

Preventive Justice: Law, Theory
And Practice

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Abstract

This thesis asks: given the events, legislation and literature already dedicated to preventive justice – in particular concerning terrorist (and adjacent) legislation – what reforms should be considered to this controversial area of criminal justice? To answer this question, Chapter 1 lays out the relevant terms and explores the thesis's central question. Chapter 2 explores how prevention has been introduced into the UK's criminal and civil legal systems through the examination of legal statutes and judicial proceedings. Chapter 3 addresses the state's interest in prevention, how it benefits the state, and the normative problems posed by prevention. Chapter 4 explores the same issue from the point of view of the individual citizen. In particular, it asks what responsibilities a citizen has in regard to the state. Chapter 5 seeks to unite the empirical and normative branches of preventive justice through a discussion of the Terrorist Prevention and Investigation Measure. It includes a discussion of how it could be reformed, and of how this reflects on the ongoing debate around preventive justice.

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I declare that this thesis is a presentation of original work, and I am the sole author. This work has not previously been presented for an award at this, or any other, University. All sources are acknowledged as References.

Chapter 1: Introduction

Thesis Aims

This thesis concerns ‘Preventive Justice’, which is an umbrella term for ‘the criminal law or criminal law-like tools [states use] to try to prevent or reduce the risk of (anticipated) future harm. Such measures include the criminalization of ordinarily harmless and seemingly innocent behaviour in order to allow authorities to intervene at an early stage; the incapacitation of suspected future wrongdoers; and extended sentences for past wrongdoers on the basis of their predicted future conduct’ (Ashworth, Zedner, & Tomlin, 2013, pg. 1). Its central research question is, given the events, legislation and literature already dedicated to preventive justice – concerning terrorist (and adjacent) legislation – what reforms should be considered to this controversial area of criminal law? This chapter firstly lays out the structure of the thesis and then goes through the terms and principles the thesis uses to answer this question.

Thesis Structure

This first chapter serves to layout the overall structure of the thesis and to go over important concepts and terms relevant to all the chapters of the thesis. As well as preventive justice itself, it is important to highlight here concepts such as “the Risk Society” which underpins much of the academic debate over preventive justice concerning exactly why the state has expanded the law in the ways examined here.

The second chapter begins with a brief literature review and lays out the legislative history of preventive justice specifically with a concentration on terrorism and similar serious offences. This chapter is the main body that explores what events and legislation have occurred in preventive justice so far. Ancillary legislation is discussed where appropriate themes or historical ties are present. Also discussed are important judicial proceedings that

follow the passage of this legislation. Many elements of the legislation covered in this chapter were amended in Acts of Parliament because of judicial proceedings that ruled practices incompatible with existing human rights commitments such as the European Convention on Human Rights. Summaries of the relevant proceedings are included to give the reader an accurate legislative history of the specific laws and measures that have resulted in the modern preventive framework. This section is divided into rough time eras to differentiate different legislative stages regarding preventive justice. These being pre-1997 and the New Labour government, the New Labour government and the first wave of preventive justice legislation and finally the post-new Labour governments and the second wave of preventive legislation building on and responding to the legislation and judicial opinions from the previous decade.

The third chapter seeks to identify the state's responsibilities with regards to security and how this affects preventive justice. This chapter and the following examine the academic literature concerning prevention and lay out what factors should influence the decision to reform this area of the criminal law. A guiding principle is that the state can legitimately act preventively provided that its motive is the provision of security as a (qualified) public good. The chapter also addresses the problems posed by the ideas of objective and subjective security and how ideas of uncertainty, risk and fear pose problems both for identifying what preventive justice should be used for, and as a temptation for government to act "illegitimately" by using prevention when other methods would better fit the principle of the provision of security as a public good. The chapter starts by introducing different conceptions of security in a liberal democracy and builds on this to explicate problems the state faces in justifying increasing control of citizens through preventive justice and the problems posed by objective and subjective security and associated problems with fear, uncertainty and risk.

The fourth chapter approaches the problems of preventive justice from the point of the view of the citizen and further explores the academic literature concerning preventive justice. It highlights further important areas that should be considered when discussing reform. The chapter begins by examining theories of human rights before exploring how the citizen is affected by different forms of preventive justice as well as discussing what responsibilities a citizen may have towards the state's goal of security. This includes both citizens not under suspicion (who may have duties put upon them by the state) and those under suspicion and thus subject to preventive justice through the state's tools granted by the legislation covered in Chapter 2.

The fifth chapter of the thesis brings together the first four chapters to demonstrate and remark upon the difficulties of applying the theories of chapters three and four in practical circumstances. It seeks to combine a legislative process of reforming the TPIM system discussed in Chapter 2 with the philosophical principles outlined in Chapters 3 and 4. To do this the chapter moves through the mechanism of a TPIM suggesting reforms to the system and how those reforms are backed by the discussions in Chapters 3 and 4.

What is Preventive Justice?

Preventive Justice has been much discussed in criminal and legal philosophy in the last two decades. As noted above, it is about addressing potential wrongdoing and harm through measures that seek to prevent, rather than punish, harm. That does not mean that all, or even most preventive justice actions, are devoid of the element of blame or punishment. Lucia Zedner and Andrew Ashworth provide the key definitions of preventive justice as it applies to this thesis;

“Preventive justice seeks to investigate and catalogue the extent and nature of prevention within the criminal law and beyond the criminal justice system.

Preventive justice also seeks to evaluate the preventive endeavour critically and to

propose limits on it. These two facets are inextricable: the normative project of determining what powers the state may justly exercise cannot be divorced from the task of identifying, categorising, and analysing the preventive endeavour in all its considerable variety.

The chief goal of preventive justice can be usefully defined as “*the significant reduction of (potentially) harmful behaviour, or the reduction of (potentially) harmful behaviour to a tolerable level*” (Ashworth and Zedner, 2014 pg 5).

Preventive justice does not belong in one particular legal or political field or an established judicial system (Ashworth and Zedner, 2014 pg 6). In practical terms, it branches across criminal law, civil law, regulation, and broader state legal powers and authorities such as Border Control, the Security and Intelligence Services, and more. In academic terms, the foundations of preventive justice cross the disciplines of political theory, law and criminology. A key problem in the study of preventive justice and its expanding scope has been the diversity of applicable fields and areas of study.

Many authors have examined preventive justice from many different angles. Lucia Zedner and Andrew Ashworth have written in great detail about coercive measures of preventive justice (Ashworth and Zedner, 2014). Peter Ramsey has approached preventive justice from the perspective of the right of the populace to security from fear and the increasing prominence of subjective security in state thinking (Ramsay, 2012). A P Simester and Andreas von Hirsh have discussed at length the issues that arise from the criminalisation of remote harms. (Simester and von Hirsch, 2014), (Simester and Von Hirsh, 2011) While Barbara Hudson, David Garland, Ian Loader and Neil Walker have all written on the background to preventive justice, the nature of risk and how the prominence currently given to preventive justice has come about (Hudson, 2003), (Garland, 2001), (Loader and Walker, 2007).

Many more authors have contributed to this area, but these show the breadth of coverage preventive justice has received in recent years, commensurate with its scope. A single definition of preventive justice is hard to come by because its limits do not yet seem to have been reached. Indeed, as stated in the Introduction, one of the aims of this thesis is to explore the avenues down which preventive justice might proceed next.

Serious Harms

The research question of this thesis seeks to examine preventive justice as it relates to serious criminal harms in order to keep to a relative narrow scope. Given the breadth of this area of the law, this thesis mostly restricts itself to a focus on the risk posed by terrorism as an example of a serious harm that the state dedicated significant time and resources to prevent as well as to punish.

The reasons for concentrating on terrorism in this thesis are twofold. Firstly, dealing with the entire modern history of preventive justice would be too complicated a task.

Preventive justice also encompasses areas that might not be thought to be particularly serious. Various 'orders' have been used to prevent seemingly minor crimes like nuisance and public order offences. These include the New Labour ASBO regime, football banning orders and many others. Serious crimes such as sexual crimes and a long list of 'organised' crimes now have preventive measures associated with them as well. While such examples of preventive justice are mentioned in this thesis this is intended to show the relationship between these areas of prevention and this thesis' focus on terrorism.

Secondly the concentration on terrorism allows the thesis to demonstrate a narrative that runs from how the UK Government dealt with terrorism in Northern Ireland to the threat terrorism presents today, showing how important prevention and preventive justice have become in a relatively short space of time.

The focus on terrorism is not meant to imply that terrorism is a unique area for preventive justice, although this is a point of debate in academia. For some authors, terrorism *is* unique, a crime so serious in character that rather than being subject to a 'citizen' criminal law, it should instead be subject to a kind of 'enemy' criminal law (Jakobs, 2014 pg 420). This idea is explored further in chapter 4 but is not taken as a given. It can also be argued that even if terrorism has 'unique' characteristics as a crime, there is no reason that the actual harms committed cannot be prosecuted as part of existing criminal laws – with any ideological or public intimidation factors being considered as aggravating.

Thus, when this thesis discusses serious harms, it is chiefly talking about the kinds of harm that acts of terrorism usually seek to accomplish without wishing to imply that the discussion of preventive justice is *only* relevant to terrorism.

Pre-emption and Pre-emptive measures or policies

A key part of the evolution of criminal justice since the early 2000s has concerned pre-emption. In this thesis, this term is generally used to cover measures that are not part of criminal law. For example, the Prevent program is aimed at pre-empting serious harms by attempting to ensure that the persons who would or might commit such harms are identified and dissuaded from doing so prior to the commission of any act, attempt or even preparatory activity that might result in a criminal charge (even given the expansive scope of terrorism offences now available). Outside of terrorism specific measures, we might consider initiatives such as the Home Office's 2012 advertising campaign aimed at reducing sexual offences by educating the public about consent, and similar publicity campaigns or outreach efforts.

Preinchoate Criminal Offences:

Preinchoate criminal offences are described by Peter Ramsey (2013, pg 214) as '*purely* preventive criminal offences. This group includes possession offences, preparation offences, failure to report offences, and breach of preventive orders. These offences appear to be concerned with pre-empting harmful conduct before the opportunity for its commission even arises...' A suitable example is contained within s.16(2) of the Terrorism Act 2000 that criminalises the possession of money or other property, with either the intent that it should, or with reasonable cause to suspect it may, be used for the purposes of terrorism. This wording puts this offence firmly before an inchoate offence such as that laid out in Part 2 of the Serious Crime Act 2007 which creates, for example, the inchoate offences of intentionally encouraging or assisting an offence. In the case of the Terrorism Act only intent on the part of the offender is required, as opposed to encouragement or assistance.

A Note on 'Terrorism'

Much of this thesis deals with the prevention-orientated legal response to acts that are commonly described as 'terrorism' and many of the actions discussed in the text undoubtedly qualify as 'terrorism' (or would do if completed). It is important to note that the definition of terrorism is highly contested in academic, political, legal and lay circles. The quest for a canonical definition of terrorism has even been referred to as a waste of time (Waldron, 2004) and this thesis will not attempt to provide a comprehensive analysis. Other authors have attempted such an examination and these attempts show Waldron's point of the term being highly contested (Meisels, 2009). The British government itself has adopted a very wide definition of terrorism (discussed below). For the most part, this thesis tries to avoid any overarching definition, but when the word occurs, it is most often about what the UK government would consider as terrorism, given that it is the response of (various) UK Governments to potential harms that is the main focus of the thesis. This

means that the definition used within this thesis is a broad one but one that should be viewed in the context of referring to the current policy of the UK government.

The Risk Society

The primary goal of the modern liberal state is to produce an environment in which its citizens can pursue their own desires and happiness (where these desires do not seriously conflict with the happiness of others in the society). Security, in the words of Barbara Hudson, is the one 'unsubstitutable' good on which freedom depends, both in one's own person and one's possessions (Hudson, 2003 pg 32). The modern state makes efforts to provide this security through many forms of legislation, regulation and organisation. This 'responsibility to protect' is the core justification for governments to take preventive action against such serious harms (Gunther, 2013 pg 71). Over the last two decades many new criminal offences and preventive orders have been established in the area of terrorism and it is these that this thesis seeks to expand upon and discuss what reforms should be made.

This issue can best be examined with reference to two of the elementary problems of security – the problem of assurance and the problem of proportionality. The fact that the idea and actuality of the 'risk society' exists and has resulted in the various forms of preventive measures discussed in this thesis shows that at some level there has been, or has seen to be, a failure of assurance; one that should be corrected, in proportion to the 'assurance deficit' that has been created. Of course, to do this, we must first identify where and why the problems of assurance have arisen before recommending a response.

While neither the matter of preventive justice nor the discussion about its proper remit and use is a new area in the philosophy of the criminal law (see generally Dubber, 2013) the last decade of political and criminological debate, technological and societal change and the changing geopolitical situation has created a 'slippery slope' of preventive rationales and measures. Improvements in the ability to detect and measure risk in the

twenty-first century have led governments to move from managing risk to controlling risk (Hudson, 2003 pg 60). For the areas this thesis is concerned with this has chiefly meant a dramatic increase in both the number of criminal offences and the means to control individuals who might pose a serious risk to society through the commission of such offences (created through legislation such as the Prevention of Terrorism Act 2005).

The reason that this is of great concern is that, particularly over the last decade and a half, British society has seen a gradual erosion of individual rights in the name of collective security. Compared to 1999, the Government of 2014 has vastly more legal means of observing and controlling those it deems to pose a serious risk to society and many more offences with which to charge them; many coming far earlier in the criminal process than the traditional formulation of 'attempts' under the general part of the criminal law.¹ This thesis concerns itself mostly with the farthest ranging offences (such as 'engaging in conduct in preparation of terrorist acts') and the farthest ranging measures of control (such as the Terrorism Prevention and Investigation Measure). What is even more concerning is what the author sees as a pattern of abdication of responsibility by the state over time where rather than seeking to reform practices that have been criticised, the state attempts to sidestep criticism with new and arguably harsher measures.

Why is what is happening different?

Preventive justice is not a new concept but while some of the legislation and measures that have been proposed in the last two decades echo the experience of, to name the best UK-adjacent example, Northern Ireland-related terrorism and the response to it in the 1970s and 1980s, other factors such as technological change (leading to changes in perception and ability of both state and non-state actors or observers) play an important

¹ Traditionally in attempts a 'substantial step' is needed before someone could be charged with attempting a substantive offence.

role as well. Examination of Ireland-related terrorism, the measures taken to address it, and criticism of those same measures are useful, but not enough to tackle the issues present today. Many of the underlying issues are the same, such as the bypassing of the traditional court system, rules of evidence and having high degrees of secrecy in specific criminal proceedings. Other areas, such as the issues of privacy, surveillance and the increasing use of pre-emptive, non-criminal instruments such as control orders have progressed quite far beyond the experience of the Troubles.

Technological change has affected our perception of serious harms, on an individual basis (i.e., those seen as 'causing' a risk to society), a public basis (including the portrayal and coverage of the media), and finally the perception of the government itself. This is especially true regarding what powers are generally believed to be necessary to prevent harm from occurring. These same changes in society are also responsible for problems of assurance. The development of one's conception of the good is affected by the community in which one lives, and a community's commitment to living with others on moral terms is only reasonable where others also make that commitment (Matravers, 2000, pg 239). Just as this is a possible justification of coercive punishment or 'hard treatment', it is also a possible justification for the prevention of serious harms and any measures that stem from that goal. However, it is important to identify and understand the root causes of any assurance deficit. If a technological change or other factors have changed the perception of risk and harm, and not the actual incidence of risk and harm, then certain responses will be more appropriate, and more effective, than others. To make this explicit, if the change in assurance is related to over-estimation of the likelihood of a harm, then it is likely to be more effective to address the estimation of the harm by the state or the general public than it will be to, for example, increase the punishment of those who perpetrate the risk or harm under consideration. These changes should be seen in the context of a broader shift in criminal law theory detailed in Chapters 4 and 5.

While preventive justice is not a new concept, the rapid advancement of technology in the twenty-first century has caused a hurried change and expansion in its use. In the area of the commission of offences, the wider availability of goods, services and knowledge combined with an actuarial view of risk assessment by the state (for example in assessing risk of re-offending (Hudson, 2003 pg 48-49), or risk of radicalisation) means that far more people are seen as potential risks by the state.

Anyone with the means to access the internet can find goods and information that would be useful, or indeed vital, in the commission of terrorist attacks, ranging from lists of the materials needed for homemade bombs to overseas groups or individuals willing to train or assist others in the preparation and commission of such attacks. Combined with this is the fact that much of this activity is disguised by legitimate purchases of such ingredients and talk by those sympathetic to extreme causes or ideologies but innocent of any intention to resort to criminal acts against society. It is this group to which the kinds of pre-inchoate offences mentioned above and detailed in Chapter 3 are aimed in government discourse.

On the other side of the equation, the state has an ever-increasing arsenal of technological tools to use against those who pose a serious risk to society. Improvements in computing capability allow governmental agencies to collect and analyse an enormous amount of data, looking for signs of potential danger. The problem is that such techniques are rarely individual specific. In order to detect potentially dangerous activity, such agencies must parse through huge amounts of data that in no way relates to potential criminal activity. In the modern world this will result in a large invasion of privacy given how much of people's personal information is online and the extent to which most people use resources like email, smart phones, etc. The slow pace of academic literature has meant that only recently has such activity been subject to academic scrutiny. Governments feverish to match the pace of technological change in these areas have passed wide-

ranging legislation designed to combat it, with the effect that the modern western state collects vast amounts of data on its citizens (beyond even that collected for commercial means) from a wide variety of sources in the name of protecting them from the possible actions of the very few.

This new conception of preventive justice challenges the criminal law and the criminal justice system that has traditionally focused on past actions, judged to be morally wrong, as justification for punishment. A crime occurs, and the system steps in to punish the perpetrator (Horder, 2012), (McCulloch and Pickering, 2010). The criminal justice system broadly operates on philosophies established long before the dangers described above were considered. Including measures aimed solely at prevention presents great difficulty for traditional theories, as does the attempt to bypass the traditional criminal process (and its protections) by the use of preventive legal measures such as hybrid civil/criminal offences.

The foundations of the criminal law are based on punishing wrongdoing that has already occurred in some substantive form. This means that until the last few decades most crimes prosecuted would have been crimes that had already occurred, or crimes where the defendant had taken a 'more than merely preparatory' towards completing the crime (i.e. an attempted crime). This traditional idea of the criminal law as primarily concerned with setting out the rules and punishing those who culpably break them works well for parts of the current justice system. However, this system, for many reasons explored in later chapters, has proven to have intense difficulty in dealing with various forms of preventive justice; in particular, crimes or civil measures imposed on actions far more removed from substantive harms.

These problems with the use of preventive justice are not always clearly visible outside of the professional legal sphere and academic debate. The increase in media attention to

terrorism, sexual offences and anti-social behaviour has undoubtedly created a strong impetus for governments to legislate extensively (and to explore new options) in these areas. Incidents such as the 2007 London bombings or the series of attacks between March and June 2017 lead to demands that positive action be taken, and the basic duties of government arguably demand action in any case. One response to these demands has been rapidly to expand the use of preventive justice. This expansion has caused problems to emerge in how preventive justice interacts with systems chiefly aimed at post-hoc criminal justice.

Governmental perception of these issues can broadly be separated into two parts: the first is that of the elected legislature and executive whose election prospects depend upon gaining and keeping the support of the electorate. To this end, they will work to both meet the demands of the electorate and work to prevent situations occurring where they will have to shoulder responsibility for the occurrence of serious harms. This undoubtedly gives incentives to elected governments to act to meet the demands of the electorate and to go as far as possible to prevent situations that would reflect badly on the government, even at the cost of individual liberties. The second governmental perspective is that of the people and agencies charged with the detection and prevention of the sorts of serious harm considered in this thesis (chiefly the police and intelligence services). While these organisations do not have to concern themselves as much with public pressure, the fact that their jobs consists of detecting and controlling or apprehending dangerous individuals means they have a vested interest in having the most powerful tools available. Together, these pressures create a strong possibility of favouring the potential security of society as a whole over the rights of individuals deemed to be 'dangerous'.

This covers some of the reasoning behind why the state seems to be pursuing more methods of preventive justice through control orders and similar legislation. But there is

also the issue of how these measures are qualitatively different from the rest of the body of the criminal law itself. The manner in which preventive justice measures such as Control Orders are imposed has attempted to, and often succeeded in, bypassing elements of the traditional criminal justice model. Given the events, legislation and literature summed up in this section, this thesis asks what reforms should be considered to this controversial area of criminal law.

Chapter 2: Literature Review, Legislation, Policy and Powers

This chapter explores some of the relevant developments in the legal framework surrounding preventive justice as well as giving an overview of the academic writing about preventive justice. The goal is not to be fully comprehensive, if only because that would be very long and quickly become dated. After the literature review, the chapter is split into three broad time periods consisting of measures that existed prior to 1997 including an initial section on Northern Ireland; measures passed between 1997 and 2010 under the New Labour governments; finally, 2010-2017, measures passed under the coalition between the Liberal Democrats and the Conservatives and the subsequent Conservative government. The intent is to highlight the most important legislation and legal developments and demonstrate the expanding scope of different kinds of measures under the larger preventive justice umbrella.

Literature Review

The academic starting point for the discussion of recent anti-terrorism measures cannot avoid discussion of the problem of risk. This review seeks to chart the origins of the risk society dialogue in academia and highlight notable works that underpin the thesis' question and aims. While not all encompassing it seeks to establish a baseline and communicate the ideas of other authors in this field (many of whom are discussed throughout the thesis).

Discussed first above the "Risk Society" as defined by Ulrich Beck has proven to be a vital part in understanding both governmental and societal attitudes towards the risk posed by terrorism and other serious harms. Many authors have used Beck's work as a jumping off point to more closely scrutinise the law and elements of legal philosophy, but it is important to mention Beck's work first, even if it is less specific than other works covered later.

Beck defines risk as “the probability of physical harm due to a given technological or other process”. (Bech, 1992, pg 4) He notes that risks will always be present in society and will be created even by those organisations which are supposed to manage or control risk. We will encounter an example of this later in the chapter in discussing the Prevent strategy. Most importantly for this thesis is an element that Beck identifies as “non-determinable victimisation”. This is where a being the victim of some act is a risk that is not determinable by someone’s own cognitive means. (Bech, 1992, pg 53) This element is perhaps the key to understanding why so much legislation has been passed to counteract potential terrorist acts, even though such acts represent a very small, and until recently decreasing, source of harm. Even if it is unlikely to occur the possible harm posed by terrorism is very high, and people’s ability to assess the risk of something happening to them is relatively low, at least for those frequenting highly populated areas.

This problem applies to the government and its departments, as it too is dealing with relatively little freely available information as to the level of risk to particular people or places at any one time. The timing and location of a specific terrorist attack are pieces of information of vital importance to assessing the risk to an individual or location. Unfortunately, this information is usually kept well-hidden and there can be a very narrow window in which it can be obtained. Moreover, only the resources of the state are likely to have a reasonable chance of success in obtaining this information while possessing the time and resources to act to stop the action. At the very least it has a duty to try and do so as part of a social contract to ensure the security (amongst other things) of its citizens. Beck also highlights the problem that increased news coverage and decreased latency of hearing about risks and events as well as the idea that as a society we have come to think in terms of risk as systemic problems become visible with hindsight. For example, the recognition of the dangers of things previously thought harmless such as smoking or wine consumption (Bech, 1992, pgs 51-56)

Many authors have taken up Beck's work and applied it more directly to the area of the criminal law generally, and terrorism specifically. Of these the most relevant work to discuss next is *Policing the Risk Society* by Richard V Ericson and Kevin D Haggerty. These authors highlight the actuarial nature of modern policing and demonstrates how the risk of criminal action is something people automatically factor into their day to day lives and consciously act to lower the risk of criminal action against them or insure (often literally) that any action that does occur does not have too great or too permanent an effect. Risk, in these authors' view does not eschew morality, but alters it into a utilitarian scheme (Ericson and Haggerty, 1997, pg 40-42). As discussed in relation to Beck, Terrorism causes a particular problem here, compared to, for example, the risk associated with not locking the front door before a quick trip out. A terrorist attack is far more serious, yet on the face of it we have less information about how likely it is to happen to us individually and we can do less to remove the risk we do perceive. In cases such as people look to the state, and its organisations such as the police and the security services, to safeguard us from these risks and to provide information as to how likely they are.

This problem of risk has led to many governments, including in the UK, carving out new powers for themselves and their security organisations to fulfil their population's risk-aware desires for protection and information. Matched to this are Governments' own aims of risk control for societal reasons (such as preserving the social contract whereby it is granted power by citizens in return for protection) and political reasons (the government, its organisations and individuals not wanting to be seen as responsible for failing to adequately protect or predict some serious harm that does then happen). To this end, governments of recent times and political persuasions have created numerous pieces of legislation to combat the rising tides of risk and risk-awareness.

Pre-1997 Legislation

Prevention as an aim of criminal justice is not new, but as outlined above the circumstances of its use have changed in the last two decades. The root of many of these changes can be found in older legislation. A full history of the use of prevention in criminal justice is beyond the scope of this thesis but there are some statutes that should be examined to give context to the situation as it stands today and the legislative history behind the legal measures discussed later in this chapter and throughout the thesis. This part of the chapter moves historically except where acts can be grouped by theme or where they directly build upon a prior piece of legislation. The aim is to highlight the legislation relevant to our discussion, note important preventive powers, related legal cases and questions raised that relate to the main thesis question.

Prevention of Terrorism Acts, 1974, 1976, 1984 and 1989

Much of the legislation passed since 1997 is not unprecedented. Many similar powers passed throughout the 1970s and 80s to deal with the threat from IRA. For example, Exclusion Orders to prevent persons from entering or being in Great Britain and Northern Ireland, and provisions for arrests to be conducted without a warrant on suspicion of the individual being involved with terrorism. Much like today, these powers were used extensively and came under intense scrutiny and critique, just as the previous legislation, the Prevention of Terrorism Act (1939) did over thirty years before. There was perhaps a different 'character' to much of this early legislation. The measures were presented as extreme, but necessary, with Secretary of State Mr Roy Jenkins stating "These powers, Mr Speaker, are Draconian. In combination, they are unprecedented in peacetime. I believe they are fully justified to meet the clear and present danger." (Jenkins, 1974a) The original Bill and its subsequent revisions kept explicit the idea that these were 'temporary provisions' and had to be renewed yearly. The practice of inserting these 'sunset clauses' into legislation that dealt with increasing or extending powers and measures to deal with

the threat of terrorism ended with the Terrorism Act 2000; prior to that the previous Acts were temporary, with options to renew between 6 months and 2 years after they were passed (Ip, 2013, pg 77). Although the broad use of sunset clauses for terrorism legislation has ceased, certain measures within Bills have included them such as the Terrorism Crime and Security Act 2001 or the Data Retention and Investigatory Powers Act 2014. While the content of these acts is less relevant to much of the aims of this thesis it is important to note this difference in character in their passing.

Communications Act 1984

The Communications Act of 1984 is an important example when considering how far the role of the state extends into protecting security, as well as touching upon issues of covert surveillance and the rights of citizens to know what legal powers might be used against them. Moreover, it is an example of the danger that some state action that avoids, as much as is feasible, public, judicial and even legislative scrutiny. A communications act might seem an unusual choice for inclusion in the thesis narrative, but it is included chiefly to highlight two aspects of the aims of the thesis. Firstly, the aspect of technological change in the state's new laws against terrorism. Secondly, to establish a pattern of the government using a piece of old legislation in a way that could not have been anticipated when it was written.

Section 94 of the Telecommunications Act, as amended in 2003 with the original in square brackets states:

94 - Directions in the interests of national security, etc.

1) The Secretary of State may, after consultation with a person to whom this section applies, give to that person such directions of a general character as appear to the Secretary of State to be necessary [requisite or expedient] in the interests of national security or relations with the government of a country or territory outside the United Kingdom.

(2) If it appears to the Secretary of State to be necessary [requisite or expedient] to do so in the interests of national security or relations with the government of a country or territory outside the United Kingdom, he may, after consultation with a person to whom the section applies, give to that person a direction requiring him (according to the circumstances of the case) to do, or not to do, a particular thing specified in the direction.

This loosely worded section of the Act allowed the Secretary of State to require persons to whom the act applied (OFCOM and providers of public electronic communications networks) to do any 'particular thing' in the interests of national security; that is, any 'thing' deemed necessary by the Secretary of State. Section 94(5) disallowed any disclosure of directions given under this section. This section of the act was used for many years as the legal basis for collection of bulk personal data sets and bulk communication data sets by the Security Service and Government Communications Headquarters (GCHQ) and until 2015 operated with very little government oversight and almost completely out of sight of the public. None of this type of surveillance would have been envisioned when the act was written because the circumstances for it did not yet exist. This was a situation referred to as 'beneath the waterline' by a subsequent review by the Investigatory Powers Tribunal. That review found that the use of Section 94 in this fashion was in contravention of the Human Rights Act 1998. The problems this Act raises for the purposes of this thesis are not necessarily the illegality as judged post-hoc, although this is still important. Rather it is what the use of legislation in this way says about the nature of the relationship between institutions of the state and the citizens they have a duty to protect. Specifically, there are three key issues. The secrecy of the state and its institutions discussed in Chapter 2. The knowledge of legal powers used against citizens and the laws they are subject to, covered in Chapter 3. And finally, the importance of communication between citizens and state, which is discussed in Chapter 4.

One area worthy of discussion here is the evolution of the Diplock Court in Northern Ireland. While this was not a preventive measure as such, the structure of the Diplock Courts and the criticism of them is important in considering the later measures from the 1997-2017 period, and in particular how immigration tribunals, and proceedings relating to Control Orders and TPIMs, have been conducted.

Diplock Courts

The Diplock court system was established in 1973 as a jury-less court with a single judge and serves as a forerunner to modern anti-terrorism measures such as the Control Order and TPIM. A jury-less trial system, the Diplock court was established as a result of the Diplock Commission to cover a schedule of offences, all of which had some connection to terrorism. Notably few changes were made apart from the exclusion of the jury. The judge was required to provide a reasoned judgment in support of a decision to convict, the provision of an automatic right of appeal against conviction and/or sentence was removed as well as a change in the rules regarding the admissibility of confessions. (Jackson and Doran, 1995, pg 12) Notwithstanding this, the removal of the jury from a trial concerning serious criminal offences was a large departure from the norm, and would be so today even with the increased scope of magistrates courts in England and Wales. Jackson and Doran cite the tension between a “cloak of legal normality” and the idea that Diplock trials were something out of the ordinary as a defining feature of Diplock trials. (Jackson and Doran, 1995, pg 15) This tension is something that can be seen in later legislation discussed in this thesis. An out-of-the-ordinary measure – such as control orders – created with a cloak of legal normality, such as through using the existing civil legal system with few, if any, other changes.

Lord Diplock identified several points of difference between ordinary criminal trials and those that handled offences with a terrorist element. In the latter, firstly, witnesses were

subject to intimidation with the aim of stopping them from testifying, this threat also extended to jurors and had possibly resulted in acquittals contrary to the evidence, and finally that the eligible jury pool was skewed towards protestants. However, it should be noted that the Commission's conclusions were attacked on the grounds of lacking supporting evidence to back-up these conclusions. (Jackson and Doran, 1995, pg 17)

Diplock courts differ mainly from later measures such as control orders in the ostensible reasons for their introduction, and the fact that while out of the ordinary, they still fit the mould of post-hoc criminal trials for serious offences (unlike the pre-inchoate and preventive measures that came later). The idea of risk certainly plays an important part in both, however. In the case of Diplock courts it seems mostly to have been the risk of jury tampering and intimidation that spurred such rapid action, given the lack of hard evidence. Likewise, later terrorism acts in England and Wales emphasise the risk posed by would-be terrorists or those sympathetic to them, rather than on concrete criminal activity.

1997-2010 Legislation

The New Labour Government under Tony Blair marks the beginning of the modern wave of anti-terrorism legislation. Since then, there have been multiple substantive acts designed to expand preventive justice across several areas including public order, terrorism, sexual crimes and organised crime. Terrorism law has seen the most laws, with five substantive acts passed between 2000 and 2008. The Terrorism Act 2000, the Anti-Terrorism, Crime and Security Act 2001 (introduced two months after the September 11th attacks), the Prevention of Terrorism Act 2005, the Terrorism Act 2006 and the Counter-Terrorism Act 2008. All of these are covered below along with other important Acts. As above, the aim of this section is not a comprehensive legislative examination, but an initial analysis of key measures that are mentioned in the context of the problems they pose in later chapters.

Human Rights Act 1998

The passing of the Human Rights Act 1998 (HRA) was an important step in the process of allowing citizens to assert their rights and freedoms as set out by European Convention of Human Rights (ECHR) in British courts of law. The passing of the Act was strongly supported by both human rights groups and scholars of criminal justice (Hudson, 2001, pg 161). It is hard to overstate the importance of the HRA for this thesis. The passing of the Bill started the process of addressing many perceived shortfalls in the criminal process and some of the rights contained within, such as the right to private life, home and correspondence ensured by Article 8 of the ECHR. These had never been enshrined in domestic law before (Donohue, 2006, pg 1154). For our purposes, the most vital articles of the ECHR are nos. 5, 6, 7, 8, 10, 11, 13, 15 and 17. While these are expanded upon here, the relevant articles are brought up throughout this thesis, underscoring the importance of the Convention and the corresponding British Act of Parliament. One thing that deserves mention in this section, however, is that Section 6 forbids the contravention of the Convention by any public body through policy unless under domestic law they could have acted no differently, and even then such an act would have to be declared to be incompatible with the government's obligations under the ECHR (a 'declaration of incompatibility'). Many of the legal arguments concerning preventive justice have been decided by judicial authorities in the UK with reference to the ECHR and the judgements of the Council of Europe and the European Court of Human Rights (ECrHR). Many of these are referenced in this thesis where relevant. This has the effect of arguably placing the Act 'above' other laws, in a legal and political system that has traditionally viewed all sources of law (statute, case law etc.) to have the same basic status (Donohue, 2006, pg 1153). That is so, even if the consequence (a declaration of incompatibility) has limited inherent power, as seen in examples such multiple declarations of incompatibility² concerning the UK's blanket ban on

² Specifically resulting from cases in from the ECtHR Grand Chamber:

Hirst (No.2) v the UK (2004)

Greens and M. T. v the UK (2010)

voting by prisoners that has so far covered a 13-year period. This means that despite the various rulings on anti-terrorism measures ruled incompatible with human rights legislation by the judiciary, such as detention of foreign nationals without trial (§23 of the Anti-Terrorism, Crime and Security Act 2001), the government has the option of ‘digging in its heels’ and disregarding the ruling. While an adverse ruling from the ECtHR would be almost certain, prior experience such the prisoner voting case *Hirst v United Kingdom (No 2)* – only resolved in September 2018, show that there can be considerable delay between a ruling being made and the UK government making any changes.

Crime and Disorder Act 1998, Anti-Social Behaviour Act 2003, and Sexual Offences Act 2003

Anti-social behaviour and public order offences are not a focus for this thesis. However no examination of preventive justice and hybrid civil/criminal orders should overlook the importance of arguably the first modern preventive order.³ In the wake of the creation of various injunctions by Acts such as the Protection from Harassment Act 1997 and the Housing Act 1996, the Labour Party – as part of its ‘tough on crime, tough on the causes of crime’ policy – promised a ‘zero tolerance’ approach to anti-social behaviour, emphasising the role of young offenders in the ‘unacceptable’ levels of disorder (Labour Party, 1997). Fulfilling their promise, the Labour government passed the Crime and Disorder Act 1998 which created the Anti-Social Behaviour Order. The imposition of an Anti-Social Behaviour

Scoppola v Italy (No 3) (2011)

Many ‘clones’ of these cases exist, and as of the latest, *Firth and Others v. the UK*, the government position is that it is ‘in dialogue’ with the Committee of Ministers of the Council of Europe Justice, L. C. a. S. o. S. f., Justice, M.o. (2016) *Responding to Human Rights judgements*. www.gov.uk: Ministry of Justice.

³ While the sentiment behind such orders is in keeping with much older ideas of being bound over to keep the peace (reaching as far back in legislation as 1361) the Law Commission wrote in 1994 that “The power to bind over to keep the peace and be of good behaviour is no longer defensible if modern views of proper practice and procedure in our courts are to be respected” *Binding Over*, Commission, L. (1994). www.gov.uk: Law Commission. Thus, necessitating a new, more modern method of preventative action be created by the New Labour government.

Order (ASBO) under section 1(1) of the Crime and Disorder Act 1998 was an administrative measure, imposed using civil law. Breaching the terms of the order was a criminal offence under Section 1(10). This is what makes the ASBO a 'hybrid' order; a new combination of civil and criminal law and the first modern form of what later became more widely known as a 'two-step prohibitions' (TSPs) (Simester and von Hirsch, 2006, pg 174). While the order covered similar behaviours to earlier substantive criminal offences (such as harassment under The Public Order Act 1986), its method of imposition was new, and the standard of proof needed to impose an ASBO was different to that imposed in criminal law. The standard of proof required to impose an ASBO was not that of "beyond reasonable doubt" as it is in criminal law. Instead ASBOs were imposed on a standard much more akin to the civil standard of "on the balance of probabilities". In addition to this there were some key changes in what evidence was permitted in ASBO cases. In particular hearsay evidence could be permitted while it is not allowed in standard criminal cases.

Crucially the process of imposing an ASBO was not seen as an official verdict on past behaviour, but a potential criminalisation of actions undertaken in the future. Therefore, the imposition of the order was an exercise in risk assessment, not the establishing of a past moral wrong. This feature would repeat itself in later orders where traditional criminal procedure and protections are avoided with recourse to civil law and procedures.

The nature and functioning of these hybrid orders is discussed further under the Prevention of Terrorism Act 2005. But at the heart of the ASBO, and most other hybrid/TSP orders is a problem of assurance. In response to a lack of assurance by society or, put another way, a failure on the part of the 'defendant' to reassure society they mean no harm to its members, society, as represented by the state, places a preventive measure to "permit everyone to go about their daily lives without fear of harm to person or property" (Clingham v Royal Borough of Kensington and Chelsea, on appeal, *Clingham (formerly C (a*

minor) v *Royal Borough of Kensington and Chelsea; Regina v Crown Court at Manchester Ex parte McCann and Others*, 2002). The wrong that an ASBO is trying to address is a disrespectful disposition manifested by the defendant's conduct that causes others to feel exposed to future wrongs (Ramsay, 2012, pg 27). This 'failure to reassure' basis is a clear parallel to later hybrid orders created and amended by various anti-terrorism acts in the UK as well as other measures. The ASBO itself was strengthened with the Anti-Social Behaviour Act 2003, and numerous other orders have emerged since in many different acts of legislation. In the same year that ASBOs were expanded the idea of a failure to reassure was extended to sexual offences through the Sexual Offences Act 2003. This act also expanded the field of preventive justice to the sphere of post-conviction and post-sentence action. The Sexual Offences Act created additional requirements post-conviction such as mandatory notification of the police with regards to matters such as travel, and changes of address. The possible imposition of various other orders such as the Sexual Harm Prevention Order, a Sexual Risk Order or a Foreign Travel Order on those found guilty of sex crimes. Many of these measures became mandatory after conviction for particular offences. In this case, serving out a criminal sentence did not then establish a presumption of innocence until proven guilty of another offence (Zedner, 2004, pg 293). No longer was conviction and punishment seen as sufficient to reassure society against future offending; additional measures were needed. A failure to reassure fellow citizens of future conduct has become the heart of many measures that transcend the traditional boundaries of criminal and civil law in England and Wales, and it is important for this thesis to note that the issues discussed throughout the following chapters have been applied to all sorts of harms and behaviour, from the very minor to the very serious. The application of prevention both pre- and post- criminal charge and sentence would soon be expanded to the area of terrorism legislation.

Terrorism Act 2000

In late 2000 the Labour government passed the Terrorism Act 2000 (TA 2000), the stated intention of the legislation was to reorganise existing measures and to acknowledge that, while the threat from terrorism from Northern Ireland and the (now) Russian Federation had decreased, there was still perceived to be a need for a unified and expanded suite of powers and offences to tackle emerging threats. The creation of this legislation followed in part a 1996 inquiry report by Lord Lloyd of Berwick PC into the potential future of counter-terrorism legislation. This report concluded that there would be a continuing need for permanent anti-terrorism legislation even in the event of peace in Northern Ireland (Lloyd, 1996). This legislation was sweeping in scope and goes beyond the scope of this section. 'Terrorism' was defined in law under Section 1 of the act for the first time in modern domestic law, adopting a very broad conception compared to similar measures, such as the UN Security Council resolution 1566, adopted in 2004 (Ashworth and Zedner, 2014, pg 173). The act (as amended in 2006 and 2008) states that:

- (1) In this Act "terrorism" means the use or threat of action where—
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.
- (2) Action falls within this subsection if it—
 - (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person's life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

The key difference between this definition and more restrained ones used in academia or by other states was the additional focus on damage to property as well as violence against a person. In addition it included interference with electronics and the very loosely worded section 2b requiring only an action that “seeks to influence a government or international organisation”, rather than the language of compulsion used in the Security Council resolution 1566. Similar language was later used in the USA Patriot Act of 2001. It should be noted however that establishing a definition of terrorism internationally has been difficult. Neither the European Union nor the United Nations has historically been able to create one. The EU has relied on framework decisions to approximate a consensus between its members, referencing lists of specific offences contained within other treaties as “terrorism offences”. The United Nations has adopted a similar approach as recently as 2005 (Murphy, 2015, pg 51).

The act’s second important measure was the criminalisation of a number of activities related to terrorism on the basis of intention, or of having 'reasonable cause to suspect' that X would be used for terrorism. Most importantly for this chapter are sections 38B 57 and 58. Which illustrate key areas of expansion in the substantive criminal law.

Section 38B of the TA 2000 states:

(1) This section applies where a person has information which he knows or believes might be of material assistance—

(a) in preventing the commission by another person of an act of terrorism, or

(b) in securing the apprehension, prosecution or conviction of another person, in the United Kingdom, for an offence involving the commission, preparation or instigation of an act of terrorism.

(2) The person commits an offence if he does not disclose the information as soon as reasonably practicable in accordance with subsection (3).

(3) Disclosure is in accordance with this subsection if it is made—

(a) in England and Wales, to a constable,

(b) in Scotland, to a constable, or

(c) in Northern Ireland, to a constable or a member of Her Majesty's forces.

(4) It is a defence for a person charged with an offence under subsection (2) to prove that he had a reasonable excuse for not making the disclosure.

(5) A person guilty of an offence under this section shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or to a fine or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, or to a fine not exceeding the statutory maximum or to both.

(6) Proceedings for an offence under this section may be taken, and the offence may for the purposes of those proceedings be treated as having been committed, in any place where the person to be charged is or has at any time been since he first knew or believed that the information might be of material assistance as mentioned in subsection (1).

This offence is of particular interest here because of the positive obligation that it imposes on citizens, which is discussed further in chapter 3. In character, section 38B is most similar to the idea of the ‘misprision of felony’ or ‘misprision of treason’ – the failure to disclose information about offenders who commit serious crimes, a common law offence dating from the thirteenth century (Wallerstein, 2012, pg 39). However, the Criminal Law Revision Committee found the offence was ‘of doubtful existence’ in modern times prior to *Aberg* [1948] 2 KB 173; Cr. App. R. 144; a case in which a nurse knowingly concealed an escaped prisoner and was convicted of misprision of felony (Criminal Law Revision Committee, *Criminal Law Revision Committee Seventh Report Felonies and Misdemeanors*, 1965). The offence remained vague and controversial despite further clarification in *Sykes v DPP*. Lord Denning wrote in his judgement that the crime itself was undoubtedly still a valid one, with a long history and that the fact that it was not often invoked was not in itself a ground for denying its existence (*Sykes v. DPP Sykes v Director of Public Prosecutions*, 1962).

Despite this long history, and indeed because of the breadth of Lord Denning’s judgement on the substance of the offence, the crime of misprision was criticised as being ‘intolerably wide’ because of the lack of restrictions upon the offence (Williams, 1961) and even ‘an embarrassment to common lawyers’ (Glazebrook, 1962). The section 38B offence is, of course, narrower in scope, but still raises questions as to the suitability of a positive obligation, backed by a criminal penalty, to report crimes committed by others. This is explored further in Chapter 3.

Section 57 and 58 of the TA 2000 are of note because of the extension in how remote from the actual occurrence of harm the criminal law now reaches. Sections 57 and 58 state:

Section 57 (1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

Section 58 (1) A person commits an offence if (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or (b) he possesses a document or record containing information of that kind.

In both cases to defend against the charge, the defendant must raise and prove the defence that possession of the article or information is not connected with the commission, preparation or instigation of an act of terrorism, as per section 57 (2) and section 58 (3). This requirement places a large burden of proof on the defence, whereas in traditional inchoate crimes the onus is on the prosecution to prove the 'substantial step' has been made towards commission of a substantive offence. The prosecution must only demonstrate "reasonable suspicion" in the case of section 57. Arguably in the case of section 58 the prosecution must show the defendant made, collected or possessed a relevant record before the defendant must prove his defence of having a reasonable excuse.

The fact that this burden has been even partially reversed is a most disquieting facet of this kind of legislation, and markedly different from almost all other criminal proceedings where the burden of proof falls almost exclusively on the prosecution. Most importantly it should be noted that section 58 does not include the word 'Intention' (or even recklessness). It is simply an offence to possess or make a document or record likely to be useful for terrorism. This offence can clearly apply to almost anyone in the country who

possess a map or a copy of the yellow pages, indeed in their judgement on the appeal of *R v G* the House of Lords clarified that 'the Crown must prove beyond reasonable doubt that the defendant (1) had control of a record which contained information that was likely to provide practical assistance to a person committing or preparing an act of terrorism, (2) knew that he had the record, and (3) knew the kind of information which it contained. If the Crown establishes all three elements, then it has proved its case against the defendant, and he falls to be convicted - unless he establishes a defence under subsection (3)' (*R v G*, [2008] UKHL 37, 2008] UKHL 37). We can see here that the Crown's case is easy to make, and it is chiefly up to the defendant to provide an adequate explanation for his behaviour.

Alongside this is the issue that as a general principle each substantive criminal offence created by the state has an attempt crime automatically appended to it. It is therefore possible that someone could be charged with 'attempting to attempt to gather information likely to be useful for terrorism'. While this seems rather absurd on the surface, it is another argument in favour of a profound disconnect between these types of preventive criminal legislation and 'traditional' criminal offences. This seems to be both a pre-inchoate crime and one with a purely preventive justification. It is not reasonable to state that possessing the kind of information this crime is specifying is a moral wrong in and of itself and neither is 'intending' to have it. Neither the mens rea, the actus reus or the combination of the two can be presented as harm in and of themselves. Tadros highlights an example of this found in *R v Mansha*; where defendant 'D' was sentenced to six years imprisonment under section 58(1)(b) of the TA 2000. 'D' had possession of a piece of paper with the name and previous address of a soldier who had served in Iraq upon it, DVDs with anti-Western Propaganda, other Islamic Propaganda, a dismantled blank-firing pistol and information about suicide bombings. 'D' had made no approach to the soldier in question,

and no evidence was presented of any plan to do so (Tadros, 2007, pg 673). This case is examined further in Chapter 3.

Regulation of Investigatory Powers Act 2000

The Regulation of Investigatory Powers Act 2000 (RIPA) was an attempt by the Labour government of the time to create statutory guidance for the use of covert surveillance by the police. Surveillance of various kinds, both public and covert, has become a key element in modern strategies of investigation and crime prevention. Until RIPA there was no statutory mechanism to control the use of covert surveillance by law enforcement (as opposed to the Security and Intelligence services which were covered by earlier Acts). One of the key reasons for the need for some sort of legislation in this vein was the passage of the Human Rights Act 1998; which had for the first time incorporated a general right to “private life, home and correspondence” in the laws of England and Wales. The outcome of two legal cases in the years preceding RIPA were also of particular importance. The first was *Halford v United Kingdom* and the second was *R v Khan and Khan v United Kingdom*.

Halford v UK concerned the judgement of the European Court of Human Rights (ECtHR) in a case where the Chief of Police for Merseyside secretly recorded the calls of the Assistant Chief Constable, with the aim of preparing for the bringing of an Industrial Tribunal case against the Force for gender discrimination. Domestically there was no law that governed the interception of communications over private lines, unlike the public network, and thus UK domestic law provided inadequate protection in this area. Importantly the court held in keeping with past cases that while Article 8 (2) of the ECHR allowed for secret measures of surveillance it was incumbent upon domestic governments to ensure that citizens had an adequate indication as to the circumstances and conditions in which their communication might be secretly monitored (*Halford v United Kingdom, Halford v. United Kingdom, 1997, § 49*).

Khan v United Kingdom reinforced the same point alongside the observation that there was no statutory general right to privacy in domestic law and that the fact that no legal framework existed for the use of surveillance devices by the police was 'astonishing' (*R V Khan (Sultan)*, *R V Khan (Sultan)*, 1996). While numerous reports and committees in the UK had highlighted this absence of privacy protection, with privacy law instead stemming from case law and more specific privacy protections (Donohue, 2006, pg 1153). While a complainant could take their case to the ECHR and argue, as in Halford, that some surveillance action had breached their Article 8 rights, this was not possible in far more accessible, and faster, domestic courts until the passage of the HRA.

However, the government did not just use RIPA to codify surveillance laws and insert the protections the HRA and ECHR that were required. In the areas of interception of communications and electronic bugging and surveillance, the Labour government used RIPA as an opportunity to expand existing powers even as it put them under increased scrutiny from newly established Commissioners (Donohue, 2006, pg 1176). Of particular note was the establishment of the power for the security services and police to establish monitoring and tracking of communications data through direct taps on internet service providers (Fitzpatrick, 2002, pg 365). A power that would later be greatly expanded by the Investigatory Powers Bill 2016.

Anti-Terrorism Crime and Security Act 2001

The Anti-Terrorism, Crime and Security Act 2001 was passed with great haste in November 2001 in the aftermath of the attack on the Twin Towers on the 11th of September 2001. Debated in the commons for only 16 hours, and with many measures within the Bill not being debated at all (Tomkins, 2002), the Act created numerous new measures and criminal offences, including many surrounding aviation security, the security and regulation of nuclear, biological and chemical weapons and materials, as well as

freezing or confiscating financial assets linked to terrorism. In addition to expanding the substantive criminal law, the Act also greatly expanded police powers, making citizens subject to more intrusive investigation when an investigation or arrest was related to terrorism (Tadros, 2007). These included additional police powers related to fingerprinting, photographing of suspects and stop and search powers (Anti-Terrorism, Crime and Security Act *Anti-Terrorism, Crime and Security Act*, 2001, §10). It also expanded the surveillance powers recently created by the RIPA (Donohue, 2006, pg 1181). Of most interest to this thesis, however, are the Act's sections on the detention of foreign citizens and the retention of communications data.

The *Anti-Terrorism, Crime and Security Act 2001* also paved the way for the introduction of the control order and its successor the TPIM. The 2001 Act allowed the Home Secretary to detain any non-British citizen indefinitely pending deportation proceedings against them, even when deportation would normally be prohibited. Prior to this the *Immigration Act 1971* contained provisions for the deportation of those who were judged a threat to national security. However, in *Chahal V United Kingdom*, the European Court of Human Rights ruled that deportation in such cases could not occur if there were substantial grounds for believing that a person would be subject to torture in the destination country (Chahal v. The United Kingdom *Chahal v. The United Kingdom*, 1996).

The 2001 Act allowed the Home Secretary to bypass this by simply detaining suspects until assurances could be made that the deportation would not breach the ECHR ruling. The use of these measures was crippled when in 2004 the Law Lords ruled that they were incompatible with the UK's responsibilities under the European Convention on Human Rights in a series of cases and appeals. In 2004 in the case of *A and Others v. Secretary of State for the Home Department*, 10 respondents challenged their imprisonment at HMP Belmarsh without trial, in accordance with section 23 of the Anti-Terrorism, Crime and

Security Act. This case culminated in a judgement in December 2004 declaring the measure to be incompatible with the UK's responsibilities to numerous articles of the ECHR (*A and Others v. Secretary of State, A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, 2004). The key part of the decision was the fact that the powers used to detain the men without trial could only be used against foreign nationals. In the judgement Lord Bingham wrote:

“the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom” (*A and Others v. Secretary of State for the Home Department A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, 2004, §43).

It is also important to note that a number of Lords (in particular Lord Hoffman) expressed doubt in their judgements that the disposition of the respondents was sufficient to meet the criteria of a “public emergency that threatened the life of the nation” which was qualifying criteria for derogation under Article 15 of the ECHR. (*A and Others v. Secretary of State for the Home Department A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, 2004, §86-97), although this contention did not form a part of the majority judgement. As a result of the House of Lords' judgment, the relevant sections of the Act were repealed and replaced with the control order regime created by the Prevention of Terrorism Act 2005 which is discussed below. However, despite the ruling, the Belmarsh detainees were not released until March 2005, after the Prevention of Terrorism Act 2005 had been passed by Parliament (Ewing and Tham, 2008, pg 670). Four

years after this the ECtHR would reach its own unfavourable judgement on the legality of the detention provisions discussed here in *A and Others v. The United Kingdom* which is discussed below in relation to the judgement's effect on the replacement control order regime.

Part 11 of the Anti-Terrorism, Crime and Security Act 2001 expanded the Secretary of State's powers over the retention of communications data initially introduced by the Regulation of Investigatory Powers Act from the previous year. A key concern with the new measures was their broad nature and their potential scope (Tomkins, 2002 pg 209). Section 102 of the act, and the first section of Part 11 reads:

(1) The Secretary of State shall issue, and may from time to time revise, a code of practice relating to the retention by communications providers of communications data obtained by or held by them.

(2) The Secretary of State may enter into such agreements as he considers appropriate with any communications provider about the practice to be followed by that provider in relation to the retention of communications data obtained by or held by that provider.

(3) A code of practice or agreement under this section may contain any such provision as appears to the Secretary of State to be necessary—

(a) for the purpose of safeguarding national security; or

(b) for the purposes of prevention or detection of crime or the prosecution of offenders which may relate directly or indirectly to national security.

(4) A failure by any person to comply with a code of practice or agreement under this section which is for the time being in force shall not of itself render him liable to any criminal or civil proceedings.

(5) A code of practice or agreement under this section which is for the time being in force shall be admissible in evidence in any legal proceedings in which the question arises whether or not the retention of any

communications data is justified on the grounds that a failure to retain the data would be likely to prejudice national security, the prevention or detection of crime or the prosecution of offenders.

While any creation or amendment to the code of practice the Secretary of State created was subject to consultation and parliamentary examination and resolution before implementation, part 11 nonetheless represented a broad increase in the state's potential ability to demand the retention of large amounts of communications data from private companies. In addition, it expanded the state's authority to examine such data in large quantities when compared to the tighter restriction initially enforced under the RIPA of 2000.

The Retention of Communications Data (Code of Practice) document that resulted from part 11 was specifically stated to be voluntary and contained sections addressing the human rights and data protection implications of the code (Home Office, *Retention of Communications Data Under Part 11: Anti-Terrorism, Crime & Security Act 2001 Voluntary Code of Practice*, 2003). Despite this, the code was heavily resisted by ISPA U.K, the umbrella organisation for UK Internet Service Providers (Chadwick, 2006, pg 279). Appendix A of the code set out the periods that communications data should be retained for the purposes of safeguarding national security. Section 11 even states that:

“The retention specification set out in Appendix A to this Code has been drafted taking into account a number of factors, including the right to respect for private life under Article 8 of the European Convention of Human Rights. The Secretary of State considers the retention periods set out in Appendix A to be both necessary and proportionate in light of the individual's right to respect for private life and the national security purposes for which the retention of data is required.”

The periods the code called for proportionate retention of communications data varied from 4 days to 12 months. By 2016 this voluntary requirement had become a statutory duty for communications providers. Of particular note is the retention of web history data. Under the 2003 code, the advised proportionate retention period for domain level web address data was 4 days. By the end of 2016, this had changed to 12 months under the Investigatory Powers Act.

Prevention of Terrorism Act 2005

The Prevention of Terrorism Act 2005 (PTA 2005) is most widely known and criticised for the creation of the control orders regime which exists, in a slightly diluted form, to this day in the form of Terrorism Investigation and Prevention Measures (TPIMs). Before the Act's repeal in 2011, 52 control orders were issued with durations ranging from a few months to four-and-a-half years (Anderson, 2012a, pg 5). In addition to the control orders regime, the PTA 2005 also created the statutory position and responsibilities of the Independent Reviewer of Terrorism Legislation.⁴ When proposed, the legislation was undoubtedly controversial. When considering the Bill, the House of Lords debated for over 30 hours. Despite this, just one year later, when the Bill was up for renewal, only 13 MPs were present for the debate (Zedner, 2007, pg 176). Control Orders bring together a whole host of issues with ideas of preventive justice and pre-punishment and should be understood and examined from multiple angles such as human rights discourse, the desired reach of the criminal justice system, and broader social and political philosophy.

⁴ Although the position had existed at the request of and appointment by parliament since 2001 and there is a history of independent review stretching back to the 1970s *History of the Independent Reviewer of Terrorism Legislation* (2017). <https://terrorismlegislationreviewer.independent.gov.uk/history/>: Independent Reviewer of Terrorism Legislation. Available at: <https://terrorismlegislationreviewer.independent.gov.uk/history/> (Accessed: 14/07/2017 2017).

Non-criminal measures that involve administrative or executive detention are not new in the UK. Similar thinking led to the measures that were used to detain almost 2500 people suspected of involvement in terrorism in Northern Ireland in 1971-1972. These in turn were derived from similar measures and laws passed during colonial occupation of territories including Palestine, Singapore and Malaysia to enable the internment of those suspected of being involved with terrorism (Ashworth and Zedner, 2014, pg 182). The PTA 2005 was passed in early 2005 in large part because of the results of *A and Others v. Secretary of State for the Home Department* discussed above. Despite winning this case, the ten respondents were detained until the PTA 2005 was passed in March of 2005, and all ten immediately became subject to the newly created Control Orders under section 3(1)(c) of the act.

A Control Order as defined by the PTA 2005 Act is an order “against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism” (Prevention of Terrorism Act *Prevention of Terrorism Act 2005*, 2005). §2 (1) of the PTA 2005 gave the Secretary of State the executive authority to make a control order against an individual if they had “reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual”. These grounds are widely considered to be have been very weak given the severity of the restrictions that could be imposed.⁵

⁵ See as examples:

Ewing, K. D. and Tham, J.-C. (2008) 'The continuing futility of the Human Rights Act', *Public Law*, Winter 2008(4), pp. 688-693.

Tadros, V. (2007) 'Justice and Terrorism', *New Criminal Law Review*, 10(4), pp. 658-689, Available: University of California Press. Available at: www.jstor.org/stable/10.1525/nclr.2007.10.4.658 (Accessed 27/06/2016).

Murphy, C. C. (2015) *EU Counter-Terrorism Law*. Oregon: Hart Publishing.

Ashworth, A. and Zedner, L. 2014. *Preventive Justice*. 1st ed. Oxford: Oxford University Press.

Control Orders were further delineated into two categories: derogating and non-derogating. Non-derogating orders required approval by a High Court Judge, but the Secretary of State could impose the order itself before receiving judicial permission to do so if permission was sought at the earliest possible time. Moreover, permission for a control order could only be withheld if the presiding High Court judge considered the Home Secretary's decision to be 'fundamentally flawed'.

The subject of a control order was also entitled to a review hearing. While it was possible for a controlee to be represented at these hearings, additional restrictions such as closed hearings and the use of a Special Advocate for the controlee could be imposed. These restrictions had a severe impact on the subject's ability to defend themselves as they were not able to see all the evidence against them. According to Zedner, this special advocate would not be allowed to speak to his client without special permission once he had seen the evidence that necessitated a closed hearing. (Zedner, 2007, pg 177) This is not quite accurate as the Civil Procedure Rules do give the Special Advocate the option of applying to the court for permission to speak to their client after hearing restricted evidence.⁶ However, Lord Bingham notes in his judgement *Secretary of State v MB and AF* that such permission was not given in practice.⁷ The substantive point Zedner makes therefore holds, that the control order review proceeding eschews protections that would apply in criminal cases such as the defendant being entitled to review all evidence against them. (Zedner, 2007, pg 179)

Derogating control orders (of which none were issued before the repeal of the relevant sections of the PTA 2005) would have involved a deliberate breach of the right to liberty, as defined by Article 5 of the ECHR, because the conditions of the control order would be

⁶ Specifically, sections 76.25 and 76.28(2) of Civil Procedure Rules which are unchanged despite the later changes to the control order regime.

⁷ *Secretary of State for the Home Department v MB [2007] UKHL 46* Section 35

onerous enough to amount to a deprivation of liberty. Derogating orders were legislated as requiring to be proved only 'on the balance of probabilities', the standard of proof for civil cases and was condemned an 'anathema both to the common law's tradition protection for the liberty of the individual and to the guarantees in modern human rights' (Joint Committee on Human Rights Twelfth Report of Session, *Joint Committee on Human Right Twelfth Report of Session 2005-6006*, 2006). This was especially concerning at the time given that the McCann case and appeal mentioned above in relation to ASBOs had already observed that the burden of proof for ABSOs should be the criminal standard despite the ASBOs civil implementation, precisely because of the burdensome restrictions that could potentially be levied (*R (McCann) v Crown Court Clingham (formerly C (a minor)) v Royal Borough of Kensington and Chelsea; Regina v Crown Court at Manchester Ex parte McCann and Others*, 2002, §37). Such an order would only have been allowed in the case of a 'public emergency' in the statute and would have required approval by both Houses of Parliament.

Much like ASBOs before them, the individual named in the control order could be subject to a number of negative obligations. The act itself laid out several possible examples of obligations in Section 1 (4):

- (A) a prohibition or restriction on his possession or use of specified articles or substances;
- (B) a prohibition or restriction on his use of specified services or specified facilities, or on his carrying on specified activities;
- (C) a restriction in respect of his work or other occupation, or in respect of his business;
- (D) a restriction on his association or communications with specified persons or with other persons generally;

(E) a restriction in respect of his place of residence or on the persons to whom he gives access to his place of residence;

(F) a prohibition on his being at specified places or within a specified area at specified times or on specified days;

(G) a prohibition or restriction on his movements to, from or within the United Kingdom, a specified part of the United Kingdom or a specified place or area within the United Kingdom;

(H) a requirement on him to comply with such other prohibitions or restrictions on his movements as may be imposed, for a period not exceeding 24 hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with other obligations imposed by or under the order;

(I) a requirement on him to surrender his passport, or anything in his possession to which a prohibition or restriction imposed by the order relates, to a specified person for a period not exceeding the period for which the order remains in force;

(J) a requirement on him to give access to specified persons to his place of residence or to other premises to which he has power to grant access;

(K) a requirement on him to allow specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened;

(L) a requirement on him to allow specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force;

(M) a requirement on him to allow himself to be photographed;

(N) a requirement on him to co-operate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means;

(O) a requirement on him to comply with a demand made in the specified manner to provide information to a specified person in accordance with the demand;

(P) a requirement on him to report to a specified person at specified times and places.

The Act goes even further than this in one respect, making an explicit power for control orders to “prohibit or restrict the controlled person’s movements including, in particular, power to impose a requirement on him to remain at or within a particular place or area (whether for a particular period or at particular times or generally)” (PTA 2005, *Prevention of Terrorism Act 2005*, §5). Similar to ASBOs before them, Control Orders are a hybrid of the criminal and civil law; a ‘two-step prohibition’.

Unlike traditional post-hoc criminal offences and as laid out by Simester and von Hirsch, control orders and similar measures operate on a three-incident timeline:

T0: Qualifying behaviour by Defendant D occurs;

T1: A Two-Step Prohibition (TSP) Order is issued, predicated on proof of D’s behaviour at T0, but forward-looking in character;

T2: Conduct by D occurs in contravention of the TSP, leading to criminal prosecution for violation of the order (predicated on proof of conduct at T2). (Simester and von Hirsch, 2006, pg 175)

In the specific case of Control orders, this can be broken down further. At T0 defendant D exhibits ‘qualifying behaviour’. This behaviour is whatever leads the Secretary of State to have “reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity” as explained above. Control Orders are an extreme example of

an 'individualised law'. Individualised laws are those that aimed only indirectly at specific harmful conduct by identifying an individual or group deemed likely to participate in that harmful conduct and legislating directly against that individual or group rather than targeting the harmful conduct directly (Tadros, 2007, pg 683). Control Orders, of course, take this to the extreme by creating, in essence, an individualised criminal law for the person subjected to them. Taken as a whole control orders were imposed in such a way as to severely damage the principles of fair trial and adversarial justice (through the use of civil burdens of proof, post-hoc judicial review and Special Advocates), and the presumption of innocence (by their openly preventive nature and implementation). Three core criticisms are levelled at control orders, and all three would see litigation and much academic and journalistic comment over the next several years.

The first criticism is the type and seriousness of the sanctions available and applied, which are undoubtedly punitive in nature if not in intent. These include curfews, tagging, reporting requirements and limits on communication and personal association. Naturally, these all come with attendant psychological burdens for both the controlee and their family and friends (Zedner, 2007, pg 180-2).

The second criticism was one of process. Control Order hearings were subject to special restrictions, while hearings were necessary to apply or confirm control orders these proceedings could be closed to the public to protect evidence or sources supplied to prove the necessity of the order; a very different process than that of an open court used in the vast majority of civil and criminal trials. (Kelman, 2016, pg 265-266)

The third criticism is one of implementation. As discussed above, when the Secretary of State's decision to impose a control order was made it was only necessary that they had 'reasonable suspicion' of the suspect's involvement in qualifying conduct, or 'on the balance of probabilities' in the case of derogating control orders. (Tadros, 2007, pg 668)

Control Orders soon came under judicial review,⁸ with first case being heard in early 2006.⁹ This case and the majority of subsequent cases centred around two key legal issues – the first was the process by which the control orders were issued (and compatibility with Article 6 on the ECHR), and the second the extent to which controls orders restricted the liberty of those subject to them (and compatibility with Article 5 of the ECHR). In short, while a ‘restriction of liberty’ would be acceptable under the ECHR, a ‘deprivation of liberty’ would not be. In addition to this, questions would also be raised about the rights of appeal/effective remedy (guaranteed by Article 13 of the ECHR). While this is not an exhaustive list, it is prudent to look at four cases that tested the legality of control orders in the field in the first couple of years after their implementation.

Initially, the imposition of the control orders was upheld, but the Mr Justice Sullivan found in *Secretary of State v MB* that the process by which the control order was placed upon the defendant fell afoul of the European Convention on Human Rights Article 6, which guarantees a ‘fair and public hearing’. The judge, therefore, made a declaration of incompatibility which the Secretary of State appealed. This appeal was later upheld but not before control orders appeared again in front of Justice Sullivan in June of 2006 in *Secretary of State v JJ and Others*¹⁰ which alleged that the control orders imposed upon the respondents constituted breached Article 5 of the ECHR. Justice Sullivan noted the extremely restrictive nature of the control orders these six new respondents were under and the case was heard before the results of the Home Secretary’s appeal in the case of *Secretary of State vs MB*. The six respondents in this new case were under more onerous

⁸ Control orders were also criticised in many other areas from various sources including the Joint Committee of Human Rights in its Twelfth Report on Session 2006, and the Independent Reviewer of Terrorism Legislation, Lord Carlile in his first report on the legislation also in 2006 as well as numerous academic sources.

⁹ *MB, Re [2006] EWHC 1000 (Admin)*

¹⁰ *Secretary of State for the Home Department v JJ & Ors [2006] EWHC 1623 (Admin)*

restrictions than MB and were perceived as being close to the border of derogation under the 2005 Act. While there were slight differences between the specific control orders imposed, they had in common 16 categories of restriction including electronic tagging, an 18-hour curfew, daily reporting, severe restrictions on allowed visitors, meetings outside the subject's residence and communications, submission to police searches, a ban on owning or using communications technology and severe restrictions on travel. Justice Sullivan found that all six orders amounted to breaches of the respondents' Article 5 rights. Importantly existing case law, especially *Guzzardi v Italy*¹¹ meant that the totality of the restrictions on the respondents' liberty, not the individual restrictions, were the correct standard to judge the control orders' compatibility with Article 5. Given that the restrictions imposed were very great, Justice Sullivan was led to the conclusion that there was "no doubt whatsoever that the cumulative effect of the obligations has been to deprive the respondents of their liberty in breach of Article 5 of the Convention. I do not consider that this is a borderline case. The collective impact of the obligations in Annex I could not sensibly be described as a mere restriction upon the respondents' liberty of movement".¹² Comparing the restrictions to life in an open prison, noting that the orders were imposed by the executive and the evidential bar of 'reasonable suspicion' was far below the criminal standard, as well as the lack of an appeal process, led Justice Sullivan to quash the control orders.

In early 2007 the High Court heard the case of *Secretary of State v E*.¹³ E was one of the people previously held in detention at HMP Belmarsh under the Anti-Terrorism Crime and Security Act 2001 (discussed above). By 2007, he was one of two of those original detainees still under the control order that had been issued in the wake of his release. Much like the

¹¹ *Guzzardi v. Italy* - 7367/76 - Chamber Judgment [1980] ECHR 5

¹² §73, *Secretary of State for the Home Department v JJ & Ors* [2006] EWHC 1623 (Admin)

¹³ *Secretary of State for the Home Department v E* [2007] EWHC 233 (Admin)

MB and JJ cases discussed above, the principal ground upon which E based his argument that the control order should be quashed was a breach of Article 5 of the ECHR due to the order constituting a deprivation of liberty. In addition to this, an argument was put forward in terms of the Act itself, that the obligations of the control order were disproportionate enough that both E and his family's rights under Article 8 of the ECHR had been breached. Article 8, the 'Right to respect for private and family life' includes an open-ended protection for the holder from undue interference by a public authority.¹⁴ This is an accusation that has been levelled against Control Orders and other anti-terrorism provisions since their inception in academic critique of the legislation (Zedner, 2007, pg 181; Hudson, 2003) but this was the first time the issue was raised as a matter of law in the functioning of control orders specifically. Concerning E's wife (referred to in the judgement as 'S') Justice Beastson wrote that he "recognised the considerable impact of the control order on S and the children who are not suspected of terrorism-related activities. On the evidence before me the long-term impact on the children is likely to be significant and detrimental to their mental health. S is clearly significantly affected, particularly in the light of her dependence on E and the understandable cultural factors".¹⁵ However, he found that national security concerns raised by the assessment of E's likelihood to engage in terrorism-related activities in the future was serious enough to warrant the impact on his and his family's private lives. This is an area of discussion we shall return to in Chapter 3 concerning those citizens in the 'social orbit' whom the state deems to be threatening or

¹⁴ "Article 8 – Right to respect for private and family life:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

http://www.echr.coe.int/Documents/Convention_ENG.pdf

¹⁵ §276, *Secretary of State for the Home Department v E* [2007] EWHC 233 (Admin)

suspicious. The end result of the case, like those before it, was that the control order was deemed incompatible with Article 5, constituting a deprivation of liberty for E, and the order was quashed.

Soon after this, the High Court saw another case, *Secretary of State v AF*,¹⁶ in which AF challenged the conditions of the control order he had been placed under. This was the second such order as, because of the results of the earlier cases, the control order had been re-issued with a shorter curfew (ten hours). The case raised again the issue of restriction versus deprivation of liberty. While the restrictions placed upon AF were less restrictive than those under consideration in the JJ and Others case, the judge decided they still fell beyond the scope of a restriction of AFs liberty and quashed the control order.

These four cases form the basis for a joint opinion by a House of Lords Appellate Committee in 2007, bringing together a summary of the issues control orders had raised since their implementation. The questions under direct consideration were whether the imposition of the control orders in the four cases breached Article 6 of the ECHR and whether the measures imposed breached Article 5. Lords Bingham, Carswell and Brown along with Baroness Hale concluded the control orders were rightfully quashed, with Lord Hoffman dissenting.

Lord Bingham of Cornhill and Lord Hoffman both stress that at some point in a process such as the imposition of control orders there needs must be a value judgement made as to whether the restrictions imposed constitute a violation of ECHR Article 5(1). Deprivation of liberty in case law encompasses far more than physical restraint or confinement of a person (a prison sentence being the stand-out example). The degree of the key elements present in a prison (restriction on movement, activity and association etc.) are obviously important factors, but they are not the only type of restrictions that should be considered.

¹⁶ *Secretary of State for the Home Department v AF (Rev 1)* [2007] EWHC 651 (Admin)

The importance for Article 5(1) compliance is the total impact on a citizen's life from the restrictions put in place, rather than any single specific element to the control order (even severe ones such as long curfews). This is stressed in the judgement and is an important point to consider moving forward. If there is a value judgement to be made in this and similar preventive legislation, then it is important to consider the position of whoever is making the judgement and what constraints they are under.

The broad thrust of the Lords' ruling meant that curfews the length of which had been imposed in the most serious cases (18 hours) were unlawful, but that shorter curfews that did not amount to a deprivation of liberty were permissible. For example, Lord Bingham noted that the 12-hour curfew that was imposed upon 'E' was acceptable. Although it is important to note that Lord Bingham's comments are made in the context that E, unlike other subjects of control orders, was not forced to relocate and continued to live with his family and lacked many of the harsher restrictions others had faced such as geographical restrictions outside of curfew hours¹⁷. Despite the ruling (and the subsequent need for the government to re-think its control order strategy), several areas of concern received little attention from the committee such as whether the imposition of control orders was in compliance with Article 6(1) of the ECHR, the right to a fair trial (Forsyth, 2008, pg 4). In *JJ* Baroness Hale stated that she believed that not every control order would be held as compliant with Article 6 by the ECtHR, but this was not explored in any greater detail.¹⁸

The issue of compliance with Article 6 would soon after appear in front of the High Court and the Court of Appeal in the case of *Secretary of State v AE, AN and AF*. The Court of Appeal dealt with the application of Article 6 in the initial 3 cases together, addressing the issues of the requisite burden of proof and the use of closed proceedings and Special

¹⁷ §24, *Secretary of State for the Home Department v JJ & Ors* [2007] UKHL 45

¹⁸ §66, *Secretary of State for the Home Department v JJ & Ors* [2007] UKHL 45

Advocates. On the issue of the burden of proof little was discussed except to re-affirm the judicial interpretation in *Secretary of State v MB* (discussed above) that upheld that, provided the civil proceedings involved in the imposition were fair, the requirement of 'reasonable suspicion' did not breach Article 6 of the ECHR¹⁹. The issue of the burden of proof would not see full judicial scrutiny before the abolition of control orders in 2011, despite criticism from academic and parliamentary sources.²⁰

Much more attention was given to the question of the use of closed hearings and Special Advocates, centring around the issue of how Articles 5 and 6 of the ECHR applied to the situation in which the defendant in the imposition of a control order would not at any point have personal access to all of the evidence against him, and that once his Special Advocate had seen that evidence they would no longer be able to contact the defendant. The argument under consideration in the words of the court was that, despite the controlee's acceptance they were not entitled to full details of both the case against them and the evidence used to support it, they were entitled to an "irreducible minimum of information" in order for the proceedings to be acceptable under Article 6(1).²¹ The problem around this was explored by the Lords in *Secretary of State for the Home Department v MB and AF*. This case expanded on the process of the implementation of control orders and the problem with the differences between the 'open case' – being the information the (proposed) controlee had direct access to – and the 'closed case' – being the material that only the Special Advocate had access to. Thus, the contention of *MB* and *AF* was that the material available in the open case was not sufficient to fulfil the requirement that they should be able review an 'irreducible minimum' of the evidence against them, even if accepting that

¹⁹ §67, *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140

²⁰ In particular, the Joint Committee on Human Rights Twelfth Report Session 2005-06 *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005* which recommended that the standard of proof be raised to the 'balance of probabilities' for non-derogating orders and 'beyond reasonable doubt' for derogating ones.

²¹ §26, *Secretary of State for the Home Department v AF & Ors* [2008] EWCA Civ 11487

some evidence might rightly not be available to them directly and only to their Special Advocate. Lord Bingham felt the fact that such an 'irreducible minimum' existed was established by Lords of Appeal in *Roberts v Parole Board* in recognition that such was needed in order to satisfy Article 5(4) of the ECHR.²² However, this opinion was not shared by the majority of the Lords of Appeal with Baroness Hale commenting:

"It follows that I cannot share the view of Lord Hoffmann, that the use of special advocates will always comply with Article 6; nor do I have the same difficulty as Lord Bingham, in accepting that the procedure could comply with Article 6 in the two cases before us. It is quite possible for the court to provide the controlled person with a sufficient measure of procedural protection even though the whole evidential basis for the basic allegation, which has been explained to him, is not disclosed."

It was broadly this approach that the Court of Appeal took when examining the appeals of AE, AF and AN, expanding it out to several points before making judgements on the individual cases. The appeal of AE was dismissed, but the appeals of AN and AF were allowed. Despite this judgement, the Court thought it in the public interest to give permission for all three to appeal to the House of Lords on all issues relating to Article 6,²³ which they duly did. Before this appeal could be heard, Grand Chamber of the ECtHR reached a judgement in *A and Others v. The United Kingdom*. This case was chiefly concerned with the provisions under Part 4 of the Anti-Terrorism, Crime and Security Act 2001 to detain foreign nationals suspected of terrorism which had been repealed in 2005 as discussed above. The Grand Chamber ruled against the UK, expressing similar concerns

²²§17, *Roberts v Parole Board* [2005] UKHL 45

²³§105, *Secretary of State for the Home Department v AF & Ors* [2008] EWCA Civ 1148

and opinions to the ones of the House of Lords that had led to the repeal of the measures and their replacement with the control order regime.

The reason the ECtHR's judgement was of interest in the case of Special Advocates and closed hearings was that the court tackled this subject in the discussion of the Special Immigration Appeals Commission (SIAC) which had used a similar system of Special Advocates to hear sensitive evidence in closed hearings that were unavailable to the person appealing against their detention. The court unanimously found that Special Advocates potentially performed an important role in situations where closed hearings were necessary for reasons of national security and, provided that there was not 'unjustified secrecy', in principle both closed hearings and Special Advocates were permissible under the ECHR. The permissibility of non-disclosure itself had been affirmed in *Chahal v United Kingdom*.²⁴ Much like the Court of Appeal, the Grand Chamber emphasised the requirement to examine such measures on a case-by-case basis while noting that:

“Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.”²⁵

While this case dealt with the matter of detention (similar in character to imprisonment) rather than with the kind of limitations imposed by control orders in civil proceedings, the Lords of Appeal took considerable note of the judgement in their opinion in *Secretary of State v AF, AN and AE*.²⁶ Indeed, the ECtHR's judgement was considered of sufficient strength as to supersede the findings of the Court of the Appeal judgement because of the

²⁴ §131, *Chahal v. The United Kingdom - 22414/93 - Grand Chamber Judgment [1996] ECHR 54131*

²⁵ §220, *A. and Others v. The United Kingdom OM - 3455/05 [2009] ECHR 301*

²⁶ *Secretary of State for the Home Department v AF & Anor [2009] UKHL 28*

assertion that any decision based solely or decisively on closed material breached Article 5(4). This was reflected in the majority opinion of the Lords of Appeal which was supported by all involved, albeit very grudgingly by Lord Carswell and Lord Rodger, the latter ending his opinion "*Argentorum locum, iudicium finitum* - Strasbourg has spoken, the case is closed."²⁷

This decision was controversial as the tone of the judgment seemed to indicate that many of the Lords only acceded grudgingly to the majority opinion, citing that they had little choice under the UK's responsibility to Section 2 of the Human Rights Act. This section however only states that the higher courts of the United Kingdom must take Strasbourg jurisprudence into account (Kavanagh, 2010, pg 844). The death knell for the control order regime as it was originally envisaged would come with the Joint Committee for Human Rights (JCHR) report on the renewal of the control order regime in 2010 which was published a few months before the 2010 General Election. While the reports of the JCHR on control orders had been consistently negative, the 2010 report added extra weight to this trend highlighting the result of *A and Others v United Kingdom*. The JCHR's opinion was that despite this litigation control orders were substantially unreformed and likely to result in even higher costs in the future due to protracted litigation. (JCHR, 2010, pg 38) The Coalition Government would subsequently launch a review of counter-terrorism and security powers which is discussed further below. This marked the end of control orders and the beginning of their replacement, the Terrorist Prevention and Investigation Measure (or TPIM).

Terrorism Act 2006

The Terrorism Act 2006 was passed in the wake of the detonation of four bombs in London on the 7th July 2005. The Act proved controversial in both its creation and passage

²⁷ *ibid.* § 98

through Parliament. In the timeline of legislation concerned with prevention, the Terrorism Act 2006 demonstrates a parallel course to control orders. Much of the Terrorism Act 2006 is concerned with the creation of new criminal offences including 'encouragement of terrorism', 'disseminating terrorist publications', 'preparation of terrorist acts' and 'training for terrorism' along with multiple criminal offences centred on the making of radioactive devices or the possession of the radioactive material required to create these.

The offence of 'encouragement of terrorism' requires either an intentional or reckless publication of a statement that directly or indirectly encourage or induces another party to commit, prepare or instigate acts of terrorism or convention offences (these being a wide variety of more traditional criminal offences such as offences against the person, aviation and maritime security offences etc.) Incitement as an inchoate offence has a long history in the criminal law, along with attempts and conspiracy. Incitement to commit any crime (except conspiracy) was itself a crime under the Criminal Law Act of 1977 (Duff, 1997, pg 135) until the relevant section was repealed and replaced with various offences of 'encouraging or assisting crime' under Part 2 of the Serious Crime Act 2007 (which is discussed further below). The difference between the terrorism-specific offence and the broader offence of incitement and later encouragement/assistance was the addition of a subjective 'reckless' condition (as an alternative to intentional commission) to the mens rea of the crime under 1(1)(b)(ii) of the Terrorism Act 2006. An intention to directly or indirectly encourage acts of terrorism etc. was not necessarily required. A similar provision was originally part of the Racial and Religious Hatred Act 2006 but was defeated at the Bill's Third Reading in January 2006 (Kay Goodall, 2007, pg 90). The fact that this 'reckless' condition survived with little comment, where a similar provision would fail just months later under heavy criticism, is arguably indicative of the difference in approach and scrutiny terrorism Bills have historically received. A second unique element to this offence was the addition of the 'glorification' of the commission or preparation of terrorist acts under

section 1(3) of the Act which expands the offence beyond the usual bounds of incitement or encouragement in specific cases. This expansion of the offence allows it to cover actions that encourage the creation of an ideological climate where terrorism becomes more likely, even if it does not directly encourage terrorist acts (Douglas, 2014, pg 150). The second new offence of ‘dissemination of terrorism publications’ follows broadly similar lines to encouragement, with the same additional ‘reckless’ mens rea. Notably, concerns over this offence were cited as the reason the British Library declined to curate a digital archive of the Taliban Sources Project, which was widely reported in the media.²⁸ Despite this, few people have been charged with the offence; 28 since the legislation was passed. However, the increasing use of the internet and social media by extremist groups (Helmus, York and Chalk, 2007, pg 1) may mean this offence being more widely prosecuted – possibly borne out by the fact that 22 of the 28 charges occurred within the last 4 years.²⁹

Section 5 of the Terrorism Act 2006 created the offence of ‘preparation of terrorist acts’,. This offence was similar in character to some of the new offences created under the Terrorism Act 2000 and constitutes the most serious ‘pre-inchoate’ crime. Due to the remoteness of the qualifying conduct and seriousness of the penalty, it represents the quintessential example of the reach of pre-inchoate crimes. Much in the same way that control orders exemplify the reach of hybrid criminal/civil individual prohibitions. The text of the offence reads:

- (1) A person commits an offence if, with the intention of—
 - (a) committing acts of terrorism, or

²⁸ The most thorough example being <http://lj.libraryjournal.com/2015/09/digital-content/british-library-declines-taliban-archive-new-hosts-step-up/> Accessed 24/09/2017

²⁹ Centre, N. C. T. P. O. 2017. Statistics on the operation of police powers under the Terrorism Act 2000 and subsequent legislation. *In*: operation-police-powers-terrorism-mar17-tables.xlsx (ed.) Excel/365. www.gov.uk: Home Office. Table A.08a accessed 13/09/2017

(b) assisting another to commit such acts, he engages in any conduct in preparation for giving effect to his intention.

(2) It is irrelevant for the purposes of subsection (1) whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally.

(3) A person guilty of an offence under this section shall be liable, on conviction on indictment, to imprisonment for life.

This offence was to do date the most far-reaching and serious pre-inchoate crime with the potential for a life sentence upon conviction. Terrorism offences are often critiqued on the basis that they are redundant; any criminal action taken in the name of some political or fear-causing agenda is very likely already a crime, and many legislative actions are aimed not at genuine harm but at public reassurance (Parker, 2007, pg 753). Some offences, like this one undoubtedly expands the criminal law even if the broad crimes it seeks to preempt or prevent (such as murder, detonation of explosive devices etc.) are obviously crimes regardless of the motive. This crime is notably distinct from other offences that are aimed at prevention because of the scope of the qualifying Actus Reus, namely engaging in “any conduct in preparation for giving effect to his intention”. Since the passing of the Act, 104 people have been convicted after being principally charged with Preparation for Terrorist Acts. This is more than any other single principle offence in crimes judged to be related to terrorism (even if the range is extended back to September 11th, 2001).³⁰ Offences such as this are prime candidates for reform, the qualifying action for the crime being so wide in scope.

By far the most controversial measure in the Terrorism Act 2006 was the extension of pre-charge detention. The stated reason for the increase was largely the complexity, and

³⁰ Ibid. Table A.08a

difficulty, of investigating persons arrested but not yet charged on suspicion of one or more terrorism offences. The proposed measure received broad support from senior figures in the constabulary such as Andy Hayman, Assistant Commissioner of the Metropolitan Police³¹ and Michael Todd, then Chief Constable of Greater Manchester police.³² Ordinarily, under the Police and Criminal Evidence Act 1984, once arrested a suspect can only be held without charge for a maximum of 24 hours (although an application to a Magistrate's Court for detention of up to 96 hours can be made in the case of serious offences). Any application must fulfil 3 criteria under section 42 (1) of the aforementioned Act:

- a) The detention of that person without charge is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him;
- (b) An offence for which he is under arrest is an indictable offence; and
- (c) The investigation is being conducted diligently and expeditiously

Additionally, there are numerous protections to the effect that, unless charged, an arrested person must be released (potentially on police bail) as soon as there is no reason to hold them further.³³ This practice of any pre-charge detention being as short as possible is re-affirmed by commitments under the Human Rights Act 1998, as the ECtHR has consistently recognised three major principles when considering how Articles 5 and 6 of the ECHR (Right to liberty and Security and the Right to a Fair Trial): the presumption of innocence and liberty; the need to individually assess cases; and that the least restrictive regime possible (Ashworth and Redmayne, 2010, pg 229-230). These principles should be

³¹ <http://www.statewatch.org/news/2005/oct/met-letter-terror-law.pdf> 03/30/2017

³² <https://www.theguardian.com/politics/2005/nov/07/terrorism.uksecurity>,
<https://web.archive.org/web/20080210145019/http://www.timesonline.co.uk/article/0%2C%2C59-1860635%2C00.html> 03/03/2017

³³ <https://www.legislation.gov.uk/ukpga/1984/60/contents> 01/10/2017

of increased importance when dealing with restrictions before a charge has been levied. Under section 41 of the Terrorism Act, 2000 potential pre-charge detention in terrorism cases had already been increased to 7 days and then to 14 days in section 306 of the 2003 Criminal Justice Act. After much debate, the final text of the Terrorism Act 2006 extended pre-charge detention to 28 days. In addition, the Terrorism Act 2006 expanded the list of potential reasons for extended pre-charge detention from the Terrorism Act 2000 which as originally passed used language similar to the Police and Criminal Evidence Act 1984 mentioned above. The amended section (no. 32) now gave the grounds for extensions as:

(1A) The further detention of a person is necessary as mentioned in this subparagraph if it is necessary—

(a) To obtain relevant evidence whether by questioning him or otherwise;

(b) To preserve relevant evidence; or

(c) Pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence.

These grounds are, at least potentially, much wider than the grounds for offences not covered by the various terrorism acts, another way in which these laws differ substantially from 'regular' offences and dilute protections for those being investigated for offences related to terrorism (by the UK Government's definition). Subsection (c) in particular is wide-reaching. Given how much evidence investigators may have to go through, it would seem easy to justify the full 28 days of pre-trial detention on matters such as forensic analysis of documents or computer equipment alone. The 28-day pre-charge detention extension under the Terrorism Act 2006 expired in January 2012 (Zedner, 2014, pg 116) and

the 14 day period was confirmed as the statutory maximum a few months later by the Protection of Freedoms Act 2012.³⁴

Serious Crime Act 2007

A brief mention of the Serious Crime Act 2007 is relevant to our discussion of preventive criminalisation and the broader trends of pre-emptive and preventive justice. The Serious Crime Act 2007 created a new type of control order aimed at those convicted, or suspected, of involvement in 'serious crimes' and it widely reformed inchoate crimes in English and Welsh law with the introduction of a range of offences relating to encouraging or assisting others in an offence. Schedule 1 makes provision for the making of a new type of control order. The Act lists numerous crimes, chiefly relating to the supply of illegal drugs, human trafficking, prostitution, firearms offences and fraud – although this is not an exhaustive list. Indeed, the list is large enough, and imprecise enough, to cover offences such as freshwater fishing with a spear.³⁵ The conditions for the implementation of a Serious Crime Prevention Order (SCPO) are arguably tougher than those for a terrorism-related Control Order (or later TPIM) but can still be imposed when the controlee has not been convicted of a crime (although this is also an option). Under section 2 of the Serious Crime Act 2007, the High Court or Crown Court may impose a SCPO in civil proceedings (despite the latter's criminal role) upon some who:

- (a) Has committed a serious offence in England and Wales;
- (b) Has facilitated the commission by another person of a serious offence in England and Wales, or

³⁴ <http://www.legislation.gov.uk/ukpga/2012/9/section/57/enacted> 04/07/2017

³⁵ Schedule 1 of the Serious Crimes Act covers all offences under section 1 of the Salmon and Freshwater Fisheries Act 1975, which includes this prohibition.

(c) Has conducted himself in a way that was likely to facilitate the commission by himself or another person of a serious offence in England and Wales (whether or not such an offence was committed).³⁶

The burden of proof for the imposition of a SCPO in the Serious Crime Act itself is the civil standard (under Section 35). There was significantly less legal pushback from the courts in the case of SCPOs than in the case of the original control orders or their ASBO forebears but one remark in the appeal of *R v Hancox and Duffy*³⁷ did serve to highlight that “the court, when considering making such an order, is concerned with future risk. There must be a real, or significant, risk (not a bare possibility) that the defendant will commit further serious offences (as defined in s 2 and Schedule 1) in England and Wales.” While the appeals in question were dismissed, this was an important step in clarifying the level of risk that warranted the imposition of an SCPO that was absent in the Serious Crimes Act itself. The SCPO demonstrates that preventive measures such as control orders were not to be confined to areas of the potentially the most serious harms (such as terrorism), areas of broad political and/or public concern - such as that surrounded anti-social behaviour in the lead up to the 1997 election (Macdonald, 2003, pg 630-631) – or the more limited kinds of preventive order that preceded ASBOs such as Football Banning Orders.

The second area worth discussing in relation to Serious Crimes Act 2007 was the creation of new offences in sections 44 to 46 relating to a defendant performing an act that is capable of encouraging or assisting in the commission of a substantive offence. What separates these new inchoate offences from older offences (such as attempt, conspiracy or incitement) is that the new offences can be committed even if there had not been effective

³⁶ <https://www.legislation.gov.uk/ukpga/2007/27/contents> Section 2 11/10/2017

³⁷ *R v Hancox and Duffy* [2010] EWCA Crim 102
<http://www.bailii.org/ew/cases/EWCA/Crim/2010/102.html> 15/10/2017

encouragement or assistance in the substantive offence, and the perpetrator of that offence did not need to know or realise that any encouragement or assistance has occurred. (Simester *et al.*, 2016, pg 294). This extension of inchoate liability demonstrates another line of preventive justice similar to that explored in the new criminal offences, hybrid orders and other measures discussed above. However, much like the point concerning SCPOs above it demonstrates a pattern of expanding criminalisation. In this instance, the expansion is potentially huge as the encouragement and assistance offences contain no notion of remoteness from the substantive crime (or its attempt) (Simester *et al.*, 2016, pg 297). While offences such as Preparation of Terrorist Acts or Encouragement of Terrorism under the Terrorism Act 2006 already gave prosecutors the ability to charge suspected terrorists for similar crimes (arguably even wider in scope as shown above) to those covered by this change, it can be taken as another sign of pattern of expanding criminalisation and of the increasing concentration on risk and future uncertain harms. This is reflected not just in the sheer number of offences but also in moving the limits of criminalisation further back to a time more remote from the harm.

Counter-Terrorism Act 2008

While the 2005 and 2006 Terrorism Acts represent the landmark legislation concerning terrorism, the Counter-Terrorism Act 2008 further expanded the number of criminal offences related to terrorism and reinforced the theme that such Acts were being driven by preventive concerns. The Act is of interest for both the introduction of more criminal offences based on potential risk of future harm (such as the photography restrictions) and a third vein of preventive action. Similar in theme to measures such as the expanding of the timeline of liability in offences like preparation of terrorist acts, the Counter-Terrorism Act 2008 granted broad powers to the investigators of such offences, on top of the considerable extra powers granted to them in the previous seven years. The Act also

markedly increased the potential criminal penalties for various crimes by introducing 'terrorism connection' as an aggravating factor in sentencing.³⁸

The first part of the Counter-Terrorism Act 2008 grants the police and security services various powers in addition to those these bodies already possessed and those granted by the Terrorism Act 2000 to deal with the threat from Terrorism³⁹ (which, as discussed above, is potentially a very wide range of cases given how broad the definition of terrorism is in that Act). One example from the Counter-Terrorism Act 2008 is a new provision to remove documents (including in electronic format) for examination in order to determine whether those documents should be 'legally seized'.⁴⁰ While there is a limit as to how long such documents can be held (a maximum of 96 hours including authorised extensions) it is hard to resist the idea that at a basic level such documents are being seized in order to determine whether they can be legally seized under measures such as Sections 19-22 of the Police and Criminal Evidence Act 1984 (PACE). Like many other measures discussed in the chapter, this one would also seemed to be aimed at forestalling the risk of terrorism by empowering police to go beyond their traditional powers of search and seizure both generally under PACE and specifically when investigating terrorism under such numerous measures within terrorism legislation⁴¹.

³⁸ <https://www.legislation.gov.uk/ukpga/2008/28/contents> Section 30-33 15/10/2017

³⁹ Such as the 'Stop and Search' powers granted by sections 43-44

⁴⁰ <https://www.legislation.gov.uk/ukpga/2008/28/contents> Section 1-9

⁴¹ Specifically, under section 1 of the Counter-Terrorism Act 2008:

(a) Section 43(1) of the Terrorism Act 2000 (c. 11) (search of suspected terrorist);

(b) Section 43(2) of that Act (search of person arrested under section 41 on suspicion of being a terrorist);

(c) Paragraph 1, 3, 11, 15, 28 or 31 of Schedule 5 to that Act (terrorist investigations);

(d) Section 52(1) or (3)(b) of the Anti-terrorism, Crime and Security Act 2001 (c. 24) (search for evidence of commission of weapons-related offences);

(e) Section 7A, 7B or 7C of the Prevention of Terrorism Act 2005 (c. 2) (searches in connection with control orders);

(f) Section 28 of the Terrorism Act 2006 (c. 11) (search for terrorist publications).

Another extension was to the powers related to the questioning of terrorism suspects after charge. Section 22-27 of the Counter-Terrorism Act 2008 allows a Crown Court judge to authorise the questioning of a suspect during a period not exceeding 48 hours, provided that the suspect has been charged with an offence or officially informed that they may be prosecuted for one.⁴² There is no limit to the number of times this authorisation can be given, although certain conditions (such as interference in the subject's preparing of his defence) limit whether authorisation can be given. A worrying feature of this power would be the effect it could have in combination with the provisions under the Terrorism Act 2006 for the detention of suspects before they are charged. Indeed, the Counter-Terrorism Act 2008 originally included a provision extending that pre-charge time to 42 days, but the measure was dropped after the House of Lords added a clause to the Bill enshrining the 28 day limit for 'the avoidance of doubt'.⁴³

A second area of interest in the Counter-Terrorism Act 2008 was the further expansion of the law relating to terrorism and the collection of information. Section 76 adds the offence of "Eliciting, publishing or communicating information about members of the armed forces etc."⁴⁴ to section 58A of the Terrorism Act and the offence is subject to many of the same criticisms. The offence is very broad, as the scope of the information is the same as that for the Collection of information offence under section 58 of the Terrorism Act 2000, being "of a kind likely to be useful to a person committing or preparing an act of terrorism".⁴⁵ While guidance was later issued by the Home Office to the effect that legitimate journalistic or tourism activity likely constituted a reasonable excuse to the offence,⁴⁶ this only serves as a

⁴² <https://www.legislation.gov.uk/ukpga/2008/28/contents> Section 22 (1)-(4)

⁴³ <https://publications.parliament.uk/pa/ld200708/ldhansrd/text/81013-0002.htm#0810135000003>
Hansard 13th October 2008 16/10/2017

⁴⁴ Specifically, a member of Her Majesty's armed forces, any member of the intelligence services or a police constable.

⁴⁵ <https://www.legislation.gov.uk/ukpga/2008/28/section/76/enacted> Section 76 16/10/2017

⁴⁶ <https://web.archive.org/web/20100329112945/http://www.homeoffice.gov.uk/about-us/publications/home-office-circulars/circulars-2009/012-2009/> 16/10/2017

legal defence to the charge. It does not necessarily protect anyone from the process of arrest or charge – and the subsequent powers the police have to investigate such charges as have been outlined above. Much like similar offences of preparation or collection in terrorism legislation, this offence carries an extraordinarily high penalty of a maximum 10 years in prison and an unlimited fine. This is arguably disproportionate given the harm caused - if any harm is caused at all.

The final measure the Counter-Terrorism Act 2008 brought in that is of interest to us is the creation of a notification system broadly along the same lines as that created for persons convicted of sexual offences under Part 2 of the Sexual Offences Act 2003 (commonly referred to as the Sex Offenders' Register). Anyone convicted, found not guilty by reason of insanity or found to be under a disability and to have performed the *actus reus* of a qualifying offence is subject to the mandatory notification scheme.⁴⁷ Notification can also be applied by order to persons convicted of similar offences outside of the United Kingdom who later return. In both cases, the length of notification is determined by the severity of the criminal sentence that either was imposed or would have been imposed in circumstances such as a finding of not guilty by reason of insanity. The notification period ranges from 10 to 30 years and involves both periodic notification to the police of personal information or other information prescribed by the Secretary of State, and notification of certain other information such as moving home or travelling abroad. Failing to comply with the notification requirements is a criminal offence punishable on summary conviction (up to 12 months, a fine or both) or indictment (up to 5 years in imprisonment, a fine or both). There has been comparatively little reporting on the use and efficacy of the notification scheme, a fact highlighted by the Independent Reviewer of Terrorism Legislation in his 2016 report which highlighted a single case of two men being prosecuted for notification

⁴⁷ <https://www.legislation.gov.uk/ukpga/2008/28/part/4> 15/10/2017

breaches after being stopped at the Hungarian border without travel documents (*R v Trevor Brooks and Simon Keeler*). Importantly it was never suggested that the two men were travelling for purposes of terrorism and it was accepted that their purpose of travel was to visit relative in Turkey (Anderson, 2016c, Annex 2 S 2(f)).

2010-2017 Legislation

The 2010 election that led to a coalition government between the Conservative and Liberal Democrat parties (hereafter the Coalition) led to a soft reset of counter-terrorism policy and thus the advancement of preventive policies in combating serious harms. The Coalition published a review of counter-terrorism and security powers in 2011 that laid out the Coalition's path. In response to criticisms received from many different sources including academic, legal, parliamentary, and the general public, the review recommended curtailing certain powers and abolishing and replacing others. Alongside this was an increasing focus on prevention, before even the preparatory stage, through measures such as the rapid build-up of the controversial Prevent programme and later a concentration on the problems relating to nationals going abroad to fight for or against Daesh, and on extremism of varying stripes and the use of the internet and specifically social media as a tool for communication, planning and recruitment into extremist causes.

The Review of Counter-Terrorism and Security Powers was published in January 2011. The review was selective, concentrating on six counter-terrorism and security powers.

- (1) The detention of terrorist suspects before charge, including how we can reduce the period of detention below 28 days.
- (2) Section 44 stop and search powers and the use of terrorism legislation in relation to photography.
- (3) The use of the Regulation of Investigatory Powers Act 2000 (RIPA) by local authorities and access to communications data more generally.

(4) Measures to deal with organisations that promote hatred or violence.

(5) Extending the use of 'Deportation with Assurances' in a manner that is consistent with our legal and human rights obligations.

(6) Control orders (including alternatives).⁴⁸

All of the reviewed measures were at least partly preventive in aim or form, and the report generally recommended curtailing almost all the measures discussed or the improving of the safeguards that surrounded them. Under the report's recommendations, the detention of suspects without charge for 28 days should be allowed to relapse and the subsequent 14-day period enshrined in statute. Stop and search powers should be more tightly controlled and the controversial section 44 stop and search power repealed. While the report recommended the existing laws in relation to photography should stay in place, it recommended more substantial guidance for police and security officers on what constituted good grounds for search and seizure. The use of RIPA, and access to communications data, were both areas where the report suggested further safeguards to protect human rights and civil liberties, with the same being said with regard to the use of deportation powers. Lastly the report recommended the abolition of the control order regime and its replacement with a new measure. The aim of the new measure would be to eliminate forced relocation and lengthy curfews while requiring greater detail of any imposed measures and the tightening of judicial oversight over them.

At around the same time as the review came out (January 2011), YouGov published a poll for the Sunday Times about the curtailing of civil liberties. A large majority of the 1797 people polled supported the principle of government being able to impose measures like control orders (73% in favour) although opposition to weakening the measure was much

⁴⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97972/review-findings-and-rec.pdf Introduction page 4. 17/10/2017

lower. 38% believed weakening control order was unacceptable compared to 31% who considered it acceptable.⁴⁹ Public opinion is a difficult element within the discussion of preventive justice as it is debatable whether politicians are led by or lead public opinion in dealing with the response to crime (Zedner, 2004 ,pg 42). Nonetheless it is important to our discussion that despite the extensive amount of legislation already passed concerning terrorism, and the many legal challenges and parliamentary concerns, public support for control orders remained very high across many demographics. Liberty and the interests of minorities are broadly contingent on the whims of the majority of population (Hudson, 2003, pg 40). Any weakening of the majority's commitment to minorities, for example in response to events that harm or kill large numbers of people, are a cause for great concern.

Prevent

Alongside preventive measures enshrined through civil and criminal law, the UK government has also had a long-running strategy to pre-empt acts of terrorism by targeting those individuals it suspects are likely to present a future risk of involvement with terrorism. These kinds of preventive measures and strategies might, in many cases, be considered to be more in the area of social policy than criminal justice. However, the Prevent programme, in particular, deserves mentioning here. While it is not enshrined in criminal or civil law it has been a long strand of UK counter-terrorism through the overarching CONTEST strategy. Prevent is not directly within the purview of the criminal law, but its creation and use raise many of the same procedural and philosophical questions and its reporting and referral mechanism lack the protections offered to those who find themselves the subjects of legal proceedings. It is, therefore, worth outlining the initiative and considering it in the overall scheme of prevention.

⁴⁹ http://cdn.yougov.com/today_uk_import/YG-Archives-Pol-ST-results-07-090111_0.pdf Page 7 accessed 20/10/2017

Absent context, the pre-emption of harmful conduct without resorting to sanctions is a laudable societal goal. Implementing such a strategy in a targeted way is a complex issue which raises many concerns for civil liberties and due process because of the identifying of, and interacting with, some subset of the population a government has deemed to be to some degree 'risky' or 'at risk'. While the goals and methods of Prevent are not in the traditional ambit of the justice system or criminal law theory, it is hard to question the fact that the program is born of the same risk-centred thinking that has led to the expansion of preventive justice endeavours in the criminal law. Prevent is arguably the next logical step in a philosophy that seeks to move the point of state intervention further and further back in time from the point at which serious harm might occur. Prevent and similar initiatives in other countries were also considered to be part of the solution to the problems generated by counter-terrorism laws especially when coercive counter-terrorism powers contributed to a sense of alienation or discrimination. (Hardy, 2017, pg 118)

Prevent becomes a larger issue in this thesis' discussion if elements of it are made mandatory. If cooperating with Prevent, such as attending sessions designed to tackle radicalisation, becomes a duty incumbent on the individual, then the character of the programme changes significantly (this is explored more in Chapter 4 under the discussion of what duties a citizen has towards the state.

Prevent was originally one of the strands of the CONTEST counter-terrorism strategy created in 2003. The strategy was first published publicly in 2006 and has been revised frequently since then. The strategy consisted of four strands; *pursue, prevent, protect and prepare*. Many of the measures contained in the legislation discussed above had their roots in the needs identified by the original CONTEST strategy. In 2003, the Prevent strand was the least developed part of CONTEST. (HM Government, 2009, pg 82) The programme was extensively revised in 2007 and since then has developed into an extensive programme

across multiple departments. In 2009 the Labour government set out 5 key goals for Prevent in its 'Pursue Prevent Protect Prepare' report which was aimed at tackling Islamic extremism:

- Challenge the ideology behind violent extremism and support mainstream voices.
- Disrupt those who promote violent extremism and those who support the places where they operate.
- Support individuals who are vulnerable to recruitment, or have already been recruited by violent extremists.
- Increase the resilience of communities to violent extremism.
- Address the grievances which ideologues are exploiting

The report also listed a few key programs that it had implemented for 2008/2009 with a budget of more than £140m:

- The Preventing Violent Extremism programme was led by the Department for Communities and Local Government aimed at creating a community-led approach to tackling violent extremism in partnership with statutory and volunteer organisations.
- The Prevent Strategy and Delivery Plan is a police-led initiative with 300 staff across 24 forces working alongside counter-terrorism and neighbourhood police.

- The Channel programme is a referral initiative between police, local authorities and the community (including institutions such as schools) to identify those at risk from being drawn into violent extremism with a goal of intervening to provide assistance.

This summary of Prevent as it stood in 2009 also reveals the two key criticisms that led to its revamping in 2011. The first was that all the programmes, including ones that did not explicitly involve the police such as the Preventing Violent Extremism programme, were viewed with deep suspicion by many in the Muslim community. These criticisms were reported widely in the media and by parliamentary reports, such as the Communities and Local Government committee which consulted widely with societies and charities such as the Islamic Society of Britain and Oxfam (CLGC, 2010, pgs 8-14). These organisations accused Prevent of being counter-terrorism in disguise and that information from projects that did not involve the police was being passed onto them for counter-terrorism purposes. The second issue was the singling out of Islamic violent extremism over any other type. This had the effect of both stigmatizing Muslims and their communities and because much of the programme's spending went on improved facilities or engagement/integration projects it evoked the ire of other communities who felt they were being financially disadvantaged by a strategy that targeted funding in areas with a high concentration of Muslim residents. (CLGC, 2010, pg 18)

Prevent thus exhibits the same problems as the other preventive measures discussed above, even if the consequences are less serious and the process less formal – or at least less open to judicial scrutiny. There is firstly a concern that people are being targeted unfairly or improperly, and that consequences are being imposed upon them that are disproportionate in relation to the actions, and that this is being done in the name of an actuarial-like risk calculation. For the citizen, this raises similar rights concerns to many

other measures such as the right to privacy as well as liberty and security. On the other side, the state wishes to be seen to be doing all it can to prevent future serious harm.

In 2011 the Prevent programme was revamped extensively, and a review was published by the Coalition Government in June 2011. The review established three objectives for Prevent. Tackling the 'ideological challenge' posed by terrorism, preventing people from being drawn into terrorism, and working with sectors and institutions where it was considered there was a risk of radicalisation. A full review of these objectives and their attendant programmes is beyond the scope of this thesis, but two elements of the new Prevent strategy are of note: the Channel programme and the 'Prevent duty' now incumbent upon various institutions.

The Channel programme was introduced nationwide in April 2012. The aim of the programme was "providing support at an early stage to people who are identified as being vulnerable to being drawn into terrorism". (HM Government, 2015a, pg 7) There is no single way of identifying these vulnerable people in the structure of the programme. Educational establishments, the NHS, social and other services are all potential points of referral and identification. In 2015 this referral requirement became a statutory duty for many organisations through the Counter-Terrorism and Security Act, requiring each local authority to ensure a panel of persons are in place to handle interventions.⁵⁰

Individual participation in Channel is voluntary, and there is currently no obligation to engage or continue to engage with the programme. Once identified, a person in the channel process was evaluated with respect to their engagement with an extremist group or ideology, their intent to cause harm and their capability to cause harm. (Government,

⁵⁰ A provision contained within Section 36 of the *Counter-Terrorism and Security Act 2015*, available at <http://www.legislation.gov.uk/ukpga/2015/6/part/5/chapter/1/enacted>

2015a, pg 11) After assessment, an individual plan was created to address the specific problems of risk. The details of the plan could vary widely, with the official Channel guidance offering the following examples of the sort of support the programme used:

- (a) Mentoring support contact – work with a suitable adult as a role model or providing personal guidance, including guidance addressing extremist ideologies;
- (b) Life skills – work on life skills or social skills generally, such as dealing with peer pressure;
- (c) Anger management session – formal or informal work dealing with anger;
- (d) Cognitive/behavioural contact – cognitive behavioural therapies and general work on attitudes and behaviours;
- (e) Constructive pursuits – supervised or managed constructive leisure activities;
- (f). Education skills contact – activities focused on education or training;
- (g). Careers contact – activities focused on employment;
- (h). Family support contact – activities aimed at supporting family and personal relationships, including formal parenting programmes;
- (i). Health awareness contact – work aimed at assessing or addressing any physical or mental health issues;
- (j). Housing support contact – activities addressing living arrangements, accommodation provision or neighbourhood; and
- (k). Drugs and alcohol awareness – substance misuse interventions.

As can be seen, despite being a police-led process the range of assistance and advice extends to many areas covered by other government services. This is because the process as a whole is based on the idea of risk, and this connects the process with the broader themes of prevention under discussion here. The kinds of support offered here are not

done for their own sake as social goods, but to reduce the risk of a person being drawn into terrorism. This is the most important element of the Channel process for discussion in this thesis, and a normative examination of the issue behind programmes like Channel are explored in chapters 3 through 5.

The 2011 Prevent strategy noted that sympathy for terrorism was highest amongst young people. It was therefore important that institutions that interacted with young people were engaged with as part of a strategy to prevent radicalisation and ultimately terrorism. Education, the health, and charity sectors were considered the most important areas to address. (HM Government, 2011, pg 63) In 2015, section 26 of the Counter-Terrorism and Security Act created a statutory but general duty that “a specified authority must, in the exercise of its functions, have due regard to the need to prevent people from being drawn into terrorism.”⁵¹ While this change does not necessarily affect an individual’s right to liberty, there is the ‘institutional liberty’ to consider with compliance with Prevent now forming part of the framework for governmental oversight (for example, through school inspections). The idea of duties in this context is discussed further in chapters 3 and 4. With regards to public perception of Prevent, the changes with the 2011 strategy and the 2015 Counter-Terrorism and Security Act did little to improve Prevent’s reputation. The Home Affairs Committee’s report into counter-extremism noted that the strategy was still viewed with suspicion. Stating that “Rather than being seen as the community-led approach Prevent was supposed to be, it is perceived to be a top-down ‘Big Brother’ security operation”. (Home Affairs Committee, 2016, pg 36)

Terrorism Prevention and Investigation Measures Act 2011

⁵¹ Available at <http://www.legislation.gov.uk/ukpga/2015/6/part/5/chapter/1/enacted> Section 26 (1)-(5)

The Terrorism Prevention and Investigation Measures Act 2011 was the Coalition government's response to the criticism of the control order regime discussed above. The Prevention of Terrorism Act 2005, which originally granted the power to issue control orders, was repealed and replaced with this new act which established the Terrorism Prevention and Investigation Measure (TPIM). The TPIM is dealt with in depth in Chapter 5 as a case study in applying normatively backed reforms to the existing regime, but consistency dictates that the main changes from control orders are discussed here as well.

Despite the TPIM forming its own statutory instrument, critics of the control order regime stated there were few substantial differences between Control Orders and TPIMs. Tadros states that the two measures are at best only marginally different. (Tadros, 2014, pg 135). Dyzenhaus considered the government's approach to be perverse as measures such as TPIMs (like control orders) were being introduced without coterminous criminal investigations. (Dyzenhaus, 2014, pg 111) Dyzenhaus states that a measure such as a TPIM was only allowable as a temporary measure while a criminal investigation was under way. Duff notes that while TPIMs do contain fewer restrictions on liberty than Control Orders, there is a greater provision for surveillance and monitoring (Duff, 2014, pg 115). The character of these criticisms is broadly accurate, but there are some changes between TPIMs and Control Orders.

The main changes to the regime were an end to forced relocation, a maximum 10-hour⁵² 'overnight' curfew and a limit on the measure of two years – although this can be renewed by the High Court if there is proof that the TPIM is still necessary. In addition, the burden of proof on the Secretary of State – who still initiates the measure with High Court approval – was also increased from the 'reasonable suspicion' of control orders to 'reasonable belief' that the subject of the proposed TPIM had been involved in 'terrorism-related activity'

⁵² Determined in *Secretary of State for the Home Department v BM* [2012] EWHC 714

(TRA). TRA is defined in Section 4(1) of the TPIM Act 2011 and encompasses a very wide range of activities, namely:

- (a) The commission, preparation or instigation of acts of terrorism;
- (b) Conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so;
- (c) Conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so;
- (d) Conduct which gives support or assistance to individuals who are known or believed by the individual concerned to be involved in conduct falling within (a) to (c)

The new “reasonable belief” standard still seemed to fall below the ordinary civil burden of proof of ‘on the balance of probabilities’ (Dyzenhaus, 2014, pg 110). The government seemingly refusing to apply the usual civil burden of proof and simply change the word “suspicion” to “belief”. Semantics aside neither had the legal clarity that the long established civil burden of proof could afford. The TPIM also greatly expanded the type of restrictions that could be imposed upon the subject. At the time the Bill was enacted the types of restrictions allowed were set out in twelve categories under Schedule One of the Act⁵³:

- (a) Overnight residence measures, requiring the subject of a TPIM notice to reside and to spend the night either in his own residence or in premises provided by the Government in an “appropriate” or agreed locality. In the latter case, the individual may be required to comply with any specified terms of occupancy in the lease. An appropriate locality is one in which the individual resides or with which he has a connection, making it impossible to relocate a TPIM subject without consent to an unfamiliar town or city.

⁵³ Schedule 1, Part 1 of the *Terrorism Prevention and Investigation Measures Act 2011* available at <http://www.legislation.gov.uk/ukpga/2011/23/contents/enacted>

- (b) Travel measures, restricting travel outside the United Kingdom (or Great Britain, or Northern Ireland)
- (c) Exclusion measures, imposing restrictions on the individual entering a specified area or place, or a place or area of a specified description;
- (d) Movement directions measures, requiring compliance with police instructions for the purpose of securing compliance with other specified measures;
- (e) Financial services measures, imposing restrictions on the holding of more than one bank account and on the possession of cash;
- (f) Property measures, placing restrictions on the transfer of property and requiring disclosure;
- (g) Electronic communication device measures, limiting the possession and use of such devices, but allowing the individual at least a fixed-line telephone, an internet-enabled computer and a mobile telephone without internet access;
- (h) Association measures, which may require permission to be obtained for association or communication with specified persons or descriptions of persons, or notice to be given prior to associating or communicating with other persons;
- (i) Work or studies measures, which may require permission to be obtained for specified activities, or notice to be given prior to carrying out any work or studies;
- (j) Reporting measures, which may require regular reporting to a police station;
- (k) Photography measures, requiring the individual to allow himself to be photographed; and
- (l) Monitoring measures, which generally require the wearing of a GPS-enabled tag which should be charged at the individual's residence for at least 30 minutes, twice a day.

Compared to the list of restrictions available under the control order regime the TPIM's restrictions appear to be fewer in number. However, comparing the wording of the PTA 2001 and the TPIM Act 2011, the TPIM restrictions are more general in nature. In both cases, the restrictions are couched in terms that the restrictions may consist of these restrictions, not solely these restrictions. In particular, TPIM restrictions (l) and (g) are not found under the control order restrictions, and both represent a high level of intrusiveness and surveillance of the TPIM subject.

Despite the relatively minor changes in the TPIM, the measure has been used less frequently than control orders. Over the lifetime of the Prevention of Terrorism Act 2005, 52 control orders were issued, while by March 2015 only 10 TPIMs had been issued, nine of which were transfers from the control order regime⁵⁴. Although as of 30th November 2016 6 were in force,⁵⁵ indicating a substantial increase in the total number as many TPIMs had been allowed to lapse after 2 years and during most of 2014 only one TPIM was in force.⁵⁶

Unlike Control Orders before them, there have been few legal challenges to the TPIMs except as individual cases such as reviews and appeals of individual TPIMs in front of the High Court. These are discussed in more detail in Chapter 5 in relation to how the system currently operates and proposed reforms.

Parallel to the introduction of TPIMs, the Coalition also drafted a second Bill, the Enhanced Terrorism Prevention and Investigation Measures Bill 2011. This Bill would have

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411824/IRTL_TPI_Ms_2014_final_report_web.pdf

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⁵⁵ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-12-15/HCWS362/>

Hansard 22/10/2017

⁵⁶

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411824/IRTL_TPI_Ms_2014_final_report_web.pdf

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created a new preventive measure: the Enhanced Terrorism Prevention and Investigation Measure (ETPIM). The Bill was seemingly designed to be introduced and passed in the event that the new TPIM regime was not considered up to the task of tackling some extremely serious if rather nebulously defined threat (Fenwick, 2013, pg 877). ETPIMs retained many of the measures that were part of the Control Order regime prior to its repeal all be it with somewhat more stringent safeguards. The standard of proof for the imposition of a ETPIM would have been the civil standard, but it would have allowed measures such as a 16-hour curfew, a complete ban on the use of electronic communication devices, forced relocation and complete prohibition from entering defined areas.⁵⁷ Some of these measures – such as relocation or extended curfews – had previously been found to be in breach of Article 5 of the ECHR. No single restriction in the new regime violated the legal findings of the legal cases against the control order regime but the combination of the harsher restrictions would likely to breach Article 5 of the ECHR if applied. These same cases such as *Secretary of State v AF* (and other judicial decisions discussed previously) stressed the importance of examining the restrictions imposed as a whole, rather than through any single restriction. Despite this uncertainty, parliament was informed that the ETPIM scheme would be compatible with the ECHR during the process of the Bill's first reading.⁵⁸

The ETPIM Bill clearly re-introduced measures condemned by the Coalition review of counter-terrorism and had the potential to breach legal decisions made about the prior control order regime given how onerous the potential total limitations on an individual might be even given the limits on each specific measure. There was also arguably a worrying element in the character of the draft Bill itself. By submitting the Bill for a first

⁵⁷ <https://publications.parliament.uk/pa/jt201213/jtselect/jtdraftterror/70/7005.htm> Section 2.7

⁵⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98426/echr-etpim-memorandum.pdf Section 1 27/10/2017

reading but choosing not to bring the Bill before Parliament for a second reading and full ratification, the Coalition created a Bill that could be passed very quickly but did not exist in statute to be challenged by the judiciary. This at least invites the worrying thought that this was intentional, with the aim of being able to pass the Bill and to use the coercive ETPIM at short notice such as a time of heightened fear or tension and without fear of immediate legal challenge being made. In this way, the government would not be vulnerable to a situation such as occurred with the original control orders where successive cases restricted the boundaries of what restrictions could be applied.

Protection of Freedoms Act 2012

The Protection of Freedoms Act 2012 was another legislative response to the general perception that the New Labour government had gone too far in its expansion of criminalisation and in the other legal measures described so far in this chapter. Specifically it was this act that amended pre-charge detention of persons suspected of terrorism offences, changing Schedule 8 of the Terrorism Act 2000 to a statutory 14 day maximum and removing or reforming various parts of 'stop and search' powers to eliminate some justifications for stop and search and to change others to a higher threshold of suspicion, so that an officer must have 'reasonable suspicion' that an act of terrorism will take place before initiating a search in a specified zone.⁵⁹

Despite rather grandiose statements about the breadth of the legislation, it was distinctly a limited exercise in curbing some of the perceived excesses of the previous government. Improved codes of practice for the use of CCTV and some RIPA powers were present and it tightened regulations in other areas such as the retention of DNA samples by the police that had not been dealt with sufficiently in statute due to their relatively recent pedigree.

⁵⁹ [http://www.legislation.gov.uk/ukpga/2012/9/contents/enacted Section 59-63](http://www.legislation.gov.uk/ukpga/2012/9/contents/enacted%20Section%2059-63) 26/10/2017

Nevertheless, the Act did very little to curtail most of the preventive powers that had been created in the previous two decades.

Counter-Terrorism and Security Act 2015

The Counter-Terrorism and Security Act 2015 (CTSA 2015) represents something of a 'return to form' for counter-terrorism legislation. The Bill introduced new police powers, new civil orders, expansions to the TPIM regime and expanded the Prevent strategy into measures imposing positive duties on various authorities. The prime political motive of the Bill was the problem posed by foreign terrorist fighters (FTFs) which had become of increasing concern especially after the success of ISIS and similar groups (Walker and Blackburn, 2016, pg 840). Although the UK governments overarching CONTEST strategy had little specific to say on this threat (Anderson, 2016c, pg 102).

Part one of the CTSA 2015 concentrated on new powers and orders aimed at firstly preventing UK citizens from going abroad to engage in hostilities in areas such as Iraq, Somalia or Syria and also to manage the risk posed by those UK citizens returning from such conflict zones. Alongside a general political desire not to have UK citizens possibly fighting with groups the Government considered to be terrorists there was a preventive rationale to these powers. British citizens who fought abroad and returned to the UK were likely to have learnt skills or established contacts that would enable them to carry out recruitment or attacks at home more easily than someone without such experience.

Chapter 1 of the CTSA 2015 allowed for police constables who have reasonable grounds to suspect a person of travelling abroad for activity relating to terrorism to search for and inspect person's travel documents. With the permission of a senior police officer, those documents could be retained for up to 14 days. Any further retention of the documents required a court hearing by a local Magistrates Court at which the owner of the documents

must be allowed to make a representation. However similar to other laws discussed above part of the proceedings may be held as a Closed Material Proceeding similar to that for Control Orders/TPIMs discussed above.⁶⁰ Such proceedings have a number of possible negative outcomes for the subject as a number of powers, or criminal charges, would be available to the Police or the Home Secretary such as TPIMs, Foreign Travel Restriction Orders or a charge of Preparation for Terrorism etc.

The second chapter of the CTSA 2015 creates a new civil order that allows the Home Secretary to make Temporary Excluding Order (TEO) upon a UK citizen. The implementation of the order works much like other such civil orders, in particular, the TPIM. The Home Secretary makes an application to the High Court to impose the order but can impose the order unilaterally in urgent circumstances, subject to later review. The order has a maximum duration of two years, and the standard of proof for such an order is reasonable suspicion that an individual is or has been involved in terrorism-related activity and the court can only refuse permission if it finds the Home Secretary's application to be fundamentally flawed (for example, by being incompatible with the ECHR as in the case of the numerous Control Order cases discussed above).⁶¹ Notably, there was an early concentration on exclusion rather than a managed return and measures such as judicial scrutiny were later additions to the Bill made after early parliamentary criticism (Walker and Blackburn, 2016, pg 849-850). The prime purpose of the order as it was enacted is to create a 'managed return' of those subject to the order. Section 5 details factors such as time and place and other measures such as mandatory interviews (with failure or refusal to appear being grounds for continued exclusion under Section 6 of the act). Despite the name, the effect of the TEO continues after the subject returns the UK with Section 9 of the

⁶⁰ <http://www.legislation.gov.uk/ukpga/2015/6/section/1/enacted> Section 1 and Schedule 1 27/10/2017

⁶¹ <http://www.legislation.gov.uk/ukpga/2015/6/part/1/chapter/2/enacted> Section 2-13

Act detailing obligations that can be imposed. These obligations draw on the Terrorism Prevention and Investigation Measures Act 2011, specifically with regard the obligation to report to a designated police station or attend specified interviews or appointments as well as notification requirements regarding place of residence. Breach of a TEO is a criminal offence, punishable by up to five years in prison, a fine or both. TEOs represent much the same issues as other preventive civil orders but have an added factor of effectively exporting risk to other countries by discouraging the return of British citizens who are made subject to them (Walker and Blackburn, 2016, pg 852). 2015 and 2016 would show numerous examples where attacks had been carried out by people who had either fought or trained abroad such as the *Charlie Hebdo* attacks in France and Belgium and other killings in France, Belgium, Turkey and the USA. However while there are numerous specific incidents, wider empirical detail about the risk is minimal and disputed (Walker and Blackburn, 2016, pg 845). Even if only a small number of FTFs return with the intention to cause harm or otherwise continue to aid or participate in terrorism a cloud of suspicion is inevitably cast over anyone suspected of travelling abroad to fight, a problem covered in more detail in Chapter 4

Part 2 of the CTSA 2015 made some relatively minor changes to the TPIM regime through amendments to the Terrorism Prevention and Investigation Measures Act. Section 16 reintroduced the ability to relocate the subject of a TPIM to another locality within the UK and there was an important change to the definition of terrorism-related activity so that the condition under section 4(1)(d) of the Terrorism Prevention and Investigation Measures Act 2011 applied only to persons believed to be involved with conduct that amounted to the commission, preparation or instigation of acts of terrorism. Before this, the condition also applied to the individuals facilitating or encouraging the commission, preparation or instigation of such acts. This change came about because of concerns that the current statute allowed TPIMs to be used “against a person whose connection with an act of

terrorism could be as remote as the giving of support to someone who gives encouragement to someone who prepares an act of terrorism.” (Anderson, 2014, pg 49 §6.14) Such a person is three steps removed from an act of terrorism; acts which are themselves subject to a very broad definition under Section 1 of the Terrorism Act 2000 as discussed above. In addition to these changes, Section 20 of the CTSA 2015 raised the threshold for the imposition of a TPIM from the original “reasonably believes” to the “is satisfied on the balance of probabilities”. The effect of this change is somewhat hard to judge; it is hard to say independently what the difference between the two standards of proof is and the pressure group Liberty UK considered it a ‘minor concession’⁶². However, this change does effectively makes the TPIM subject to a recognised burden of proof as the balance of probabilities has long been a recognised standard of proof in civil law. There is at least the potential for more thorough judicial scrutiny of the Secretary of State’s decision to impose a TPIM with a standard of proof that is widely understood within judicial circles even if the difference to a lay-person is minimal.

Part 5 of the CTSA 2015 is also of direct relevance to prevention as it imposes a positive duty on numerous authorities to “have due regard to the need to prevent people from being drawn into terrorism”⁶³. As is discussed above in the section on Prevent, these authorities chiefly included local, prison and probation authorities, educational, medical and social care bodies, and institutions as well as the police. At the time, Higher and Further education institutions received the most attention after well-publicised criticism that imposing a statutory obligation of this nature was a threat to academic freedom as well as to freedom of speech, considered vital for effective education at these levels

⁶² <https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%27s%20Briefing%20on%20the%20Counter-Terrorism%20Security%20Bill%20%28Second%20reading%20HOL%29%20%28Jan%202015%29.pdf> Section 33 28/10/2017

⁶³ <http://www.legislation.gov.uk/ukpga/2015/6/part/5/enacted> Part 5 Chapter 1 Section 26 27/10 2017

(Walker and Blackburn, 2016, pg 860). Certainly, while this new duty would seem to coincide well with the responsibilities of certain specified authorities such as the police or prison and probation authorities, it sits less well with bodies such as NHS trusts or Community Health Councils which have their own important priorities to consider.

The CTSA 2015 is a continuation in the extension of prevention as a means to curtail the risk of serious harms, and is very similar in character to the direction taken under the previous government. Much like prior pieces of legislation it raised concerns about both about the measures themselves - introducing relocation to TPIMs and deputising education and health authorities into de-radicalisation or anti-extremism work – and to the future direction of legislation. If these measures are perceived to be successful as the first civil orders were, will we see increasing statutory duties incumbent upon other authorities or other areas such as broader crime control? As an example, one can envisage similar duties in relation to other areas of concern ranging from serious crime to anti-social behaviour.

Other Legislation

The Counter-Terrorism and Security Act 2015 is the last comprehensive piece of terrorism legislation that this thesis explores. Since 2015 there have been other acts and amendments that are of tangential importance, and new measures and Bills are often proposed or discussed. The primary extra piece of legislation relevant here is the Investigatory Powers Act 2016 and the proposed Counter-Extremism Bill.

The Investigatory Powers Act 2016 created new powers for the UK's intelligence agencies and restated existing ones in an updated form as well as addressing ambiguities such as that noted in the Telecommunications Act 1984. In addition, it updated processes and review measures for actions such as the interception of communications, both individually and in bulk. Communications providers were legally obligated to store various communications records, which could be accessed by senior-level managers in numerous

government departments as part of ongoing investigations. The possible scope of the powers is wide-ranging, and many government departments have at least some access to them. Despite this, while investigation certainly forms an important part of the government's strategy on prevention, its workings are not directly relevant to the discussion of this thesis. Rather, the Act is of importance if only as a reminder of the UK state's legal ability to monitor communications and require communications companies to store information before legal proceedings of any kind, including preventive, are taken against an individual.

The second statute of relevance to this section is the proposed Counter-Extremism Bill. This Bill has been announced in the Queen's speech in both 2015 and 2016 but failed to materialise. The latest incarnation, the Counter-Extremism and Safeguarding Bill proposed number measures including:

- The introduction of a new civil order regime to restrict extremist activity.
- Measures to safeguard children from extremist adults, by taking powers to intervene in settings which teach hate and drive communities apart and through stronger powers for the Disclosure and Barring Service.
- New powers to enable government to intervene where councils fail to tackle extremism. (Dawson and Godec, 2017)

As of 2017, the Bill has not materialised, and thus concrete discussion of it is beyond the remit of this chapter. Nonetheless, it serves as a signpost to the Conservative Government's thinking in the 2015-2016 period; that greater prevention was needed, and

in circumstances stretching further back from actual harm than the kinds of legal measures and programmes discussed so far.

Summary

This chapter has sought to examine in detail the relevant academic work, legislation and legal cases that have shaped preventive justice as it is currently enshrined in UK law. The aim was to explain the core issues that have coalesced the idea of the risk society and to demonstrate how wide prevention has spread within criminal and civil law as well as in broader policy. Alongside this, it has explored the legal challenges that have resulted from these developments and the state's responses to those challenges. In part this is to demonstrate that while reform to some existing measures has been made, the state has also tried to make an "end-run" around criticism, by, for example, switching its focus from immigration law to terrorism law, or from control measures like TPIMS to exclusionary measures such as the removal of citizenship. The next two chapters seek to explore the normative background to preventive justice, chiefly through looking at the debate concerning the duties of the state and the rights and duties of its citizens. Preventive justice in some form is likely to continue to be part of government policy in the area of moral wrongdoing for the foreseeable future. Creating and contributing to a multi-disciplinary debate about preventive justice is therefore of great importance. It is to this debate that this thesis aims to contribute.

Chapter 3: The State's Duty to Provide Security

In order to understand what the state aims to achieve with the legislation detailed in Chapter 2 (and thus discuss how its approach should be reformed) we must understand on what the aims of the state are in passing this legislation and what political philosophy underpins these aims. Chapter 1 stated that the primary goal of the modern liberal state is to produce an environment in which its citizens can pursue their own desires and happiness (where these desires do not seriously conflict with the happiness of others in the society). In order to achieve this the government of the state must create a secure environment. Starting with the premise that security is a valuable (although not an unqualified) public good and a necessary ingredient in a moral, well-run society, the democratic state has a necessary role to play in achieving this public good (Loader and Walker, 2007). However while this conception of security is widely used in this thesis it must be compatible with an seen alongside a scheme of human rights as explored in Chapter 4. This kind of public good claim is echoed in broader political theory, such as Hobbes' discussion of sovereign authority (Hobbes, 1991), and Robert Nozick's conception of the state as a 'night watchman'. Indeed for Nozick, the function of the state as protecting its citizens against violence, theft and fraud forms the majority part of the bare minimum a state can be. (Nozick, 1974, pg 26) Importantly, we do not need to accept the whole of Hobbes' or Nozick's theories to acknowledge that security is quite likely the duty of the state that could best be described as the most important, or at least as first amongst equals. This conception of security as a qualified public good is taken to be a legitimate interest of the state for the purposes of answering whether or not preventive justice should be reformed.

The first part of this chapter will begin with a brief look at how the state seeks to achieve security. While this can by no means be comprehensive, it is important briefly to elucidate the different kinds of security a state might or should be required to provide, or assist in providing, to its citizens. The second part of the chapter explores the duty of the state vis a vis security. The last section deals with the problems the state faces in fulfilling its duty, including the problems of uncertainty and risk, blame, and the need for reasonable state secrecy. This approach has been taken as opposed to a more traditional look at political or legal theory because while the work of many authors such as Hobbes, Locke or Rawls has relevance to this debate, none tackle this kind of philosophy of the criminal law, the emerging idea of the 'risk society', and the state's remit or lack of one in such areas. This chapter aims to add to a dialogue that crosses the traditional subject boundaries to address the 'blurriness' of current and future policy.

Different Conceptions of Security

The idea that the state should be responsible, and even primarily or solely responsible, for the provision of security for its citizens is well-established and echoes of many philosophers can be heard in modern thinking about security. Plato's *Republic* describes a class of 'guardians', encompassing both a professional, courageous soldiery and a wise, selfless cadre of leaders. Their classes work to defend the citizens, laws and customs of the state. (Grube and Reeve, 1992, pgs 50-53). Hobbes' philosophy espouses that foresight and fear, be it of an external conqueror or the actions of others in the same community, will result in the establishment of a sovereign authority to protect its citizens from each other and from those outside that authority (Hobbes, 1991, pgs 117-121). Of course, there are different conceptions of state security at play here and elsewhere in the history of political thought. Plato speaks of defending not only the people of a state but its customs as well. Hobbes holds that the purpose and origin of the state is not only to protect us from potential or

realised threats but also from the fear of those threats. Locke emphasises this transfer and sovereignty itself in a different way: we transfer some elements of our personal sovereignty to a system more able to constrain the actions of other actors in society. Without this transfer, our own sovereignty is 'uncertain'. We are better able to guarantee that others will respect our personal sovereignty by ceding sovereignty and authority of it to a group charged with protecting our interests (Locke, 1772, pgs 88-90). This introduces the element of the relative powerlessness of the individual to affect his own security without assistance and the idea that the state should act as an impartial judge when conflict arises between citizens. There are of course many more discussions of such points within political philosophy, but the key factors that confront us in discussing the problems the state must face in protecting its citizens have been long identified within political theory and legal theory (Ashworth and Zedner, 2014 pg 7-10), even if the specific challenges that face us, and the potential means to prevent or punish them, have changed dramatically and will likely continue to do so.

In the discussion of modern-day law and the threat of serious harms to citizen and society, these key philosophical questions require addressing. Modern law enforcement has for a long time been a professional endeavour largely controlled and regulated solely by the state. For over a Century, the police, the intelligence services, the court, prison, and parole systems have been almost entirely professional bodies of trained men and women. However, this has changed in recent decades where the state has encouraged more participation from the general public and private enterprise in ensuring their own security through the practice of 'responsibilization' (Garland, 2001, pg 124). This has repercussions not just for the state's approach to security, but also for citizens themselves as discussed in Chapter 4.

Alongside civil law and regulation, criminal justice is a key part of governance and part of a broader goal of creating a sustainable society (Zedner, 2004 pg 2). While criminal justice has unique roles in governance, an important one that it shares with broader thinking about security is that it helps remove fear and uncertainty and to promote a kind of predictability to ordinary life. Regulation and civil law ideally help citizens make decisions and act in such a way that they can foresee the likely outcome of their actions and make reasonably accurate predictions about how other citizens will behave around them. Even in situations as simple as walking from place to place, law and regulations tell me where people on foot should travel and where people in or on vehicles should travel, reducing uncertainty (and the accompanying fear of being run over).

This predictability is well summed up by the concepts of objective and subjective security. Criminal justice should be effective in lowering the objective risk of victimisation – the risk that one will be a victim of crime – and the subjective perception of how at risk one is of being a victim of crime. (Ramsay, 2012, pg 1) This concept of subjective security is highly related to the broader problem of assurance. This element of criminal justice is key to understanding preventive justice. Preventive justice aims to achieve this type of security by preventing harms before they manifest (most usually in a crime being committed). If people believe the state is actively⁶⁴ acting to prevent serious criminal harms, and not just punish the perpetrator after the fact.

Philosophers as diverse as Hobbes and Rawls both address the problem of assurance (Matravers, 2000, pg 238-239). When citizens are living together in society that obliges them to restrain themselves from infringing upon the lives and/or rights of others (acting morally), there is always a risk that other citizens in society will refuse to act according to

⁶⁴ As opposed to the passive prevention from a harm being illegal, the perpetrator being punished etc.

whatever rules have been laid out by the social contract. If such refusal is widely known or widely feared, cooperation will break down. Therefore in Rawls' words "to maintain public confidence in the scheme...some device for administering fine and penalties must be established". (Rawls, 1971)

Extensions of this problem of cooperation appear in many modern political theories. Examples include the issue of vulnerable autonomy as recognised in communitarianism, neoliberalism and civic conservatism. (Ramsay, 2012, pg 84-112) The modern application of the basic principles of assurance to criminal justice are self-evident. When a citizen refuses to act in cooperation with his fellows and causes them harm, the state steps in to restrain and censure that citizen. This, ideally, will have a retributive effect in the punishment of the harm, a preventive effect in encouraging others not to commit the harm and a reassuring effect that the harm is not allowed and will be punished.

The application of assurance to preventive justice is slightly different. Here it is not the refusal to act in cooperation that is being addressed, but the perceived risk that in the future cooperation will not be forthcoming. Combined with a fear on the part of the citizen and the state that when/if cooperation is not forthcoming it will be in a form that a.) the state will be unable to restrain/censure before harm occurs, and b.) the harm will be such that any *post-hoc* action will come too late to be acceptable to a large majority of citizens. This thesis chiefly addresses prevention in relation to the most serious harms, as discussed in Chapter 2. However, there is no reason that the problem of assurance is limited to serious harms. An example of this can be seen in the creation and justification for the ASBO and subsequent regimes, where a discretionary risk assessment by the state reduces an individual's civil rights because it is judged that the individual poses a risk to others' sense of security, causing them uncertainty and fear. (Ramsay, 2012, pg 64)

A prerequisite of almost all citizens' pursuits of their conceptions of the good life will be reasonable freedom from uncertainty and fear. Without this, it is difficult, or even impossible, to interact with the world and their fellow citizens. Nevertheless, this 'security from fear' is particularly problematic as the state response to it, especially when it involves coercive measures (such as regulatory, civil and criminal law) runs the risk of creating a fear of the state itself, or at least uncertainty as to what a citizen is or is not allowed to do without consequences from the state. Even when the measure is not primarily coercive there still may be this risk of fear-creation. An example of this detailed in Chapter 2 is the Prevent programme, where a lack of transparency and fear of police involvement meant that a measure that was supposed to appeal to "hearts and minds" had a chilling effect in some communities and circumstances. (Innes, 2011)

In addition to this, responding to uncertainty and fear may encourage the state to pursue policies that citizens believe work and alleviate fear but are in fact counter-productive or not in keeping with fairness or obligations to citizens' agreed rights. This is particularly likely in circumstances where responding to the fears of one section of the citizenry raises a fear or uncertainty concerning the state action in another section (particularly concerning when dealing with a minority section of the citizenry such as a particular ethnic or social group).

Assurance also produces difficulties because the state should only respond to reasonable fear and uncertainty with criminal justice methods. If citizens fear or uncertainty is unreasonable this does not make it less real, but it should change the governments response. An unreasonable fear or uncertainty should be met with attempts to address the cause of the fear, not to increase its provision of criminal justice to accommodate it.

It can be concluded from this description of the assurance/subject security problem that the western liberal state's duty of security extends to reducing and addressing the fear of

harm as well as harm itself. Indeed, the fear of possible harm might even be considered the more serious of the two. Such seriousness has been, in the last few decades, reflected in governments' researching and enacting policies specifically to reduce the fear of crime (Garland, 2001 pg 10). Assurance therefore is a legitimate aim of the state's provision of security as a public good but it is not one without difficulties.

The State's Duty of Security

If ensuring (as far as possible) the security of its citizens is a primary duty of the state as outlined above, then it follows that the state requires a large degree of control over security. For this thesis, the most relevant areas of control are the civil and criminal law and the institutions involved with them.

The criminal law is the most coercive institution of the state in regards to those living within it (Zedner, 2004 pg 3). Historically, the modern criminal law and legal system has largely been a system of post-hoc punishments of conduct performed by someone who knows, or should reasonably know, is prohibited. However, increasingly the state has sought, and been able to commit to, more preventive ideals. The idea is to stop proscribed actions being committed, or at least to step in earlier in the process of a citizen (now potentially) committing a crime. While prevention has long been a goal of the criminal law in the eyes of writers such as Adam Smith and Sir William Blackstone (Ashworth and Zedner, 2014, pg 9), the state's potential capacity to actively pursue prevention has increased and its doing so seems to have become more desirable to its citizens. The cause of this increase can be said to have many roots. Firstly, improvements in technology (and the laws regulating such discussed in Chapter 2) allow for the state or private enterprise to more easily and cheaply enact measures designed to prevent crime, such as CCTV – often very visibly. Secondly the advent of the "Risk Society" and the role of policing in it has encouraged prevention as an effective tool alongside traditional criminal justice measures,

where responding to crime as a moral wrong becomes secondary to estimating, averting and minimizing losses. (O'Malley, 1992)

The wider reason for the increased demand for prevention and for the public acceptance of preventive measures is hard to discern. Authors such as David Garland point to a rising insecurity concerning crime in the 1980s and 1990s that may form part of the reason. (Garland, 2001, pgs 100-101) Expanding preventive state control for subjective insecurity is worrisome. Subjective security is vulnerable to awareness of new or resurgent sources of threat, which renders it transient and inherently expansive. (Zedner, 2009, pg 18) The threat being that new insecurities will constantly arise as time passes, and if responded to precipitously or without evidence, this will lead to ever expanding preventive state control. This can be seen in the case of more serious harms in the legislation that has emerged over time as detailed in Chapter 2 where the state kept expanding preventive measures and had to be curtailed repeatedly by the judiciary.

In the UK, the more extreme measures of preventing serious harms such as large-scale attacks on the populace have been restricted to times of war or great civil strife. Ashworth and Zedner note that many and various political theorists such as Locke, Montesquieu, Hume, Rousseau and Adam Smith accept that in times of emergency the government has a prerogative of exercising executive powers outside of normal legal and constitutional limits. (Ashworth and Zedner, 2014 pg 8) In the UK, this has included extraordinary measures such as the internment of 64,000 Germans, Austrians and Italians in the opening months of the second world war and of some 364 suspected IRA members as part of Operation Demetrius in 1971. More recently, detention without charge was established and revised in numerous UK terrorism acts has raised the spectre of past actions that even at the time were viewed as extreme measures (seen in the legal language of acts, the use of sunset clauses in legislation etc). While the current raft of preventive measures is not as severe as these

examples they, and the preventive principles behind them have become normalised within UK law.

This rise in prevention can be seen in David Garland's analysis of modern crime control which indicates broad changes in criminalisation, punishment and the increased involvement of citizens and private enterprise in crime control. The most relevant of these changes for this discussion are the decline of the rehabilitative ideal, the re-emergence of punitive sanctions and expressive justice ("condemn more understand less"). Changes include the emotional tone of policy, the return of the victim in judicial thought, the ideal of public protection, expanding the infrastructure of crime prevention and safety and a perpetual sense of crisis. (Garland, 2001 pg 8-20). These factors, and a disillusionment with the more rehabilitative penal welfare brand of crime control that preceded the recent shift, have resulted in governments changing policy. Dual strategies of adaptation to emphasise prevention and a partnership between state and citizen, alongside a sovereign state strategy – emphasising enhanced control and expressive (mostly condemnatory) punishment (Garland, 2001 pg 140).

We can see both theorised strategies in preventive policies. Pre-choate crimes and control fall squarely in the adaption strategy of prevention and the sovereign strategy of control. Expanding criminalisation and increases in surveillance ability (such as extensive CCTV) and legal powers straddle this boundary. The idea of condemning more and understanding less can be seen in the early history of measures such as Control Orders, which lacked the kinds of reintegration measures that are present in the contemporary TPIM legislation. The New Labour government was much more interested in the control of people it deemed risky than it was in understanding them. This can also be seen in how initially the Prevent strand of the CONTEST strategy was under-developed until the last years of the Labour government.

Garland's explanation is not the only plausible one however and many writers such as Ian Loader and Richard Sparks have criticised Garland's work. Chiefly, their claim is that he underestimates the role of politics and political culture (Loader and Sparks, 2005 pg 5-33)⁶⁵. Not all late modern democracies resorted to the neo-liberal politics of the UK and US and the scale of the increase in incarceration differs greatly even between those two countries. (Lacey, 2008, pgs 24-29) This shows that different states are enacting their duties of security in different ways. The most important theme of such analyses for this thesis, however, is the contention that many recent policies aimed at the prevention of serious crime are rooted in broader changes in societal economic and political thinking as opposed to being a direct result of, for example, a more acute threat from terrorism or mass murder. Terrorism, in particular, has long been the proximate cause for the introduction of special powers or emergency security measures. (Zedner, 2009, pg 118) As briefly described in Chapter 2 many of these had preventive aims.

Modern prevention measures arguably have a different character. They are reaching further into criminal and civil law through the expansion of hybrid civil/criminal orders that relate to different forms of anti-social behaviour, rather than to just the most serious. The thrust of these measures, tracked through the legislation in Chapter 2, shows a pattern that the state is increasingly seeking to control risk as much as possible, even if it must bend or break legal and constitutional norms to do so. Successive governments have continued this approach to fulfilling the duty of security, but it is another sign that the traditional moral dimension of such actions are taking a back seat to the minimisation and control of risk and of those who are seen to create it.

⁶⁵ Garland was also criticised here for taking an explanation that fitted findings in the US and UK and applying them to world at large. This is a valid and important criticism but is less relevant for this thesis, concentrating as it does on the situation in the UK.

In certain areas, the laws of the British state stretch further back from the commission of a substantive (criminal) act than ever before. The criminal and civil law has extended to cover everything from what we say, to what we buy, if our perceived intent is one that is seen to potentially threaten the lives or well-being of our fellow citizens in certain situations. Examples of this are found in Chapter 1. In particular the offences such as ‘preparation of terrorist acts’ under the Prevention of Terrorism Act 2005. However, other serious harms such as drug and people trafficking, slavery, sexual harms and even computer misuse and intellectual Property violation, have more recently been targeted by pre-conviction preventive measures such as the Serious Crime Prevention Order or the Sexual Offence Prevention Orders described in Chapter 2. Other areas such as anti-social behaviour have their own history of preventive measures, and while this thesis seeks to concentrate on serious harm (as defined in Chapter 1), it is important to note that this focus on prevention has become far-reaching since the early 2000s.

Preventive justice falls outside of the ‘traditional’ post-hoc, punitive and coercive approach to the criminal law and thus, it is argued, outside the traditional boundaries of the state’s duty of security. Hybrid civil/criminal orders, as seen in Chapter 1, have had to be designed and adjusted to be non-punitive, at least in goal. Judicial oversight has meant that civil orders must impose restrictions commensurate with their preventive goals and must not include measures that are too punitive or solely punitive (as shown by the legal cases such as the progression of *A and others v United Kingdom*⁶⁶ discussed in Chapter 2).

If the state’s further expansion into prevention is to be justified, then it needs a normative foundation. We cannot rely on a simple acceptance of a kind of natural progression described by authors such as Garland. The progression of legislation shown in Chapter 2 demonstrates that successive British governments have chosen to fulfil their duty to

⁶⁶ *A. and Others v. The United Kingdom OM - 3455/05 [2009] ECHR 301*

provide security through the creation and use of preventive justice. A normative foundation is needed because it is unclear as how beneficial this response is to the citizens to which the state owes the duty of security. Garland's assertion that New Labour was more interested in control than understanding speak to a state that seeks increased prevention for the political gain of the government or political parties rather than the increased security of citizens. Such an aim would undermine the liberal democratic ideal that security should be pursued as a public good. Preventive justice under a public good conception exists to make all citizens feel and be more secure, not to promote the security interests of one group over another or to assist political parties in a non-security related aim (such as election victories or ease of governance at some citizens' expense. The state has benefited from preventive justice through an increase in state control, but its motives are questionable.

Increases in State Control from Preventive Justice

The ability to impose coercive sanctions at an earlier stage in the timeline of a potential harm has increased the state's ability to exert control, as have measures such as TPIMs and other hybrid civil/criminal measures. The benefits of expanded criminalisation and prevention potentially serve multiple goals in criminal justice. The state may believe that a person is dangerous, but not have the evidence for a more established charge like a traditional attempt charge of a crime. However, almost everything that could legitimately be called a terrorist attack is already covered by ordinary criminal law (Ashworth and Zedner, 2014 pg 179). The *mens rea* of intending to cause severe harm, for whatever reason, and the *actus reus* of whatever violent or damaging action is taken is certainly within the more traditional bounds of criminalisation. Even if we wish to attach special significance or outrage (Waldron, 2010 pg 49) to terrorism or some aspect of it (such as attacking civilian rather than military targets for political purposes), this could be dealt with

through aggravating factors in sentencing guidelines. The state must be able to demonstrate and justify a legitimate increase in security from expanded criminalisation and increased use of preventive justice.

Recall from Chapter 2, these laws include the creation of new crimes such as 'collecting or making a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism' contained in section 58 of the Terrorism Act 2000. This gives the concept of terrorism a unique character in the UK's criminal law. This matches the unique character of terrorism in the media and the fear terrorism evokes in the population. Action such as passing new laws or giving increased power to police or security services gives the impression that the problem of terrorism is being tackled head on, while concern for human rights is left at the periphery, or at least not an immediate priority. (Moss, 2009, pg 93) The issue for this thesis is that security, as conceived as a public good is inherently bound up with human rights concerns. In degrading or diminishing human rights the state acts against its citizens personal safety and security and therefore their ability to pursue their desires and happiness.

Alongside the issue of the expansion of criminalisation to earlier stages of conduct, there is the makeup of the offence. The mens rea for a section 58 crime is comparatively easy to prove because the wording of the offence makes it one of strict liability. Moreover, the burden of proving innocence is on the defendant. They must proactively prove that they had a reasonable excuse for possession of whatever is the subject of the prosecution. The prosecution themselves only have to prove collection, possession or creation, which is relatively simple. These newer crimes are thus easier for the state to reach the burden of proof required for prosecution and often place unique or larger burdens on the defendant.

The increased investigatory powers now available to the state are also worthy of brief mention here. Statutes such as the Regulation of Investigatory Powers Act 2000 and the

Investigatory Powers Act 2016 allow delegation of certain duties to enterprises such as communications service providers. These include a requirement to retain internet connection records to form a 'haystack' for intelligence, police forces and other departments to search through on request. Other measures such as bulk data collection allow for the legal interception of vast amounts of data for an investigation. While on its own this would not seem to directly increase state control, information is invaluable to the state in making risk-based decisions. A more informed decision arguably makes for more precise control. This is before considering the potential for over-reach or the side-effects knowledge of such collection may have on the citizen body, something that is discussed further in Chapter 4.

Lastly, more socially orientated programs like Prevent have perhaps the most long-term control benefit for the state although these can be considered more of a 'soft-power' measure than an expansion of criminalisation. This is especially true when discussing measures such as education, and the active promotion of ideas or qualities identified by the state. While this is not in and of itself a bad thing, great caution is required depending on what these stated qualities are and how the state demands they be addressed. Similar concerns arise when the state responsabilizes professionals outside of its direct control such as teachers, health professionals, religious or community leaders, etc. These are people who, prior to the Prevent, had no special responsibility to promote or encourage a certain set of beliefs or any duty to report those who expressed beliefs defined as 'extremist'.

Even without criminal sanction for failure, the potential expansion of state control here is vast, even if the stated goals are to promote ideas such as democracy, religious freedom and toleration. An example of this is found in the Prevent duty discussed in Chapter 2. A specific example is in the UK government's departmental advice for schools and childcare providers where the Prevent duty requires teachers to "assess the risk of children being

drawn into terrorism, including support for extremist ideas that are part of terrorist ideology” and to “promot[e] fundamental British values...enabling [children] to challenge extremist views” (Department of Education, 2015, pgs 5-6) Such a duty shows how the policy of risk management in the area of terrorism has been expanded outside of the legal system and into the education system. Alongside this the government hopes the existence of such programs acts to ease fears of the risk of terrorism, radicalisation and other ‘risky’ behaviours.

Justifications and Legitimacy of Increased Control

So far, the potential benefits and drawbacks of increased control through prevention have been discussed. Now the possible justifications for this increase must be addressed. All forms of liberalism mandate the punishment of those whose conduct seriously undermines the ability of others to live their lives as they wish because of the value liberalism places on free pursuit of one’s chosen ends. (Hudson, 2003, pg 23) To pursue one’s chosen ends requires objective and subjective security as discussed at the beginning of this chapter. To extend this argument to justify the restriction of the liberties of those who *might* commit future wrongs is more troublesome.

For the state to be able to justify expanding its control further into prevention and pre-emption, we must establish, and appeal to, a philosophical framework. This framework must do more than merely reflect the simple demands of the majority of the electorate, and must take into account the judicial process and obligations to human rights, both in spirit and in the letter of treaties and agreements the UK has signed – such as the European Convention on Human Rights – much in the same way that a state should justify its intervention in any sphere of society.

There is considerable unease shown in both the academic literature discussed in this thesis and, sometimes, the media in regard to preventive justice. This is especially true of

the expansion of criminalisation and the creation of hybrid civil/criminal orders. This unease covers many areas, from unease at the very nature of the risk society (Ulrich Beck, Richard V Erikson, Kevin Haggerty, Clive Walker), to concern as to the use of the criminal and civil justice systems for preventive ends (Andrew Ashworth, Kate Moss, Lucia Zedner) A starting point for considering this unease is Mill's harm principle which explicitly acknowledges that power can legitimately be exercised to prevent harm to others. (Mill, 1979; 1859, pg 68) However, while the harm principle or some variation on it can be considered necessary to justify prevention, it is not sufficient. If a loose application of the harm principle were to be considered enough justification for the application of state power then many areas of free, or relatively free action come under threat. Claims of harm are so pervasive that the harm principle itself cannot serve as a *critical principle*. The issue has become not whether something causes harm, but of what type and how much. (Harcourt, 1999, pg 113) Terrorism is undoubtedly a very serious harm when a terrorist attack occurs, but the rarity of such events should also be taken into consideration.

One way to approach this problem is consider security as a form of public good or service as per the beginning of the chapter. A subject that has seen discussion in a broader context in political and economic debate. (Posner, 1999) From an economic point of view, a public good is "a good or service that has the features of 'non-rivalry and non-excludability and as a result would not be provided by the free market'"(Garratt, 2012). Typically, such goods are exemplified by things such as street lighting or clean air. By focusing on whether preventive justice would be provided at all without the intervention of the state, we can form a basis of necessity to justify the state's intervention (or not) (Loader and Walker, 2007).

The provision of security is traditionally considered mostly non-rival, at least when instituted at a state-wide level, and within the context of a state's own national security

and law and order⁶⁷. The protection afforded to each individual by the law does not subtract that same protection from another individual. The observed forms of preventive justice such as control orders are have difficulties at this point, while the law itself is non-rival the imposition of a control order increases the security of every citizen, except, it can be argued, the individual under the restrictions of the control order, one who, importantly has not necessarily committed a criminal offence at this point.

The provision of security by the state has also been largely non-excludable; it is impossible to stop two citizens *of equal standing* from benefiting from the effects of law and security (both positive and negative). Security is a good that is unlikely to be provided by an economic market because of the problem of free-riding. This relates back to the theory of the problem of assurance discussed earlier. Although the senses in which free-riding is used are different in the two accounts. Without the state, two problems of free-riding are likely to occur. In addition to the one above there is the sense that all wrongs are acts of free-riding. One person is taking advantage of a system 'paid' for by others through their compliance (Matravers, 2000, pg 255).

An exception to this would be, for example, the provision of private security such as in the form of closed communities. This would indicate that security is not in all respects a public good. For example, gated communities are one area where the provision of security is taken into the hands of a small community in order to generate a safer environment for themselves – a kind of 'club good'. The creation of such a club good is still non-rival, the same provision of security present outside the community is still there, but there may nonetheless be an increase in criminal activity outside of the community, as, by

⁶⁷ Whether one state's provision of security could affect another state's security is beyond the scope of this thesis.

comparison, it is now less secure, being excluded from the gated community and assuming the amount of crime over the total area is not affected.

When security is considered as a public good, provided by the state, it can control who 'pays' for the provision of the good. Most obviously this will be in the form of some scheme of taxes, although discussion of the specific burdens of taxation and how they fall is beyond the scope of this thesis. Less obvious than the economic cost of providing security, however, is what we might consider the 'social cost' paid for by society in the form of the intrusion by the police and other security agencies. Such intrusion is in some sense a decrease in security for that group, as security from state action is just as important as the state's actions to prevent non-state actors harming others as noted in the previous section. This social cost is likely to be unequal. Most policing and security work is discretely targeted to an incident, victim, offender or locale. (Loader and Walker, 2007, pg 149) Loader and Walker reach the conclusion that security may, therefore, be unequally distributed. When discussing prevention the same logic applies in reverse. Given that prevention is limiting individual action in some form, discrete targeting will place the burden of the social costs of preventive justice unevenly. In the case of civil orders this unequal distribution may prevent individuals or those close to them from participating fully in society, even when they intend no wrong, given that their opportunities are restricted due to specific burdens placed upon them; burdens that will also inevitably affect those around them.

Alongside the obvious benefit of preventing actual harms that may otherwise be committed there is also the peace of mind that prevention may bring; the idea that prevention increased the sense of stability in society. In this way seeing security as a public good addresses the problem of objective and subjective security. Without some basic assurance of protection of life and property (where relevant) the population of a society would be overwhelmingly concerned with the provision of individual security over and

above any other goods. This would be especially acute with other collective goods in a society lacking the rules and enforcement needed to both provide stability and give people the confidence to cooperate. After that basic provision, security in the modern liberal state starts to compete with many other social goods and rights such as freedom of speech or education. The difficulty for preventive justice – particularly extreme forms of risk management such as control orders, deportation orders or the removal of citizenship/passports – is whether it forms part of this fundamental security or belongs to the realm of security that competes with other ‘social’ goods, especially those (such as freedom of movement or freedom of speech) that could be restricted by such measures on an individual level.

The good that could arise from preventive justice is the prevention of criminal acts although secondary effects, such a reduction in the fear of crime, could also occur. Concentrating on the prevention of very serious offences, this benefit is magnified in that there is the possibility of preventing damage to society that could not be repaired (chiefly the loss of life). This is as opposed to the less serious offences covered by preventive justice in the form of ASBOs or other anti-social behaviour prevention measures. There are two important, although not necessarily fatal problems with this view. This first is the problem of objective security in prevention and the second is subjective security in prevention.

Objective security with respect to traditional crimes can be measured through the normal operations of the police, and this information can be presented as evidence to raise or lower the provision of security. Prevention has no such objective basis because it is hard to tie the kinds of preventive actions discussed in Chapter 2 to the prevention of specific incidences of harm. In the case of pre-inchoate crimes one can make the attempt, but given the potential timescale of crimes such as possession of material likely to be of use for terrorism, or preparation of terrorist acts, this is difficult to do. It is possible only to address

these risks as harms in and of themselves. It is not possible for the state to say with certainty that they have stopped a greater harm from occurring when it uses preventive justice. That is, the kinds of harm upon which the harsh punishments of these offences are predicated. When we consider preventive measures such as control orders or TPIMs the situation is bleaker. When considering the effectiveness of TPIMs in 2012, David Anderson notes “TPIMs are likely to have been effective in preventing terrorism-related activity during 2012. They were undoubtedly effective in releasing resources for deployment in relation to other pressing national security targets.” (Anderson, 2013, pg 6) Terrorism-related activity as discussed in Chapter 1 is an extremely broad category of activity that goes far beyond the kinds of serious physical harms under discussion here. There is no way to know that without the TPIM in operation that the subject would be a risk. Although as discussed in Chapter 5 it has been held to be very likely by both the executive and the judicial elements charged with implementing and reviewing TPIMs. Anderson’s report only concretely tells us that TPIMs allowed resources (presumably police time and energy) to be deployed elsewhere. This is very arguably an increase in objective security in regards to police work, but we must weigh this against the very real intrusion felt by the targets of TPIMs and those around them.

Subjective security in prevention is difficult to tackle for the same reasons that it is traditional criminal law. A democratic populace’s subjective feeling of security, and thus their decision on the provision of prevention, is not likely to be based on a factual determination of risk. Where a citizen or group of citizens perceive a lack of subjective security without a basis, there is the risk that they will act in ways that prematurely and illegitimately disregard the wellbeing of other individuals or communities.

To address these problems the democratic provision of security must be more explicitly tied to the evidence base for preventive justice. There is a strong sense that, past the basic

application of prevention, justification and legitimacy can only be found through evidence and responsible analysis of policies already in place. Democratic deliberation amongst those affected by security problems in a way that is inclusive and evidence-based will help alleviate the objective and subjective issues outlined above. Much as in the debate around security more generally, inclusive debate provides a check against citizens or state-sponsored actors (i.e., members of government and its institutions) proceeding on a self-defined or self-corroborating basis (Loader and Walker, 2007, pg 220)

The form and result of this debate can already be seen in the legislative history of prevention. Judicial scrutiny of prevention and independent review of the measures enacted both serve to feed democratic deliberation. Where this has not occurred the demands for justification of a preventive policy necessitate that it should be so. In the UK we can point to a deficiency in the examination and oversight of the Prevent programme. Notably, the independent reviews of terrorism legislation have frequently flagged the need for greater independent scrutiny of both counter-terrorism measures and policies such as Prevent (Anderson, 2016c, pg 90). Nonetheless, this is a daunting task and not one the UK has achieved. Any evidence-based approach in public policy needs a measure of effectiveness, and criteria for assessing success and failure. (Marsh and McConnell, 2010, pgs 564-565) The creation of a framework for assessing evidence ideally allows for an accurate provision of preventive measures. A potential basis for this is found in the discourse on Australian counter-terrorism law that combined modern public administration thinking with ideas of necessity and appropriateness with respect to specific preventive counter-terrorism measures. (Legrand and Elliott, 2017) To compound the difficulties here the earlier discussion of illegitimate aims of the state must be addressed. The state must act to forward the legitimate interest of security as a public good even when its citizens demand different action. If citizens subjective sense of security is threatened then the state should act to intervene, but it may be very tempted to intervene in an illegitimate way. If,

for example, citizens are subjectively concerned with their security due to poor or incorrect information and demand preventive justice be used to tackle that fear the state may be tempted to do so to appease these citizens. Doing so pleases the citizens which is of political benefit to the state, but not beneficial to the citizens themselves as, due to poor information they have increased the state's control over their actions for no objective gain in security even if subjectively they feel safer (for the moment). The correct course of action for the state here is to correct the misinformation, decreasing the subjective fear without exerting more control. Politically this is likely to be more difficult path given the nature of parliamentary democracy and the fact that correcting misinformation is a difficult and often thankless task.

Fear, Uncertainty and Risk

The collection of evidence and application of a framework is however subject to problems beyond the technical scope of problems such as collection or interpretation. These problems broadly stated are those of fear, uncertainty and risk.

The change in the culture of criminal control creates many problems relating to different kinds of risk, fear and uncertainty for the state. The foundation of risk comes from the acknowledgement that some citizens are more likely to wish to harm their fellows than others. The foundation of uncertainty is that the state has difficulty in finding out who these citizens are, regardless of its intent. The problem of fear applies to the state itself, and how it seeks to manage that fear in its citizens. Over time it seems that the state's citizens have become more aware of these facts, and either through societal changes (such as that described above by David Garland) or political manoeuvring the desire and willingness to address risk before it manifests into traditional criminal harm has risen. This thesis concentrates on those instances where the chief rationale for earlier intervention is seriousness of the harm that might be prevented. Stepping onto this path requires the

state to attempt to calculate several things relating to risk and uncertainty: the risk of the harm itself, both in likelihood and seriousness; the effectiveness of its actual response to that risk; and its citizens' perceived effectiveness of that response.

On initial examination, this might not appear too hard. After all, actuarial risk assessment is used by the UK government to answer these kinds of questions in many areas. Why would criminal justice be any different? The main concern with using any calculation of risk of serious harm is that it requires a combination of the level of certainty of the risk of the outcome, and the reliability of the process that has determined the risk. (Tadros, 2014, pg 149) This harks back to Beck's "non-determinable victimisation" point expressed in *The Risk Society*. In every strand of policy from immigration to economics, we can illustrate many examples when the state has declared that something will happen, only for it not to occur, or at the very least not to the predicted extent. In the area of national security, these claims are made often, and more than in any other area, are harder to prove or disprove, given that so much behind the policy is locked away behind legislation like the Official Secrets Act in the UK and similar legislation in other countries.)

Since the early 2000s, much media and scholarly attention has been devoted to the subject of counter-terrorism across the western world. Governments and academics both must now confront a body of legislation passed in haste that nonetheless has likely played some part in preventing similar tragedies, but that was nonetheless passed in great haste. While some of the sharper edges of anti-terrorism legislation have been curbed since 2010 (such as long periods of detentions without trial or frequent use of closed/secret hearings) we are left with a comprehensive system of legislation stretching across at least 15 years which gives the government executive, the police and the security services, wide-ranging powers, along with, it should be noted, wide-ranging responsibilities. Unlike many policies, however, there is often very little disclosure of how much is actually known about the

threats to modern liberal democracies. Governments themselves are clearly uncertain as to the risks, one of the reasons surely that such wide-ranging and far-reaching laws have been passed, greatly widening the scope of criminalisation and the ability of governments to interfere directly with those seen as 'risky'.

Uncertainty

The security seeking state must form legislation that protects its citizens while respecting other interests and duties and the values or rights to which it ascribes. Often however there will be great uncertainty stemming from a lack of information about the threats that are posed. Relatively few empirical studies have been done concerning the make-up of potential threats by individuals or small groups of citizens, while there has been a great deal of uninformed speculation. For example, recent studies show that there is very little to suggest that there is a clear profile of a 'lone-actor' terrorist. (Gill, Horgan and Deckert, 2014) These actors are often considered the most dangerous given the difficulties of identifying and stopping them. Given the many factors identified in this and other studies, governments have instituted expansive legislation and powers in order to cast the widest possible net for their police and security services to use. The clear aim is to reduce the uncertainty about who poses a serious enough risk to warrant detailed investigation or sanction. This involves both potentially far-reaching powers such as TPIMs and large amounts of data collection and sifting, such as that allowed by the Investigatory Powers Act 2016.

A recent example facing the UK is the matter of its citizens going abroad to fight for or against an entity that it has publicly denounced. The formation of 'Islamic State' has seen increased use of measures and laws designed to both deter people from fighting abroad, and from returning to the UK afterwards. These people are not directly harming, or immediately threatening to harm, people that the state has a direct, elected responsibility

to protect. Some indeed, are going abroad to fight in the name of ideals that the state would seem to find laudable such as the reported case of Jim Atherton (The Independent, Jim Atherton: The British grandfather with no military experience fighting Isis in Iraq, 2015). The obvious foreseeable threat is that these individuals will return to the UK, possessing 'radical' ideas, training and possibly materials that the state (and a majority of its populace) consider to be dangerous or not in keeping with the ideals of society (pro-Islamic State literature or propaganda for example). Despite this, acting before a person has even left the country is a point very far from the harm they may cause the state or its citizens; further still than the potential harm that forms the backing of criminal offences such as 'possession of information likely to be useful to a person committing or preparing an act of terrorism'. Measures such as the confiscation of passports show an expansion of preventive measures through executive action. This connects with our themes of governmental avoidance and risk assessment. Rather than face the difficulties encountered with controlling risky people at home, the state prefers to avoid any kind of risk at all by excluding its own citizens from their home country. In this way the state avoids having to make any real ongoing risk assessment at all, and simply acts in a utilitarian manner to eliminate as much risk as it can, regardless of the morality of effectively exiling a citizen and/or stripping them of citizenship.

When it comes to national security, there has been a marked change in tone over the last twenty years when talking about the issues of terrorism. Statements such as 'the threat to the country has 'never been greater' (Cameron, 2014) or that 'the threat we face is now more dangerous than at any time before or since 9/11' (May, 2014) are common. Such statements have quickly translated (for government) into new criminal law, new hybrid and civil offences, and new programs designed to alleviate the risk of further attacks. For example, the Counter-Terrorism and Security Act 2015 expanded the restrictions allowed under TPIMs, created a specific passport removal power, new civil orders, and it placed the

Prevent duty on a statutory footing. This kind of ‘state exceptionalism’ being used to justify security strategies, has become increasingly common. However, there are serious doubts about this, even within the security establishment. In a speech at the Lord Mayor’s Annual Defence and Security Conference, John Evans, the Director General of MI5 said, “Those of us who are paid to think about the future from a security perspective tend to conclude that future threats are getting more complex, unpredictable and alarming. After a long career in the Security Service, I have concluded that this is rarely in fact the case. The truth is that the future always looks unpredictable and complex because it hasn’t happened yet. We don’t feel the force of the uncertainties felt by our predecessors.”(Evans, 2012)

History shows us that legislation like the various terrorism acts are unlikely to be repealed. Various terrorism acts passed between 1974 and 1989 were initially described as ‘emergency temporary powers’ and required annual renewal. They were renewed by successive governments until many of their powers were made effectively permanent (and expanded upon) by the Terrorism Act 2000.⁶⁸ Those powers that were not retained (such as exclusion orders) have returned to British law through similar means in the form of Control Orders and TPIMs. Roy Jenkins said of the measures instituted in the original 1974 Bill, “these powers, Mr Speaker, are Draconian. In combination, they are unprecedented in peacetime. I believe they are fully justified to meet the clear and present danger.”(Jenkins, 1974b). This demonstrates one of the problems of the Risk Society, if legislation is passed on the basis of future risk, then it will likely be very difficult to repeal or to argue that such legislation is no longer needed, given that this would require quantifying an ‘unknown’ future level of risk. The justification that things are “more dangerous now” or “could get

⁶⁸ Such as the changes made under Schedule 15, available at <https://www.legislation.gov.uk/ukpga/2000/11/contents>

more dangerous” should be viewed very warily when it comes to the implementation of new forms of control through preventive justice.

Another area that relates to uncertainty is the identification and discouragement of certain views that are deemed harmful or threatening to society. Examples such as the ‘Prevent’ – part of the post 9/11 CONTEST strategy (later updated in January 2016) – designed for counter-terrorism are the most recent in Britain, although consultation on new measures is currently underway (discussed below). While such initiatives on the part of the state are not necessarily a bad thing and offer a means to pre-empt serious harm if successful, there is a real danger of such prevention programs leading to an unjust restriction of liberty. Even if the restriction of the subject’s liberty is warranted, there will be consequences for those around them such as their family even under relatively light restrictions or monitoring. As an example, TPIMs routinely restrict and monitor the use of communications devices by their subjects.

A second issue, examined in more detail later, is that pre-emption programmes aimed at people whose views lead them to distrust the state and institutions are not likely to work and may even be counterproductive. However, as discussed below in Chapter 5, there may be ways to circumvent this using some of the same adaptive/responsibilization strategies the government has used in the past.

There are two core areas of analysis to this sort of expansion of government powers with respect to possibly ‘extreme’ individuals and groups within society. The first is purely practical: will such methods be successful in heading off future harms to society? The second is normative: is it the democratically elected government’s place to dictate to its populace what an ‘extreme ideology’ is while backing up that view with powers designed to curtail the activities of people who adhere to such ideologies? This second applies not only

to those who might be identified under Prevent, but also to those who, by law, must participate in reporting suspicions, especially teaching and medical professionals.⁶⁹

The 2015 Counter-Extremism Strategy marks a distinct change in government policy towards non-violent extremism, above and beyond the measures and offences included under provisions such as crimes of hate-speech or various forms of incitement. Decrying previous strategies as being 'too tolerant' or 'too afraid to cause offence' (Counter Extremism Strategy 'Counter-Extremism Strategy,' 2015) the new proposals aim to put wide-ranging powers in the hands of the government and to institute policies and programs aimed at countering non-violent extremism. Much like similar measures before it, new civil orders shy away from the language of criminal law by a stated aim to 'disrupt' extremists through measures including, but not limited to, banning organisations linked to extremism, restricting the activities (particularly online ones) of those responsible for spreading extremist messages as well as restricting access to premises that are repeatedly used to support extremism. Alongside these new measures, the new strategy seeks to make the use of other powers easier, in particular, the revocation of British citizenship.

Uncertainty over the scale of the threats prevention seeks to address means there is a danger of over-reach and the associated danger of not being called to account for that over-reach because of the same uncertainty. As the state seeks to balance security and liberty considerations the uncertainty is over how large a risk is posed by a specific individual. Chapter 1 noted that prevention is not new. However, state uncertainty has led to an intolerance of risk and a concentration on targeting individuals particularly in the sphere of crime control and public safety. (Hudson, 2003, pg 53) This has become even more evident in the last decade and half with the creation of individual targeting measures

⁶⁹ Under Part 5 of the *Counter-Terrorism and Security Act 2015*, available at <http://www.legislation.gov.uk/ukpga/2015/6/section/1/enacted>

such as control orders and TPIMs in the area of crime control. In the area of public safety, the individualised nature of the Prevent programme and the statutory duty to report those perceived to be at risk of being drawn into terrorism demonstrate how this trend has extended beyond the criminal and civil law. The specific case of terrorism and the possibility of attack seems to demand prevention and extraordinary treatment in the face of uncertainty, rather than cautious or prudent policymaking. (Zedner, 2009, pg 128)

On the other side of this, the state clearly has a duty to protect its citizens from the actions of other citizens, or non-citizens, who intend to harm them. At what point from the state's point of view, does one of its citizen's actions mean that it must over-ride their right to freedom of movement, freedom from imprisonment or freedom of speech even if it is uncertain as to what risk they pose? Such rights are most generally seen as qualified; a citizen should be protected from unlawful imprisonment, or perhaps rather unjust imprisonment. When it comes to 'traditional' crimes, or perhaps crimes we might consider *mala in se*, such things are relatively uncontroversial in modern times. The necessity of the punishment of serious offenders who commit crimes such as murder or rape is relatively unquestioned – even if debate arises about the purpose and exact justification behind those measures. The question of whether the government should have acted pre-emptively is much more difficult – we do not live in a world where we can exactly predict whether or not a crime will occur – and thus it is a relatively unimportant absolute to dwell on. We must, however, dwell on the issue of at what point of certainty or uncertainty does a state have the duty to act when the possibility of a serious wrongful harm occurring appears. As seen in the above section on risk this question becomes even more difficult when we cannot even say 'there is a 91.5% chance of this event occurring' and must instead contend with the same sort of language that makes up the existing body of legislation; there is a 'slight' chance, a 'reasonable chance' an 'almost certain chance', etc. When we criticise the

policies and actions of the state in these very serious areas, we should take into account the dearth of exact information around which they are formulating policies.

There is no easy solution to this issue of uncertainty, but there is potential in the idea of addressing uncertainty with regard to a combination of state duty and citizen responsibility. Matravers conjectures that there has been a re-evaluation of the nature of agency and blame. There is potential to combine an argument concerning agency and blame to form the basis for state action in the face of uncertainty. Matravers argues for a conception of agency and blame that acknowledges the degree to which our fates are not wholly determined by our own choices. This, in turn, raises the possibility of prevention being used as a response to an agent who struggles with their behaviour and requires help in order not to become liable to the serious criminal penalties that come with criminal charges. (Matravers, 2014, pgs 248-250) This idea is returned to in Chapters 4 and 5.

Risk

This section discusses the problem of risk as it relates to the state. It establishes the problems posed by a concentration on risk in making decisions about an individual's future behaviour, especially when applied to preventive justice and the restriction of an individual's liberties by the state. It also considers the risks the state must take on behalf of the citizens it has a duty to protect.

The state often takes decisions concerning risk in public policy and in the area of criminal justice. A key example is found in the assessment of the risk of re-offending where, rather than individual clinical judgements about how likely a person is to re-offend, instead an actuarial judgement is made based on the characteristics a person possesses and whether those characteristics are associated with re-offending. (Hudson, 2003, pgs 47-49) In prevention, we can see this kind of risk operating in some police powers such as the stop and search powers contained in the Terrorism Act 2000.

Within the realm of preventive justice, a more clinical use of risk is deployed in the implementation of civil orders such as the TPIM, where the Home Secretary uses a risk assessment of an individual to decide whether or not to impose restrictions on them. This cannot be said to be an actuarial risk assessment, as each TPIM is individually assessed and applied. The full workings of this are addressed as a case study in Chapter 5 Actuarial risk however arguably forms the basis for large parts of the Prevent strategy, especially in its wider social elements. Within the Prevent strategy, the government is clearly identifying broad characteristics that correspond with some association with terrorism. This can be seen in how the strategy addresses the issues it is trying to solve. Some of these characteristics are obvious and relevant such as measuring the popular support for terrorist organisation such as Al Qa'ida. (HM Government, 2011, pg 17) Others are less so, such as the targeting of the education, health and charitable sectors for engagement with Prevent or the use of general demographics to determine priority of Prevent work (HM Government, 2011, pg 97-99)

This would seem to be the correct way to deploy the use of risk in prevention at first glance, but it is not without difficulties. Regarding TPIMs, no matter how individual the risk assessment or clinical its construction, it cannot be precise. Once a TPIM is imposed it is not possible to ascertain whether not imposing it would have led to the subject committing a punishable crime. In cases where no crime or harm would have been committed, the state has undoubtedly caused harm to an individual's liberty for no objective gain although some subjective sense of security might arise from the knowledge that the risky individual's actions are being restricted. On the other hand, failing to restrict the liberties of a risky person fails to respond to the risk they pose. (Tadros, 2014, pg 139) There is a paradox of harm here where it is impossible for the state to quantify the harm involved in two opposed courses of action. All other things being equal, moral agents such as the individuals under consideration here, should be treated as responsible agents. We should

presume they will not act wrongly unless there strong evidence that they will. (Tadros, 2014, pg 144) As the current TPIM legislation stands, this criterion appears to be met, as demonstrated by the High Court cases discussed in Chapter 5.

However, treating people as moral agents has implications beyond legitimate prediction of their future behaviour. The means we use to restrict their liberty and the conditions for the relaxing of any restrictions are equally important. Using state predictions of risk to restrict liberty requires that the state not only act to control the risk but also act to mitigate the risk posed long term. In keeping with the arguments of agency and blame discussed above. This argument is explored in more detail in Chapter 5.

The state must also address the problem of risk as it relates to the danger to citizens as a whole, and not just to individuals or groups upon which it has focussed special attention. There is an element to the criminal law that results in one of its purposes being in the managing of our expectations, in particular, the behaviour of others. The creation of a body of criminal law communicates a standard of behaviour that the state deems acceptable, or at least non-criminally culpable – leaving minor moral infractions to the social judgement of friends, family or the general public.

Where risk and expectation directly involve the criminal law (which certainly stretches from some of the most minor to the most serious of crimes) we must ask whether the state has a duty, as the provider of security and the ultimate manager of criminal justice in its jurisdiction, to mediate between the criminal laws it creates and the expectations and fears of the populace. If a government submits immediately and blindly to public outcry, then there is a severe risk of the rights of minorities (be they political, racial etc.) or individuals being threatened in the name of security, and ultimately fear. This might be considered an offshoot of populism and criminological discussions of ‘moral panic’. There is a problem here with how a state should address the communication of risk. A broader conception of

this concept 'the fear of crime' and the media's role in instigating and channelling fear has long been debated in criminology. (Sparks, 2001, pg 200) The state is restricted in interfering in this area by principles of the freedom of speech and its own duty to provide security. Liberal democratic states are rightly wary of acting against the media even when the media can be shown to play a role in instigating and channelling fear. However, there is a preventable danger in remarks such as those made by David Cameron and Theresa May quoted in the previous section that add to this populism when these words are backed by legislative action. Couching measures in terms of 'threat' and 'danger' rather than in more measured language is arguably irresponsible.

When law enforcement and the security services seek further legal powers these will invariably be at a cost to the rights of citizens in society. This might be an individual and his close family and his acquaintances – in the case of control orders/TPIMs, active surveillance etc. – or the public more generally in the case of mass interception of communications, stop and search powers, etc. Clearly, there is a balance to be struck here also between the needs of law enforcement and espionage and the rights of those whom they will inevitably be acting against. While the issue of expectation and fear is unlikely to play out in quite the same way as above, (although individuals working for the police/security services are obviously citizens themselves), it is undeniable that these agencies are closer to the problem of serious attacks and other harms than any others. When the security or police services ask for greater resources, or indeed wider-ranging powers in order to perform their roles better, Parliament must ultimately make the decision of how far to go in accommodating their requests.

This creates an even bigger potential pitfall for government when the demands of law enforcement and the security services, and the demands of the citizenry taken as a whole, coincide. It would be an unpopular politician in such a situation who declared that more

powers or more resources were not necessary; it is all too easy to point to successful attacks or other harms as a rebuttal. But this is exactly the role that government perhaps needs to take in some circumstances, in order that no-one makes a mistake that will affect the state's citizens' rights for years to come. In these sorts of circumstances, which clearly seem to have occurred in the wake of major terrorist attacks, the duties of the state must be considered, not only what duty they have to further the security of their citizens but also any duty to be the body that holds back or questions the need for legislation in the face of public and private pressure to act quickly.

Fear

Citizens in a state will always be afraid of crime, and as mentioned above there is much political philosophy in the works of Hobbes and Locke that would support the argument that a key duty and purpose of the state is to reduce fear amongst its populace. Much of this duty is already addressed by existing crime policy – which also hopefully has the effect of reducing actual instances of crime. When it comes to the threat of serious harms, though, the situation is more complicated. There is also the fear of those within the state's institutions; the fear of failing in whatever particular task has been assigned to them and so in the protection of others. Many areas of what this thesis defines as 'serious harms' seem to be greatly feared, by both citizens and state representatives. A 2015 ComRes poll of 1061 people aged 18 or older found that 35% of respondents were personally 'very worried' about the threat of a terrorist attack, while a further 43% were 'quite worried'.⁷⁰ The difficulty for the state comes in how it responds to these types of fear and how academics judge that same fear and response. We cannot assume that all expressed fear

⁷⁰ “At the present time how worried, if at all, are you personally about a terrorist attack happening in Britain?” available at <https://www.statista.com/statistics/488048/worry-about-terror-attacks-in-britain-uk/>

from either source is legitimate and credible. The darker side to this is that governments are often eager to use the fear of crime for their own political purposes (Simon, 2007 pg 75-111). This political expression of fear has become a key component of modern crime policy (Garland, 2001 pg 144). This broader picture presents a worrying conclusion, although beyond the scope of this thesis there is much evidence to suggest that the state has failed in its duty of security with regards to the fear and uncertainty of its populace by utilising it for its own ends instead of working to honestly reduce it.

The problem of fear returns us to the issue of subjective security (Zedner, 2009 pg 14-19). This conception has been used to good effect in the analysis of preventive measures such as ASBOs, which were often expressed in the terms of protecting particularly vulnerable people (Ramsay, 2012 pg 55-60). A YouGov survey in 2016 of 1681 British adults found that 2% thought there was a very high chance of themselves, a member of their family, or a good friend being killed or wounded in a terrorist attack. A further 10% thought the chance was 'fairly high' (Smith, 2016). This would equate to roughly 7.8 million people assuming the sample size was reflective of the population as a whole. In fact, 90 people were killed in terrorist attacks in the UK between 2000 and 2015, and another 1074 injured (La Free, 2017) for a total of 1164. In this sense citizens' feelings of subjective security are quite unrelated to the level of objective risk. Zedner notes that the desire for subjective security seems to have been increasing, drawing on the writings of authors across Europe (Zedner, 2009 pg 17), in keeping with Garland's analysis of extensive changes in social perceptions of crime and the importance of crime control (Garland, 2001 pg 146-165).

Zedner presents a useful comparison when discussing security as a subjective state, and thus one vulnerable to fear. Young men often remain relatively fearless at the prospect of being assaulted when compared to women or the elderly. This is despite the fact that they

are statistically more at risk. This is not necessarily irrational as women and elderly persons may feel more vulnerable to the consequences of an assault (Zedner, 2009 pg 16).

We can apply this analysis to the above statistics concerning the fear of being a victim of a terrorist attack. Zedner highlights that women and elderly persons may feel more vulnerable to the consequences of an assault despite being at a lower risk than young men. Perhaps then part of this fear is related to how readily a citizen can respond to that fear. Or at least how they subjectively feel they can respond. An extension to Zedner's example would be that young men feel confident that, even if they were assaulted, they would be able to defend themselves or escape whereas women and the elderly feel less confident in this. Terrorist attacks such as bombings in public places may have a character that evokes this extra sense of vulnerability in more people, heightening their fear of those events occurring and distorting their subjective security in relation to the objective risk of such a harm occurring. More people feel they could do far less in the event the harm was to happen to them, or someone they know and care for. In a sense, this is the individual counterpart to the state's issues of control discussed before: when citizens feel they have less control, or harms may be sudden, they are more fearful. This could even be partially applied to situations where fear is less rational. Zedner notes that the fear of flying pervades society much more than fear of travelling by road, despite a substantial difference in statistical risk (Zedner, 2009 pg 17). However, people know that a passenger on a plane has far less control over his situation than the driver of a car.

This presents a difficulty for the state, and for the proposed measures to tackle problems of justifying state control discussed above with regards to informed democratic discourse as a solution to the problems of justification and legitimacy. If the state faces a situation where the citizens in its democratic system have a perception of subjective security not in keeping with the objective risk of a particular harm occurring, it faces these problems of its

citizens perceiving risk “incorrectly”. The legitimate thing to do, in treating security as a public good, would arguably be to attempt to correct the misperception of risk, rather than act using criminal justice to expand preventive justice. The state therefore has a duty to correct problems of risk, uncertainty and fear through the most non-coercive means available to it. Such a principle would dictate that preventive justice as it exists today should be reformed as it seems unarguable that the British state has failed to abide by this principle with the preventive legislation outlined in Chapter 2.

This concludes the examination of theory as it relates to the state in preventive justice. The main conclusion that can be drawn is there are no easy answers to the problems posed by prevention and how the state can justify it. The key to the legitimate use of prevention by the state lies in addressing the problems caused by the difficulty in assessing any preventive measure on a basis of success or failure. Creating and improving on such a framework will be necessary for the preventive justice project to be justifiable in the long term. A second conclusion is that legitimacy of prevention lies not only with the state but with the citizen as well. In addition to the state, we must look at the duties and rights of citizens to understand the legitimate reach of prevention, as it applies to society at large and specific individuals who fall under high degrees of suspicion. Importantly it concludes in the con It is the theory of the citizen that the next chapter addresses.

Chapter Four: Citizen Rights and Security

The primary goal of the modern liberal state is to produce a secure environment so that its citizens have the freedom to pursue their own desires and happiness (where these desires do not seriously conflict with the happiness of others in the society). Security, in the words of Barbara Hudson, is the one 'unsubstitutable' good on which freedom depends, both in one's own person and one's possessions (Hudson, 2003). The modern state makes efforts to provide this security through many forms of legislation, regulation and organisation. This thesis is primarily concerned with the problems presented by individuals perceived by the state to be a risk to society because of its predictions about that person's future behaviour in relation to the commission of serious harms (bombings, mass murders etc. – politically motivated or otherwise). The state's responsibility to provide a secure society for its citizens certainly allows it to act in this area to prevent such individuals from causing serious harms. This 'responsibility to protect' (Gunther, 2013) is the core justification for governments to take preventive action against such serious harms, but how far should this allow governments to proceed? To what extent (if any) should governments monitor such individuals or impose conditions upon them not experienced by those in society not judged to be a serious risk? While Chapter 3 looks at this issue from the point of view of state, this chapter looks at the problem from the point of the citizens that make up the state, especially those individuals of whom the state is afraid or suspicious.

A 'baseline' of human rights

The citizen has different issues and priorities compared to the state, many possible duties or freedoms to act are 'given up' to the state or restrained in some way in return for security and a certain 'predictability' in daily life. The exact nature of this for political society is described very differently across differing political philosophies. On a broad theory of the existence of some form of social contract on which this thesis is based the

account would be that citizens give up their claim to unlimited action or freedom, as well as specific responsibility or duties for such things as protections of themselves or their family, in return for specific rights acknowledged and defended by the state and its organisations and affiliates. The democratic citizen is expected to respect those rights as they are relevant to other citizens, and, potentially, fulfil any duties the legitimate state imposes, such as obedience to the criminal law, payment of taxes, and so on. Ideally the freedoms the citizen surrenders and any duties incumbent of them will align with the states duty to provide security as a qualified public good. For example a citizen would expect the state to provide security, both from other citizens hostile actions and from the state itself through the provision of an known set of enforced laws that respect the citizens right to pursue their desires and happiness provided doing so does not conflict with others pursuit of the same.

When considering matters such as pre-inchoate crime, hybrid criminal/civil orders and requests or demands from the state to assume new positive obligations that have the stated purpose of fulfilling the state's duty to protect its citizens, the citizen must be able to justify to himself and to others why such measures are necessary and just in a democratic society. Do the citizens have some duty vis-à-vis the state, or his fellow citizens, that requires compliance with these measures? What rights of the citizen are affected by this and how much 'push-back' by the citizen is justified? This chapter seeks to engage with these questions in a number of ways. The first section seeks to explore how the state interferes with the lives of citizens. The second section deals with issues for those citizens that the state does not consider to be a risk, but who nonetheless will inevitably be caught up in the state's overall protective goals. This includes sections on the possible duties of citizens to assist the state with its own obligations, the problems that come with this, such as the uncertainty and inaccuracy citizens will have when interacting with the state in this way, as well as briefly looking at the problem of neutrality or arbitration between citizens

and the state. The final section of this chapter looks at those labelled risky or suspicious. How do they interact with a state that views them with suspicion, what happens when their rights come into conflict with the state's goal of protecting the rights of others from possible or potential harm?

Before the bulk of the chapter begins, it is good to lay down some groundwork. It is accepted in most liberal western states that people, and thus a state's citizens, have certain inalienable rights. In countries operating under the European Convention on Human Rights, some of these are unqualified – such as the rights prohibiting torture, slavery, and punishment without due process. Some are qualified – such as the freedoms of expression and assembly – such that a state can interfere with them for a 'legitimate aim' as decided by the European Court of Human Rights through its judgments. Given that this thesis concentrates on the tradition of common law and jurisprudence in the UK, the rights as given by the European Convention are treated as the minimum to which citizens are entitled – although as seen in Chapter 2 sometimes cases will end up in front of the ECtHR regardless. For the purposes of this thesis upholding these rights is part of the state's legitimate provision of security. When discussing the problem of 'risky' individuals, it is vital to recall the nature of these rights. Much of human rights' theory expresses that there are certain rights that people possess that cannot be simply traded away by the state against other principles (such as expediency or public interest as well as security or 'dangerousness'), or other apparatus of the modern liberal state such as a legitimate decision or law made by a democratic majority. The principle in particular behind those rights that are said to be inalienable, such as the prohibition on torture, is that the effectiveness (or not) of such practices is completely irrelevant, as is any democratic majority supporting them. These ideas have long been reflected in the literature on human rights and in the criminal law, and there is broad agreement that as individuals the rights we possess have a strong normative force. In some cases, this normative force is so strong

that it negates any overriding by any other goal or objective of society or the state. Indeed, this is exactly why rights must be recognised both in law and in political theory more generally. Regardless of the source of the rights, or indeed the nature of the state, rights serve a simple yet important function in areas of jurisprudence such as the ones under investigation here. Dworkin writes that we need rights

“when some decision that injures some people nevertheless finds prima-facie support in the claim that it will make the community as a whole better off on some plausible account of where the community’s general welfare lies. But the most natural source of any objection we might have to such a decision is that, in its concern with the welfare or prosperity of people on the whole, or in the fulfilment of some interest, widespread within the community, the decision pays insufficient attention to its impact on the minority; and some appeal to equality seems a natural expression of an objection from the source.”

(Dworkin, 1984 p.166) Dworkin’s theory of ‘rights as trumps’ is useful for us when considering a community’s or, for our purposes a state’s, desire to increase the security of its citizens and to act pre-emptively in some way against those it considers to be risky or suspicious. Such a principle may provide a useful solution to the question of the validity, or not, of many forms of state pre-emption against risky citizens. The problem of this approach for our purposes lies in the proposition that the state’s duty to protect its citizens, and its actions in pursuit of that, arise from the rights of those same citizens, such as the right to life, liberty and security or even of freedom of assembly and association. If, or when, this is the case, then whose rights ‘trump’ whose and in what circumstances? Do some rights, therefore ‘trump’ others, even within those rights thought of as ‘inalienable’? In such cases, the rights of the citizen body as a whole, and the rights of some individual or smaller grouping within that body are in contention. This is an issue that is difficult to resolve and that requires fine examination.

Broad State Interference

Within the context of criminal justice, as well as in wider society, state interference in the lives of its citizens is a necessary, if occasionally unpleasant, requirement for orderly governance and social peace. Given the relative power of a state's criminal justice system relative to the 'average' citizen and the resources available to them to answer any criminal case put before them, it is prudent to have strong protections for those being investigated and accused of harms worthy of state-driven investigation and possible punishment. Certainly, taken as a whole the UK can be considered to have such protections, but as with all areas of the law, they are deserving of constant scrutiny especially when new laws or procedures emerge in response to new challenges or changes in the social and political frameworks that inform legislation addressing matters of criminal justice. In the context of the criminal law and the addressing of serious harms, state interference, especially before the point of a serious wrongful harm, has been increasing in the last twenty years. Chapter 3 discussed the source of state responsibility to do this, and the various new forms it has taken and from what 'state duty' they originate from. As discussed in there, the state, acting on behalf on the whole body of citizens, can undoubtedly justify both to itself and to at least most of its citizen electoral base, 'meddling' in our affairs for some form of social good. Even in regard to the expansion of any interference, changes in technology and especially communication can account for the need for the state to create more laws and be increasingly involved in citizen's lives. For this section, the most relevant issues here are new preinchoate crimes, risk and where interference aimed at addressing these might bring the state into conflict with some citizens' rights in pursuit of defending other rights of other citizens. In particular, the recent trend of establishing criminal offences, or consequences that strongly ape criminal punishment or sanction (such as control orders) should give us concern that in pursuit of its own duties the state is overstepping its bounds. The most obvious right of citizens that might be interfered with in this case would be the

right to respect for private and family life, as elucidated by Article 8 of section 1 of the ECHR. (European Convention on Human Rights, *European Convention on Human Rights*, 1950). There is a vital importance in addressing the potential scale of interference with the right to privacy that is especially apparent, and important when we are discussing measures that affect almost all citizens.

A modern state, by necessity, must have departments and ministries for the various duties it takes upon itself. These ministries and departments require information about us to a greater or lesser degree, and all retain this information for long periods, and some require that they are kept informed of any changes to it. As time, society and technology have progressed it seems that the state is demanding ever more information from us, either directly, or indirectly through others. Through some of the legislation detailed in Chapter 2, such as the RIPA Act, the legal rights of the government to collect this information has increased as well as the allowances made for it to do so secretly.

For the purposes of this section, we are concentrating on the state's interference with, actions against, or observation of, the vast majority of citizens who are neither considered risky (at least no more than any other citizen) nor are connected or associated with other citizens who might be considered as such. The focus, therefore, is on how the state's actions even to identify risky or suspicious citizens will affect the citizen population generally with regards to their rights. The immediate issue is that a state that wishes to pre-empt any sort of illegal or otherwise harmful action by acting against an individual it must in some way identify those who might commit such actions.

Measures such as the Investigatory Powers Bill are a step toward obtaining meaningful consent from the citizens in this area. The question for us is that what level of consent should be required? To bring back Dworkin's 'rights as trumps' analogy, should a citizen's right to a private life, and broadly right to freedom of expression and liberty – if we say that

such rights are infringed upon by passive state monitoring or requirements that records be kept by private companies – trump the state’s goal of “ensuring law enforcement and the security and intelligence services have the powers they need to keep us safe in the face of an evolving threat.”⁷¹ Related to this is the question of how far democracy can take us in legitimating infringing these rights through statute before, for example, the right to privacy trumps a democratic majority? Even if we consider these questions purely from the more utilitarian risk-assessment basis discussed in *Policing the Risk Society* we must consider the problem that the electorate authorising such legislation through elected MPs, may not have a very good conception of the risk posed. To counter this, does that matter if the fear of terrorism is powerful enough to negatively affect people’s lives even if the chance of that risk materialising is low?

The advent of online communication poses an important double-edged issue for such discussions. Most citizens now use the internet; email and other online networks are their main method of communication and information storage, both for personal and professional/administrative communications. Access to it, even limited access such as the ‘who, where, when, how and with whom’ information that makes up the British government’s definition of ‘communications data’ gives you a large amount of information about a citizens’ activities. Such collection likely amounts to as much or more than tapping of phones and the opening of personal mail would have been two decades ago. Moreover, this is information that, under current proposals will be available to law enforcement and security services upon their request in relation to a specific investigation, without immediate judicial oversight. The sea change in the use of online communications means that old methods of targeted interception of phones or postal mail are no longer as

⁷¹ May, Theresa foreword to the *Draft Investigatory Powers Bill* available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473770/Draft_Investigatory_Powers_Bill.pdf

effective, while online versions can be much more effective. The government fact sheet on just the communications data claims that 95% of serious and organised crimes investigations handled by the Crown Prosecution Service (CPS) as well as 'every' Security Services counterterrorism investigation uses communications data (HM Government, 2015b) This gives us a good idea about how ubiquitous the use of such data has become. Certainly, such data seems important to state investigations aimed at keeping citizens safe. Just as concerning for the citizen, however, is the question of how widely such data is collected and used without their knowledge, in investigations that do not reach the CPS or are otherwise not acted upon further.

From this first section, two important questions arise, firstly what the scope of any powers or investigation that potentially covers the whole body of citizens should be and how much citizens should know about the creation, use and regulation of such powers. Secondly, we must explore the reasons why the citizen should accept the creation, use and regulation of such powers.

There is a paternal character to the modern liberal state, which prohibits certain actions on the promise that it is all done for one's own benefit (as well as the threat of negative consequences if one does not obey). This can be seen through measures such as seatbelt laws where a small sacrifice of individual liberty is made as a reasonable trade for enhanced safety. (Kleinig, 2008, pg 29-30) Much of the discussion about the broader implications of this are outside the remit of this thesis, but a relevant point is brought up by how much should be known about any interference or observation. It is very hard for a citizen to protect their rights and speak out in favour or disagreement with a policy or investigatory method that they are either ignorant of or lack complete information about. To take the seat belt example, the benefits of wearing a seatbelt compared to not wearing have been well studied a number of scientific papers. (Sabey, Grant and Hobbs, 1977), (Hobbs, 1978)

Such papers form the empirical backing for a legal requirement, backed by coercive penalty, for all drivers to wear seatbelts. However, the same is not true for all situations.

In preventive justice, the Prevent programme has a distinctly paternalistic character. The characterisation of a paternalist act in democratic theory is “one in which one party interferes with another for the sake of the other’s own good” (VanDeVeer, 1986, pg 17) The Prevent Programme certainly meets this character with its measures of reporting and de-radicalisation plans. Other measures such as TPIMs could perhaps be construed as similarly paternalistic, in that as preventive measures they seek to prevent an individual from further involvement in terrorism, although there would be a question of how much this process is ‘for their own good’ (such as avoiding a prison sentence) and how much is for the good of the state/society at large. In both cases, there is a problem in the lack of evidence of effectiveness, unlike in the example of seat belts. Much of the evidence concerning Prevent – both that it has met with success, (UK Government, , pg 37, 141) and that it is a ‘flawed’ or ‘toxic’ policy. (Anderson, 2016a) – is largely anecdotal.

Citizens should be seen by the state as rational actors, pursuing their own version of the good life but both the state and the citizens should keep in mind how inaccurate our own worldview and information is liable to be. We rely on people around us, at home, at work, through media and government, to keep us informed. In order to help us, we expect these people to require cooperation and information from us. When we visit the doctor, we are expected to provide truthful information about our state of health (no matter how embarrassing it might be to us) if we wish to receive, in turn, useful information about how to fix or prevent any problems we have. If we are prepared to give medical professionals information, we would likely ordinarily share with very few, if any, other people, can the state not make similar demands for information considered relevant to the provision of security or otherwise interfere with our lives to create a secure environment?

There are of course a number of problems with this comparison, but it is still a useful one. Firstly, there is the issue of consent. Other than in very rare cases – for example, under the Mental Health Act when the person in question presents an immediate risk to the safety of himself or others – a doctor cannot compel treatment or even examination of a potential patient. This is the case even if doing so would advance the welfare of society.⁷² A doctor ultimately has limited influence over our actions, and any information is given voluntarily. Secondly, it seems that in almost all things relating to the behaviour of its citizens the modern state cannot help but be ultimately coercive, especially when it comes to the criminal law. After all, the criminal law, regardless of any stated goal to prevent crime or to act as a deterrent, does not ask ‘Do not assault others, *please*’. It tells: ‘Do not assault others, *or else...*’ (Simester and von Hirsch, 2014). Even in the state’s role as a collector of public revenues or in the distribution of public funds, the regulations are full of coercive language, penalties and threats concerning non-compliance. This, combined with the amount of legal power and resources of the typical modern state, means that going against the state in some way, or even acting in a way that it disapproves of is a daunting prospect, and one of the chief reasons why the establishment and enforcement of individual rights is of vital importance to an individual citizen. This is because, as mentioned in the introduction, rights provide some measure of defence for the individual: regardless of the welfare or betterment of society that might be achieved, the individual’s rights can ‘trump’ the state’s desired goal under the correct circumstances.

The first question that was identified above was about the scope and knowledge of any powers the state has the option to use against any single member or group of citizens. The importance of this question was brought into stark relief by the Independent Powers

⁷² We can take it as a given, I think, that improving the individual health of a citizen has a net benefit to society as a whole, if only in an economic sense that healthy people contribute more to a country’s economy and cost a state with socialised medicine fewer resources.

Tribunal's (IPT) finding against the British Intelligence Services relating to the collection of bulk data sets. Much of the legal argument stemmed from the claim that there was a basis that the collection was allowed by section 94 of the Telecommunications Act 1984 (Investigatory Powers Tribunal, 2016). While the Independent Reviewer of Terrorism Legislation, David Anderson Q.C (Anderson, 2016b) states that there is a strong operational case for bulk collection of certain types of information this is an opinion formed from his consultation with police and intelligence officers who are necessarily concerned chiefly with security. The decision whether or not such powers should be allowed is not, and should not be solely up police and intelligence officers. Despite ruling for the respondent on the issue, the Tribunal points out in its judgement Section 94, "In 1984 the only commercially available telecommunications services in the United Kingdom were by landline. The first commercial mobile telephone call was made on 1 January 1985 via Cellnet. There was no internet. The first dial-up service was introduced in March 1992" (Independent Powers Tribunal, 2016, Section 28). While subsequent acts, such as Regulation of Investigatory Powers Act 2000, and Data Retention and Investigatory Powers Act 2014 allude to and qualify section 94 there is a strong argument to be made in that using a piece of legislation that is manifestly out of date with regards to current communications technology as the basis for the use and retention of massive amounts of communications data is intellectually dishonest to the citizens whose data has been collected.

When it comes to the issue of citizens' data being collected, especially in secret, then citizens should expect that the rules for both collecting and accessing the data should be as clear as possible. In their summary of the ECHR jurisprudence in relation to the bulk data judgement, the IPT noted that "The nature of the rules fettering such discretion and laying down safeguards must be clear, and the ambit of them must be in the public domain so far as possible; there must be an adequate indication or signposting, so that the existence of

interference with privacy may in general terms be foreseeable”, qualifying this by saying that they did not such rules need to be written into substantive law. (Investigatory Powers Tribunal, 2016, Section 62). If we are to accept that the state needs these powers to fulfil its duty of security then this should be matched by efforts to be as open as possible. As well as publishing what sorts of data have the potential to be collected and seen one could envision a system where citizens are notified when their information has been, for example, viewed by a human agent (as opposed to sifted by a computer program). Such a declaration might need to be made some time after the information has been viewed or subject to the stipulation that the person in question was not then charged with a crime.

Even with the clarification in the Investigatory Powers Act 2016 the full rules for how and when law enforcement and other departments can demand data from communications providers is vague. Current reporting on necessity divides the reason for data acquisition into broad categories. (Burton, 2017, pg 8) When the reasons for the acquiring of data are as vague as “national security”, “public health”, “to prevent death or injury” etc., there is cause for concern especially when the system does not include a judicial warrant (Brennan, 2002) It is unreasonable to ask citizens to trust agencies with such powers when some of the rules remain hidden from them and when those same agencies have been extremely unforthcoming with the broad strokes of the measures they use. A lack of specificity in the rules of collection and usage leads to concerns with the non-specificity of the rules of investigatory discretion by those trying to gain access to sets of bulk-data. This is similar in many ways to concerns over the scope of police discretion; itself considered problematic (Kleinig, 2008, pg. 72). Even within the scope of an individual case or investigation (which is the condition under which such communications data can be requested in the Investigatory Powers Act.) individual investigators in law enforcement will still have wide discretion on the range of data they request. Independent oversight of these powers has likewise been

largely non-specific (Burton, 2017) with no facility for individuals to request to be informed if they have been targeted.

The second question before us then, is why the citizen should accept the creation, use and regulation of such powers in light of the problems highlighted in question one, particularly when it comes without their direct knowledge or consent of the monitoring or investigation or even a record of what has been examined. Is there some duty on the part of the citizen to do so? Or is there perhaps a conflict of rights as looked at briefly above? As well as human rights concerns, data protection laws in the European Union create a strict regime that persists to this day. How much should a citizen know about what information the police and security services of the state has on them? Whose duty is it to find out that information, if it falls on the state how pro-active should it be in informing its citizens of the actions it is taking? If it falls on the citizen, is it wise to accept passivity in the process as a form of formal consent?

For now, we are assuming that the state's goal in such matters is to fulfil its obligation to ensure the safety and security of its populace, thus protecting rights such as the rights to life, liberty and security, etc. This is rather than any more self-serving motive such as the protection of its institutions or its officials from criticism, etc. It is hard to argue that under such a justification the state does not have some sort of duty to prevent, rather than simply punish serious harms. The right to life, in particular, is one of the few that is ever considered or argued to be an 'absolute right' (Gewirth, 1984). Even without such a status any examinations of the most 'vital' human rights are bound to include a right to live close to, if not at the top, of such a list. When the threat to life is certain or near certain, there would be few people who would put forward the argument that an individual's rights to a private life or freedom from state interference would 'trump' the state's duty to protect the citizens imminently at risk of losing their lives. But what about when the risk is so much

less certain? When the state can or will only (publicly) list the risks, their intrusions are preventing as 'low', 'substantial', 'critical' etc., and their compliance with legal restriction as 'good', 'satisfactory' or 'poor'. It is hard for us to judge how warranted the intrusions are and how well departments are complying with their duties in relation to privacy. This is despite the fact that duties themselves have been laid out in detail.⁷³

Informed Consent

To understand and accept (or at least tolerate) the policies and practices of the state the citizen must have some reasonably accurate knowledge of the policy both in terms of what the specifics of the policy are and its intended and (in due course) actual effects. Only in this way can a citizen be reasonably expected to 'consent' to the policy.

In addition, the citizen must have some expectation that the state, or its organisations and agents can, will and have implemented the policy in the manner it was intended. The responsibility for keeping the citizen informed would ideally be placed solely on the state - being the institutor of the policy and having powers of coercion over the citizens. In practice, however, this would be impractical. There are so many policies, rules, laws and other similar decisions made in the modern state that the resources and time required to inform every citizen of their comings and goings would be overwhelming. Through necessity at least then, the citizen will have some role in keeping themselves informed, either through direct consumption of material made publicly available by the state or through an intermediary (such as journalism and the media in general). Inevitably some state decisions and policies will be of higher priority than others. Government policies surrounding the criminal law will have importance for citizens as they will be held responsible by the state if they breach the restrictions made in such policies.

⁷³ Most recently in Section 2(1) of the Investigatory Powers Act 2016, available at <http://www.legislation.gov.uk/ukpga/2016/25/section/2/enacted>

In order for this to happen of course, the citizen must have an expectation of trust that the information they are given or seek out is both complete and accurate as far as possible. While there is certainly some argument for the redaction of some specifics (for example, privacy concerns or national security), this should not be allowed to extend much further than the minimum necessary. It should be reasonable for the citizen to trust the organisations of the state they live in to act within the published rules. When states break this trust, or manipulate it in a way that while technically not illegal, still leaves its citizens in the dark about its actions in relation to them, the state damages this trust and it becomes less reasonable for the citizen to trust the state and thus consent to any limitations the state places upon them in the name of an agreed policy goal. We can see this erosion of trust in incidents such as the leaking of information about secretive state surveillance programs, while the information contained in the leaks made by people such as Mark Klein, Thomas Tamm and Edward Snowden in relation to the activities of the US and other 'Five Eyes' countries (MacKinnon, 2012, pp.77). In the face of revelations that their state has been conducting intrusive surveillance illegally, or without the knowledge of the electorate the individual citizen is right to be sceptical as the state has violated its duty of security in regard to protecting the scheme of human rights the individual expects to be upheld. Indeed, this thesis would go as far to say that especially when it comes to a newer legal structure such as that which surrounds preventive justice and the 'risk society', the promulgation of the law and the means used to enforce it should be a priority. In the traditional post-hoc criminal justice system the processes of investigation and trial are reasonably well understood. It is safe to say that, even if through fictional courtroom dramas and police procedurals, if not the news media, the electorate has an adequate understanding of how the police and courts operate when investigating and prosecuting crime. There is in this understanding some form of consent, while individual cases may

result in calls for sentences to be longer or shorter there is no wide-scale public outcry evident about the core of the system itself.

When it comes to newer laws and procedures, however, especially legislation such as the Investigatory Powers Bill, or the introduction of hybrid civil/criminal orders, there is less understanding, and thus on some level at least, less consent – or signs thereof - from the electorate. The morality of the law depends in part on its clear and accurate publication, at the very least so they can be obeyed, examined, critiqued and checked against the realities of their enforcement. (Fuller, 1969, pg 51) These are necessary for citizens to be in any way consenting to the law. When it comes to newer developments of the types we have discussed then this morality should reach further, especially when investigatory methods are not ‘observable’ by the lay voter.

‘Collateral’ surveillance.

The state’s duty to prevent harms to its citizens is a serious one. But the scope of its duty to do so will quickly come into conflict with the right of privacy for its citizenry. Neither the right nor the duty can be considered absolute. Many of the concerns raised here are similar to those we might bring up when discussing the extent to which the state may go in investigating a possible crime. Assume a stage of investigation where some crime is known to have occurred or some definite risk has been foreseen,⁷⁴ but before any real suspects are identified. How far can the state’s duty to investigate such harms impinge on the rights of its citizens if at all? For a citizen’s communications data or other information to be requested, there must be some suspicion that that data can assist in the prevention of a serious harm. However, much of this data goes only to form the ‘haystack’ through which the state is searching for a ‘needle’ that requires more direct investigation or intervention.

⁷⁴ It should be noted at the beginning that there is of course a large gap between a committed crime and a foreseen risk.

The data around the needle is not necessarily suspect itself, it simply forms part of the body of material in which some evidence may be discovered, possibly indirectly through examinations of the correlation of different pieces of information. We, therefore, have two classes of citizens' data under discussion. The first is the data collected on citizens as a matter of course or in keeping with new legal rules (such as the Investigatory Powers Act 2016). For example, the updated requirement for communication service providers (CSPs) to keep one year's worth of records of their customers' internet connection records. This is the 'top-level' set of data and almost all of it, under current or pending legislation, is likely to be deleted after a year without ever being examined. The second set of data is that which is requested by law enforcement or intelligence services for closer examination either from a public or private body. Normally this would be data that would be examined by the police or other agency. This class is the more invasive of the two given that the citizens data is actively studied by a human agent, rather than simply collected and stored.

This in effect means that much of a citizen's data that is collected or even directly parsed by computer program or human analyst is in some way 'collateral damage'. The collection and even investigation does not necessarily mean that the citizen is held in suspicion, or presumed to have committed, or to be planning to commit, some offence, simply that data about their activities and communications may prove useful in locating more concrete and actionable evidence. Even if some of the data shows the citizen in question is committing or preparing to commit acts the state wishes to prevent much of the data they analyse will have little to no relation to the proscribed or suspicious conduct.

Civic Trust

An important facet of criminal procedure that may assist with this is the idea of the presumption of innocence, long enshrined in the common law tradition as well as in more recent human rights legislation, such that "everyone charged with a criminal offence shall

be presumed innocent until proven guilty according to the law” ECHR Article 6 (2). Does this presumption apply to those *not* charged with a criminal offence? Is the presumption of innocence only a legal rule to assist in achieving a fair trial process or does it say something more about the relation citizens have to each other and the institutions of the democratic state? (Duff, 2015, pg. 193)

Duff makes the argument that the presumption of innocence reflects a wider and more basic ‘civic trust’ that is necessary in a well-functioning democracy. (Duff, 2015, pg 202) Is this civic presumption of innocence compatible with the kind of wide-scale information gathering and retention compatible with legislation such as the Investigatory Powers Bill which amongst other measures allows for personal records about people’s activities to be searched without their knowledge or consent at the time,⁷⁵ as well as prohibiting, through the criminal law, the disclosure of any search to the person under investigation by anyone involved in the search or charged with facilitating it?⁷⁶ (Draft Investigatory Powers Bill, §102, *Draft Investigatory Powers Bill*, 2015) Does the legislating of such provision show a kind of ‘state suspicion’ of citizens in general, one that undermines the idea of civic trust? After all, we do expect the state to act to reasonably prevent serious harms, as well as to investigate crimes ex-post. Denying them reasonable tools to do so is certainly counter-productive, so at least when it comes to investigation, there is a balance to be struck.

Any state investigation, civil or criminal will likely involve some damage to the idea of civic trust as detailed above if any means beyond simply asking a suspected citizen whether or not they committed an offence are used. On one side we would see the state simply ‘taking our word for it’ as a ludicrous degree of naivety and dereliction of its duty to investigate and prosecute criminal or civil offences. On the other side, there are many forms and

⁷⁵ Under section 3 of the Investigatory Powers Act 2016 available at <http://www.legislation.gov.uk/ukpga/2016/25/contents/enacted>

⁷⁶ Ibid. Under section 57

degrees of investigation that a liberal society would view as too severe, regardless of the offence being investigated, some extreme examples might involve mass-curfews or the searching of large numbers of private residences and the seizure of possessions. Such measures would be grievous violations of the right to privacy and the general view of due process in investigations and the presumption of innocence (even if the ECHR's Article 6 refers specifically to criminal charges rather than pre-charge investigations.)

Under the new legislation, and indeed under previous iterations of police powers that have spanned numerous Bills, many of which were not written with modern communication methods in mind, this is a difficult question to answer. The first problem is that the scale of interception is largely unknown. Reports such as that by David Anderson QC and the British government's fact sheets highlight how much this kind of communications data and more intrusive interception is used in investigations managed by the Security Services or the CPS as well as highlighting individual cases where such information has proven 'invaluable' (Anderson, 2015b, pgs 166-202). However, for jurisprudence theorists and citizens in general a key indicator that is missing from much of the reporting is exactly how the powers will be used, and importantly how many investigations gather any such intercepted data and then do not proceed to charge anyone with a crime, or to continue with any kind of investigation, or more specifically when such data exonerates an individual subject to investigation. Such information would provide valuable insight into how effective such measures truly are, which is surely one manner of assessing how justified such measures are and how comfortable citizens should be in having them as an established part of the investigatory framework for serious crimes, terrorism, and other investigations. If a large number of citizens' data is being examined under such legislation, but relatively few charges are made, then there is clearly an efficacy issue with the powers that deserves examination and debate. While more extreme measures of investigation would clearly fall on the wrong side of the ECHR, powers of

investigation, such as those recommended in the draft Bill, fall within the exceptions for national security in the right to privacy, leaving it largely up to individual states and their voters as to how far such powers should be allowed under this and the other exceptions given - with possible recourse to the Court itself. Within this murky area, the efficacy of the powers being requested is surely of relevance to the citizens.

One way to gain insight into this problem, as well as into those discussed later in the chapter, is to look at those procedures and practices already in place for the investigation, namely the laws of evidence. While we cannot simply apply the same epistemological standards of post-hoc criminal investigations to investigations of possible or potential harms/crimes, the same principles that govern the former could aid us in critiquing those used in the latter, and any new measures proposed.

The five principles of criminal evidence are broadly speaking:

- 1.) Factual Accuracy,
- 2.) protecting the innocent from wrongful conviction,
- 3.) protection of liberties and the minimising of state intervention,
- 4.) the principle of humane treatment and
- 5.) maintaining high standards of propriety throughout the process
(Roberts and Zuckerman, 2010 p.18).

When considering state action as laid out in a Bill such as Investigatory Powers Act 2016, the most important principles that might offer guidance would be the third principle, and to a lesser extent the fourth and fifth. The third principle stems chiefly from a liberal state's general respect for the liberty and personal autonomy of its citizens (Roberts and Zuckerman, 2010).

The main concerns for us here are the rules and procedures that govern the 'fact-finders'. In the case of traditional criminal investigation, this will be state actors in the form of the

CPS, the police and forensic services charged with determining the who, what, why, where of a criminal action that has already been committed. When the state is seeking to prevent serious harms, the actors are still in the employ of the state but will also include the intelligence services and possibly other departments such as HMRC alongside the police. Any fact-finding process will involve normative judgements made by the fact-finders themselves; we cannot separate the facts of an investigation from the values of the investigators. Even if evidence is being collected for, as an example, the Secretary of State, rather than for presentation to a jury, it will inevitably be framed by the investigators, drawing inferences and conclusions that will vary in their security. Fact-finders in these cases are both helped and hindered by the experience, backgrounds and training, all they can do is extrapolate from their current knowledge and past experience to produce a probabilistic conclusions (Roberts and Zuckerman, 2010 p. 145). Most likely, these are the same fact-finders who deal with more urgent and pressing threats that require swift action and where indecision is possibly more dangerous than no decision. However, such cases are almost always going to be beyond the scope of this examination, clearly involving actions (such as actively attempting or late preparation of serious harm rather than early preparations or plans). For the criminal law and criminal philosophy, these are perhaps further apart than they are for the investigators and politicians making decisions at the time.

The Duties of a Citizen

The last two decades have seen a large increase the number of positive obligations or duties a citizen has to the state, as decreed by that state through legal statute. Whereas these might once have been limited to existing staples such as the duty of serving on a jury when summoned, or giving evidence as a witness, there are now an increasing number of positive obligations imposed on various members of the public by the state such as the

obligation to protect a child within the household,⁷⁷ or for professional accountants to report suspected money laundering.⁷⁸ These examples have become numerous enough we must ask ourselves a philosophical question. To what extent can the state legitimately demand we take positive action with regards to our fellow citizens based upon a responsibility to the state, our fellow citizens, or to some pre-existing moral obligation? If we are going to impose new obligations upon citizens, especially mandatory ones, there must be some justification for the citizen to consider any such obligations valid. In addition we must ask what level of efficacy is required to justify any change in obligations, especially the imposition of new obligations, particularly if they may put the citizen at any degree of risk themselves.

The enforcement of the law in the UK combines a common law approach and the idea that the police are “members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the interests of community welfare and existence” (Home Office, *Definition of Policing by Consent*, 2012, §9). This idea, originating from the founding of the Metropolitan police⁷⁹, and devised in a time of extreme scepticism of the idea of an organised police force (Emsley, 2014 p. 26) is markedly different from the policing philosophies of, for example, continental Europe or the United States. For the purposes of this thesis, and the citizen in general (as opposed to those employed as policemen) there are two relevant sides to this section. The first is that, at least in theory, all the duties (and limitations, especially those also listed in the same policy) to ‘community welfare and existence’ that apply to British police officers are also incumbent upon all British citizens. The second is that there is an acknowledgement that

⁷⁷ As per Section 5 of the *Domestic Violence, Crime and Victims Act 2004* available at <http://www.legislation.gov.uk/ukpga/2004/28/contents>

⁷⁸ As per Sections 330-332 of the *Proceeds of Crime Act 2002* available at <https://www.legislation.gov.uk/ukpga/2002/29/contents>

⁷⁹ Sir Robert Peel is often quoted as the founder of the principle of policing, but this is uncertain. The Home Office believes the principle originated with Charles Rowan and Richard Mayne in 1828, before being adopted by Peel for the Metropolitan Police Improvement Bill 1829.

those citizens will not be devoted full time to such duties unlike the state employed police force. Certainly, this incumbency is not anything that has been required of the citizenry at least since the time of the founding of the police force.

Current UK common law does not have a 'duty to rescue' or an obligatory duty of assisting the police.⁸⁰ Such duties arguably existed in the past. Indeed the sentiment that the preservation of the community was the duty of every citizen is traceable at least in British political theory to John Locke (Locke, 1993 Bk 2, §134) and in legal case history to 1736 (Heyman, 1994 p678). While the historical antecedents and debate about the duty to rescue or a duty to assist in the preservation of society are interesting, they are of lesser concern to how such a duty would be formulated now, given the vastly different circumstances, both societal and technological. That is not to say that the same sorts of philosophical and legal foundations used for such duties that cannot be used now of course. For the citizen the important question that arises is that given that the police, investigators and legal professionals have a set of duties incumbent on them when investigating and prosecuting crimes, what duties, if any, to assist in this process are incumbent upon citizens and should these duties be enforced by the state or any lapses punished in some way? Such consequences could range between an actual criminal offence or simply whatever social consequences come from any publication of a citizen's negligence in fulfilling any duties to assist with law enforcement.

This idea that citizens, as well as the police, bear responsibilities for the practice of policing, has seen a resurgence in the idea of Situational Crime Prevention (SCP). (Garland, 2000) Within the sphere of preventive justice and the impact upon and responsibilities of citizens of policies seeking to identify risky individuals we can use much the same

⁸⁰ Indeed, driven by the increase in reports of police overreach in the western world, extensive observation and recording of the police, rather than assistance, seem to be becoming the norm.

methodology of consequentialist critique as that used upon SCP by authors such as R A Duff and S E Marshall. (Duff and Marshall, 2000, pg 18) We shall concentrate on those citizens who are relatively unconnected with any potential risk or 'risky' persons.

If we take a consequentialist approach to the issue, then we shall need to identify the benefits of imposing or enforcing various duties upon citizens as well as the costs to those citizens that those burdens would create. This could encompass a wide range of proposals. At the broadest level, we might create or acknowledge a duty that citizens have to allow their personal information or communications to be intercepted or monitored en-masse so that it can be analysed (likely solely by computer program for the vast majority of the information collected) in search of signs that a small minority (possibly even only in the hundreds) are engaged in the planning or discussion of serious physical harms as defined in Chapter 2 Such a duty imposes little active requirement on the citizens in question. They do not need to take any actions outside of their normal routine in order to fulfil this duty of disclosure or 'duty to report'. It is certainly true though that under this duty the citizen accepts a deprivation of rights and liberties (centred around the privacy of their lives) in order, as cost/benefit analysis goes, to increase the extent others can continue to enjoy different rights and freedoms (the right not to be harmed). As identified by Duff and Marshall, a justification on this account requires at least some acceptance that our values and freedoms are goods, important goods to be sure, and ones with a very high 'price', but goods nonetheless (Duff and Marshall, 2000, pg 18).

This seems to be a remarkably callous way of looking at these kinds of issues, with people's rights and freedoms being traded to create a lower risk of serious harms occurring, but I would posit that it is one that has an appeal to modern politicians and departments because it frames the issues in a familiar manner. Departments and politicians regularly weigh the costs and benefits of new rules, perhaps less in terms of rights and freedoms, but

more in terms of economics or even, at least abstractly, human life. Regulations such as speed limits, and those that govern pollution and food safety will all contain an element of cost-benefit analysis in terms of the lives of the people who live under those regulations compared to the benefit that relaxing that regulation gives. This is perhaps one of the reasons that as the criminal law has expanded over the last two decades. We have seen more of this actuarial justice being used not just to measure the effects of criminal laws, but to justify them.

For most citizens, however, such discussion is rather abstract. After all, we do not generally see discussions on speed limits made in philosophical terms about rights to life, liberty or security but instead on an evidential basis such as the seat belt example discussed earlier in this chapter. Such an approach to the prevention of serious harms comes under the same criticism as all moral arguments based on consequentialism: that it is wrong to treat rights and freedoms as highly priced, and instead rights should be treated uniquely, such as by Ronald Dworkin's 'Rights as Trumps' approach discussed in the introduction. Another criticism is one that occurs for much of this topic and that is the difficulty of creating a cost and benefit analysis of the certain mass-infringement of people's rights to privacy of their communications or other information and the potential for a very small number of those people to be discussing or planning activities that the police wish to know about (and prevent). When it comes to mass surveillance, this actuarial approach is perhaps at its strongest, at least compared to when it is applied to persons deemed to be 'risky' (as discussed below). Statistics can tell us how much data is being intercepted from how many people, and of those amounts, how much was looked at by a human investigator and how much of that turned into credible information. Certainly, this is still an uncertain risk-based assessment, but at least one that is reasonably comprehensible to people, all of whom are under the burden of the interception of communications, but few of whom are communicating anything the state is looking for.

The most common extension of the consequentialist debate when objections such as Dworkin's are brought up is to side-constrained consequentialism. (Duff and Marshall, 2000, pg 19-20) Under this argument, we place constraints on the burdens that we place upon citizens, spelling out that any duty they owe to the keeping of law and order does not extend to certain areas or activities. One part of bulk data interception as outlined by the Investigatory Powers Act 2016 is that bulk interception cannot include the content of communications, only the who, where, when, how and with whom of communications.⁸¹ The actual content of communications being deemed too much of an infringement on privacy for a 'bulk interception' scheme. This is largely because a most of the data collected in bulk relates to individuals not likely to be of interest to the authorities. (Burton, 2017, pg 26) In the context of the Investigatory Powers Act 2016, this could be viewed as a kind of side-constraint. Our moral aim is the reduction of serious harm which consequentially justifies the monitoring of communications. However, it is not a complete justification for the interception of all content of the message traffic as it is subject to the non-consequentialist value of personal privacy. Thus the law is side-constrained, even though not constraining it in such a way might further reduce harm.

Much like any law in a liberal democratic society, we can say the citizen has a political obligation or a duty to support and comply with a justly passed law just as they have an obligation to support and comply with state institutions (Simmons, 1981, pg 29). However, this requires clarification and examination. The 'support' for a law does not, for our society, mean agreeing with the law or not acting to change or reverse a decision that has been made. But it does mean respecting that law while it is in force and acting through the existing systems of rights, freedoms and relevant institutions. For example, challenging a law, or an interpretation of the law through the judicial system, or utilising one's right of

⁸¹ Laid out in Part 6 of the Investigatory Powers Act 2016 available at <http://www.legislation.gov.uk/ukpga/2016/25/contents/enacted>

free speech to speak out against the law in some fashion. Broadly speaking, this rough interpretation is accepted by both state institutions and citizens (including those, of course, who work for those institutions). Perhaps the larger problem though is the difference in how this decision is reached. As covered above and in Chapter 2, governance in a modern liberal democracy has become increasingly actuarial, following a model of 'government house utilitarianism'. As previously discussed this makes sense for both those institutions directly involved and the politicians responsible for them. As Goodin argues, the same reasons that make a certain form of rule utilitarianism ideal for the creation of broad public policy make it unsuitable for individual citizens for the reasons commonly cited against rule utilitarianism in general. There is, therefore, going to be a point of tension where broad actuarial policy meets individual case-by-case examination. As an example, most duties the state is concerned with outlining are role-based. In your role as a citizen what duties do you owe to the state and within that the legal system itself. However, many citizens will also be concerned with role-based duties to others (as a parent or other family member, a member of an organisation etc.) and with some judgement of moral or 'natural' duties. There will be significant overlap on the part of individuals, indeed it might be preferable that the primary source of an individual's assumption of a duty not to seriously harm other people comes primarily from a moral teaching that to do so is wrong, rather than a duty to obey the state's rule on harming others. There will also be conflict between role-based duties to the state and other duties, conflicts which broad utilitarian constructed rules and policy will not be able to cover in enough details and this, amongst many other reasons, is why citizen participation in a judicial system is necessary. It is in the interpretation of the law and court system that these 'broad strokes' and 'case-by-case' situations meet and where we must examine the specifics of broad 'categories' of citizens that are relevant specifically to this thesis.

Uncertainty and the "Suspicious" Citizens

Just as the state must cope with uncertainty, so must the citizen, and to a much greater degree than the state, which has greater resources (both legal and material) to gather information and assess risks to its own apparatus and its citizens. Indeed recently available evidence shows that the average citizen of the UK is woefully inaccurate in their off-the-cuff assessments of social issues (MORI, 2013) and, just as worryingly unlikely to change any existing views on those issues (Nyhan and Reifler, 2010). This is concerning for a number of reasons outside of the scope of this thesis, but a key point emerges for the individual in the 'risk society' and given the recent movements of the state towards increasing positive duties.

A high level of uncertainty about what risks are present and the frequency/seriousness of the risk itself will show itself in citizens' inputs into the political system (voting preferences for example). A high level of uncertainty will also affect the citizen performance if the state transfers some of its responsibilities onto 'civilians'. The level of uncertainty will affect what level of accuracy can we realistically expect. If the state encourages the public to watch for certain kinds of behaviour, or more broadly, for people they think might be engaging in behaviour X presumably past a certain point the amount of 'false positives' will overcome any actual benefit towards identifying or preventing 'risky' or criminal activity.⁸² It is well documented that in the last few decades the population of the UK has consistently felt that crime has risen in the past year. (Flatley, 2015, Section 1) when all evidence points to the fact that the opposite has been true in almost every year. (Flatley, 2016, table 1)

A consideration might be given to some sort of criteria that takes into account inherent average inaccuracy. When we obligate a doctor to report suspicious injuries or evidence of something like female genital mutilation we are obligating them to take an extra step in an

⁸² There may be some perception-based benefit too such policies even if the state never acts on the information, but this raises the same questions of value and efficacy given the onus the state is placing upon citizens.

area in which they have proven, regulated expertise. When we obligate a teacher or other professional to report 'extremist behaviour' we are not asking them to do something we would expect them to have any great expertise in doing. Indeed, given the fact that classrooms and education are places of learning for the exploration of differing ideas, it may well be harmful to their primary professional obligation, rather than complementing it. Here we have two different cases within the professional sphere, the first relates to practice that could already be considered part of the duty of the profession (care for one's patients) that needs extra attention and the kind of broad policy approach covered above to act upon properly. Individual doctors acting on a case-by-case basis cannot 'solve' the issue, only provide evidence and judgement as to what has occurred. In the second case while it may be possible for a teacher or educational professional to be trained to assess potential 'risky' behaviours, there is a strong argument that even the knowledge that they are doing this undermines both their primary professional aim and indeed the aim of the 'risk assessment' policy itself. 'Training' the general populace to more accurately identify and assess risk might, theoretically, be possible. After all police, bouncers, security service personnel are all trained to do this to some degree or another with respect to the people they meet and observe, and almost all members of society are taught to do this with regards to matters such as crossing a road for example. To do this, however, would be devastating to a society where this sort of policy to be directed at others within society (or indeed other societies) especially if, even unintentionally, such a focus was directed too strongly at a subset of the population such as an ethnic or social minority.

In many ways some of this has already been done, the state has acted to reduce the 'sovereignty' of its role in preventing, reducing and punishing crime as part of what has been described as responsabilization (Garland, 2001, pg 124). For the general public, this includes such measures as community policing, public awareness campaigns and schemes as well as community sentencing. This has resulted in a number of new quasi-governmental

bodies being formed over the last two decades, and its reach is extremely extensive. There is little space here for a full accounting of Garland's work, but undoubtedly the changing nature of the most severe instances of serious harm through instances of terrorism have prompted a new wave of responsabilization-type efforts. For example, the Action Counters Terrorism campaign launched in March of 2017; a campaign that seeks to show how public assistance has contributed to terrorism investigations. The promise of such campaigns to address the shortfall in investigatory 'nouce' amongst the general public is certainly laudable but there is cause for concern where a policy of responsabilization turns a general duty to assist in the keeping of the peace – which has existed in some form or other for many decades – to a more specific duty to report on the suspicious activity of other citizens. The potential for new crimes, violations of other citizens' rights and simply the creation of an air of distrust in the population is very real, and while it is the state's responsibility to see that such policies are created with a politically or societally neutral tone, it must also fall to the citizen themselves, through the accepting of responsabilization as a legitimate policy, to make sure that duty and uncertainty do not lead to paranoia, discrimination and witch-hunts. This is made more difficult in any circumstance when these duties become mandatory and failure to carry them out punishable. While criminal punishment seems unlikely for the moment (unless there is an argument for traditional criminal negligence), professional punishment or disciplinary findings by such bodies as the British Medical Association or one's employer are a real possibility.

Even if citizens accept a duty and role within a scheme of responsabilization, in this case, aimed at the detection and prevention of serious harms, we must be cognizant of three areas of concern. The first is that uncertainty will mean much of the information collected does not pertain to any real threat of serious harm. The second is that uncertainty itself, alongside measures that involve citizens in detecting radicalisation, the planning of serious harms, and so on, will have unintended negative consequences. Amongst those, thirdly,

will be the harnessing of those same measures to further radicalise or to harm citizens they are designed to protect.

Much weight must be given to the many possibilities for error by both the state and the citizen. While primary responsibility for 'setting the tone' of any policies lies with the state (or whichever body it delegates responsibility to, such as the police). The voluntary assumption of a duty to watch for and report 'suspicious behaviour' comes with an equal duty to respect the safety and privacy of fellow citizens. While many serious harms are foiled with help from the public through responsabilization, which up to a third of serious plots averted with help from information provided by the public (BBC News, 2017). This took place in an environment where 22,000 people contacted the anti-terrorism hotline in the space of a year up to two thirds of these reports will have proven to have needed no action despite any investigation (and the invasion of privacy such an investigation would cause). Unfortunately, while the risk of serious harm deriving from terrorism is justifiably labelled as 'severe', the odds of any one individual being affected by it are still very small. This is both a problem for the collection of information to stop that attack and for citizens working out how worried to be and how to respond to the real, if nebulous and individually unlikely, threat. As an example, the most recent guidance released by the UK government lists such things as 'hiring or acquiring large vehicles or similar for no obvious reason' (Counter Terrorism Policing, 2017). This is clearly in response to recent attacks involving heavy goods vehicles in continental Europe and is arguably a prudent measure. However, it relies on the judgement of uncertain citizens as to what an 'obvious reason' exactly is. How far must, for example, the person in charge of lending out such a vehicle, go to establish a client's veracity? What sort of state intrusion will result from a report to the police of a client who failed to satisfy the citizen in question?

There is a delicate balance to be addressed here, where vigilance on the part of the public must be balanced against creating an environment of suspicion and fear. Just as Garland posits that as the developments in crime control adapted and responded to the late modern world, they also played a role in creating that world and future new waves of forms of responsabilization will do the same. There is not time to debate or establish a connection between social policy and crime policy here, let alone the effects that one has on the other, but any responsabilization strategy runs a severe risk of creating or underscoring biases not directly related to the strategy itself. This is a particular concern for ethnic biases in the field of crime control. It would be all too easy for society, or a part of it, to start demonizing 'the other' where that other is perceived to be involved, or perceived to be more likely to be involved, with potential future serious harms. Examples from neighbourhood watch schemes would include biases against black or other ethnic minorities, younger citizens or even people exhibiting certain fashions such as 'hoodies'. Counter-terrorism is obviously vulnerable to biases against those who are, or look to be, Muslim or from the middle east as well as those connected with far-right political movements. Given the seeming effectiveness of current anti-terrorism activities in the UK in preventing potential terror attacks (BBC News, 2017) it is arguable that the potential for societal damage done by efforts to 'watch out' for serious harms like terrorism exceeds that of terrorist attacks themselves especially in the UK where victims of violence deriving from extremism have been few and far between in the last decade. Although the rise in far-right activity, both directly through activities ranging from incidents of hate-speech to attacks on those considered 'the other' or supporters of such is concerning.⁸³ While data from the police and Security Services is sparse, the rise can be seen in areas such as the governments 'Channel' program where referrals for suspect far-right radicalisation have hit 25% of the total, up from 15% last year (The Evening Standard, 2017). An extremist

⁸³ Such as the killing of pensioner Mohammad Saleem or of Jo Cox MP.

movement does not need to inflict mass casualties, or even any casualties, to be successful. The fear of attack, and the damage this can cause to society through state action, mutual distrust, anger and suspicion leading to outright hatred, can cause all citizens to suffer. In addition to this, responsabilization is also likely to affect the public's perception of the sort of events these measures hope to combat. Raising the issue in the public consciousness works both ways. If the population is more vigilant, they will also very likely be more afraid, meaning that even in an environment where threats to safety have been decreasing, public perception of the seriousness, frequency and likelihood of those events has increased. In short, while security is increasing, feelings of insecurity are also likely to increase in part because the obligation, and urging, to be watchful raises ultimately unlikely events high in our individual and societal conscience.

The third concern we should have with any scheme of responsabilization is the co-opting of the 'watchfulness' or 'suspicion' elements into the narratives of extremist elements it was partly designed to combat. This has been especially noticeable in far-right extremism in recent years, and schemes like the newly proposed ACT run the risk of increasing support, or tacit approval, for groups of citizens or attitudes that are in fact its target. Should such schemes try and adopt a 'neutral' position, so as not to seem partisan, or remain silent on the issue, hoping that the scheme's success with moderate citizens will overshadow any detrimental effects? The narratives of Islamist extremism and far-right extremism build off each other, each citing the actions of the other as evidence of persecution, repression or outright attack of those they purport to defend (Anderson, 2017, 10:00). The propaganda that comes out of both sides serves to 'muddy the waters' for anyone seeking a definitive truth as to what is going on and who is 'in the right', exacerbating the problem of uncertainty. Ultimately it is this uncertainty, and importantly the response to that uncertainty by citizens that has the greatest potential to cause harm to society as a whole

and potentially to undermine the democracy, values and rights that all such state policies are ultimately aimed at defending.

Bystanders

The idea of a bystander in this thesis is closely connected with the idea of the possible duties of a citizen but is a narrower area of particular relevance. The problem in essence is to what extent should a citizen, who has otherwise no involvement or obligation in the matter (apart from geographical or a broad involvement of being part of the same state or society), interfere in the life of another if he becomes suspicious of that person's behaviour or spots suspicious activity? Certainly, this is something that has been encouraged for many years by current and retired state officials in the UK both in media interviews and in speeches (May, 2014). Most recently, the ACT initiative has encouraged people to report 'anything that seems out of place, unusual or just doesn't seem to fit in with everyday life.' (Counter Terrorism Policing, 2017).

Older examples such as PREVENT have established a duty on citizens in a variety of roles in education, health, prison and emergency services, amongst others (HM Government, 2015c). While there has not been discussion of any mandatory 'duty to report', institutions such as universities and colleges are under a legal obligation to engage with the program and to train their staff concerning it. This adds to the pressure applied through publicity campaigns, interviews and public speeches repeated (usually in the wake of successful attacks on a state's citizens) and is undoubtedly very real. Even without the implication that failure to report would result in punishment, the extolling of the necessity and virtue of reporting on people or activities citizens consider suspicious is troubling even if a small number of those reports can be proven to be effective in identifying specific citizens actively planning attacks on their fellow citizens. The problems, of course, come with the scale of encouragement of such reporting, typically phrased as 'anything you think is

suspicious', and how far officers of the state take such reporting. Problematic scenarios involve relatively innocuous behaviour being reported, coupled with an overzealous state response such as an unwarranted, violent intrusion into someone's life or property. The problem of social cohesion and suspicion is also very real, as is the possibility that such policies will drive deeper wedges into the problems that create those who would attempt the mass-murder of their fellow citizens. The third and arguably least likely consequence would be direct intervention by the by-standing citizen themselves in an incident they found deeply suspect but was in fact harmless.

Public policy aside, there would seem to be a potential conflict between any by-stander's obligation to preserve society and any obligation to leave his fellow citizens in peace. There is a balance to be struck here, even if we do not wish to actively punish non-reporters, there can only be praise for someone who raises the alarm when genuine danger threatens another person, even if they have no obligation to each other than being members of the same society. The problem comes that in the vast majority of cases there will be no clear-cut answer, and cases like a British Muslim who was stopped by police after being reported by an airline for reading a 'suspicious book' (O'Hare and Jeory, 2016) will always create controversy.

The danger, of course, is that for any given standard of suspicion successful reports will be labelled as 'prudent measures' and failures as 'violations of privacy' without objective examination of the policies that lead to such outcomes. If this report had led to something concrete, rather than a 15-minute interview with the police, would the same questions about the needfulness of the airline's report be asked, or would the airline have been lauded for its diligence? These kinds of situations beg the question of what special duty a by-standing citizen has 'on the spot' as it were. This question is similar to those posed by the idea of 'responsibilization', but goes somewhat further. Given the heightened

awareness of the use of commercial aircraft to commit acts of mass murder, an employee of an airline will likely be briefed to be alert to anything 'suspicious' as a matter of course. But, this is then a duty placed on them by their employer, and part of the private, rather than public sphere.

In other words, the trend of responsabilization as laid out by David Garland applies not just to citizens and communities, but to private businesses as well. More commonly this has been providing security for premises or personnel, but the changing nature of the threat from serious attacks has seen a change in how the state 'responsibilises' businesses as well as citizens. Airlines and freight hauliers have been engaged to work alongside state-run institutions such as border and customs controls while telecommunications companies have been put under increasing legal pressure to assist in criminal investigations that wish to acquire data of those they suspect of planning or committing acts of serious harm.

Such firms are as much bystanders as those proximate to those planning or committing serious harms, and discussion of what we can or should expect them to do, especially when it involves taking action to monitor, record or even confront their own employees and customers – as well as how public these actions should be – is an important question to answer when talking about the duties and rights of citizens. In recent times the threat from far-right and Islamist extremism has raised this issue more prominently, but other areas where serious harm can occur, such as human-trafficking or widespread or long-term sexual abuse are equally relevant when discussing what obligations a citizen may or may not have. Raising the issue of a duty to inform on others raises clear comparisons to totalitarian regimes where this is the norm, including those within relatively recent memory such as the GDR's Stasi security service. Even without enforcing such a duty, establishing a duty to inform, even in only the most serious cases will foster suspicion as to the motive of the state in doing so and of course we cannot discount the possibility of such

a duty being used vindictively under the cover of the performance of a legal duty. (Gur-Arye, 2001, pg 5).

The key measure to establishing a citizen's rights and duties in this area is perhaps best found by examining the relationship with the state that the responsabilization is using to 'transmit' information to the state and/or police/security services. For example, then relationship between the state and a police officer or the state and a teacher. Most such incidences of this will do damage to the relationship; the questions must be whether the duties and rights of the citizens on both sides of that relationship (and society at large) can support the intrusion. In the case of a police officer the answer is like yes, in the case of a teacher very arguably no. To chart a course even for broad guidelines of action here will be very difficult. Thus it is the nature and depth of that relationship that is best used to examine the issue. The state, of course, must also consider what legitimate aims there are for creating such obligations, and what to do with any information it receives. Only together can examination of these factors be used to discuss solutions (see Chapter 5).

Relatively remote relationships where the state sees a need to responsabilize citizens are perhaps the least controversial but are compounded by the problem they are likely to be some of the more widespread examples. Social media and telecommunications companies are one of the better examples. These are firms who are already collecting, storing or using some information about their users for a variety of reasons – be it for targeted advertising or monitoring data usage. If the state requires or responsabilizes a social media company to ban or report certain types of content for a particular policy directive - for example detecting or preventing certain categories of crime - then that is certainly an extension of what they were doing previously, but arguably not a very large one, particularly if society considers the aim a valid one and serious enough to warrant investigation.

We expect a typical social media company to use the data consumers provide it in return for the (financially free) service they provide. If some of that content, judged to be criminal, or highly risky, in nature is passed on to the police or the security services with the aim of preventing serious harms, it is not unfeasible to argue that it falls within our obligation to fellow citizens to cooperate in keeping each other free from harm. At the very least it is a measure of scale. We do not expect employees of firms to keep to themselves confessions of an imminent crime or one already committed. Indeed, we would generally consider them obliged to do what is in their power to stop it. At the other end of the scale, there are much closer, more personal relationships. What obligation can we legitimately impose on family members, for example, to report their relatives for certain types of behaviour? Of course, there are concrete examples where a reasonable person would be expected to violate the implicit trust in a familial relationship in order to report a crime or to end an injustice; the abuse in some form of a fellow family member being the most likely example. However, if the obligation to report is being based on simple suspicion, then no matter the seriousness of an end-result, we must consider whether the state can legitimately impose burdens on relationships in this fashion. Even assuming a legitimate end, or even the discovery of a legitimate threat or actual crime, that relationship will have suffered heavily due to one of its participants fulfilling an obligation to the state/society above the obligation of trust and privacy inherent in a familial relationship.

One of the few remaining privileged forms of communication in the UK is within the practice of Catholic Confession. It is an example where society recognises an interpersonal obligation trumping that of an obligation to society at large. Few other relationships remain as privileged and many have become less secure from government oversight over time, a key example being social media where one can no longer reasonably expect privacy because of the possibility of government requests for information such as communication logs or locational data. Within familial relationships, there is much scope in how much we

may trust or expect privacy from a given member of the family. In both cases, though it is the use and extension of the relationships between individuals or groups of citizens by the state that has created these increasing obligations whether through campaigns such as ACT, legislation such as the Investigatory Powers Act 2016 or expected professional standards such as in the case of FGM.

Programs and legislation like Prevent or the stalled Counter-Extremism and Safeguarding Bill have immediately run into the obstacle that many of those that need to be on-board with such efforts reject them as being asked to 'spy' on those they have trust based-relationships with. This was commented on in Chapter 2. To expand upon this the state should treat programs like Prevent's de-radicalisation as a trust-based relationship and one that starts off on a bad footing as most citizens in the program will have been referred there. If the citizen believes that the program exists to report or pry into the affairs of their friends or family they will be unlikely to engage and the attempted prevention will fail.

One relationship that has come under particular criticism is that between student and teacher. Many have argued that the duty that Prevent has imposed upon teachers severely damages teacher/student relationships.⁸⁴ Critics argue that students, especially older

⁸⁴ Numerous media sources have reported this antipathy towards the Prevent program in news stories and interviews with academic professionals, although criticism is not universal.

Dodd, V. (2015) *School questioned Muslim pupil about ISIS after discussion on eco-activism*: The Guardian UK. Available at: <https://www.theguardian.com/education/2015/sep/22/school-questioned-muslim-pupil-about-isis-after-discussion-on-eco-activism> (Accessed: 14/03/2017 2017).

Khaleeli, H. (2015) *'You worry they could take your kids': is the Prevent strategy demonising Muslim schoolchildren*: The Guardian UK. Available at: <https://www.theguardian.com/uk-news/2015/sep/23/prevent-counter-terrorism-strategy-schools-demonising-muslim-children> (Accessed: 14/03/2017 2017).

Verkaik, R. (2016) *Government 'must publish questionable science' behind controversial counter-terrorism strategy*: Independent.co.uk. Available at: <http://www.independent.co.uk/news/uk/home-news/prevent-terrorism-strategy-government-must-publish-evidence-royal-college-psychiatrists-a7338096.html> (Accessed: 14/03/2017 2017).

Merrick, R. (2016) *Oxford University vice-chancellor says Prevent strategy 'wrong-headed'*: The Independent. Available at: <http://www.independent.co.uk/news/uk/politics/oxford-university-vice-chancellor-says-prevent-strategy-wrong-headed-a7323916.html> (Accessed: 14/03/2017 2017).

Peters, C. (2017) *Prevent is not a safety net - it is a programme designed to censor academic freedom*: The Telegraph. Available at: <http://www.telegraph.co.uk/education/2017/02/10/prevent-not-safety-net-programme-designed-censor-academic/> (Accessed: 14/03/2017 2017).

Hooper, S. (2015) *Stifling freedom of expression in UK schools*: Al Jazeera. Available at:

<http://www.aljazeera.com/indepth/features/2015/07/stifling-freedom-expression-uk-schools-150721080612049.html> (Accessed: 14/03/2017 2017).

students at college and university, should feel free to discuss difficult or controversial topics with their teachers, without the worry of being reported for 'extremist behaviour' or similar. Teachers are also in the unenviable position of feeling obliged to report behaviour or speech that matches government guidelines or risk their own or their workplaces coming under intense scrutiny.

There are two questions to be asked here. Firstly, whether teachers have an obligation to the state or, perhaps to students themselves, to report suspicious behaviours either to the institution at which they work or directly to the police. Secondly, if there is such a duty whether it should be on a statutory footing, with repercussions, no matter how slight, for the teacher themselves or their institution. The recently launched ACT campaign highlights a previous case (Action Counters Terrorism, 2017) where a visiting Biology lecturer had become concerned with the questions asked in a long conversation with her by one of her students. The student, Andrew Ibrahim, had asked what sort of bacteria were able to kill people. The lecturer was concerned and was evasive in her answers and afterwards contacted the college with her concerns but at the time nothing was done. Later evidence collected showed that Andrew's interest in preparing a suicide attack grew, to the point of researching explosives, previous attacks and potential locations. Sometime later, a member of Andrew's mosque reported him to the local police after becoming concerned with an injury Andrew had suffered while experimenting with explosive devices. This led to his arrest and the controlled demolition of the devices he had assembled at his home in Bristol (Dawar, 2008).

The Andrew Ibrahim case has long been used as an example where a report by a member of the public led to the arrest of someone clearly heavily invested and prepared to carry out a bombing and who was completely unknown to the police. The ACT podcast reveals that an earlier report on Ibrahim was made by the biology lecturer and seemingly ignored

by his college. The podcast espouses that everyone should contact the police if they see something 'suspicious' or 'out of place'. The message clearly reinforces the idea of responsabilized local communities watching for potential attackers, but the most interesting part for our argument is that the result for Andrew Ibrahim might have been much better if the earlier report of his questions to the visiting lecturer had been passed on. The idea being that before he had committed to the planning stage of his attack, there may have been room for intervention to challenge and change Andrew's growing interest in terrorism and previous suicide attacks. If such an intervention had succeeded, the argument goes, then perhaps Andrew Ibrahim would never have progressed as far as he did, and he would not be serving his lengthy prison sentence.⁸⁵ Certainly, it is hard to condemn the lecturer for being concerned, and taken individually and with the benefit of hindsight, we would be hard-pressed to condemn her choice to report the incident to the college long before this became a mandatory obligation. We could even argue that this fulfilled both an obligation to society but also a duty or obligation of care to Andrew himself, who had started down a path that would end either with his arrest and a long prison sentence or his own death and that of potentially many others. Given its intent to encourage reporting, the ACT campaign makes little mention of the pitfalls of this strategy. Andrew's questions to the visiting lecturer were certainly odd, and presumably alarming to her, but they were in no way a declaration of intent to break the law. Certainly, going as far as to construct a principle based on reporting anyone who inquired about which bacteria were potentially lethal to human beings is going to create reports that, upon investigation have little or no merit and warrant no further investigation. Reports that are made but turn out to be false are of course the large downside of the obligation or encouragement to inform. We could assume the spectre of this might be smaller in the hard sciences. Asking questions of your teacher that lead towards or amount to 'how would you build a bomb?' are suspicious enough that

⁸⁵ Andrew Ibrahim is currently serving an indeterminate sentence, with a minimum of 10 years.

few should begrudge a teacher from being worried, if only from the perspective of student safety.

In the arts and social sciences, however, there is a much larger issue. Enquiring about the ideologies of previous terrorists clearly falls into a category of questions that might be considered suspicious, but the likelihood of them being in the service of a genuine desire to harm others seems much more remote. Yet the teacher to whom they express these views will now feel under pressure to report them. What, they will think, could happen if I don't? A report that is taken seriously and investigated will no doubt lead to extensive interference in a student's life. Establishing the validity of any potential threat could involve a massive violation of someone's privacy. Email and internet history, interviews with someone's friends or family about what views they had expressed, even a simple interview with the student about whatever views they expressed, will be gruelling and very likely to damage the relationship between that student and their teacher. If such reporting was carried out in a covert manner, then the problem of an open breach in the relationship, and the damage this causes, is replaced either by some covert system – a bad mark against the student's file perhaps, or an intrusion into their personal affairs such as the reading or monitoring of their email.

This last measure was raised by King's College London's recent policy of recording students email, considered to be part of their statutory duty under the Counter-Terrorism and Security ACT 2015 (Weale, 2017). While the Prevent duty does not mandate such actions, certainly many educational establishments feel under pressure to do so, and those that have done so have been lauded by the government for fulfilling their obligations. This conflict between the obligation to help foster a secure a society and the right to privacy of those within that society is further complicated by the fact that we cannot simply dismiss the idea that early intervention, even if it causes damage to some relationship, maybe

better individually for the person affected. If early intervention can be shown to work, then the potential benefits to an individual who otherwise would at best go on to serve a long prison sentence and at worst kill himself and other citizens, then there must be some point where the tradeoff in 'false positives' is acceptable if not ideal. Teachers are often acknowledged to have a duty of care to their students, outside of the learning process, and educational institutions certainly do. Does the argument that this duty of care could involve reporting a student concerning 'suspicious' behaviour assist the position that governments such as the UK are taking?

The Citizen Under Suspicion

This thesis has considered the difficulties the state will have in balancing its duty to protect its citizens from harm, and any duties incumbent upon those citizens to help it do so. It is also important to consider the rights and duties of those upon whom that suspicion actually falls. Anyone living in UK has a widely accepted (and enforced) obligation to obey the law provided that those laws are in keeping with the state's human rights obligations and have been approved by a democratically elected government. This then is our baseline for the 'suspicious citizen', they have acted according to the law, but some of their views or actions result in the state, or other citizens, distrusting them, being suspicious of their views and importantly fearing how they may act on them.

Regardless of history, a citizen who finds himself regarded as 'suspicious' in modern times may well find himself under an enormous amount of surveillance by the state in the course of an investigation into how much of a risk he potentially poses. Since the beginning of the latest round of terrorism acts in the UK, starting from 2000, more and more activities, relatively harmless⁸⁶ on their own but perhaps suspicious in some contexts, have been made illegal. Additionally, with citizens being encouraged to report suspicious persons or

⁸⁶ Or at least considered beyond the bounds of traditional attempt law – 'a substantive step'

suspicious online activity through programs like Prevent, showing sympathy with, or expressing support for certain political causes or groups will (as ever) result in suspicion from the general public and quite possibly state interference in, or observation of, one's life.

Treating as a given that most people who might be regarded as suspicious will be aware that the majority of their fellow citizens do not share their views, or are even horrified by them and that the state, should it learn of such views, might be suspicious of them, what rights does such a person have against interference? Many of the rights that would protect someone with extreme views are considered qualified rights that a state may restrict for reasons such as national security or the prevention of disorder or crime. Because of this, we have many crimes concerning things such as hate speech or 'glorifying' or in some way indirectly supporting terrorism. While such offences may be harmful or offensive enough in and of themselves to warrant criminalisation, we should be careful that they are not simply being criminalised as remote harms. Criminalising an action committed by X, because an observer Y perceives that action and, independently, commits a harmful crime claiming encouragement by X, should be treated with suspicion. We may decide that the actions of X, such as hate speech or praising the actions of others who have trespassed against the state, are condemnable by the criminal law on their own merits, but whether punishing them for the actions of another party who does go on to commit a crime are a justification in and of themselves is far less certain. The harm here is more remote and justification needed either for criminalisation or some form of prevention (be it through referral to a de-radicalisation programme or a harsher measure such as a TPIM).

There are two sides to the 'suspicious citizen' problem and two sets of questions. The first is for the 'suspicious' citizen themselves. Assuming they are at least tangentially aware that their views are considered suspicious, harmful or extreme by the general public, but they

do not break existing criminal laws, do they have any kind of duty to moderate or hide their views particularly from those who would fear them rather than simply be offended by them? This could include other citizens or indeed those working for the state directly. After all, one of the purposes of the law, both criminal and civil, and therefore one of the purposes of the state is to provide a secure environment in which people can live their lives in pursuit of their own goals. Secondly, assuming they do not hide or amend their views, what duty or obligation do they have to cooperate with the state that finds them suspicious particularly with respect to the law enforcement or security institutions that would wish to interfere or monitor their lives outside of a formal prosecution for a crime? The subjects of various civil/criminal hybrid orders are the most visible examples of this, although their 'cooperation' is, of course, backed up by the threat of criminal prosecution. Programs such as Channel or other de-radicalisation programs are also being established and used. While these are clearly not as invasive as the relatively small number of civil/criminal orders (such as TPIMs), they reach further into the population to those whose behaviour is only more generally suspicious.

On the matter of some kind of duty to moderate or hide one's personal views that society does or might consider extreme or dangerous – ones that you have no intent to act on and are thus not breaking any laws such as those dealing with the preparation or support of a criminal act – we can draw inspiration from related legal arguments. Antony Duff highlights in his discussion of drink driving laws and speeding that there will be some minority at citizens, due to superior skill, ability or tolerance that are to drive safely at a speed or alcohol level above the legal limit (Duff, 2007, pg 170). We can assume for example, that a driver trained in high-speed pursuits by the police is capable of handling their vehicle at higher speeds than an ordinary citizen without such training. A key reason we can use to argue that such people should still obey the same rules as their less-able fellow citizens is that we cannot expect those citizens to know of each other's abilities and training in such a

scenario, making them over-estimate the risk the other person poses both to them and other road users.

Naturally, such an argument cannot be simply transferred directly to our problem of the suspicious citizen. There is a large qualitative difference between a citizen's ability to drive or consume alcohol and their beliefs about politics or society. However, the outside perception of both a fellow citizen driving very fast or of one relaying an 'extremist' political message could be very similar, in so far as it would be easy to find either threatening or at least highly disturbing. Working within the existing criminal framework, we are mostly concerned with the valid response to actions, statements and other communications in support of some view or value very much at odds with those of society at large but that do not run afoul of the criminal law because not being directed at any specific person or group or otherwise directly intended to threaten, insult, harm or cause distress. Those in this kind position might include those the UK government has started referring to as 'non-violent domestic extremists' (UK Govt, 2015). Do such people have a duty to 'reassure' their fellow citizens or the state? Who is in place to judge whether or not they do, on both a general and specific level? Are their rights being unreasonably infringed by being identified in this way by an official governing body?

Many of the views expressed by people (or their associated publications) in the Home Office's press release, citing universities that have hosted speakers deemed to be 'non-violent extremists', are those whose views are indeed not in step with those of the majority of the population from matters such as LGBTQ+ rights (Patel, 2013), (Al-Haddad, 2017) to post-mortem autopsies (Syed, 2016) . Some of these speakers have taken some action that, in part at least, tries to allay fears that they are a threat or should otherwise be treated with suspicion (Penny, 2016) but are they under any obligation to do so either relatively publicly or privately to any organisation or body of the state, such as in these cases the

relatively new Extremism Analysis Unit at the Home Office in the UK? Of these two, it is the citizen's potential obligation to the state that we should be most concerned with, given the disparity in power and the fact that a liberal society should be able to rely on a robust media to scrutinise individuals who actively publicise unpopular or extremist views (mostly through the internet and social media) to provide investigation, clarity and debate. While this is unlikely to win them many friends, responsible coverage should act to remove uncertainty about whether such opinion-holders are actively perceived as directly risky to the general public and remove the security and risk angle from any argument about what is or is not appropriate for public or published discourse in the UK.

This chapter has explored the problems posed by prevention to the citizen. It has concentrated on those citizens connected at a lesser degree to the threat of harm. Even these citizens, who are regarded with suspicion, are not believed to have broken the law or engaged in terrorism related activity, as defined by the Terrorism Act 2000 and discussed in Chapter 1. The next chapter will look at those individuals held in the highest degree of suspicion. These are those the authorities believe present a considerable threat to society through their potential actions, but nonetheless cannot be charged with a criminal offence. This places them within the remit of Preventive Justice.

Chapter 5 Applying Theory To Practice

The term Preventive Justice was likely coined by Blackstone to define an area of law that aimed at intervention before, and thus the prevention of, a crime that was intended or like to happen (Blackstone, 1772, pg 248). The criminal law has always had to confront and adapt to the desires of prevention, and there is arguably historical precedent for the kind of legislative overreach of modern counter-terrorism legislation. An early example in the criminal law would be Bills such as the Criminal Lunatics Act 1800, passed in the aftermath of James Hadfield's attempted assassination of George III, with a preamble that stated the Bill aimed "for the better Prevention of Crimes being committed by Persons insane" (Walker, 1968, pg 78).

So far, this thesis has examined the modern history of prevention as it pertains to counterterrorism and explored some of the problems and philosophical underpinnings of it. This chapter moves onto the second question the thesis asks which is how can or should this system of prevention be examined or reformed going forward. The September 11th 2001 attacks in the United States arguably magnified the role that law and policy can play in preventing harm (Tulich, 2017). Although in the UK modern preventive measures in the criminal sphere have a longer history, as detailed in Chapter 2, with the creation of Diplock Courts, ASBOs, football banning orders, etc. This same legislation, as explored in Chapter 1 also represents well the perils of this kind of action. Given that Chapter 2's section on legislation covers a relatively short twenty to thirty years of history there are a remarkable number of Bills, many new criminal offences, and many new ways of tackling the problem of risk, such as Prevent, Control Orders, etc.

Focussing solely on the criminal law and its associated procedures and protections in the prevention of serious harm fails to recognise the degree to which liberal states have developed an extensive range of strategies to anticipate risk and danger outside of the

criminal law and seek to adapt them to matter such as counter-terrorism (Finnane and Donkin, 2013, pg 12). A key goal in taking preventive justice forward is recognising the limitations of the various areas in which it operates (criminal law, social policy, community and online policing, etc.) and seeking practices that play to the strengths of these areas being careful not to bypass the protection of human rights and a sense of perspective in how far such measures should reach.

In this way, the reach of various branches of prevention can be articulated and policed just as civil and criminal law, and broader statutory regulation are (Steiker, 1998, pg 773-4). Such a process may, of course, mean removing certain measures from the areas they currently inhabit and creating new systems around them with their own procedures and protections. A key example discussed below would be hybrid civil/criminal orders, which fit awkwardly into the frameworks of both legality and human rights.

To discuss this further, this chapter seeks to examine the TPIM in greater detail. The TPIM is used as the primary point of discussion as it pertains the most serious risks, can be made prior to any criminal conviction, and has the widest scope for restriction a subject's freedom. The TPIM regime also includes many issues that have expanded to other areas such as Special Advocates and Closed Material Proceedings which have been incorporated into other areas through the Justice and Security Bill 2013. (Carlile and Owen, 2015, pg 25).

Much of this chapter centres around the proposition that, as currently constituted, TPIMs need reform, and that the scale of the needed reform and its underlying reasons necessitate them being moved from the awkward area of hybrid civil/criminal law they currently inhabit to a system of preventive law founded on the principles discussed in Chapters 3 and 4. To avoid confusion, the phrase "reformed TPIM" is used when discussing a TPIM under the proposed system of preventive law. The reason for this is to use perhaps the "headline" measure of modern antiterrorism legislation to explore in more practical

terms the theory and legal decisions that has been discussed in previous chapters. This chapter does not aim to create a whole new system, but to sketch the outline of important elements that should be considered and how these reflect on the theory used so far.

The normative backing for these proposed reforms is based on the idea that as a discrete system of preventive justice must minimise any coercive elements. The goal is to impose the minimum restrictions necessary to achieve a proportionate reduction in the risk the subject of a TPIM poses. There are two further elements to this necessity/proportionality framework. The first element concerns what restrictions can be placed upon the subject at what stages of the process. The second is one of engagement, concerning what measures are suitable for reducing the risk the subject poses.

A future for TPIMs and other two-step prohibitions:

The legislative course of TPIMs, commonly referred to as ‘control orders’ due to their legal antecedent, is charted in Chapter 2, while Chapters 3 and 4 dealt with the larger political and legal issues that delineate the desire of the state to act to prevent the serious harms caused by terrorist attacks and the desire of individuals for protection of their individual human rights; a protection that includes protection both from the same threats the state seeks to prevent, and also protection from the state itself in pursuit of those goals (and others). This section seeks to unite the content found in previous chapters to propose a reform of these kinds of measures that aims to retain the core preventive aim while pulling back from the more coercive elements of imposition and sanction. Given that TPIMs have some of the harshest restrictions available to a non-criminal proceeding, and that TPIMs can be imposed prior to a criminal conviction, they form the focus of this chapter.

However, it is hoped that many of the same reforms and principles discussed will be relevant to other similar measures, forming a foundation for them under a new approach

to preventive justice in the future that recognises its potential but defines and limits its aim and scope.

The state's duty to prevent harm is a foundational one for classical liberal theory regardless of how it is defined in terms of security, public protection, etc. (Ashworth and Zedner, 2014, pg 251). Even minimalist conceptions of the state interference such as the 'night-watchman' state accept some measure of a duty to prevent harm (Nozick, 1974, pg 26). There is equally broad support for an account of rights of the individual (Waldron, 1984, pg 1) and in particular, the ECHR guarantees rights to liberty and a presumption of innocence (Articles 5 and 6). Any reform to the current system of hybrid civil/criminal orders must still be bound by these principles even it discards some of the other trappings of civil and criminal law. In the view of this thesis the post-hoc nature of process (even in regard to attempts) fundamentally prevents TPIMs from being an effective preventive tool – both in the preventing of harm and in the protection of those subjected to the kinds of measures imposed for the purpose of prevention. The reform of the current system should be substantial. This is in direct contrast to the best example of this kind of idea which was the Diplock Trial system. While one of the concerns is the secrecy some information must be kept, a key error of the Diplock system was to simply remove the jury without reconsidering the adversarial nature of the trial system as a whole and how appropriate it was in the new setting. With a preventive, rather than post hoc, purpose this is even more important.

Why is a new system needed?

Despite the reforms that have been made to the TPIM/Control Order regime, it is not fit for the purpose it purports to serve. This section aims to highlight the issues as they currently stand and to analyse how they could be addressed by a revised system. The idea that preventive justice, and TPIMs in particular, requires a new, separate normative

framework to operate within has been expressed before (Zedner, 2007, pg 202-3). Given the continuing shift toward prevention, especially in areas such as counter-terrorism, a new normative framework has moved from a possibility to a necessity. The reports of the office of the Independent Reviewer of Terrorism have been an invaluable look inside the Control Order and TPIM regime, and it is hard to deny that small improvements have been made and that solid advice for improvement has been given, particularly in the reports for 2012 and 2013.

Nonetheless, many of these recommendations take the TPIM towards an even more inclusive scheme of prevention, with discussions of 'exit strategies' and mandatory intervention for subjects, that makes the systems reliance on the traditionally post-hoc civil and criminal law even more tenuous. Alongside this, the current regime is too greatly controlled by the executive branch of government without adequate provision for the role of the judiciary. The fact that the aim of the TPIM regime is preventive should not mean that the judiciary plays any smaller role than it does in criminal or civil matters. However, we should also consider that we want any such system to be reasonably fast to operate for all parties. This would discourage the executive from seeking a way around the provisions (through, for example, the removal of citizenship or the refusal to accept someone back into the UK) as well as provide a degree of fairness to the controllee, ensuring them swift hearings or appeals against any procedure.

Prevention has undoubtedly always been a part of the criminal law through the deterrence of future wrongdoing and the incapacitation of wrongdoers, but these are both post-hoc responses to some harm that has already happened. Acting instead to prevent someone from engaging in future wrongdoing is a fundamentally different normative aim (Cole, 2015, pg 503). If reformed TPIMs or other similar measures are to be used justly, then they must be separated from existing systems entirely and be justified, enacted,

constrained, and measured on their own merits in their own system. The merits and limitations of any such system can and must still be based on the same system of human rights and principles of jurisprudence in use today.

Aim of the Current TPIM System:

There is an almost unresolvable conflict at the heart of the current TPIM regime. The state's stated aim of prosecuting all terrorism-related activity is not compatible with the creation of a measure that starts outside of the criminal law and aims to impede the planning or execution of terrorist attacks or other serious harmful acts. TPIMs deal with the threat a suspect is thought to pose, rather than investigation and punishment of that suspect for a specific moral wrong (Ashworth and Zedner, 2014, pg 187-9). This has been confirmed by the independent reports into the operation of terrorism legislation (Anderson, 2014. pg 3). This is the practical consequence of the phenomenon described in some Risk Society literature, where a concentration on moral punishment is replaced by a utilitarian avoidance of risk strategy. One is no longer concerned with achieving a 'good', one is concerned with preventing the worst. (Beck, 1992) The exception to this would be the narrow sense in which someone breaching a TPIM is punishable by imprisonment as detailed in Chapter 2. Even here there has been little success with only two convictions for breach of a control order or TPIM between 2005 and 2012 (Anderson, 2014, pg 37). The wrongful act being addressed by such a sentence, however, is not directly related to terrorism, but to the breach of a preventive measure.

A more accurate aim is found in the initial review of TPIMs, that their aim is to protect the public from the risk posed by persons believed to have engaged in terrorism-related activity, but who can neither be prosecuted nor deported (Anderson, 2013, pg 4). This aim is certainly worthwhile, and it will be argued ultimately an unfortunate necessity, but this aim is not sufficient on its own for such an extreme measure. The solution to this problem

is partly political; there must be a re-evaluating in the aims of counter-terrorism policy and an acceptance that certain cases call for intervention and prevention of future harms, rather than either taking no legal action or resorting to criminal prosecution. There needs to be a compromise. Alongside this, there needs to be clarification and reform concerning the exact purpose and remit of TPIMs and similar measures. Essentially a TPIM system should embrace its risk society origins, and have rules constructed that reflect that origin, rather than cloaking itself in the forms and functions of the post-hoc criminal justice system aimed at tackling moral harm.

The purpose of a reformed TPIM should first be expressed broadly and negatively: they are not, and cannot be seen to be, an expression of coercive punishment. Nor can they be used directly as a response to behaviour wrongful enough to be considered traditionally criminal in nature. The application of punishment in response to a harm worthy of that punishment by the state belongs in the realm of the criminal law, with its associated procedures and protections. It is imperative that preventive systems are used for prevention not as an alternative when authorities find the protections and principles of the criminal process too rigorous (which is a common criticism of such measures). (Zedner, 2007, pg 201) On one level this may seem obvious, but the past system has presented problems where citizens have been charged with crimes, acquitted, and then placed under TPIMs partly on the strength of that same evidence. (Anderson, 2013, pg 46) The principle in such cases should be that an individual acquitted of a criminal charge should not be subject to the coercive measures of a TPIM as they now stand (Ashworth and Zedner, 2014, pg 189). This avoids a scenario where a TPIM is used instead of an applicable criminal charge as a way to bypass a jury or some legal protection such as a specified burden of proof or rule of evidence. The same applies to a situation where a TPIM is issued after a not guilty finding by a criminal court, using the same evidence as a court presents. The suggested reforms to the TPIM system would ideally not create a linear or 'instead of'

progression, but a fully independent system. The most important point here is that the current system is too bound up in the civil and criminal processes of law, and any new process must be, and be seen to be, independent. Any similarities between the two systems must come from the common need to respect human rights in procedure, not because one system was derived from the other.

The positive aim of a reformed TPIM system would be assurance governed by proportionality. The 'assurance problem' is well recognised in political philosophy and was discussed in Chapters 3 and 4 from the perspective of the state and the citizen. It forms part of the state's duty to protect and an expectation of the citizen to be assured that others in society will act according to the same moral rules that they do (Matravers, 2000, pg 238). TPIMs and other preventive measures are correctly used when the situations they concern fall between a gap where there is a perceived risk of serious physical harm but not action that amounts to a criminal attempt. Coercion is seen as a legitimate course of action when a citizen of a state rejects the rules that govern a moral community and acts in a way that threatens the conditions of Hobbes' 'sufficient security' (Hobbes, 1991, part 1 ch.15, 110).

A problem arises when a citizen is perceived by the community to reject the rules but has not acted to harm it, in conditions that lead to a reasonable belief that he or she might do so in the future. Such a situation is unworthy of coercive action by the community (generally in the guise of the government of the state) for no harmful action has been taken nor any substantial step towards a harmful action. Yet assurance is still lacking, and arguably the condition of sufficient security is doubted even though it has not been materially affected (and might never be). The community is reasonably certain that the conditions of sufficient security exist now, but lack the reasonable assurance that this condition will continue. It is at this gap in assurance that preventive justice should be

aimed, especially when the potential harm is particularly serious, and thus of great apprehension in the moral community/state.

It could be considered that this rejection of the rules is a harm in and of itself, one deserving of punishment by the state. This would be similar in construction to the wrong found in the construction of the Crime and Disorder Act 2003, briefly discussed in Chapter 2. Under this statute, the Anti-Social Behaviour Order was conceived as addressing a moral wrong caused by continued manifestation of a disposition to cause harassment, alarm or distress. (Ramsay, 2012, pg 52) Constructing the threat in these terms leaves it open to the same criticism levelled at the criminal component of the ASBO. Namely that an offence that amounts to a 'failure to reassure' can be read as a law that reverses the burden of proof with respect to future offences. As noted in Chapter 3 this should be avoided, as it lacks a commitment to respect the individual under suspicion as a responsible moral agent (Tadros, 2014, pg 144). Some action may well be required, but it should be non-punitive in character.

TPIMs as they currently stand lie at the extreme end of a reassurance gap, where the executive in the form of police or intelligence agencies and the Secretary of State, are unassured to the degree that it is deemed necessary to act to impede in the planning or execution of some serious harm upon citizens that rely on them to maintain the conditions of sufficient security. TPIMs contain, and would continue to contain, the harshest restrictions that a state can reasonably levy against someone who has not, or cannot be proven to have, committed a criminal offence. This likely means that at some point we can say that the individuals involved have 'failed to reassure' the state of their future intentions. The consequences of a failure to assure cannot be any more than what is necessary to alleviate that failure in keeping with a provision that

The nature of this 'failure to reassure' will likely be nebulous and fragmentary, a problem that has been highlighted in reports on the TPIM regime, "The need for caution is particularly great when – as will often be the case – much of the evidence was second or third-hand (hearsay or multiple hearsay), or a 'mosaic' composed of many small indications, often in the form of coded conversations or snippets of human source information, none conclusive in itself." (Anderson, 2013, pg 56 §6.8) If people who 'fail to reassure' are the target, and relatively weak evidence the proof, what then is the aim of the preventive measure itself? The final aim of a TPIM or similar measure should be to close the reassurance gap, or at least to close it enough that other, non-coercive measures can take over.

Anderson notes in his 2012 review that he has "been struck from time to time by the incongruity of a system that allows young men who have been characterised as dangerous terrorists to be closely controlled for a period of up to two years, but takes no advantage of the opportunities thus provided for dialogue." (Anderson, 2013, pg 95) Ashworth and Zedner also mention this fact. Stating that "One largely missing element in the spheres of conduct currently covered by civil preventive orders is that of support. The civil preventive orders are chiefly prohibitory, and tend not to be underpinned by any formal framework of support for the person subject to the order." (Ashworth and Zedner, 2014, pg 94)

Compare this to a criminal sentence where even before sentencing instruments such as pre-sentence reports are created containing information about the offender and suggestions as to their sentence, made in cooperation with them by the Probation Service. (Zedner, 2004, pgs 183-184), (Anderson, 2013) The lack of such a provision can also be negatively compared with post-conviction provisions such as offenders being transferred to open prisons near the end of their sentence, or being released on license back into the community. In theoretical terms, the lack of engagement with the subject in the original

TPIM formulation fails to respect controlees and their moral worth through acting solely in an incapacity manner and failing to engage in attempts at a version of rehabilitation. In practical terms reform is needed to correct this problem through the creation of an 'exit strategy' for TPIM subjects; a programme or set of goals they can work toward to obtain release or partial relief from the restrictions placed upon them.

This need for an 'exit strategy' was acknowledged in the 2012 and 2013 reviews of TPIM legislation and by 2013 some progress had been made with respect to those subject to TPIMs (Anderson, 2014, pg 30-31, §4.27-4.34). A reformed TPIM, under a preventive system of law, would include such exit strategies from the beginning. Indeed they would be a primary goal of the measure, with any restrictions or requirements designed both to head off the perceived risk *and* to facilitate engagement. Such a measure would resemble the already existing Channel program discussed in Chapter 2, but aimed at those seen as a higher risk and involvement with terrorism strongly suspected, if not proven to a criminal standard.

Procedural Protections and Restrictions

Control Orders and the TPIMs that replaced them contain an extraordinary array of potential powers that can be imposed by the Secretary of State (as discussed in Chapter 2). The problem is there is little attempt to codify possible restrictions within the system. An order that asks that a suspect not be allowed to use a certain communications device is treated the same as an order that confines a person to their home for significant periods through a curfew. This is analogous to the criminal justice system, where the principle is that the same process and rules are used regardless of the ordinal proportionality of the wrong the defendant is alleged to have committed.⁸⁷ Should this be the case in preventive

⁸⁷ Of course there are difference, such as between the processes of the Magistrates and Crown Courts, but the important elements of the process, such as rules of evidence, burdens of proof etc. Remain the same.

justice? A system of preventive law lacks many of the normative qualities associated with criminal justice proceedings because it lacks the core principle that some harm has occurred and some form of punishment is needed. This does not necessarily hold true of preventive justice, the failure to reassure could be conceived as a moral wrong, but this has dangerous implications as discussed in Chapter 4. If we do not see a failure to reassure as a moral wrong worthy of some punishment or censure, then whoever is the subject of proceedings is not answerable in the same way as a criminal defendant is. The criminal burden of proof or standard of evidence does not change between a charge of shoplifting and a charge of murder. The proceedings and protections that are put in place are the minimum sufficient conditions for having a case to answer at all. Additionally, with a criminal conviction, there is the additional communicative element of both the process and any result that should be lacking in a preventive system. The communicative element in a criminal conviction, as opposed to other regulation, is particularly strong (Duff, 2007, pg 87-89).

If preventive justice measures lack the normative elements of punishment such as retribution, rehabilitation, communication, etc., then we should determine the procedural protections and restrictions independently of processes that rely on criminal law theories and instead begin with a foundation of human rights. Respect for human rights and legislation associated to them should provide an irreducible minimum upon which to build a preventive system that includes measures such as TPIMs – the current version of which, we assume, would have protections equal to, or perhaps even exceeding, the traditional protections and procedures of the criminal law – given the current potential range of restrictions.

Starting Points:

Our initial starting points must be to recognise the problems and values identified in chapters 3 and 4. The first chapter highlights the past of control orders and TPIMs from their legal origins to their most recent reforms. Chapter 3 addresses the goals any reformed TPIM should meet, and chapter 4 raises ongoing issues of human rights and the problems posed by those a TPIM might be centred on. To this end any reformed TPIM should aim to fulfil the state's duty of security. TPIMs should avoid the expressive and condemnatory punishment highlighted by David Garland (Garland, 2001, pg 139-144), while acknowledging that their aim is risk averse and preventive as described by O'Malley. (O'Malley, 1992)

Markus Dubber begins his Introduction to the Model Penal Code with an assertion that the criminal law centres on the question "who is liable for what?" (Dubber, 2002, pg 5) A preventive scheme of law must ask a broadly similar question. Antony Duff, in *Answering for Crime*, seeks to ask a related question, "who is (or should be) criminally responsible for what – and to whom?" (Duff, 2007, pg 15). The key difference between these two questions is that someone may be responsible for some action or event, but argue that they are not liable for criminal punishment because of the circumstances, such as a harmful action being self-defence (Duff, 2007, pg 21). Both of these questions are relevant for a reformed scheme of preventive justice. A potential subject of a preventive justice proceeding, such as a TPIM, is being held both responsible and legally liable for some action or pattern of actions that have led to the belief that they present a risk to the future safety of their fellow citizens. Identically to Peter Ramsay's view on the imposition of ASBOs, the citizen in question has exhibited behaviour that fails to reassure others about their future security (Ramsay, 2012, pg 16). In the case of TPIMs, the 'others' are the Secretary of State and most often the police or intelligence services. The question of citizenship and responsibility vis-a-vis the failure to reassure was addressed in Chapter 4, but how does this responsibility move towards liability under a preventive law system?

The first question that must be asked is who exactly is responsible under a scheme of preventive law, and to whom are they responsible? A potential subject of a reformed TPIM is responsible to our hypothetical system of preventive law. As discussed in Chapter 4, they, like all citizens of the state, have some sort of positive duty to other citizens to reassure them as to their non-malign intentions. It was noted there that their positive duties in regard to citizenship present a problem, especially as construed in relation to the kind of ‘assurance gap’ discussed by Peter Ramsey in *The Insecurity State*, because of the scope of behaviour that could fail to reassure and the subjective nature of a feeling of security, combined with the problem of how a failure to live up to those duties. This reassurance gap does not seem to fit easily within the civil/criminal sphere, if there is a duty to reassure, it fits uneasily within the traditional legislation, regulation and criminal sanction options that have traditionally served in other areas.

These issues are present in our discussion of a reformed TPIM but are more tightly focussed. The ‘assurance gap’ that TPIMs cover is centred around much graver harms than anti-social behaviour, for example, and the people who lack assurance about a potential subject’s behaviour are often professional law enforcement officials with access to more information about the subject that is available to the general public.⁸⁸ Despite this, it is correct to say that in preventive law, similar to the criminal law, a citizen is responsible as a citizen to his fellow citizens (Duff, 2007, pg 52). There is a difference however in that within criminal wrongs there is a greater individual element. Some person or persons will have been wronged or harmed.

In the case of the current TPIM regime, the closest match to a complainant is the Secretary of State at the time, and they act in their official capacity. The ‘wrong’ or ‘harm’

⁸⁸ There is also likely to be more generalised insecurity in society itself, and indeed a specific insecurity from the people a potential subject comes into contact with on a daily basis (indeed this feeling of insecurity may be one that resulted in potential subject being reported to the police or intelligence services).

involved is the failure to reassure, which, as already discussed, is not a harm that amounts to a criminal wrong. Even if it contains a fault element in the sense that the individual has on some level failed in a duty to society to reassure fellow citizens of his good intentions. In this the state is acting in its duty to provide security as discussed in chapter 3. Both in a material sense, making it harder for an individual to engage in risky behaviour, to provide a path back to trustworthiness, and in a subjective sense of reassuring citizens at large that 'something is being done'.

This combination of factors brings us onto the first procedural problem with TPIMs as they currently stand and a suggestion for improvement.

Process

In order to suggest how and why TPIMs should be reformed under a different scheme of 'preventive' law, it is necessary to explore the imposition of a TPIM in more detail. The following sections look at the various stages of the implementation of a TPIM as it relates to legal procedure and judicial hearings. After this has been explored and necessary changes identified, there will be further sections dealing with issues that do not fit into this methodology, including overall restrictions on what should be allowed under a TPIM and in what circumstances. The initial investigation into the TPIM subject is not covered in great detail as it expands into areas of law such as the regulation of surveillance in society more generally, which while preventive in nature and discussed in previous chapters, is not directly relevant to TPIM reform itself, except where it comes into contact with judicial procedure and protections.

The main sources for this exploration are the Terrorism Prevention and Investigations Measures Act 2011 (TPIM Act 2011), combined with the Independent Reviewer of Terrorism Legislation's report into TPIMs in 2012. These sources give a good overview of the legal and practical aspects of the imposition of TPIMS as they stand today (Anderson,

2013, pg 53-60 §6, 73-83 §9). In addition, the open portions of cases such *SSHD v BF [2012] EWHC 1718* and *SSHD v AM [2012] EWHC 1854* provide some insight into High Court judges' findings and opinions when TPIMs have been reviewed under section 9 of the aforementioned act. This section seeks to cover the imposition and judicial review process in some detail using the material in these sources and then to identify how it could be improved within a bespoke system of preventive law that could, with further work, be expanded to other preventive measures.

As laid out in section 6 of David Anderson's 2013 report into the operation of TPIMS in 2012, the first step in the imposition of a TPIM occurs when a police or intelligence body (usually MI5) makes a request ... that a TPIM be considered for an individual. This request is made along with a dossier of evidence which is then examined by a CPS lawyer to determine whether prosecution is a feasible option. While this advice is secret, we can suppose that a test broadly similar to the standard CPS test is used, namely, the evidential and public interest tests laid out in the Code for Crown Prosecutors under Section 10 of the Prosecution of Offences Act 1985 (Crown Prosecution Service, 2013, pg 6-10). Assuming prosecution is not viable, an independent barrister is shown the evidence, and they give evidence as to whether conditions A-D of Section 3 of the TPIM Act 2011 are satisfied as well as whether the proposed TPIM is compliant with Article 6 of the ECHR. Other departments are consulted concerning the management of the proposed TPIM and a detailed dossier prepared for the Security Minister and the Home Secretary. This dossier commonly covers:

- The applicable legal test
- The risk that the person was assessed to present
- Why a TPIM notice was considered necessary
- The prospects for prosecution

- Proposed measures
- Impact on ECHR rights
- Exit strategies.

This investigation process itself is open to criticism as was briefly mentioned in Chapters 3 and 4, for example, the far-reaching measures such as those in the Investigatory Powers Act 2016 present concerns in and of themselves. Unfortunately, full knowledge of how a dossier is assembled is kept secret, but as detailed in Chapter 2, in the past legislation such as the Communications Act has been used in ways not intended at the time of its passing to collect information through modern communications equipment. This alone raises the chapter 4 issue of respect for human rights, in particular the right to private and family life and respect for his correspondence guaranteed under Article 8 of the European Convention. Broad state interference through wide ranging surveillance and the idea of informed consent are both key here. To be the potential subject of a TPIM we are assuming that the subject has somehow failed to reassure the state as to their good intentions, but there are almost certain to be others ‘caught in the net’ of any covert or open investigation. This is an area under-examined in much of the review material on TPIMs and more needs to be done in the area of informed consent to what information is being collected. This is both so that the collected information can be critiqued and checked (Fuller, 1969, pg 51) and also so that citizens are aware of what information might, or has been collected. Particularly those outside the focus of any investigation, even if this is revealed some time after the fact for operational secrecy.

After the Secretary of State has reviewed the dossier, they can proceed with implementing the TPIM if they believe that the evidence provides them with a reasonable belief, on the balance of probabilities, that the proposed subject of the TPIM has been involved in terrorism-related activity (TRA). As discussed in chapter 2, the legal scope of involvement in TRA, and TRA itself are both very broad even after the changes made in the Counter-

Terrorism and Security Act 2015. This has implications for our discussion of privacy as terrorism has become something of an overly broad, catch-all term (Walker, 2010, pg 456) and at this investigation and pre-hearing stage it is important to note that while an intrusion into privacy to prevent a serious harm is certainly justified, a lesser terrorism offence, such as a failure to disclose information, is a much lesser harm. What justification this broad definition has is discussed more below in relation to TPIM reform and the restrictions that can be imposed.

Imposition and Directions Hearings

The next stage in the implementation of a TPIM is for the Secretary of State to either seek permission from the High Court to impose a TPIM under Section 6 of the Terrorist Investigation and Prevention Measures Act 2011; or in an urgent cases to impose a TPIM and seek judicial permission after the fact under Section 7 of the aforementioned act. It is at this stage that the TPIM itself can be imposed upon the subject. This initial application hearing can take place without any representation on behalf of the subject of the TPIM, and the High Court can only reject the application if it is found to be 'obviously flawed' – this threshold is considered to be a very high one, and as of 2013 no TPIM notice had been rejected at this stage (Anderson, 2013, pg 56, §6.10(c)). After this, a directions hearing must happen within 7 days of a TPIM being applied to a subject as a result of the initial hearing. The civil rules of procedure dictate the subject of the TPIM must have the opportunity to attend as must the subject's legal representative and Special Advocate (if one has been appointed). In addition, the court must give directions for a review hearing under section 9 of the TPIM Act 2011 and specify dates and times by which the parties and Special Advocate file and serve any written evidence for the review hearing (Department of Justice, 2011, rule 80.6).

The first thing to note about this is that despite judicial involvement at the initial hearing, and the preparation for it, the TPIM as it exists at this point is an almost purely executive measure. The scope for judicial oversight is narrow and the threshold for not granting permission to the Secretary of State very high. This is an important point to note going forward as it will be argued that the TPIM process should be changed to alter the 'balance of power' between the executive and judiciary in the subsequent hearings. The second point to make is a procedural one relating to the initial hearings. From a purely procedural point of view, this is the first key problem with the system. Imposition, as it exists now, stands as a coercive and potentially highly restrictive preventive measure that can be imposed upon a subject.

Any measures imposed should be the minimum required to achieve the goal of calling the subject of a reformed TPIM to answer. This responsibility to answer is an accepted part of the criminal law, particularly for a trial on indictment. The requirement to appear is backed by the coercive sanction of arrest (Duff, 2007, pg 176). This principle can also be usefully applied to TPIMs. A question remains whether there is an equivalency between being called to answer for a criminal offence and being called to answer for a problem of reassurance. On balance, the criminal offence is worthy of a great degree of coercion, potential arrest and holding on remand. However, it is important to note that at this stage of a criminal trial the defendant enjoys the presumption of innocence yet is still called to answer in some form before the court. Similarly, the subject of a reformed TPIM could be said to enjoy a presumption of non-riskiness until at least the initial proceedings are concluded, but measures may still be taken to ensure that he is present and had the opportunity to answer.

These hearings reveal a tension between the executive and judiciary that has played out constantly in the history of anti-terrorism legislation. Chapter 2 listed many examples

where executive action has been questioned and curtailed by the courts. In one sense this is working as intended as a system of checks and balances. The state's duty of security applies to both branches of government and any reform should attempt to avert the kind of avoidance shown by the executive in the course of Chapter 1's examination of terrorism legislation.

Ensuring that a subject appears before such hearings is rightfully a duty of the court, although given the short time between the hearings, the exact restrictions that the Secretary of State wishes to impose upon an individual between the imposition of the TPIM and the directions hearing should form part of their application. The role of the judiciary would be to review the suggestions for compliance with the suggestions above, ensuring that restrictions are necessary, proportionate and favour non-restrictive measures – even if they are costlier. In this sense the court is arbitrating between the subject and/or their advocate and the executive's representative as to the risk the subject currently poses.

A comparison could be made to a criminal suspect being held on a serious charge – such a suspect will be held in prison and suffers graver restrictions despite not having had the chance to defend themselves at trial. However, there is a qualitative difference here. Firstly, the nature of the wrong committed. In a criminal case serious enough to warrant a denial of bail before trial a grave wrong will have already been committed whereas preventive law is concerned with future events. In the criminal case, the suspect, having already met the evidential test for prosecution, will be in a position where the court believes it probable that he would a.) fail to surrender to custody, or b.) commit an offence while on bail, or c.) interfere with witnesses or otherwise obstruct the course of justice (Jones, 2003, pg 401). It is, of course, possible that the defendant in the criminal case is innocent, despite the prosecution's belief that it has a good case, a fact that undercuts this qualitative difference.

The purpose of the pre-trial detention and the restrictions for a subject held on remand are different to the purpose and restrictions they would be under after a successful conviction.⁸⁹ The same is not true of the subject of TPIMs. Between the initial hearing and the directions hearing a reformed TPIM subject should only be subject to those restrictions necessary and proportionate to reasonably ensure he complies with the command to appear before a court. We must consider how sustainable this approach is for such a length of time. The previous section noted that intensive surveillance could be used in cases where the reformed TPIM subject was thought to present an extreme level of risk even in the seven-day (maximum) gap between the notice of imposition for a TPIM and the directions hearing. Despite the cost of such a surveillance the principle of the presumption of innocence (or a presumption of non-riskiness) and the short time period justifies the expense. That some sort of surveillance should be allowed is reasonable, given the subject's failure to reassure and the state's duty to provide both objective and subjective security. Notwithstanding this, the burdens on the TPIM subject as the system stands will be very high. In addition to the restrictions and associated burdens of the TPIM, the subject of the TPIM is under the material burden of preparing any defence, attending hearings and the psychological burdens involved in the process (Duff, 2013, pg 174). In addition, there will be the problem of collateral surveillance on the subject's family and associates.

As detailed above, 24-hour surveillance of a subject is extremely costly, and according to David Anderson greatly exceeds the cost of administering a TPIM notice and is one of the chief justifications for their use (Anderson, 2012b, pg 59 §6.22). That cost is so prominent a reason for the use of TPIMs is disquieting but cannot be ignored, especially given the

⁸⁹ To what extent this sentiment is backed up in reality is questionable, but the fact that unconvicted prisoners are presumed innocent and should be treated as such forms part of the mission statement for HM Prison Service even if the standards of treatment are known to fall short. Jones, S. (2003) 'Guilty until proven Innocent? The diminished status of suspects at the Point of Remand and as Unconvicted Prisoners', *Common Law World Review*, 32(2), pp. 399-417.

extremely high surveillance cost estimates given by Lord Carlisle. On the assumption that full-time surveillance is non-viable, how then should the assurance gap be dealt with at this stage of proceedings? Any measures imposed should be necessary and proportionate as well as individual to the directions hearing. It may be that the case against the subject is either so strong as to warrant the full restrictions originally asked for by the Home Secretary, or indeed so weak that the subject of the TPIM can refute them effectively at this stage. While this is unlikely it is important at this, the first stage at which the subject of a TPIM can respond that sufficient evidence of sufficient risk exists to constitute a case to be answered by the subject of a TPIM. This is exactly as we would expect this principle to work in a criminal proceeding (Duff, 2013, pg 175).

Identically to the criminal law, the state exists as an unequal partner in an adversarial proceeding, something that is likely to be true in any preventive system. It has vastly superior financial, institutional and informational resources at its disposal (Roberts and Zuckerman, 2010, pg 58) In addition, the very nature of prevention emphasises covert surveillance, secret evidence and a desire by the state to keep even investigatory methods as secret as it can. The aim of the judiciary in such a court should, therefore, be to balance these factors and to decide as to what, if any, restrictions to impose. This could result in certain restrictions not being allowed until the review hearing is complete, or qualifications to the restrictions to ensure a fair hearing for the TPIM subject. Given the scope of the possible restrictions of a TPIM (which will be discussed in full below), it is impossible to give a full accounting of what decisions the court might make under these preconditions. A specific example might be an association measure under schedule 1 of the TPIM Act 2011. This measure allows the Secretary of State to impose restrictions on an individual's associations with other persons; either banning, restricting, or requiring notification or permission for any meeting or communication. It seems likely that the Special Advocate

system, discussed in Chapter 1, would need to make some sort of return even at a hearing stage, even if its use should be closely monitored and not assumed.

It is quite possible however that regardless the subject of the TPIM will want to communicate or meet persons they are restricted from seeing in order to work on their defence. This could include desiring the person as a witness or wishing to acquire written evidence from them. This will require the court to balance the restrictions imposed against the requirement that a directions hearing act to ensure a fair trial. This is particularly true in cases where the Secretary of State desires an outright ban on association. Such decisions will likely be case specific, but it can be envisaged that association with restricted persons would be allowed provided that the subject of the TPIM is accompanied by their legal counsel or at least represented by a Special Advocate. That the results of any surveillance measures in place from an association for this purpose are not allowable as evidenced by the Secretary of State in the review hearing.

This newly defined remit of the directions hearing also serves to empower the judicial component of TPIM imposition in the reformed system. This is an important part of the overall reform being discussed. The role of the judge here, and in the Review Hearing, is different to that found in a crown court trial where responsibility is split between the judge and jury, with the judge being primarily responsible for questions of law and the jury for questions of fact. (Ashworth and Redmayne, 2010, pg 339) In this proceeding, the judge is responsible both for ensuring the hearing runs properly and for making a factual finding on the merits of the prosecution's case. This raises a comparison to the formation of Diplock courts. As noted in Chapter 1, the founding of the Diplock trial process tackled the question of the role of the judge and indeed whether to have multiple judges (which is raised later). While Diplock trials were criminal proceedings many of the same questions can be raised here. In criminal cases before a jury judges have an umpire-like role. The judge is not a

passive observer, but ideally intervenes only to keep proceedings orderly and to ensure the rules of evidence and procedure are observed. (Jackson and Doran, 1995, pg 100) On the other hand it should be noted here and considered going onwards that in Diplock proceedings the elimination of the jury reduced the use of tradition advocacy skills and led to more direct discussion between counsel and judges on the basis of written statements. As well as an increase in judges taking direct part in proceedings, this replaced the more theatrical aspects of the criminal jury trial as an adversarial contest with a more sober search for truth. (Boyle, Hadden and P., 1973, pg 99)

The final decision about what restrictions to impose at this stage belongs to the court, rather than to the Secretary of State or their representatives. By this stage of the directions hearing the TPIM imposition process has reached a place where the accuser and accused can both make representations. The primary duty of the judiciary should be to mediate between the parties and render judgement, rather than accept or decline the judgement of the accuser (the Secretary of State or their representatives). This is a vital point and is discussed in greater detail below in the relation to the review hearing, but is also relevant here when considering why the role of the directions hearing has been expanded.

Makeup of the court

Before discussing the ongoing review process for any new TPIM, there must be a discussion of the roles of the executive and the judiciary in the TPIM process. The decision of what to do about a citizen who embodies a reassurance gap in the view of the state is primarily left up to the executive in the case of the use of a measure such as a TPIM. The role of the court is to review whether that decision and the restrictions imposed because of it are valid ones. The role of the court does involve protection of the subject of the TPIM – ensuring that their human rights have not been breached by the terms of the ECHR and that the relevant rules of procedure and evidence are followed – but it does not involve a

moral judgement upon the subject. Unlike in a criminal case where magistrates or juries make decisions on the guilt or culpability of a person subject to their proceedings.

A reformed system of preventive law should change this approach for TPIMs, and potentially other similar measures, so that the judiciary has a greater role in determining whether the case put forward by the executive is correct. This would require a change to the TPIM Act 2011 section 3, condition A which necessitates only that the Secretary of State needs to have a 'reasonable belief' that the subject is involved in terrorism related activity. The court currently decides only whether there are reasonable grounds for that belief. In some cases, this will certainly not have changed the outcome of the proceedings. In *SSHD v CD* Mr Justice Duncan Ouseley specifically notes that "As it happens, I believe, and firmly so, that CD has been involved in terrorism-related activity, although to a markedly reduced extent since the imposition of the Control Order and TPIM. That makes me rather less inclined to suppose that the SSHD did not or does not hold the requisite beliefs."⁹⁰ David Anderson notes his 2012 review of TPIMs that the six review judgments made in 2012 were notable for their endorsement of the Secretary of State's belief regarding terrorism-related activity (Anderson, 2013, pg 73 §9.3(b)). It should also be noted that in one case the judge declared "if I do not agree with her I would be likely to decide that there was insufficient to support a reasonable belief".⁹¹ These sentiments from the independent reviewer and the public availability of the open parts of the judicial oversight mentioned above reassures us of the TPIM procedure to a certain extent but is insufficient to the task of ensuring fairness in a system of preventive justice. The executive, in the form of the Secretary of State in the case of has the right to initiate the imposition of a TPIM as

⁹⁰ §13, *Secretary of State for the Home Department v CD* [2012] EWHC 3026 (Admin)

⁹¹ §30, *Secretary of State for the Home Department v BM* [2012] EWHC 714 (Admin)

discussed in the sections above. In this sense the executive is taking the lead in matters of the duty of security, as well as addressing risk and uncertainty.

At any review stage, much like the directions hearing discussed above, more input from the judiciary is needed in future to create a fair procedural environment, before the discussion moves further into the specifics of the review hearing. In a reformed system of TPIMs, the review proceedings should more closely resemble the style of a criminal trial. Similar to the procedure now, the Secretary of State's representatives would form a 'prosecution' and the subject of the TPIM and their legal team forming a 'defence'. Prosecution and defence are perhaps not ideal terms under this system, although 'applicant' and 'respondent', which are currently used also perhaps do not correctly capture the role of the parties in these proceedings. For now, the latter terms will be used because they can be considered less 'charged' than the terms used in criminal proceedings. Regardless of this, the adversarial nature of trial is created on similar lines to a criminal case. The key change would be that it becomes the role of the applicant to convince the court that the respondent has failed to reassure the state of their future behaviour and created an assurance gap to a degree serious enough and commensurate with the restrictions the applicant wishes to impose. The respondent's role is to resist the applicant's case before the court. In this reformed system the responsibilities of the court have greatly increased, not only is the court responsible for ensuring that whatever decision is reached is in keeping with the state's responsibilities under human rights legislation, it must also render its own judgement on the reasoning used by the applicant in requesting a TPIM.

Nonetheless we should question the adversarial nature of these hearings, a full examination would be worthy of an entirely separate thesis, but it is worth considering that removing some of the adversity from the adversarial model would be useful. As noted

above, in Diplock proceedings the theatrics of advocacy often gave way to more intense measured examination of written statements and less cross-examination. This thesis does not want to say this is inherently desirable, but it must be considered, particularly if a reduction in the adversarial elements of a trial encourages cooperation from the respondent. This is certainly a matter for greater examination in the future.

Applicant vs Respondent

Now that the makeup of the court and the basic proceedings for a reformed TPIM system have been suggested this thesis moves to consider proceedings within the Hearing itself as well as the question of public interest in the proceedings. This thesis is not concerned with the exact details of proceedings in terms of allowable trial tactics or the order in which testimony is heard, however. The extent to which these are relevant to our discussions are dealt with above through the provision of a single experienced judge serving the interests of all parties in a fair proceeding run according to the law and respecting of rights. As well as a less adversarial system may indeed be also desirable – if too large a concept to explore fully here. Much as is the case in TPIM hearings as they stand today. It is important to return to one issue mentioned briefly above that is relevant to proceedings as they go forward. It is vitally important that proceedings in preventive law, such as the proposed reformed TPIM, distance themselves from the elements of a criminal trial that imply a criminal wrong has been committed. This might usefully be described as the ‘culture’ of preventive justice hearings. Proceedings in a criminal court can undoubtedly contain a character commensurate with a body seeking to punish a wrong. The use of a criminal dock is one of the more obvious features of criminal proceedings, and there is growing evidence that such features can prejudice a jury against a defendant (JUSTICE, 2015, pg 20-22). While current TPIM proceedings are held as civil affairs, and the proposed reforms would probably preclude the use of a jury, the effect of the trappings of the trial upon the respondent

cannot be ignored. A key problem with TPIM hearings currently is the lack of engagement shown by many respondents. In 2012 not one of the TPIM subjects gave evidence in their own defence (Anderson, 2013, pg 77 §9.21), a problem which is explored in more detail below. While the respondent should not be expected or forced to give evidence personally, consistent cases of respondents not doing so shows a lack of engagement with the proceedings, a fact noted by the Independent Reviewer in his report. Any reasonable measures that can be taken to set a respondent at ease, to distance preventive justice proceedings from a criminal trial, should be taken because the character of the proceedings and the way and reason the respondent is being called to account are profoundly different (as explored above). More specificity than this is hard, but it should be considered that the terminology used in court proceedings, the venue, the layout of that venue and the positioning of the parties involved in the proceedings could all play a part.

These considerations are more than simply superficial, compared to a criminal proceedings preventive justice should seek far more engagement with the respondent during proceedings and while restrictions are enforced. Importantly such engagement should also be less hostile. The end goal of the proceeding is to reduce the risk the respondent poses in the eyes of the state, to close the assurance gap. In the long term, this will require the cooperation of the respondent and the state has a duty to that respondent to ensure that the assurance gap is closed as non-coercively as possible. This is true even in proceedings regarding a risk as perceived as serious as those addressed by the TPIM Act 2011. It is this goal that best allays the issues raised in Chapters 2 and 3, both the problems the state faces in tackling security and risk, and the problems citizens face into what duties they have to cooperate, to appear “non-risky”, and to have their rights respected both during preventive proceedings and more broadly as citizens.

On the issue of publicity one of the key reasons that criminal trials are open to the public is that there is a long-standing belief that the public have an interest in seeing that the criminal justice process is fair and open. It is likewise in the public interest that preventive proceedings be seen as fair. In criminal proceedings, there is a conception of a 'public' wrong, a wrong that properly concerns the public collectively (Duff, 2007, pg 141).

Despite this, the fact that preventive proceedings should ultimately aim to engage with the respondent who is called to answer, and the fact that TPIM proceedings are designed to be as non-coercive as possible, provide a powerful argument for anonymity for the respondent. It is also noteworthy that under this conception we are avoiding saying for certain that a public wrong has been committed. Current TPIM procedures allow for anonymity requests by either party under Schedule 4 of the TPIM Act 2011 and to date all TPIM subjects have been granted anonymity by the court – although standard practice is for the anonymity to be rescinded should the respondent abscond from the order, such as in the cases of BX (Ibrahim Magag) and CC (Mohammed Mohamed) (Anderson, 2014, pg 18 §3.7). In our reformed TPIM scheme, there would be few changes to this. The default position should be that the respondent is given anonymity to protect their ECHR Article 8 right to privacy and family life as well as the same rights of their family and associates. Should for some reason the applicant wish to revoke this anonymity protection, then the burden to show a cause for this should be wholly upon them. Certainly, the citizens of a state have a right to be protected, but this right should not infringe unduly on rights to privacy. Separating these proceedings from privacy arguments in criminal and civil trials.

Evidence, Secret Evidence and Special Advocates

One of the most problematic areas of the control order/TPIM regime has been the types of evidence allowed in proceedings, and the fact that some evidence presented is considered too sensitive to be allowed in open court or disclosed to the defendant or their

personal legal counsel. Such evidence can be disclosed to a 'Special Advocate': an individual appointed to represent the respondent's interests in closed hearings. This section looks to explore these issues in more detail and, assuming the reforms so far explored are present, to explain how the issues of evidence, secret evidence and the use of Special Advocates could be reformed in a new system of preventive justice and specifically in a reformed TPIM regime.

In the current TPIM regime, Closed Material Proceedings allow for the disclosure of evidence the government (in the form of the applicant in TPIM proceedings) desires to keep secret from the subject of the TPIM (the respondent in the review). David Anderson notes in his opinion in his 2012 report "It must not be forgotten, however, that no closed material procedure can be wholly fair" (Anderson, 2013, pg 90 §11.21). This does not mean that such proceedings should be automatically condemned as unjust, but the risk of injustice must be acknowledged, and all measures to avoid injustice should be taken. In brief, TPIM review hearings are currently split into two parts, and open proceeding where the respondent and his legal counsel can be present, and a closed proceeding where the respondent is represented by a Special Advocate appointed to them by the court. The closed material proceedings themselves as defined in statute under Schedule 4 of the TPIM Act 2011 must extend to any evidence or proceedings the court believes would be damaging to national security interests. The contrasts sharply with similar measures dealing with sensitive evidence such as the 'Wiley' balance in the case of public interest immunity (PII) in civil or criminal proceedings. *R v Chief Constable of West Midlands, ex p Wiley*⁹² requires the court to balance the public interest in preserving confidentiality against the public interest in serving justice when considered (PII). In TPIM reviews there is no such test of balance. Where the material would be damaging to national security, the

⁹² *R v Chief Constable of West Midlands, ex p Wiley* [1994] UKHL 8 (14 July 1994)

court has no option but to permit non-disclosure (Kelman, 2016, pg 269). The counterbalance to this is the case relating to *A and Others v The United Kingdom*⁹³, *SSHD v MB(AF)*⁹⁴ and *SSHD v AF and Others*⁹⁵ that establishes the need that; “the controlled person must be given sufficient information about the allegations against him to give effective instructions to the Special Advocate. This is the bottom line or the core irreducible minimum as it was put in argument, that cannot be shifted”⁹⁶. Subsequent to this *Home Office v Tariq*⁹⁷ established that this protection was only established in regards to cases where “the fundamental rights of the individual [are] being severely restricted by the actions of the executive”⁹⁸. There remains significant uncertainty regarding the minimum level of disclosure which must be given in proceedings where ‘fundamental rights’ are being restricted (Kelman, 2016, pg 265). Do all TPIMs as currently constituted, regardless of the restrictions imposed, constitute a severe restriction on rights? Certainly one’s right to privacy of home, life, correspondence etc. are severely impacted on an individual level. Such rights are also impacted for anyone surrounding that person. In some such cases those people might be subject to some sort of duty to report, meaning that failure to do so could open up a justification for their own lives, homes and correspondence to fall under investigation. More worrying would be the fact that fulfilling a duty to report would likely not prevent someone’s privacy from being infringed given that the state would want to investigate any report made.

However, before an analysis of possible reform to the rules of evidence in TPIM cases it is important to make note of the role Special Advocates play in these proceedings, as their role and its restrictions play an important part in why Closed Material Proceedings should

⁹³ *A. and Others v. The United Kingdom (Application no. 3455/05)*

⁹⁴ *Secretary of State for the Home Department v. MB (FC) (Appellant) [2007] UKHL 46*

⁹⁵ *Secretary of State for the Home Department v AF and Others [2009] UKHL 28*

⁹⁶ *Secretary of State for the Home Department v. MB (FC) (Appellant) [2007] UKHL 46 at 81*

⁹⁷ *Home Office v Tariq [2011] UKSC 35 (13 July 2011)*

⁹⁸ *Ibid* at 81

be treated with care. As explored in Chapter 2, the Grand Chamber decision in *A and Others v United Kingdom* made note that there could be a legitimate role for Special Advocates to counterbalance procedural unfairness caused by a lack of disclosure in national security cases but that whether their use violated the ECHR would have to be decided on a case-by-case basis with reference to how ‘the gist’ of the allegations was disclosed to the respondent as referenced above. Importantly the respondent must be able to give instructions to their Special Advocate sufficient to refute, and not just deny, any allegations⁹⁹. This problem is exacerbated by the procedure the Special Advocate is appointed and the disclosure procedure when a closed material proceeding is used. Under the TPIM Act 2011 a Special Advocate is appointed by the relevant law officer (the Attorney General in England and Wales). Unlike the TPIM respondent’s own counsel, the Special Advocate is not responsible to the respondent, meaning that the normal lawyer-client relationship does not exist (Kavanagh, 2010, pg 838). While the Special Advocate can cross-examine the applicant’s witnesses, they cannot call their own and have no access to independent expertise or evidence, a state of affairs that existed in the Control Order regime (Kavanagh, 2010, pg 838).

When we consider TPIMs and the likely nature of the evidence the problems become more acute and should be considered individually. Witnesses called in a TPIM review will often be from police or intelligence services who have worked on the investigation that prompted the initial TPIM request. The danger exists that they will ‘see what they expect to see’ in a similar way as the concept is discussed in criminal trials (Choo, 1996. pg 22-25) of the problems of second-hand information and memory as demonstrated by the oral description of images (Allport and Postman, 1947, pg 65-71). It is important to ascribe more skill in analysing vague or fragmentary information to persons performing such task

⁹⁹ *A. and Others V. The United Kingdom (Application no. 3455/05) at 220*

professionally as employees of the intelligence services will often be doing but there remains the possibility that the very training allowing them to do this could cloud their judgement. TPIMs inevitably rely on evidence such as “coded conversation or snippets of human source information” (Anderson, 2013, pg 56, §6.8). Even the fact that certain evidence is in fact ‘coded conversation’ will likely be a subjective judgement by the person examining the evidence at the time or the person presenting it in court. It should be noted that investigator and the witness at the review will not usually be the same person (Anderson, 2013, pg 79 §9.30).

The most vital aspects that need reform here are the balance of the decision to impose closed material proceedings, the disclosure of evidence for those proceedings and the content of the judgements that result from those proceedings. These shall be addressed in order. Firstly, the balance of the decision for the use of a closed material proceeding lies heavily with the Secretary of State. While this decision lies with the court, it must give permission if it considered that disclosure of the relevant material would be ‘contrary to the public interest’¹⁰⁰. The Civil Rules of Procedure clarifies this by stating “disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom or the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.”¹⁰¹ This appears to be a low bar as reflected by the concerns of Special Advocates that closed material proceedings are being used too frequently has been consistent in the independent reviews of TPIMs (Anderson, 2013, pg 80 §9.31(a)-(c)), (Anderson, 2014, pg 42 §5.28-5.30), (Anderson, 2015a, pg 10 §3.1(h)). Contrary to the perception that national security is the primary reason for closed material proceedings these rules are expansive in the same way as those established under the Prevention of Terrorism Act 2005, and like those rules go

¹⁰⁰ *Civil Rules of Procedure 80.25 (8)*

¹⁰¹ *Civil Rules of Procedure 80.1 (4)*

beyond the bounds of national security of the safety of others (Fenwick and Phillipson, 2011, pg 898).

An arguably superior model to the above is found in research undertaken by the Canadian Centre for Intelligence and Security Studies (CCISS) that reviewed the UK model at the time. In particular, the first and second recommendations are highly relevant and should form the basis for reform. The report's first recommendation was that all information the government wished to keep secret should be assessed by a balancing test between the public interest in disclosure and the public interest in non-disclosure and the judge in question should be allowed to authorise forms and conditions of disclosure that reflect this balance (Waldman and Forcese, 2007, pg ii). This forms a much fairer basis for assessing secret evidence and shifts the weight of the decision away from the Secretary of State and towards the presiding judge and the respondent as well as the public at large.

The second issue to examine in the reformed TPIM procedure is the role of the Special Advocate. As outlined above, while there should be more judicial discretion in how secret evidence is heard, the possibility that evidence might be so sensitive as to make a Special Advocate necessary should not be dismissed. This does mean that changes are not needed to their use as it exists presenting. As presented in sources such as David Anderson's reports there are two sets of issues with Special Advocates as currently constituted: the first are procedural in nature, such as the late serving of evidence, and the second are systemic, such as the Special Advocates professional relationship with the respondent and issues with the powers of the Special Advocate such as calling witnesses or communicating with the respondent. The first set of issues are more easily dealt with on a normative basis as they are clearly failings in the existing process. Special Advocates complaints that disclosure by the government is late, piecemeal and often involves the late service of expert evidence is unacceptable. The ideal solution would be to follow practices similar to a criminal trial where there is an extensive duty of disclosure on the prosecution (Roberts

and Zuckerman, 2010, pg 61). In cases where disclosure is late, piecemeal or otherwise contributes to the respondent's legal counsel or Special Advocate being disadvantaged, the presiding judge should have the power to delay proceedings or penalise the applicant by ruling the evidence or witness inadmissible in the proceedings.

The second set of issues facing the role of Special Advocates are more problematic. The first of these that will be considered is the relationship of the Special Advocate to the respondent. As noted above, the Special Advocate is statutorily not responsible to the respondent. This is an unduly severe restriction. It must be accepted that the traditional lawyer-client relationship does not apply when a Special Advocate is appointed because the respondent is unlikely to be able to exercise any meaningful control over who is assigned to them. Even if we removed the responsibility for assigning a Special Advocate from the Attorney General, it would seem likely that at best the respondent would be able to select from a list of vetted and available Special Advocates.

The relationship between the Special Advocate and the respondent should be readdressed. It would be unwise to equate the Special Advocate with the respondent's own legal counsel, but to legally prescribe that they are not responsible to them steps over an important mark. The original intent of Parliament, as expressed by Mike O'Brien when discussing the role of Special Advocates in immigration hearings, was that "the Special Advocate must make a judgment about the way in which the appellant would have wanted his case to be argued"¹⁰². The correct sentiment is that a Special Advocate should follow, so far as practicable, an appellant's instructions even though he or she is statutorily enjoined from being professionally responsible to that appellant (Metcalf, 2004, pg 33). This idea should form the foundation of the Special Advocates duties towards the respondent, even

¹⁰² Mike O'Brien, 3rd reading, HC debates, 26 November 1997, col 1039.

if those duties cannot extend to the full lawyer/client relationship and all attendant protections. An option to give the respondent more of a say in proceedings might be to offer their choice of advocate the opportunity to qualify as a Special Advocate though some means to improve the respondent's agency in the proceedings.

Taken as a whole, these issues present a serious obstacle for TPIMs even when reformed. There are serious practical concerns for the equality of arms beyond the immediate scope of this work. Despite this, the necessity of allowing some forum for evidence that cannot be heard in an open court seems hard to resist given that there will always be some covert evidence in these cases.

Consequence of Breaches

The current TPIM system operates on the basis that any breach of the restrictions imposed without reasonable excuse is a criminal offence. This offence is laid out in section 23 of the TPIM Act 2011. The offence is triable either way, with a five-year maximum sentence from the Crown Court or a twelve-month sentence from a Magistrates Court. A notable and recent change was made to section 23 under the Counter-Terrorism and Security Act 2015 that introduced a strict liability element to the crime of leaving the UK while subject to a TPIM, a change that was not recommended by the principal bodies reviewing terrorism legislation. (Anderson, 2015a, pg 12-13) This section first seeks to explore the issues and controversy around this approach which remains unchanged despite the many small reforms to the Control Order and TPIM regimes. The second part of the section deals with possible reforms for a new TPIM system under preventive law.

Criminal sanctions for the breach of civil orders have long been criticised in academic reviews of measures such as Control Orders, TPIMs and similar hybrid orders. There are a number of reasons for this. TPIMs and similar measures act to criminalise conduct that is only illegal when the subject of the measure performs it; an *ad hominem* form of

criminalisation. (Simester and von Hirsch, 2006, pg 181) When a person not subject to a TPIM performs the same action there is no criminal penalty. Many of the areas that are often subject to restriction (getting a job or studying) are beneficial and likely to be perceived as such by most people in society. TPIMs themselves are form of pre-emptive prohibition and will always present difficulties about how fairly their subject has been targeted and restricted. This state of affairs is made worse when otherwise acceptable actions are given a criminal liability because prospective further wrongdoing. (Simester and von Hirsch, 2006, pg 182) The construction of the criminal charge itself is controversial because, similarly to the original ASBO legislation, it is constructed to a degree that almost reaches strict liability.

When prosecuting the breach of an ASBO the prosecution only had to prove that a.) a breach had occurred and b.) that any 'reasonable excuse' offered by the defendant was not a valid one. (Ashworth, 2006, pg 273) A similar situation applies to the current TPIM regime with the exception that there is no 'reasonable excuse' possible if a subject of a TPIM leaves or travels outside the United Kingdom. There is a clear aim that the criminal offence in a TPIM is ultimately that the subject has failed to reassure the Secretary of State of their good intentions. Breach of the restrictions imposed gives the Secretary reason to doubt to the subject. It also provides the proof required for a criminal charge, even if the breaching conduct might never result in any atrocities being committed. (Ramsay, 2012, pg 135-136) This can be seen in the example of controlee BF. In *SSHD v BF 2011*, an appeal by BF against his control order. Numerous breaches of the control order restrictions were considered concerning not because they indicated new terrorism but because they "reflect negatively on [BF's] attitude and mindset".¹⁰³

¹⁰³ *Secretary of State for the Home Department v BF [2011] EWHC 1878 (Admin)* §72

The combination of these factors is a powerful reason to consider changes to the TPIM regime due to their cumulative effect on the rights of the individuals involved and the procedural protections that the current TPIM process circumvents while still retaining a penal character. These factors have also created serious practical problems for the process as it has been operating since the introduction of control orders. Over the lifetime of the control order regime only two controlled persons who were charged with breaches of their control orders were convicted out of fourteen total prosecutions. (Anderson, 2012a, pg 44) Many, but not all, of these breaches were 'technical' in nature. (Anderson, 2013, pg 83) David Anderson gives examples such as forgetting to make phone calls relating to monitoring requirements, 'petty disobedience' and returning a few minutes late for curfew. (Anderson, 2012a, pg 44) An example of this is provided by a Liberty case study of Cerie Bullivant. She writes that she breached her control order a number of times, mostly for signing in late at the police station and was later charged after absconding from the order for five and half weeks but was acquitted by the jury despite seven counts of breaching a control order being charged. (Bullivant, 2010, pg 2-3)

Ongoing Review, Engagement and Exit Strategies

This section examines the ongoing review process that governs TPIMs to ensure their continuing appropriateness. It also investigates the history of engagement between the respondent and the applicant of a TPIM and the evolution of exit strategies. After this, the section deals with what changes should be made to these areas.

There is evidence to suggest that the applicants for both control orders and TPIMs have underused to the concept of engagement in their frameworks. There is also evidence to suggest that respondent engagement with TPIMs is not what it could be. Until recently little work has been done within the schemes to use engagement with the subject to

reduce the risk they are thought to pose and thus remove the need for any restrictions. The exit strategies for control orders are summed up effectively in *SSHD v BF [2011]*¹⁰⁴ as “prosecution, deportation, modification, revocation and non-renewal”. These approaches are notable for their concentration on the administration of the TPIM rather than any attempt to engage with the subject and the risk they are deemed to pose. Under the TPIM regime David Anderson noted that while exit strategies play a part in the formulation of the TPIM prior to the request process, the lack of engagement with the subject is striking given the length that TPIMs can last. (Anderson, 2013, pg 95) By 2013 this situation had been changed, and some progress has been made to promote stabilising factors in TPIM subject’s lives with almost all pursuing employment or education by the time the notice expired. (Anderson, 2014, pg 31) On the other side, many TPIM subjects do little to engage with the TPIM process except where they are compelled to do so. Of particular concern is that TPIM subjects do not give evidence in their own defence. In the review of cases heard in 2012, not a single TPIM subject gave evidence. (Anderson, 2013, pg 77) In *SSHD v CD [2012]* the subject’s decision not to give evidence was described as:

“hid[ing] behind the not uncommon and rather flimsy shield of many in his position, which is that he can say nothing about anything until he has had every detail about everything”.

The review group meetings for TPIMs could be improved by better representation for the TPIM respondent. Anderson notes the benefit of a ‘devil’s advocate’ for the respondent. This role should be formalised to improve the process. While the respondent representing themselves could potentially create problems surrounding confidential/secret evidence, an alternative such as representation by a Special Advocate would address such issues. This is a marked improvement, but this kind of engagement was reportedly being left until the TPIM

¹⁰⁴ *Secretary of State for the Home Department v BF [2011] EWHC 1878 (Admin) §43*

was due to expire, rather than being an ongoing process throughout. The changes that should be made in the reformed TPIM build on these recommendations and the Home Affairs Committee made an ideal recommendation in 2014 that:

“All TPIM subjects are placed on a graduated scheme, which commences concurrently with the measures, with the sole purpose of engagement and de-radicalisation. We accept that the anonymity order may cause difficulties in terms of liaising with the local community when seeking support for that process. However, we believe that the Government should engage with community leaders who are working with prisoners and ex-prisoners who have been radicalised in order to design a programme which would be suitable for TPIM subjects. Such a programme should take account of the different narratives of radicalisation. Due to the constraints placed on a subject, it is unlikely that they will be eager to engage with the state or official parts of society. It is disastrous, therefore, for a subject to be left without a constructive path towards reintegration following the end of the measures. The Government must ensure that an exit strategy is started as soon as the TPIM is imposed upon a subject. We recommend a continuation of the de-radicalisation engagement programme which they would have started under the TPIM which evolves into a more practical scheme enabling the former subject to reconnect with society through work or education.” (Home Affairs Committee, 2014, pg 47)

The respondent in the reformed TPIM process should be considered as a responsible moral agent throughout the TPIM process. This forms part of the reasoning for the concentration on engagement as the end goal of the TPIM process. What is the exact nature of this agency though? Chapter 3 discussed briefly the use of prevention as a response to struggling individuals could be considered as a method of ensuring they do not become liable for criminal penalties. Specifically cited were two-step prohibitions or CCTV cameras. (Matravers, 2014, pg 250) This approach to prevention could usefully be applied to the reformed TPIM, which already emphasises engagement with the respondent.

By considering the respondent as a responsible moral agent, but one who is not necessarily fully responsible for their conduct, the reformed TPIM, and indeed other similar measures, can be constructed in a respondent-centred, rather than risk-centred, fashion. This would require a lengthy examination of the idea of agency that is beyond the scope of this section, but an argument about agency could be an important part in justifying prevention in this context. This is especially true when dealing with respondents who are judged to have been radicalised, who we might consider properly blameworthy for any harm they cause or reassurance gap they create, but who we do not consider as unworthy of rescue. This provides a more effective justification for engagement with the respondent, and for the kinds of assistance discussed by the Home Affairs Committee, than a discussion framed by necessity and proportionality alone, both of which approach the issue more from the point of view that the respondent is a risk to be managed, not a moral agent to be helped.

Conclusion

This thesis sought to answer the question given the events, legislation and literature already dedicated to preventive justice – concerning terrorist (and adjacent legislation) - what reforms should be considered to this controversial area of criminal law? In order to answer this question this thesis started by explaining the events, legislation and literature dedicated to preventive justice. The third and fourth chapters explored the philosophy behind the state’s provision of security and the citizen’s expectation of a scheme of human rights upheld by the state, constraining not only their action but the state’s action. The fifth chapter attempts to bring this theory into reform of a preventive measure – the TPIM. This thesis answers its question in the affirmative. Given the events, legislation and literature there should be reforms to preventive justice, not only in the “case study” example of TPIMs from chapter 5 but also in the governments general approach and other related strategies such as Prevent.

Chapter 3 identified a useful view of security as public good, and a primary goal of state action to allow citizens to pursue their desires and happiness provided they did not infringe on others pursuit of the same. The state fails to do this with the current scheme of prevention as demonstrated by the judicial pushback (based on human rights concerns) and academic pushback based on those same concerns and worries about how preventive justice was being constructed and the motives behind the government approaching the problem of suspicion/risk in this way. Chapter 4 demonstrates that the state’s failure to properly utilise prevention has serious impacts not just on those under direct suspicion but all citizens because the means through which the state identifies risk involves both the invasion of privacy through the collection of information and through breaking down citizens own relationship through responsabilising citizens to identify suspicious people through their interactions with them. This is especially concerning when the relationship in

question already requires trust such as those involving teachers to name a group that already has a duty under the Prevent scheme.

Despite this it is undoubtably hard to reduce these broad arguments and philosophical principles into active legal measures as demonstrated in chapter 5. Likely this was not the approach the government took in designing these tools but this thesis contends that reform is vital in this area to consider the arguments and philosophies remarked upon in Chapters 3 and 4. Prevention is unlikely to disappear, as noted in Chapter 3 the state's response to risk has fundamentally changed even if academics disagree on the exact reasons (such as being driven by the state itself, changes in political culture or by technological change). Preventive justice as enacted by the state through measures like TPIMs or programmes like Prevent needs a firmer normative footing that it currently rests on much like the broader field of jurisprudence. Chapter 5 demonstrates how challenging this can be but this does not mean the challenge should not be undertaken by academia and the government itself. In the view of this thesis establishing such foundations in law is a priority and would likely result in many measures proving illegitimate as they exist today, lacking as they are the justifications and ideas such as exit strategies discussed in Chapter 5. Programmes such as Prevent and other efforts to control risk through deradicalization need similar treatment. Especially when it comes to identifying by what means a citizen can correct any suspicion held against them by the state. Ideally such an effort would unite the "public" and "academic" sphere, explaining the issues of problems like objective and subjective risk to citizens regardless of the role they play (which could be none at all) in such programmes.

Further reforms should be identified in how the state responds to problems of risk. Chapter 2 demonstrates that the state quickly reaches for coercive tools to deal with perceived risk on the part of the state itself or the citizens it is responsible for. This is an

understandable reaction but an incorrect one. Chapter 3 stated that the state has a duty to correct problems of risk, uncertainty and fear through the most non-coercive means available to it. This means that some prevention of subjective risk needs to occur through correcting problems where the level or risk is being mis-identified. This would require a level of frankness and honesty that is arguably lacking in the UK Governments preventive justice scheme at present – as shown by judicial and academic suspicion of its actions and motives described throughout this thesis. What form this takes is left for discussion outside this thesis but better information about the risks posed by serious harms such as terrorism provided alongside the existing information about what to do about suspicious activity would be a step forward without compromising the ability of the state to request reasonable assistance from the public. There is a need for governments to provide assurance, rather than enforcement where subjective concerns over security are not matched by objective security problems. There will of course never be a complete or perfect system to do this. The risk society is by nature bound by subjective assessments of risk. The state is unable to put figures on the risk of serious harms and can only couch it in the same language used in terrorism threat alerts; “Severe”, “Very High”, “Imminent Threat” etc. This does not mean state and citizens themselves can avoid a responsibility to use such terms as accurately as they honestly can.

Modern preventive justice has the potential to be a potent tool in the state’s goal of establishing a secure environment for its citizens and allowing those citizens to pursue their lives at smaller risk of harm than before. However the existing system is need of reform in a normative sense of what it is trying to achieve and with what justification, reflected in the legal measures and programmes the state employs otherwise it risks an unacceptable decrease in security for citizens from the state’s preventive justice practices.

Bibliography

- Al-Haddad, H. (2017) *Proposed Gay Marriage Bill & Muslim Silence*: Islam21c.com. Available at: <https://www.islam21c.com/politics/8346-muslims-a-the-proposed-gay-marriage-bill/> (Accessed: 05/05/2017 2017).
- Allport, G. and Postman, L. (1947) *The psychology of rumour*. Oxford: Henry Holt.
- Anderson, D., Terrorism, I.R.o. (2012a) *Control Orders in 2011*. <https://terrorismlegislationreviewer.independent.gov.uk/>: London: The Stationery Office.
- Anderson, D. (2012b) *Terrorism Prevention and Investigation in 2012: First Report of the Independent Review on the Operation of the Terrorism Prevention and Investigation Act 2011*, https://terrorismlegislationreviewer.independent.gov.uk: Independent Reviewer of Terrorism Legislation.
- Anderson, D. (2013) *Terrorism Prevention and Investigation in 2012: First Report of the Independent Review on the Operation of the Terrorism Prevention and Investigation Act 2011*, https://terrorismlegislationreviewer.independent.gov.uk: Independent Reviewer of Terrorism Legislation.
- Anderson, D. (2014) *Terrorism Prevention and Investigation Measures in 2013*, www.gov.uk: Independent Reviewer of Terrorism Legislation.
- Anderson, D. (2015a) *Terrorism Prevention and Investigation Measures in 2014*, www.gov.uk: Independent Reviewer for Terrorism Legislation. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411824/RTL_TPIMs_2014_final_report__web_.pdf.
- Anderson, D. (2016a) *Lack of confidence in Prevent*, <http://data.parliament.uk>: Home Affairs Select Committee. Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/countering-extremism/written/27920.pdf>.
- Anderson, D. (2016b) *Report of the Bulk Powers Review*. Available at: <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2016/08/Bulk-Powers-Review-final-report.pdf> (Accessed: 31/10 2016).
- Anderson, D. (2016c) *The Terrorism Acts in 2015*, <https://terrorismlegislationreviewer.independent.gov.uk>.
- Anderson, D. 'Terrorism and National Security'. *Terrorism and National Security*.
- Anderson, J. (2015b) *A Question of Trust*, London: Independent Reviewer of Terrorism Legislation.
- United Kingdom, *Anti-Terrorism, Crime and Security Act (2001)* Houses of Parliament.
- Ashworth, A. (2006) 'Four Threats to the Presumption of Innocence', *International Journal of Evidence and Proof*, 10, pp. 241-279.
- Ashworth, A. and Redmayne, M. (2010) *The Criminal Process*. 4th edn. Oxford: Oxford University Press.
- Ashworth, A. and Zedner, L. 2014. *Preventive Justice*. 1st ed. Oxford: Oxford University Press.
- Bech, U. 1992. *Risk Society: Towards a New Modernity*. Munich: Sage Publications.
- Binding Over*, Commission, L. (1994). www.gov.uk: Law Commission.
- Blackstone, W. (1772) *Commentaries on the Laws of England*. R Bell.
- Boyle, K., Hadden, T. and P., H. (1973) *Justice in Northern Ireland: A Study In Social Confidence*. London: Cobden Trust.
- Brennan, K. (2002) 'Fingerprints in the Digital Medium, the Evolution of Electronic Privacy', *Fortnight*, 406(2).

Bullivant, C. 2010. *RE: The story of Cerie Bullivant*.

Burton, S. S. (2017) *Report of the Interception of Communications Commissioner Annual Report for 2016*, <https://www.ipco.org.uk>: Interception of Communications Commissioner's Office. Available at: https://www.ipco.org.uk/docs/CCS207_CCS1217634744-1_IOCCO_ARA_16-17.pdf.

Cameron, D. 2014. The Telegraph.

Carlile, L. A. and Owen, C. (2015) 'The Impact and Consequences of Terrorist Legislation in the United Kingdom since 2001', in Pearce, J. (ed.) *Investigating Terrorism: Current Political, Legal and Psychological Issues*. Chicester: Wiley-Blackwell.

Centre, N. C. T. P. O. 2017. Statistics on the operation of police powers under the Terrorism Act 2000 and subsequent legislation. *In*: operation-police-powers-terrorism-mar17-tables.xlsx (ed.) *Excel 365*. www.gov.uk: Home Office.

Chadwick, A. (2006) *Internet Politics*. New York: Oxford University Press.

Chahal v. The United Kingdom [1996].

Choo, A. L.-T. (1996) *Hearsay and Confrontation in Criminal Trials*. Oxford: Clarendon Press 1996.

Clingham (formerly C (a minor)) v Royal Borough of Kensington and Chelsea; Regina v Crown Court at Manchester Ex parte McCann and Others [2002].

CLGC (2010) *Preventing Violent Extremism Sixth Report of Session 2009–10*, <https://publications.parliament.uk/>: House of Commons Communities and Local Government Committee. Available at: <https://publications.parliament.uk/pa/cm200910/cmselect/cmcomloc/65/65.pdf>.

Cole, D. (2015) 'The Difference Prevention Makes: Regulating Preventive Justice', *Criminal Law and Philosophy*, 9, pp. 501-519.

Committee (2016) *Radicalisation: the counter-narrative and identifying the tipping point*, <https://publications.parliament.uk/>: House of Commons. Available at: <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/135/135.pdf>.

Committee, H. A. (2014) *Counter-terrorism Seventeenth Report of Session 2013–14*, publications.parliament.uk: House of Commons Home Affairs Committee. Available at: <https://publications.parliament.uk/pa/cm201314/cmselect/cmhaff/231/231.pdf> (Accessed: 04/12/2017).

'Counter-Extremism Strategy', (2015). Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/469171/51774_Cm9145_Final.pdf (Accessed October 19).

Criminal Law Revision Committee Seventh Report Felonies and Misdemeanors, Department, H. (1965). London: Her Majesty's Stationary Office.

Dawar, A. (2008) *Bomb squad carries out controlled explosion*: The Guardian UK. Available at: <https://www.theguardian.com/uk/2008/apr/18/uksecurity.ukcrime> (Accessed: 18/03/2017 2017).

Dawson, J. and Godec, S. (2017) *Counter-extremism policy: an overview*, <http://researchbriefings.parliament.uk/>: House of CommonsCBP-7238). Available at: <http://researchbriefings.files.parliament.uk/documents/CBP-7238/CBP-7238.pdf>.

Definition of Policing by Consent, Office, H. (2012). <https://www.gov.uk/government/publications/policing-by-consent/definition-of-policing-by-consent>: Home Office.

Dodd, V. (2015) *School questioned Muslim pupil about ISIS after discussion on eco-activism*: The Guardian UK. Available at: <https://www.theguardian.com/education/2015/sep/22/school-questioned-muslim-pupil-about-isis-after-discussion-on-eco-activism> (Accessed: 14/03/2017 2017).

Donohue, L. K. (2006) 'Anglo-American Privacy and Surveillance', *Journal of Crime and Criminology*, 96(No.3 Spring), pp. 1059-1208, Available: JSTOR. Available at: <http://www.jstor.org/stable/40042805> (Accessed 25/06/2017).

Douglas, R. (2014) *Law, Liberty, and the Pursuit of Terrorism*. Michigan: University of Michigan Press.

Draft Investigatory Powers Bill, Office, H. (2015). https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473770/Draft_Investigatory_Powers_Bill.pdf: The British Government.

Dubber (2002) *An Introduction to the Model Penal Code*. 1st edn. Oxford: Oxford University Press.

Dubber, M. D. (2013) 'Preventative Justice: The Quest for Principle', in Ashworth, Z.a.T. (ed.) *Prevention and the Limits of the Criminal Law*. Oxford: Oxford University Press, pp. 47-68.

Duff, A. (2013) 'Who Must Presume Whom to be Innocent of What?', *Netherlands Journal of Legal Philosophy*, 42(3), pp. 170-192.

Duff, R. (2014) 'Pre-Trial Detention and the Presumption of Innocence', in Ashworth, A., Zedner, L. and Tomlin, P. (eds.) *Prevention and the Limits of the Criminal Law*. Oxford: Oxford University Press.

Duff, R. A. (1997) *Criminal Attempts*. Oxford: Oxford University Press.

Duff, R. A. 2007. *Answering for Crime: Responsibility and Liability in the Criminal Law*. 1st ed. Oxford: Hart Publishing.

Duff, R. A. (2015) 'Presumptions of Innocence', in Flanders, C. and Hoskins, Z. (eds.) *The New Philosophy of the Criminal Law*. London: Rowman & Littlefield.

Duff, R. A. and Marshall, S. E. (2000) 'Benefits, Burdens and Responsibilities', in Von Hirsch, A., Garland, D. and Wakefield, A. (eds.) *Ethical and Social Perspectives on Situational Crime Prevention*. Oxford: Hart Publishing, pp. 18-35.

Dworkin, R. (1984) 'Rights as Trumps', in Waldron, J. (ed.) *Theories of Rights*. Oxford: Oxford University Press, pp. 153-167.

Dyzenhaus, D. (2014) 'Preventive Justice and the Rule of Law Project', in Ashworth, A., Zedner, L. and Tomlin, P. (eds.) *Prevention and the Limits of the Criminal Law*. Oxford: Oxford University Press.

Education, D. o., Education, D.o. (2015) *The Prevent duty Departmental advice for schools and childcare providers*. <https://www.gov.uk>: Department of Education.

Emsley, C. (2014) *The English Police: A Political and Social History* London: Routledge. Available at: http://web.b.ebscohost.com/ehost/ebookviewer/ebook/bmxlymtfXzg1MDE0N19fQU41?sid=b6bfc30b-9ee7-404b-920f-cc3c8d634e27@sessionmgr107&vid=0&format=EB&lpid=lp_8&rid=0.

Ericson, R. V. and Haggerty, K. D. 1997. *Policing the Risk Society*. Oxford: Oxford University Press.

Council of Europe, *European Convention on Human Rights* (1950) European Court of Human Rights.

Evans, J. (2012) 'The Olympics and Beyond'. Available at: <https://www.mi5.gov.uk/home/about-us/who-we-are/staff-and-management/director-general/speeches-by-the-director-general/the-olympics-and-beyond.html> (Accessed June 25).

Ewing, K. D. and Tham, J.-C. (2008) 'The continuing futility of the Human Rights Act', *Public Law*, Winter 2008(4), pp. 688-693.

A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) [2004].

Fenwick, H. (2013) 'Designing EPTIMS around ECHR Review or Normalisation of 'Preventive' Non-Trial-Based Executive Measures?', *The Modern Law Review*, 76(5), pp. 876-908.

Fenwick, H. and Phillipson, G. (2011) 'Covert Derogations and Judicial Deference: Redefining Liberty and Due process Rights in Counterterrorism Law and Beyond', 56(3), pp. 863-918.

Finnane, M. and Donkin, S. (2013) 'Fighting Terror with Law? Some Other genealogies of Pre-emption', *International Journal for Crime and Justice*, 2(1), pp. 3-17.

Fitzpatrick, T. (2002) 'Critical Theory, Information Society and Surveillance Technologies', *Information, Communication and Society*, 5(3), pp. 357-378, Available: Routledge. Available at: <http://dx.doi.org/10.1080/13691180210159300> (Accessed 03/06/2017).

Flatley, J. (2015) 'Perceptions of changing crime levels, 1996 to 2013/14 CSEW'. Available at: <http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/focus-on-public-perceptions-of-crime-and-the-police--and-the-personal-well-being-of-victims--2013-to-2014/rft-02.xls> (Accessed).

Flatley, J. (2016) 'Total police recorded crime - rate of offences'. Available at: <http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/year-ending-june-2015/rft-table-1---bulletin-tables.xls> (Accessed).

Forsyth, C. (2008) 'Control Orders, Conditions Precedent and Compliance with Article 6(1)', *The Cambridge Law Journal*, 67(1), pp. 1-4.

Fuller, L. L. (1969) *The Morality of Law: Revised* jstor.org: Yale University Press. Available at: <http://www.jstor.org/stable/j.ctt1cc2mds> (Accessed: 03/06/2016).

Garland, D. (2000) 'Ideas, Institutions and Situational Crime Prevention', in Von Hirsch, A., Garland, D. and Wakefield, A. (eds.) *Ethical and Social Perspectives on Situational Crime Prevention*. Oxford: Hart Publishing, pp. 1-17.

Garland, D. 2001. *The Culture of Control*. Oxford: Oxford University Press.

Garratt, D. (2012) *Economics*. Harlow: Pearson.

Gewirth, A. (1984) 'Are there any absolute rights?', in Waldron, J. (ed.) *Theories of Rights*. Oxford: Oxford University Press.

Gill, P., Horgan, J. and Deckert, P. (2014) 'Bombing Alone: Tracing the Motivations and Antecedent Behaviour of Lone-Actor Terrorists', *Journal of Forensic Sciences*, 59(2), pp. 425-435.

Glazebrook, P. (1962) 'How long, then, is the arm of the law to be?', *Modern Law Review*, 25(3), pp. 801-819, Available: The Modern Law Review. Available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1962.tb02208.x/pdf>.

Government, H. (2009) *Pursue Prevent Protect Prepare The United Kingdom's Strategy for Countering International Terrorism*, <https://www.gov.uk>: HM Government. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228644/7547.pdf.

Government, H., Office, H. (2011) *Prevent Strategy*. gov.uk: Home Office.

Government, H. (2015a) *Channel Duty Guidance Protecting vulnerable people from being drawn into terrorism*, <https://www.gov.uk>: HM Government. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/425189/Channel_Duty_Guidance_April_2015.pdf (Accessed: 11/12/2017).

Government, H. (2015b) *Investigatory Powers Bill Communications Data Factsheet*. www.gov.uk: HM Government. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473747/Factsheet-Communications_Data_General.pdf (Accessed: 28/07 2016).

Government, H., Office, H. (2015c) *Revised Prevent Duty Guidance: For England and Wales*. <https://www.gov.uk>: HM Government. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445977/

3799_Revised_Prevent_Duty_Guidance__England_Wales_V2-Interactive.pdf: HM Government.

Govt, U. 2015. PM's Extremism Taskforce L tackling extremism in universities and colleges top of the agenda. <https://www.gov.uk/government/news/pms-extremism-taskforce-tackling-extremism-in-universities-and-colleges-top-of-the-agenda>.

Grube, G. and Reeve, C. (1992) *Plato: Republic*. Indianapolis: Hackett Publishing Company.

Gunther (2013) in Ashworth, Z.a.T. (ed.) *Prevention and the Limits of the Criminal Law*. Oxford: Oxford University Press.

Gur-Arye, M. (2001) 'Failure to Prevent Crime - Should it be Criminal?', *Criminal Justice Ethics*, 20(1), pp. 3-30.

Halford v. United Kingdom [1997].

Harcourt, B. E. (1999) 'The Collapse of the Harm Principle', *The Journal of Criminal Law and Philosophy*, 90(1), pp. 109-194.

Hardy, K. (2017) 'Preventive Justice Principles for Countering Extremism', in Tulich, T. (ed.) *Critical reflections on preventive justice*. Oxon: Routledge.

Helmus, T. C., York, E. and Chalk, P. (2007) *Promoting Online Voices for Countering Violent Extremism*. RAND Corporation.

Heyman, S. J. (1994) 'Foundations of the Duty to Rescue', *Vanderbilt Law Review*, 47(3), pp. 673-755.

History of the Independent Reviewer of Terrorism Legislation (2017). <https://terrorismlegislationreviewer.independent.gov.uk/history/>: Independent Reviewer of Terrorism Legislation. Available at: <https://terrorismlegislationreviewer.independent.gov.uk/history/> (Accessed: 14/07/2017 2017).

Hobbes, T. 1991. *Leviathan*. 1st ed.: Cambridge University Press.

Hobbs, C. (1978) *the effectiveness of seat belts in reducing injuries to car occupants*, <https://trl.co.uk/>: TRL. Available at: <https://trl.co.uk/reports/LR811>.

Hooper, S. (2015) *Stifling freedom of expression in UK schools*: Al Jazeera. Available at: <http://www.aljazeera.com/indepth/features/2015/07/stifling-freedom-expression-uk-schools-150721080612049.html> (Accessed: 14/03/2017 2017).

Horder, J. (2012) 'Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation', in Sullivan, G.R. and Dennis, I. (eds.) *Seeking Security: Pre-Emptying the Commission of Criminal Harms*. Oxford: Hart Publishing, pp. 79-102.

Hudson, B. (2001) 'Punishment, Rights and Difference', in Stenson, K. and Sullivan, R.R. (eds.) *Crime, Risk and Justice*. Oxon: Routledge.

Hudson, B. (2003) *Justice in the Risk Society*. London: SAGE Publications.

Innes, M. (2011) *Assessing the Effect of Prevent Policing: A report to the Association of Chief Police Officers*, Cardiff: University of Police Sciences.

Ip, J. (2013) 'Sunset Clauses and Counterterrorism Legislation', *Public Law*, 2013(1), pp. 74-79.

Jackson, J. and Doran, S. (1995) *Judge Without Jury: Diplock Trials in the Adversary System*. Oxford: Clarendon Press.

Jakobs, G. (2014) 'On the Theory of Enemy Criminal Law', in Dubber, M.D. (ed.) *Foundational Texts in Modern Criminal Law*. Oxford: Oxford University Publishing.

JCHR (2010) *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, <https://publications.parliament.uk/>: Joint Committee on Human Rights. Available at: <https://publications.parliament.uk/pa/jt200910/jtselect/jtrights/64/64.pdf> (Accessed: 09/10/2017).

Jenkins, R. (1974a) *Hansard* HC Deb 25 November 1974 vol 882 cc33-45. hansard.millbanksystems.com. Available at:

<http://hansard.millbanksystems.com/commons/1974/nov/25/terrorism> (Accessed: 05/06/2017 2017).

Jenkins, R. (1974b) 'Hansard'. Available at: <http://hansard.millbanksystems.com/commons/1974/nov/25/terrorism> (Accessed November 25).

Jim Atherton: The British grandfather with no military experience fighting Isis in Iraq. 2015. *Joint Committee on Human Right Twelfth Report of Session 2005-6006*, Parliament, H.o. (2006). London: London: The Stationary Office.

Jones, S. (2003) 'Guilty until proven Innocent? The diminished status of suspects at the Point of Remand and as Unconvicted Prisoners', *Common Law World Review*, 32(2), pp. 399-417.

JUSTICE (2015) *In the Dock Reassessing the use of the dock in criminal trials*, London: Justice. Available at: <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/07/JUSTICE-In-the-Dock.pdf>.

Justice, D. o. (2011) *Part 80 - Proceedings under the Terrorism Prevention and Investigation*: Justice.gov.uk. Available at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part80#IDAAGSBB> (Accessed: 16/11/2017 2017).

Justice, L. C. a. S. o. S. f., Justice, M.o. (2016) *Responding to Human Rights judgements*. www.gov.uk: Ministry of Justice.

Kavanagh, A. (2010) 'Special Advocates, Control Orders and the Right to a Fair Trial', *The Modern Law Review*, 73(5), pp. 836-857.

Kay Goodall (2007) 'Incitement to Religious Hatred: All Talk and no Substance?', *The Modern Law Review*, 70(1), pp. 89-113.

Kelman, D. (2016) 'Closed Trials and Secret Allegations: An Analysis of the 'Gisting' Requirement', *The Journal of Criminal Law*, 80(4), pp. 264-277.

Khaleeli, H. (2015) 'You worry they could take your kids': is the Prevent strategy demonising Muslim schoolchildren: The Guardian UK. Available at: <https://www.theguardian.com/uk-news/2015/sep/23/prevent-counter-terrorism-strategy-schools-demonising-muslim-children> (Accessed: 14/03/2017 2017).

Kleinig, J. (2008) *Ethics and Criminal Justice*. 1st edn. Cambridge: Cambridge University Press.

La Free, G. (2017) 'Global Terrorism Database'. Available at: <https://www.start.umd.edu/gtd/>.

Lacey, N. (2008) *The Prisoner's Dilemma*. Cambridge: Cambridge University Press.

Legrand, T. and Elliott, T. (2017) 'A new framework for assessing counter-terrorism law and policy: Integrating effectiveness and legitimacy', in Tulich, T., Ananian-Welsh, R., Bronitt, S. and Murray, S. (eds.) *Regulating Preventive Justice: Policy Principle and Paradox*. Oxon: Routledge, pp. 155-176.

Lloyd, L. A. J. L., Department, H. (1996) *Inquiry into legislation against terrorism*. London: London: Stationary Office.

Loader, I. and Sparks, R. (2005) 'For an Historical Sociology of Crime Policy in England and Wales since 1968', in Matravers, M. (ed.) *Managing Modernity Politics and the Culture of Control*. 1st ed. Oxon: Routledge.

Loader, I. and Walker, N. (2007) *Civilizing Security*. Cambridge: Cambridge University Press.

Locke, J. (1772) *Two Treatises of Government* Gale: Eighteenth Century Collections Online. Available at: <http://find.galegroup.com/ecco/infomark.do? &source=gale &prodId=ECCO &userGroupName=uniyork &tabID=T001 &docId=CW119317399 &type=multipage &contentSet=ECCOArticles &version=1.0&docLevel=FASCIMILE> (Accessed: 04/03/2016).

Locke, J. (1993) *Two Treatises of Government*. Cambridge: Cambridge University Press.

Macdonald, S. (2003) 'The Nature of the Anti-Social Behaviour Order. R (McCann & Others) v Crown Court at Manchester', *The Modern Law Review*, 66(4), pp. 630-639.

MacKinnon (2012) *Consent of the Networked*. 1st edn. New York: Basic Books.

Marsh, D. and McConnell, A. (2010) 'Towards a Framework for Establishing Policy Success', *Public Administration*, 88(2).

Matravers, M. (2000) *Justice and Punishment, The Rationale of Coercion*. Oxford: Oxford University Press.

Matravers, M. (2014) 'On Preventive Justice', in Ashworth, A., Zedner, L. and Tomlin, P. (eds.) *Prevention and the Limits of the Criminal Law*. Oxford: Oxford University Press.

May, T. (2014) 'Home Secretary Theresa May On Counter-Terrorism'. Available at: <https://www.gov.uk/government/speeches/home-secretary-theresa-may-on-counter-terrorism> (Accessed November 24).

McCulloch, J. and Pickering, S. (2010) 'Future Threat: Precrime, State Terror and Dystopia in the 21st Century', *Criminal Justice Matters*, 81(1), pp. 32-33.

Meisels, T. (2009) 'Defining Terrorism - a typology', *Critical Review of International Social and Political Philosophy*, 12(3), pp. 331-351.

Merrick, R. (2016) *Oxford University vice-chancellor says Prevent strategy 'wrong-headed'*: The Independent. Available at: <http://www.independent.co.uk/news/uk/politics/oxford-university-vice-chancellor-says-prevent-strategy-wrong-headed-a7323916.html> (Accessed: 14/03/2017 2017).

Metcalfe, E. (2004) 'Representative but not responsible': the use of special advocates in English law', *Justice Journal*, 1(2), pp. 11-43.

Mill, J. (1791; 1859) *On Liberty*. Harmondsworth: Penguin.

MORI, I. (2013) *The Perils of Perception*. <https://www.ipsos-mori.com/Assets/Docs/Polls/ipsos-mori-rss-kings-perils-of-perception-topline.pdf>: Ipsos MORI (Accessed: 05/08/2016 2016).

Moss, K. 2009. *Security and Liberty: Restriction by Stealth*. New York: Palgrave MacMillan.

Murphy, C. C. (2015) *EU Counter-Terrorism Law*. Oregon: Hart Publishing.

News, B. (2017) *Security services 'prevented 13 UK terror attacks since 2013'*. <http://www.bbc.co.uk/news/uk-39176110>: BBC (Accessed: 05/03/2017 2017).

Nozick, R. (1974) *Anarchy, State, and Utopia*. New York: Basic Books.

Nyhan, B. and Reifler, J. (2010) 'When Corrections Fail: The Persistence of Political Misperceptions', *Political Behaviour*, 32(4), pp. 303-330.

O'Hare, L. and Jeory, T. (2016) 'British Muslim woman detained under terror laws after cabin crew report her reading Syrian art book on plane', *The Independent*. Available at: <http://www.independent.co.uk/news/uk/home-news/british-muslim-woman-detained-terror-laws-syrian-art-book-plane-cabin-crew-faizah-shaheen-a7168751.html>.

O'Malley, P. (1992) 'Risk, Power and Crime Prevention', *Economy and Society*, 21(3), pp. 252-275.

Parker, E. (2007) 'Implementation of the UK Terrorism Act 2006 - The Relationship between counter terrorism law, free speech and the Muslim community in the United Kingdom and United States', *Emory International Law Review*, 21, pp. 711-57.

Party, L. 1997. *New Labour because Britain deserves better*.

Patel, Y. 2013. *Scrutinise the Gay marriage bill*. Islam21c.

Penny, E. (2016) *Another man's freedom fighter*. www.opendemocracy.net: Open Democracy UK. Available at: <https://www.opendemocracy.net/uk/eleanor-penny/non-violent-domestic-extremist> (Accessed: 05/05/2017 2017).

Peters, C. (2017) *Prevent is not a safety net - it is a programme designed to censor academic freedom* **Prevent is not a safety net - it is a programme designed to censor academic freedom**: The Telegraph. Available at: <http://www.telegraph.co.uk/education/2017/02/10/prevent-not-safety-net-programme-designed-censor-academic/> (Accessed: 14/03/2017 2017).

Policing, C. T. (2017) *ACT | Action Counters Terrorism*. <https://act.campaign.gov.uk/>: HM Government (Accessed: 12/03/2017 2017).

Posner, R. A. (1999) 'An Economic Theory of the Criminal Law', in Katz, L., Moore, M.S. and Morse, S.J. (eds.) *Foundations of Criminal Law*. New York: Foundation Press, pp. 52-56.

United Kingdom, *Prevention of Terrorism Act 2005* (2005)
<http://www.legislation.gov.uk/ukpga/2005/2/contents/enacted>.

R v G [2008] UKHL 37 [2008].

R V Khan (Sultan) [1996].

Ramsay, P. (2012) *The Insecurity State*. Oxford: Oxford University Press.

Rawls, J. (1971) *A Theory of Justice*. Cambridge, Mass.: Harvard University Press.

Retention of Communications Data Under Part 11: Anti-Terrorism, Crime & Security Act 2001 Voluntary Code of Practice, Office, H. (2003). OPSI.gov.uk.

Roberts, P. and Zuckerman, A. 2010. *Criminal Evidence*. 2nd ed. Oxford: Oxford University Press.

Sabey, B. E., Grant, B. E. and Hobbs, C. (1977) *Alleviation of injuries by use of seat belts*, <https://trl.co.uk:TRLSR289>. Available at: <https://trl.co.uk/reports/SR289>.

Service, C. P., Service, C.P. (2013) *The Code for Crown Prosecutors*. www.cps.gov.uk.

Simester, A. and von Hirsch, A. (2006) 'Regulating offensive conduct through two-step prohibitions', in Simester, A. and von Hirsch, A. (eds.) *Incivilities: Regulating Offensive Behaviour*. Oxford: Hard Publishing.

Simester, A. P., Spencer, J. R., Stark, F., Sullivan, G. R. and Virgo, G. J. (2016) *Simester and Sullivan's Criminal Law Theory and Doctrine*. 6th edn. Oregon: Hart Publishing.

Simester, A. P. and von Hirsch, A. (2014) 'The Act of Criminalisation', *Crimes, Harms and Wrongs on the Principles of Criminalisation*. Oxford: Hart Publishing.

Simester, A. P. and Von Hirsh, A. (2011) *Crimes, Harms and Wrongs*. Oxford: Hart Publishing.

Simmons, A. J. 1981. *Moral Principles and Political Obligations*. Chirchester, West Sussex: Princeton University Press.

Simon, J. (2007) *Governing Through Crime*. Oxford: Oxford University Press.

Smith, M. 2016. Public Perceptions of the threat of terrorism. YouGov PLC.

Sparks, R. (2001) "Bringin it all back home", in Stenson, K. and Sullivan, R.R. (eds.) *Crime, Risk and Justice*. Oxon: Routledge.

Standard, T. E. (2017) *Revealed: growing threat of far-right extremism in Britain*. <http://www.standard.co.uk/news/uk/revealed-growing-threat-of-farright-extremism-in-britain-a3467311.html>: Evening Standard. Available at: <http://www.standard.co.uk/news/uk/revealed-growing-threat-of-farright-extremism-in-britain-a3467311.html> (Accessed: 05/03/2017 2017).

Steiker, C. S. (1998) 'Forward: The Limits of the Preventive State', *Journal of Criminal Law and Criminology*, 88(3), pp. 771-808.

Syed, A. (2016) *Protect yourself from mutilation after death: Islam21c*. Available at: <https://www.islam21c.com/campaigns/protect-yourself-from-mutilation-after-death/> (Accessed: 05/05/2017 2017).

Sykes v Director of Public Prosecutions [1962].

Tadros, V. (2007) 'Justice and Terrorism', *New Criminal Law Review*, 10(4), pp. 658-689, Available: University of California Press. Available at: www.jstor.org/stable/10.1525/nclr.2007.10.4.658 (Accessed 27/06/2016).

Tadros, V. (2014) 'Controlling Risk', in Ashworth, A., Zedner, L. and Tomlin, P. (eds.) *Prevention and the Limits of the Criminal Law*. Oxford: Oxford University Press.

Terrorism, A. C. 2017. Code: Severe the inside story of uk terrorist attacks. *Hostile Reconnaissance*. <https://www.acast.com/codesevere/hostilereconnaissance>: Acast.com.

Tomkins, A. (2002) 'Legislating Against Terror: the Anti-terrorism, Crime and Security Act 2001', *Public law*, 2002(3), pp. 205-220.

- Tribunal, I. P. (2016) *Bulk Data Judgement*. Rolls Building 26, 27, 28, 29: Investigatory Powers Tribunal. Available at: http://www.ipt-uk.com/docs/Bulk_Data_Judgment.pdf (Accessed: 20/10 2016).
- Tulich, T. (2017) 'Critical reflections on preventive justice', in Tulich, T., Ananian-Welsh, R., Bronitt, S. and Murray, S. (eds.) *Regulating Preventive Justice Principle, Policy and Paradox*. Oxon: Routledge, pp. 3-23.
- VanDeVeer, D. (1986) *Paternalistic Intervention: The Moral Bounds of Benevolence*. Princeton: Princeton University Press.
- Verkaik, R. (2016) *Government 'must publish questionable science' behind controversial counter-terrorism strategy*: Independent.co.uk. Available at: <http://www.independent.co.uk/news/uk/home-news/prevent-terrorism-strategy-government-must-publish-evidence-royal-college-psychiatrists-a7338096.html> (Accessed: 14/03/2017 2017).
- Waldman, L. and Forcese, C. (2007) *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the Use of Special Advocates in National Security Proceedings*, Ontario: Canadian Centre for Intelligence and Security Studies. Available at: <https://poseidon01.ssrn.com/delivery.php?ID=677119021086097003107006113113117088127008049065074002106110013027029108077122086073029003016045000030051088112084023126117094057042094035072066004006124072093116031089032086024029106115072080083015088089093097092115124028007090085085100087111108107013&XT=pdf>.
- Waldron, J. (1984) 'Theories of Rights', in Waldron, J. (ed.) *Theories of Rights*. Oxford: Oxford University Press, pp. 1-21.
- Waldron, J. (2004) 'Terrorism and the Uses of Terror', *Journal of Ethics*, 8(1), pp. 5-35.
- Waldron, J. (2010) *Torture, Terror and Tradeoffs*. Oxford: Oxford University Press.
- Walker, C. (2010) 'Conscripting the Public in Terrorism Policing: Towards Safer Communities of a Police State?', *Criminal Law Review*, 441(6), pp. 439-530.
- Walker, C. and Blackburn, J. (2016) 'Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015', *The Modern Law Review*, 79(5), pp. 840-870.
- Walker, N. 1968. *Crime and Insanity in England*. Edinbrugh: University Press.
- Wallerstein, S. (2012) 'Imposing Obligations to Disclose Information on Non-Suspects', in Sullivan, G.R. and Dennis, I. (eds.) *Seeking Security: Pre-Emptying the Commission of Criminal Harms*. Oxford: Hart Publishing.
- Weale, S. (2017) *London University tell students their email may be monitored*: The Guardian UK. Available at: <https://www.theguardian.com/uk-news/2017/jan/20/university-warns-students-emails-may-be-monitored-kings-college-london-prevent> (Accessed: 20/03/2017 2017).
- Williams, G. (1961) 'Criminal Law. Misprision of Felony', *The Cambridge Law Journal*, 19(2), pp. 142-144, Available: Cambridge University Press. Available at: <http://www.jstor.org/stable/4504717> (Accessed 16/12/2016).
- Zedner (2009) *Security*. Oxon: Routledge.
- Zedner, L. (2004) *Criminal Justice*. 1st edn.: Oxford University Press.
- Zedner, L. (2007) 'Preventive Justice or Pre-Punishment? The Case for Control Orders', *Current Legal Problems*, 60(1), pp. 174-203, Available: Oxford Academic. Available at: <http://dx.doi.org/10.1093/clp/60.1.174>.
- Zedner, L. (2014) 'Terrorizing Criminal Law', *Criminal Law and Philosophy*, 8, pp. 99-121.