Introduction

Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.

Benjamin Franklin[1]

Since the late 1980s, preventive detention as a law enforcement tool has been gaining traction across the liberal democratic world.[2] Historically, democracies prohibited preventive detention as an unacceptable limitation on the right to liberty except as an extraordinary measure during a state of emergency when the criminal justice system is too overwhelmed to manage security threats or for the mentally ill and dangerous who are beyond the criminal justice system's reach. They weighed the societal cost of jailing people who have not yet committed a crime, and therefore remained innocent and capable of abiding by the law, as greater than the benefit from preventing a crime that may not happen. They feared that easy access to detention powers would lead to authoritarianism.

Untill recently, democracies permitted two exceptions to the right to liberty and the concomitant prohibition on preventive detention in response to exceptional circumstances in which the criminal justice system, with its strict due process guarantees, could not prevent or deter severe, criminal harm – during a war or insurrection or for the mentally ill and dangerous. These exceptional circumstances permit the government to invoke a state of exception to bypass the criminal justice system and use preventive detention to protect against the threat. In the absence of these circumstances, democracies refused to allow mere prediction of dangerousness or guilt based on suspicion, not evidence, to justify incarceration. They treated the risk of error as too high and the loss of rights too extreme to be justified in societies that place a premium on human rights and the rule of law. They preferred, instead, to prosecute and punish completed crimes

1 "Pennsylvania Assembly: Reply to the Governor" in *Votes and Proceedings of the House of Representatives,* 1755–1756 (1756) 19–21.

2 Brendan Goarty, Benedict Bartl and Patrick Keyzer, *The Rehabilitation of Preventive Detention* in Patrick Keyzer (ed.) *Preventive Detention: Asking the Fundamental Questions* (2013) 111.

in trials that guarantee due process. As Alexander Hamilton explained in *The Federalist Papers* at the time of the drafting of the United States Constitution, "[T]he practice of arbitrary imprisonments, have been, in all ages, the favourite and most formidable instrument of tyranny."[3] Thus, strict adherence to due process in the criminal justice system has been viewed as the cornerstone of democracy; whereas inroads on it have been viewed as evidence of a state's oppressive authority.[4]

As democratic societies have grown more risk averse, they, along with their political representatives, have been increasingly willing to exchange their due process and liberty rights for an increased sense of security. They have located perceived, rather than real, gaps in the law that they believe create the exceptional circumstances in which the criminal justice system is impotent and that justify preventive detention. Under a heightened sense of threat, these societies have recalibrated the cost-benefit analysis underlying the preventive detention calculation to decrease the cost of incarcerating innocent people, with its attendant loss of liberty and increase the benefit of preventing the anticipated crime. To expand their detention powers, these democracies have distorted the exceptions to ordinary due process protections historically reserved for states of emergency and the mentally ill. In doing so, they have effectively created a separate legal system that bypasses the strictures of the criminal justice system and its due process guarantees to allow for incarceration without a crime, creating a category of second-class citizens with inferior rights.

England and the United States began debating the expansion of the use of preventive detention against ordinary criminals in the late 1980s in the face of high-profile sex offenses and murders committed by known dangerous persons who could not be detained as mentally ill. The debates began because society viewed these horrific crimes as wholly preventable; the only barrier to their prevention was the strict due process requirement of a criminal conviction before incarceration. To get around these rights, both countries recast what had always been criminal acts as the acts of persons suffering from mental disorders who needed mental health detention. By categorizing these criminals as mentally disordered, these governments efficiently countered complaints that the

3 *The Federalist No. 84: Certain General and Miscellaneous Objections to the Constitution Considered and Answered,* Independent Journal, July 16, July 26, August 9, 1788.

4 See, e.g., Joanne Mariner, *Criminal Justice Techniques Are Adequate to the Problem of Terrorism*, Boston Review, December 10, 2008. ("[R]eliance on preventive detention is typically a hallmark of repressive regimes. Human Rights Watch has found, moreover, that the use of preventive detention is nearly always part of a larger package of abuses, often involving arbitrary arrest, secret and incommunicado detention, and the infliction of torture and other ill-treatment during the initial weeks or months of confinement.")

expansion of preventive detention undermines due process and liberty rights for criminal suspects.

The events of 9/11 brought to the forefront the simmering debate about whether and to what extent to use detention to prevent the most violent crimes and incapacitate the most dangerous criminals. They shifted the focus of debate from using preventive detention to manage criminals with mental disorders to detention as a national security measure. Historically, democracies treated terrorists as criminals subject to punishment under criminal law.[5] Immediately following 9/11, the United States proclaimed suspected terrorists as enemy combatants waging war against liberal democracy and employed the wartime exception for preventive detention against them.[6] England categorized them as an existential threat to its democracy. This resort to the traditional state of emergency exception effectively obscured the increasing application of preventive detention to criminals and, in direct correlation, the diminishing role of the criminal justice system in preventing and managing crime.

5 See, e.g., Maj. Scott Reid, U.S. Army, *Terrorists as Enemy Combatants: An Analysis of How the United States Applies the Law of Armed Conflict in the Global War on Terrorism*, Naval War College (2004). The United Kingdom used preventive detention in its conflict with Northern Ireland; however, the detention fell within the exception permitted for wartime or in the language of the European Convention on Human Rights, a public emergency. See *infra* Chapter 8.

6 See, e.g., Reid, *supra* note 5, at 2; Derogation Contained in a Note Verbale from the Permanent Representation of the United Kingdom, December 18, 2001; *A v. Secretary of State for the Home Department* [2004] UKHL 56, para. 28 and 29, 118, 166. The purpose of this categorization was to deprive suspected terrorists of due process rights: "The biggest advantage in treating Al Qaeda and Taliban members as enemy combatants is the right to kill them by virtue of their collective enemy status instead of arresting them for their individual criminal acts. If terror acts are only domestic crimes, then law enforcement agencies must investigate to determine who is individually responsible. They must capture the criminals unless it is necessary to kill in self-defense. However, if the nature and frequency of terror acts rise to the level of an armed conflict, there is no requirement to determine individual criminal responsibility, demand surrender, or limit the use of force to self-defense." *Id.* Others justify removal of terrorists from the category of ordinary criminal because of "the unique immoral quality" of terrorist motives. For example, one commentator writes, "Although a terrorist act is criminal in nature, society deems it much more serious and blameworthy. The terrorist act does not draw its unique gravity from the cruel and brutal way in which it is carried out or from the severe physical and mental injuries and property damage it causes its victims, because ordinary criminal acts can be carried out in an equally abhorrent way. The terrorist act is distinct from other criminal acts by virtue of the unique immoral quality of its motives." Emanuel Gross, *How to Justify an Emergency Regime and Preserve Civil Liberties in Times of Terrorism,* 5 S.C. J. Int'l. L. & Bus. 1, 12 (2008).

The current debates on preventive detention typically compartmentalize the usages of preventive detention, which lessens its harm. By itself, the limitation on due process and liberty rights of potential terrorists appears to be a small price to pay for greater security; the same is true when the cost-benefit analysis is applied to potential sex offenders or murderers. This compartmentalization effectively masks the aggregate erosion of rights and the corresponding aggregate increase in the state's coercive power caused by the current uses of preventive detention. It also allows preventive detention to retain its status as an extraordinary measure, creating the illusion that it cannot be used against broader society.

The debates also misunderstand preventive detention's slippery slope in a true democracy. They focus almost wholly on authoritarianism as its bottom without any consideration of another possibility: detention as an ordinary law enforcement tool. By relying on watered-down versions of the traditional exceptions to the right to liberty, ignoring preventive detention's aggregate harm and possibly through a misunderstanding of detention's consequences, its proponents are able to simply brush aside the slippery slope argument.[7]

The purpose of *Preventive Detention and the Democratic State* is to provide substance to the slippery slope argument that is otherwise too easily dismissed. It uses India, the world's largest democracy, as a real-world example of that slippery slope. The book examines the 60-year ascension of preventive detention from a despotic colonial instrument of control to a constitutionally-protected "necessary evil" to an ordinary law enforcement tool, a transformation rarely discussed outside its borders. The relative ease with which this extraordinary tool was made ordinary and its role in bypassing the criminal justice system and in stifling political dissent makes India an unfortunately perfect example of how expansion of preventive detention erodes the rule of law, due process rights and democratic principles. It illustrates how the transformation of detention from the exception to the rule effectively creates a second legal system that grants inferior rights to disfavoured others. In essence, it illustrates what the bottom of the slippery slope looks like.

Preventive Detention also examines the legal uses of preventive detention in two liberal democracies – the United States and England – to show that already preventive detention can no longer be characterized as an extraordinary measure, but rather is increasingly becoming an ordinary law enforcement tool employed

7 Matthew C. Waxman, *Administrative Detention: The Integration of Strategy and Legal Process*, A Working Paper of the Series on Counterterrorism and American Statutory Law, Brookings Institution, the Georgetown University Law Centre and the Hoover Institution (2008) 11; Benjamin Wittes, *Detention and Denial*: *The Case for Candor After Guantanamo* (2011) 39.

by the government to insure that certain serious crimes will no longer happen.[8] The comparison between India, England and the United States establishes that the liberal democracies are hot on India's trail to the bottom of preventive detention's slippery slope.

The book defines preventive detention by its intention to prevent criminal harm. It restricts its examination of detention regimes to those that governments use to circumvent the criminal justice system, since it is these regimes that undermine democratic principles and the rule of law. Because of this restriction, this book does not cover pretrial detention or indeterminate criminal sentences, which, although forms of preventive detention, function wholly within the confines of the criminal justice system. Nor does it cover immigration detention or material witness detention whose goals are not crime prevention but rather deportation or ensuring court testimony, respectively. The only exception is when a government uses these types of detention to achieve preventive detention's goals.

There has been some suggestion that liberal democracies are rethinking preventive detention, seeking to limit its application. For example, President Barack Obama of the United States is trying to close the Guantanamo Bay detention center for suspected terrorists, and several American states are questioning the sustainability of sex offenders' detention. The reality, however, is that the US state and federal governments are reconsidering preventive detention not for principled reasons or on legal grounds but for political and financial reasons. While President Obama's argument seems to be based on principle, a closer look at his statements shows that when push comes to shove, he would rather detain suspected terrorists than risk harm to Americans. He wants to close the facility that is the source of international ire, not necessarily end detention. The state governments do not pretend that their concerns are normative; instead, they argue that the detention programmes are growing too costly. None of the arguments for curtailing preventive detention changes the fact that the jurisprudence is set – the United States and England retain the legal authority to not only order detention against disfavoured groups but also expand it.

This book is divided into three parts. Part I provides the background information necessary for understanding the concept of preventive detention, the democratic principles at stake and how international law deals with the practice. Chapter 1 establishes the theoretical framework that underlies the transformation of preventive detention from an exceptional measure designed

8 See, e.g., Giorgio Agamben, *State of Exception* (2005) 6–7 (According to Agamben, "the state of exception . . . has become the rule."

to address extraordinary circumstances into an ordinary law enforcement tool used to manage crime. First, it examines the core democratic principles that for so long have inhibited this transformation. It notes that democracies traditionally could use preventive detention only in the exceptional circumstance in which society faces severe harm that the criminal justice system cannot manage or during a state of exception. It then explains the societal trend towards risk aversion that has created new demands for increased preventive detention powers in liberal democracies. It details the changes to the definition of extraordinary circumstances that allow greater detention powers. Chapter 1 concludes by describing the process that leads to the slippery slope – a process that begins by identifying deviant others deserving of detention and ends with a separate and unequal legal system that applies only to these disfavoured groups.

Chapter 2 then discusses the policy issues that arise in the preventive debates. It first considers the debates surrounding the choice to employ preventive detention and against which types of criminal threats. Then it looks at detention jurisdiction – which persons can be detained, who is entitled to order detention and under what type of law. The last section of the chapter raises the debates around the extent of due process rights owed to detainees. Each of the issues described in Chapter 2 forms the basis for discussion of the preventive detention regimes in India, England and the United States, as well as under international law. How each jurisdiction responds to these issues determines the extent to which the jurisdiction is on the path toward the ordinary and regular use of preventive detention.

Chapter 3 examines whether international law offers any real protection against the transformation of preventive detention into an ordinary law enforcement measure. Most of the chapter describes the different limitations international law places on the states' once unrestricted right to order preventive detention. It follows the structure of the policy discussions in Chapter 2, first describing when preventive detention is permissible and then whether international law resolves any of the jurisdictional or due process issues. The chapter ultimately concludes that despite offering some benchmarks for assessing the fairness of preventive detention regimes, international law is highly permissive of the practice. This permissiveness does little to check countries from descending down preventive detention's slippery slope.

Part II analyses preventive detention in India to show what the bottom of its slippery slope looks like in a country that remains democratic. These chapters serve as a measuring stick to determine how far along England and the United States have advanced in the process of transforming preventive detention into an ordinary law enforcement tool. Chapter 4 begins by explaining why India should be used

as any kind of example for Western liberal democracies when it is neither Western nor liberal. It then describes the rise of the risk society in newly independent India as it faced an uncertain future and a tumultuous present. Next, the chapter discusses the Constituent Assembly debates that led to constitutional protection for preventive detention and the parliamentary debates around its early detention legislation. This discussion emphasizes the role risk played in the acceptance of preventive detention in India and how the normalization of preventive detention made it – seem indispensable, even in the face of its abuse during India's Emergency. The chapter highlights that, no matter what the consequences, India cannot imagine governing what it sees as an unruly population without preventive detention. This discussion tracks the transformation of preventive detention from a despised, colonial, despotic tool to a necessary evil.

Chapter 5 describes India's current detention laws and the debates that surrounded them. These debates demonstrate how India chose groups it identifies as deviant others, which the book later uses to demonstrate the political nature of that choice. It examines the justifications for preventive detention to show how they continue to endure even as India's democracy has strengthened and its security situation has stabilized. The chapter underscores the fact that India continues to employ the rhetoric of a state of exception to justify preventive detention although there is nothing exceptional about its use. Underpinning the debates are the core beliefs that (1) the government has the right to use preventive detention; (2) preventive detention is a necessary evil, without which the government would be rendered helpless against serious threats of harm; (3) anyone captured in preventive detention deserves to lose their rights; and (4) the only real concern about preventive detention is that it could be used as a political weapon; as long as it is not used for that reason, preventive detention is an acceptable government tool. These core beliefs are what has driven India to transform preventive detention from a necessary evil to an ordinary law enforcement tool, forcing it to the bottom of the slippery slope where it can freely choose to detain criminals rather than prosecute.

The next chapter – Chapter 6 – examines how India responds to the policy issues identified in Chapter 2. It considers each issue in terms of each piece of detention legislation to paint a picture of the separate but inferior legal system India's detention powers create. It illustrates the extent of the government's right to use preventive detention and the ease with which the government can use its detention powers against nearly any type of criminal. Chapter 6 shows that India would rather bypass the criminal justice system and detain many innocent people to prevent any possibility that a guilty person will go free.

Part II concludes with Chapter 7 by drawing together the analysis from the

previous chapters on India to paint the bigger picture. It concludes that India is a risk society whose risk aversion is leading it to use preventive detention as an insurance policy against the possibility that a dangerous person might be set free among its innocent population. It describes the path of the slippery slope and the normalization of the practice within society that has led it to wholly transform the extraordinary measure of preventive detention into an ordinary law enforcement tool. The chapter ends with a description of the harm the practice has caused India, which includes inferior rights for deviant others and the degradation of the rule of law and separation of powers. Together with Chapter 6, it establishes the benchmarks for the bottom of preventive detention's slippery slope.

Part III tracks the expansion of preventive detention powers in the liberal democratic world by considering the examples provided by England and the United States. It examines the extent to which these jurisdictions have begun to use preventive detention to simply bypass the difficulties of prosecution rather than only when the criminal justice system is impotent to act. Chapter 8 starts by setting out the prohibition of arbitrary detention that governs England's preventive detention practices. It then describes how England traditionally used preventive detention. The chapter next analyzes of the rise of the risk society and shows how risk aversion has led England to employ the language of the state of exception to expand preventive detention beyond its traditional bounds. This analysis also identifies those England considers to be deviant others and how they came to be chosen for that status. Importantly, the chapter pinpoints how England was able to exploit the traditional exceptions to the right to liberty for an emergency or against the mentally ill to use preventive detention as an insurance policy against violent criminals being set free. Surprisingly, given the focus of the detention debates, England has a far harder time justifying detention on national security grounds than against criminals under the guise of mental health detention. Despite these difficulties, the chapter affirms that international and regional law do not adequately check the possibility of the slippery slope.

Chapter 9 examines how England responds to each of the policy issues raised in Chapter 2 to draw a picture of the inferior legal system reserved for deviant others. With little exception, England grants security detainees and others whose liberty is restricted on security grounds far greater due process rights than anyone held in mental health detention. The only area where this is not true, which is not insignificant, is with the right to information, where the government has substantial power to withhold information that forms the basis of security detention. The stark difference in other aspects of the process, however, indicates prejudice against people with mental health disorders that lead the government to make it especially easy to detain them.

The analysis of the United States' preventive detention regimes begins in Chapter 10. Following the same framework as the England chapters, it starts with a description of the prohibition on arbitrary detention that governs how the United States uses preventive detention. It then examines the traditional uses of preventive detention to highlight the principled distinctions that kept the government from using preventive detention when the criminal justice system could manage the anticipated harm. It then depicts the birth of the risk society and the quest to invoke a state of exception to expand preventive detention to insure against sex offenses and terrorism. The ease with which the United States is transforming preventive detention into an ordinary law enforcement tool would surprise many Americans who believe the Constitution protects citizens from detention.

Chapter 11 examines how the United States manages the policy issues raised in Chapter 2. In contrast to England, it is far more protective of the rights of mental health detainees than it is of security detainees, although both regimes are problematic. Mental health detainees receive the offered in civil proceedings due process rights, although the purpose of detention is to punish the detainee for a suspected crime. Security detainees receive even fewer protections, which the federal courts repeatedly recommend the government decrease even further. Both systems make it relatively easy for the government to order detention and carry high risk of error.

Part IV comprises the concluding chapters of this book – Chapters 12 and 13. Using the very real experiences of India, England and the United States described in Parts II and III, Chapter 12 demonstrates the necessity of redefining the bottom of preventive detention's slippery slope for a true democracy. Once the preventive detention regimes are examined in the aggregate, rather than parsed by use, it becomes apparent that while authoritarianism is one possible outcome of the slippery slope, these countries have embarked on a different, severely damaging path – the transformation of preventive detention from an extraordinary emergency measure into an everyday law enforcement tool.

Chapter 12 scrutinizes the rise of the risk society and the current justifications each country provides for expanding preventive detention to show how liberal democracies are erasing the principled distinctions that once inhibited the ordinary and regular use of preventive detention. Next, it compares how different jurisdictions choose the deviant others it subjects to detention. This comparison shows that the choice is inherently political, which means that any security gained by the concept of a deviant other is wholly illusory. Chapter 12 ends by measuring how far England the United States have come towards turning preventive detention into an ordinary law enforcement tool based on the slippery slope established by India.

Preventive Detention ends in Chapter 13 with a discussion of the havoc regular resort to preventive detention wreaks on a democracy. Most of the chapter focuses on the harm that is already happening in India, England and the United States – the creation of a second class legal system for disfavoured others. It compares these jurisdictions' responses to the policy issues described in Chapter 2 to highlight the inferior treatment of detainees and the arbitrariness of the detention regimes. Chapter 13 then delves into other likely consequences to the criminal justice system, rule of law and liberal democratic character of these countries should they continue towards the bottom of preventive detention's slippery slope. Ultimately, the chapter recommends that the liberal democracies rethink whether the cost of erasing the principled distinctions that once treated preventive detention as an extraordinary measure is too high to pay.