional control: Anchoring the boundary of necessity with the principle of proportionality

Hobbes posited that humankind relinquishes or exchanges their rights to form a contract and establish a state precisely to escape the incessant warfare of the state of nature and thereby better realize liberty. The very foundation of the state lies in protecting the security of its citizens. The preventive logic of criminal legislation is also grounded on the premise that "the state has an obligation to protect citizens' security," which is entirely legitimate in itself. However, citizen security entails not only freedom from harm by other individuals but also freedom from unnecessary state predation. The state exists to protect the security of citizens, but its ultimate purpose remains enabling citizens to be free from fear and overwhelming external determination, thus truly enjoying liberty. This proposition should hold true whether in the context of the liberal state, the welfare state, or the recently proposed security state. "According to the concept of the social contract, citizens, as the holders of state power, transfer such extensive power of criminal law intervention to the legislator only when it is necessary to achieve a communal life of freedom and peace, and only to the extent that this life cannot be achieved by other, less intrusive means."^① Therefore, while the state indeed possesses legitimacy in interfering with the private sphere of citizens to protect them from the fear caused by risk, the prerequisite is that such interference must be confined to the necessary minimum extent.

The Principle of Necessity within the broader Principle of Proportionality can provide the relevant theoretical foundation. Originating in Germany as a constitutional principle to limit police power, its fully developed and comprehensive formulation was established in the 1950s by the "*Apotheken-Urteil*" (*Pharmacy Case*) of the German Federal Constitutional Court. Its widely recognized sub-principles include suitability (the measure must be suitable for achieving the aim), necessity (the measure must be necessary, meaning the least restrictive among equally effective alternatives), and proportionality in its narrow sense (the measure must not be excessive in relation to the aims pursued). Among these, the Principle of Necessity

^① Roxin, C., & Fan, W. (2006). Is the Task of Criminal Law Not the Protection of Legal Interests? *Criminal Law Review*, (2).

requires that, among the various means available to achieve a legitimate aim, the one that causes the least infringement upon citizens' rights must be chosen.^①

In the constitutional practice of the United States, courts also require that governmental action must "fit" the governmental purpose, often articulated as requiring a "narrow tailoring" to achieve a "compelling" or "important" governmental interest. If other, less restrictive means could adequately serve the government's compelling interest, the governmental action fails this requirement. This shares the same underlying rationale as the necessity (least-restrictive-means) principle within the Principle of Proportionality.^②

Even in China, where the Principle of Proportionality is not explicitly stipulated in the constitution, the spirit of the principle is inherent in constitutional law. The Principle of Proportionality, which aims to constrain public power, is undoubtedly applicable to criminal law, whose purpose includes controlling state penal power.^③

Some scholars argue that the Principle of Necessity within the Principle of Proportionality is subsumed by the principle of criminal law's supplementary role (*Ultima Ratio*), which emphasizes the last-resort nature of criminal law application.^④ In reality, the Principle of Necessity cannot be fully encompassed by the principle of criminal law's supplementary role and can, in fact, supplement it within the context of preventive legislation in the following ways:

First, the principle of criminal law's supplementary role presupposes that penal measures are, as a whole, more severe than alternative measures. However, considering civil order legislation in the United Kingdom, and existing placement and education measures in China alongside the abolished system of re-education through labor, it must be recognized that some non-criminal measures focused on personal dangerousness may impose greater restrictions on citizens' rights compared to penalties such as probation or limited incarceration. Therefore, in the selection of preventive measures, while non-criminal means should generally be prioritized, a concrete assessment must examine the actual deprivation of individual rights caused by various measures, selecting the approach that imposes the lesser restriction on individual rights to achieve the aim.

Second, the principle of criminal law's supplementary role often only emphasizes the overall subsidiary and restrained nature of criminal measures. However, within the criminal system itself, the design of specific criminal measures should also comply with the Principle of Necessity. If a lower penalty or fewer criminal obligations can achieve the corresponding purpose, then the means involving the least intervention and burden should be chosen. For example, for less serious intentional offenses among those subject to preventive criminalization, if imposing a fine alone is

^① Mei, Y. (2020). The Scope and Limits of the Principle of Proportionality. *Chinese Journal of Law*, (2).

^② Wang, L. (2020). The Typological Application and Causes of the Principle of Proportionality in American Constitutional Review. *Journal of Comparative Law*, (1).

^③ Zhang, X. (2016). Constitutional Control of the Criminal Law System: From the Perspective of the "Liszt Trenches". *Chinese Journal of Law*, (4).

^④ Tian, H. (2019). The Function, Orientation, and Scope of Application of the Principle of Proportionality in Criminal Law. *Journal of Renmin University of China*, (4).

sufficient for preventive purposes, then a provision allowing for a fine as the sole penalty should be established.^①

3.2 Control through criminal law: Maintaining normative boundaries through doctrinal methods

The scrutiny of the necessity of preventive legislation reflects a weighing of different means to achieve an end, which is essentially a consequentialist or utilitarian calculation. The preventive logic itself is also oriented more towards utility than justice. However, criminal law, as a special and severe mechanism of censure, requires stricter triggering conditions of its own. When employing criminal law means to combat social risks, the bottom line of the rule of law must be defended.

Legislative level: Maintaining a normative connection between act and result

First, the acts regulated by preventive criminal legislation must involve a clear "significant risk." If individuals face criminal sanction merely for trivial risks, then almost all human activity would be threatened by criminal liability. Firstly, "significant risk" requires that the harmful outcome which preventive legislation aims to prevent is extremely serious. For instance, China's Criminal Law criminalizes the use of information networks "for publishing information for conducting illegal activities such as fraud." However, the "illegal" activities mentioned here do not themselves constitute crimes, let alone extremely serious harmful outcomes in the criminal law sense. The preventive provision here is highly questionable. Secondly, "significant risk" also requires an objectively identifiable probabilistic connection between the act and the harmful outcome intended to be prevented. If preventive legislation detaches itself from the outcome it aims to prevent and uses acts only weakly connected to the outcome, or even neutral acts, or the personal dangerous factors of the actor as the standard for criminalization or enhanced punishment, it would severely undermine the authority of criminal law. If the intended outcome is of extremely high severity, such as terrorist crimes, the requirement for the aforementioned probabilistic connection can be appropriately lowered to better serve deterrence and behavioral guidance.^② However, the principle of clarity should still be satisfied as far as possible, avoiding criminalizing situations involving mere intent. For example, regarding the crime of preparation for the commission of terrorist activities, China's Criminal Law stipulates the general clause "planning or making other preparations for the commission of terrorist activities." Similarly, Part 5 of the UK's *Terrorism Act 2006* contains the general provision "any preparatory acts." In contrast, Article 89a of the *German Criminal Code* details punishable preparatory acts without using a general clause and specifically provides for circumstances of mitigation or exemption from punishment during the preparation process. Compared to the legislation in China and the UK, the German approach possesses greater clarity.

Secondly, preventive criminal legislation should establish a high threshold for culpability. Since the acts regulated by preventive criminal legislation do not directly cause the intended harmful outcome—meaning the harm materializes only through the actor's own further acts or the acts of others—the actor should not be punished for their preliminary act unless they were at least negligent regarding the fact that their preliminary act could initiate a subsequent chain of events leading to the ultimate

^① Zhang, M. (2017). Legal Interest Protection and the Principle of Proportionality. *Social Sciences in China*, (7).

^② Wang, X. (2019). "Remote Harm" and Preventive Criminalization. *Criminal Law Review*, (1).

harm.^① Strict liability must be firmly excluded in this context. Furthermore, the greater the distance between the act and the intended outcome to be prevented, the lesser the inherent harmfulness of the act itself, and consequently, a higher level of culpability should be required.

For example, the crime of advocating terrorism or extremism or inciting the commission of terrorist activities, as stipulated in China's Criminal Law, already represents early-stage criminalization. In contrast, the crime of illegal possession of items advocating terrorism or extremism is a typical case of criminalizing acts at an even earlier stage—an early-stage criminalization of preliminary acts. The distance between this act and the harmful outcome intended to be prevented (the commission of terrorist acts) is considerable. Therefore, a higher culpability threshold can and should be set, for instance, by requiring that the act be committed with the direct intent to commit or cause another to commit a terrorist act.

Judicial level: Employing substantive interpretation to exclude innocent cases

Unlike perpetratory acts where the harmful outcome is largely unavoidable once the act is committed, whether early-stage acts will lead to the intended harmful outcome remains highly questionable. Furthermore, the artificially constrained standards in abstract endangerment offenses inherently accept the punishment of some individuals who, in substance, pose no harmful risk, as a trade-off for providing the public with clear behavioral guidelines and greater space for self-determination.^② Preventive criminal legislation inevitably entails injustice to a minority of individuals. Therefore, during the criminal judicial process, flexible application of criminal law interpretation should be employed to minimize the possibility of convicting individuals whose conduct presents no actual danger.

Formal interpretation and Substantive Interpretation correspond to the formal rationality and substantive rationality of criminal justice, respectively. The former emphasizes legality, while the latter focuses on reasonableness. After the enactment of the 1997 Criminal Law, the principle of legality requires that conviction and sentencing be based on formal rationality. Consequently, in special circumstances where legality and reasonableness conflict, formal rationality should be upheld even at the expense of substantive rationality. However, without violating formal rationality, substantive rationality should be pursued as far as possible to achieve the unity of law and reason. Preventive criminal legislation delineates a broadly defined and vaguely bounded sphere of crime, creating space for the exercise of discretion to pursue substantive rationality on the premise of satisfying formal rationality. Within this space, Substantive Interpretation can function to decriminalize conduct that ought not to be punished.

Taking the widely discussed case of "Man Sentenced to 9 Months for Making Jokes Involving Terrorism in a WeChat Group" as an example. In September 2016, Yang Moumou advised a fellow group member in a WeChat group (with 361 members) by saying, "Follow me in believing in Islam, join ISIS." The court held that Yang Moumou's statement in a public platform encouraging others to join the ISIS

^① Husak, D. (2015). *Overcriminalization: The Limits of the Criminal Law* (M. Jiang, Trans.). China Legal Publishing House. (Original work published in English) (p. 146).

^② Ashworth, A., & Zedner, L. (2012). Prevention and Criminalization: Justification and Limits. *New Criminal Law Review*, (4).

organization had actual social harmfulness and constituted the crime of advocating terrorism or extremism.^① Article 120-3 of China's Criminal Law enumerates several behavioral methods of "advocating," including publishing information. In this case, Yang Moumou's act of encouraging his interlocutor to follow him and join ISIS formally met the behavioral elements of publishing information. However, whether it substantively carried the risk of leading to the commission of a terrorist activity required judgment based on other circumstances. The police seized Yang Moumou's mobile phone and tablet computer, searched his temporary residence, and found no other terrorism-related statements or items that could prove his intent to incite the commission of a terrorist activity. Furthermore, no one in the WeChat group reacted to Yang Moumou's statement. It can thus be determined that his act did not pose a substantive risk of leading to the commission of a terrorist activity. Given that the statutory text of this crime does not require the actual occurrence of such a risk, the analysis of substantive risk should be incorporated into the application of the proviso in *Article 13 of the Criminal Law*, which states that an act is not considered a crime if "the circumstances are clearly minor, and the harm is not great." Consequently, Yang Moumou's conduct should have been decriminalized.

3.3 Social control: Alleviating reliance on criminal law through public participation and social governance

First, certain retrospective mechanisms should be established for preventive legislation to create oversight and constraints on the exercise of public power. On one hand, implemented preventive legislation should undergo continuous observation and regular assessment. Such retrospective mechanisms can not only provide the public with comprehensive information to foster more rational and objective public opinion and urge the restrained and normative exercise of preventive public power but also furnish legislators with more sufficient information to formulate relevant normative documents guiding and improving the judicial application of existing legislation.

On the other hand, secret preventive measures should be made more transparent. Beyond preventive legislation, measures such as data collection and surveillance are often implemented covertly. The public lacks channels to understand the resources consumed by these measures, the extent of intrusion into the private sphere, and their ultimate effectiveness. Consequently, a reasonable assessment of the pros and cons of these measures is impossible, leaving this aspect of public power exercise lacking effective supervision. Monitoring citizen data is one practical path for realizing the mindset of technological governance. Only under the premises of data openness and Public Participation can technologies like data monitoring genuinely foster social progress and advance social justice.^② Conversely, predictive crime governance, alongside the development of data monitoring, risks giving rise to a "digital Leviathan."

Secondly, there should be an active development of social prevention to reduce reliance on the preventive criminal path. On one hand, greater attention must be paid to the social causes of crime, emphasizing the government's positive obligation to improve social conditions. Preventive criminal measures, whether aiming to deter or normatively guide actors through punishment or to interrupt the process of crime through the early intervention of police power, can only target the precipitating

^① Beijing First Intermediate People's Court. (2017). Criminal Judgment Document, (2017) Jing 01 Chu No. 45.

^② Shan, Y. (2020). The Theoretical Connotation of the Technological Governance of Crime. *Journal of National Prosecutors College*, (3).

factors at the very end of the causal chain of crime. Focusing crime prevention strategies on the latter part of this causal chain means that while prevention may achieve results within a specific period and region, it cannot, on a holistic and macro level, alter the overarching trend of increasing crime.^① Therefore, greater attention must be directed towards the deep-seated causes of crime, and improvements must be made to the social conditions that give rise to it. As noted by the English criminal law scholar *Andrew Ashworth*, it may be overly harsh to hold the state responsible for the failure of crime prevention, but the state does have an obligation to improve criminogenic social conditions. If the state imposes severe punishments on offenders without having fulfilled this obligation, it undermines the authority of state punishment.^②

On the other hand, as the causes of crime become increasingly complex, relying solely on traditional legal means makes effective crime control difficult to achieve. The state is not the only entity responsible for providing security; other social actors can and should be incorporated into the crime prevention process to realize pluralistic and multilateral crime control. For instance, seeking cooperation with communities where specific racial or ethnic minorities reside can maximize the effectiveness of crime prevention, while communication based on respect can effectively eliminate prejudice and antagonism.

4. Conclusion

The rise of preventive criminal legislation signifies a profound paradigm shift in criminal law, moving from "ex-post facto punishment" towards "ex-ante prevention and control." This transformation is an inevitable choice for the state in responding to the complex risks of modern society. However, by extending the reach of punishment to remote risk-behaviors, it profoundly shakes the foundational pillars of traditional criminal law, namely its outcome-oriented nature, objectivism, and the principle of culpability. A necessary corollary of preventive criminal legislation is the diminished centrality of attribution and responsibility within the criminal law system. Criminal measures further shed their moral hue, gradually becoming part of a conventional risk control system. Yet, adopting a demoralized, preventive discourse does not mean a criminal measure ceases to be stigmatizing or burdensome. The limited efficacy and inherently coercive nature of criminal law governance require that we, from a dual standpoint of utility and justice, maintain constant vigilance against the expansive trend of preventive criminal legislation and impose necessary limitations.

This article has pointed out that while preventive legislation enhances the state's capacity to provide social security, it inherently carries the dual risks of instrumentalizing criminal law's function, tacitly expanding state power, and intensifying social group antagonism. This creates a real crisis where criminal law faces the danger of sliding into a mere tool for risk management. Confronted with the structural challenges brought by this paradigm shift, one-dimensional restrictions are insufficient. There is an urgent need to construct a systematic framework for risk control.

^① Wang, Y. (2016). The Shift of the Focus of Crime Prevention and the Return to the Social Standard: From the Perspective of the Interaction Between Crime Causes and Crime Prevention. *Journal of Shandong Police College*, (5).

^② Ambos, K. (2017). Review Essay: Liberal Criminal Theory. *Criminal Law Forum*, (3).

At the constitutional level, the scrutiny function of the Principle of Proportionality should be activated to strictly examine the necessity of preventive legislation, ensuring state intervention is confined to the minimum extent, thereby defending the fundamental baseline of citizen liberty at its source.

Within criminal law doctrine, the supplementary nature of criminal law must be steadfastly upheld. This involves legislatively requiring an objective connection of "significant risk" and a tiered setting of subjective culpability, coupled with judicially employing Substantive Interpretation for decriminalization, to preserve the autonomy and legitimacy of criminal law norms.

At the social level, it is necessary to strengthen supervision over public power through mechanisms such as post-legislative assessment and Public Participation, and to promote a transformation of the crime governance model towards addressing root social causes and pluralistic co-governance. This fundamentally limits the over-reliance on criminal law as a tool.

Therefore, the legitimacy of preventive criminal legislation does not stem from a purely utilitarian calculus of its preventive efficiency, but rather from its ability to still abide by the fundamental commitments of a state governed by the rule of law within the new context of the risk society. Future criminal legislation and judicial practice must seek a careful balance between security and liberty, and between efficiency and justice. This implies that the development of preventive criminal law must not descend into the technocratic labyrinth of "prevention for prevention's sake." It must constantly submit to the constraints of constitutional spirit, the discipline of criminal law doctrine, and the test of social democratic deliberation. Only in this way can we effectively respond to risks while safeguarding the core value of human rights protection, formed through centuries of evolution in criminal rule of law, ensuring that criminal law does not lose its normative essence in an era of change.