

Seeking Security: An Introduction

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IMAGINE A LIBERAL, democratic society governed by persons with broad and deep commitments to equality before the law, the autonomy of individuals, to tolerance of divergent lifestyles and who only resort to coercive measures for matters of great public importance and as a very last resort. In such a society, the presumption of innocence should have resonance beyond proof of guilt at a criminal trial. The governance of such a society would be permeated with a disposition to trust individuals, to assume, unless there is good reason to think otherwise, that any given man (D) is honest and well disposed to others. It would go with the grain of such a society to have a limited, circumspect criminal law, predominately concerned with preventing and punishing conduct which wrongfully harms or threatens imminent harm to persons other than the defendant. Coercive state interventions would not be made against D unless there was a reasonable suspicion that D had caused a wrongful harm or was on the brink of doing so. Should it be proved beyond reasonable doubt that D's conduct caused or imminently threatened wrongful harm to another without any justification or excuse for doing so, punishment proportionate to the wrong committed by D would be warranted. The requirement that punishment be justified and limited to the gravity of the wrong done by D is entailed by respect for D's personhood and autonomy. He is punished to the extent that he deserves. Social benefits that may flow from the just punishment of D, such as public protection and general/individual deterrence, should not influence the quantum of punishment imposed on D.

Anyone with even a slight acquaintance with the criminal law and its practice in England and Wales is aware that the picture of criminal law and punishment offered above is a travesty. This applies not only for England and Wales but for the Anglophone world in general.¹ Punishment extending well beyond any retributivist pay back is commonplace. Conduct subjected to punishment will frequently comprise of acts and omissions which did not pose any imminent

¹ McSherry, Norrie and Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Oxford, Hart Publishing, 2009).

threat of causing wrongful harm.² Why then waste any time with travesties? That question is deflected rather than answered by observing that the majority of academic criminal lawyers and criminal law theorists argue for a criminal law and punishment limited to wrongs that cause or threaten imminent harm and which are punished according to their gravity. There is an enormous gap between the normative aspirations of a large part of criminal law scholarship and the reality of criminal law and punishment, and there is very little chance that the gap will close.³

One reason why academic critiques of criminal law and punishment have so little purchase on contemporary legislators, policymakers (and even judges) arises from a commitment to diminish the risk of future harms.⁴ For these officials it is not enough for the criminal law to confine itself to harms already done, supplemented by only limited rights of intervention in respect of imminent threats of harm. For them, the criminal law must be used proactively in the cause of harm prevention. That entails the application of the criminal law to conduct which threatens not only imminent harm but harm at some uncertain distance from realisation. This concern with harm prevention is unassailably legitimate.⁵ Who could disagree that prevention is better than cure, particularly in the case of harms for which there is no cure? However, a serious engagement with diminishing the risk of harm through the criminal law and its processes entails the end of trust as the default relationship in interactions between subject and state. Assuming that persons are generally peaceable and well disposed is not a useful operational disposition for risk preventers. The first task of a risk preventer is to ascertain the seriousness of the kind of risks he or she is obliged to address. That requires gathering information about the proclivities and intentions of whole classes of persons who in general are peaceful and well disposed.

One source of information comes from the constant surveillance of persons in the general population when outside their places of abode. The House of Lords Select Committee on the Constitution reported that

² For instance s 5 of the Terrorism Act 2006 provides that any person will commit an offence if with the intention of committing an act of terrorism or assisting an act of terrorism, 'he engages in *any conduct* (emphasis supplied) in preparation for giving effect to his intention'. The maximum penalty for this offence is life imprisonment.

³ The essays in this volume will demonstrate that convictions for offences which may carry long terms of imprisonment can occur in circumstances where there may be disputation whether one or more of the fundamental elements associated with serious crimes such as harm, wrong and culpability are present. Furthermore, indeterminate sentences in the interests of public safety are frequently passed. The concern with security that in large part explains these phenomena seems unlikely to abate.

⁴ For an informed (and sobering) assessment of the likely risks to the UK from terrorist threats, see Omand, *Securing the State* (London, Hurst, 2010), particularly chs 6–8. For a breezier and more optimistic assessment see Gardner, *Risk: The Science and Politics of Fear* (London, Virgin, 2008) ch 9 (crime in general) and ch 11 (terrorism).

⁵ As Dennis (ch 8 of this volume) and Horder (ch 4 of this volume) observe, the intervention of the criminal law on the basis of risk is of very long standing.

successive UK governments have gradually constructed one of the most extensive and technologically advanced surveillance systems in the world [which] represents one of the most significant changes in the life of the nation since the end of the Second World War.⁶

Malcolm Thorburn, in the opening chapter of this volume, questions the legitimacy of general surveillance. Drawing on the German idea of ‘informational self determination’, he argues that an effective protection of privacy precludes any general dissemination of information relating to specific individuals. That D, say, spends a lot of his time at a mosque associated with a fundamentalist version of Islam is a fact that he is entitled to keep to himself. By contrast, Thorburn asserts a strong entitlement on the part of the state to have the wherewithal to identify any person within the jurisdiction. He finds no grounding for a privacy right to keep one’s identity secret and finds no argument in principle against a state insisting that persons subject to its jurisdiction carry means of identification. However, beyond that he allows very little room for a state to seek information on D for crime prevention purposes if there is no specific evidence pertaining to D giving rise to a reasonable suspicion that he may have committed a crime. That D is a Muslim fundamentalist may increase the probabilities that he is sympathetic to certain causes promoted by terrorist means. For Thorburn, that does not entitle the state to monitor and track D’s activities and communications to test the possibility of criminal associations. Indeed, Thorburn considers that such surveillance breaches D’s right to privacy and might render any resulting criminal trial unfair. Thorburn’s paper raises serious questions for English law on the compatibility of certain information gathering techniques used by the police and security services with articles 6 and 8 of the European Convention for Human Rights.

Shlomit Wallerstein addresses the entitlement of the state to assistance from its subjects in obtaining information about the risk of criminal harms. In general terms, English law does not oblige subjects to make known to officials their knowledge of crimes committed, let alone mere suspicions of crimes that might be committed. However, as with so much else, the position changes with terrorism. It is an offence to fail to disclose information which may be of material assistance to the prevention of an act of terrorism.⁷ As Wallerstein observes, the persons most frequently prosecuted for this offence are close relatives of the suspected terrorist. That fact engages a major reservation about imposing a general duty of this kind encompassing suspicions about all manner of crimes. A plural democracy should tailor the demands for information backed by criminal sanctions with due recognition of the constraints imposed by private loyalties and commitments. Wallerstein does not argue for a general duty, but

⁶ www.parliament.uk; Constitution Committee – Second Report, *Surveillance, Citizens and the State* (2009).

⁷ Terrorism Act 2000 s 38B. Wallerstein also discusses s 330 of the proceeds of Crime Act 2002 which obliges persons who are employed in the regulated sector for financial services to report suspicions of money laundering.

she does contend that that it is legitimate to impose such a duty even on close relatives in the case of suspected acts of terrorism.

That the matter suspected must be some *act* of terrorism at least confines the range of things suspected to violence or threats of violence. But of course, many terrorist offences embrace and severely punish conduct far in advance of any perpetration of a terrorist act.⁸ There are also many similar ‘prophylactic’ offences in other parts of the criminal law.⁹ The broader the swathe of conduct covered, the larger the territory for surveillance and monitoring. This expansion brings with it intractable questions relating to the very basics of criminal liability. The further away from the instantiation of any concrete harm, the more vacuous the conduct element of the crime will be. The focus will be on the intent with which the act remote from any harm is done. D may sit in his house conceiving some dreadful crime he has every intention to carry out. If he is a competent and determined criminal, the world becomes a less safe place from the moment he resolves the details of his criminal project. However, even if we put to one side questions relating to proving the criminal intentions of persons merely thinking things through in their own homes, what has D done or omitted to do that deserves censure and punishment?

It is very tempting to say that if D at no point strays from the routines of normal life, his conduct should not comprise the external elements of any crime. However that will not do. D may draw back a curtain to let in more light. Alternatively he may be giving a signal for the start of a terrorist attack. Andrew Simester accepts in general terms the social utility of prophylactic offences such as proscribing possession of firearms or excessive quantities of fertiliser. However, as he observes, the further the conduct strays from the ultimate harm that animates the offence, the greater the potential for intrusion into innocent lives. He maintains that there are tokens of conduct that are inherently innocent where the distant possibility of future wrongdoing cannot be taken to undermine the non-wrongfulness of the conduct at issue. He instances connecting to the internet as the kind of activity he has in mind. However, he concedes that where the future wrongdoing is sufficiently grave, even conduct of this inherently innocent kind may yet be allowed to constitute the *actus reus* of a criminal offence, provided the terms of the proscription do not contravene any rights that may be regarded as fundamental. Simester’s chapter nicely illuminates the many dimensions of the intractable difficulties of setting limits based on firm, unyielding principle to the scope of prophylactic offences.¹⁰ It is a problem that has bedevilled the law of attempts, giving rise to interminable disputation as to the scoping of liability for attempts.¹¹ These difficulties equally attend the

⁸ See n 2 above.

⁹ Horder in ch 4 of this volume gives interesting examples of these offences.

¹⁰ See further Simester and von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Oxford, Hart Publishing, 2011) chs 4 and 5.

¹¹ Duff, *Criminal Attempts* (Oxford, Oxford University Press, 1996) ch 2; Clarkson, ‘Attempt: the Conduct Requirement’ (2009) 29 *Oxford Journal of Legal Studies* 25.

increasing number of substantive offences that punish conduct much more anticipatory than the broadest conceptions of when a crime defined in terms of causing harm may be said to have been attempted.

Jeremy Horder is far less troubled by what he terms ‘anticipatory offences’.¹² He considers that a focus on risk is a ‘civilising move’¹³ away from the ‘fire brigade’¹⁴ model of the criminal law. As examples of this approach he approves of recent offences aimed at protecting vulnerable groups such as children, adults in social care and animals, all of whom may be in environments which expose them to serious risks of repeated harms. These offences do not depend on proof of mistreatment or cruelty, but lay down systems and procedures which must be followed on pain of criminal sanction.¹⁵ Horder makes the entirely reasonable claim that such offences are likely to be far more effective in decreasing the incidence of harm to the vulnerable by contrast with offences that are engaged after the event. He contrasts the anticipatory approach with what he terms ‘minimalism’ which confines criminal law interventions to realised harms and the immediate threat of harms. He makes the interesting observation that some prominent minimalists are not all that they seem to be in that after a sharp delineation of their minimalist position they make concessions to the anticipatory approach sufficiently far reaching as to undermine their minimalist credentials. For Horder, of course, these concessions are all to the good, although he recognises the risk that the anticipatory approach risks an overly punitive approach to conduct that does not warrant such treatment. He is content however ‘that enforcement authorities working with offences that reflect the anticipatory perspective tend to press criminal charges only in cases where there has been serious fault’.¹⁶

Larry Alexander and Kimberley Ferzan may be described as arch minimalists.¹⁷ For them the only basis for just punishment is retributivist desert. They see desert as the product of two factors. First, D must do or omit to do something which, based on his assessment of the circumstances, will unleash an irrevocable risk to the legally protected interests of others. Second, D must lack any justification or excuse for unleashing a risk that he takes to be irrevocable. (On the Alexander/Ferzan view of culpability, it does not matter whether or not D does create a risk to the legally protected interests of others provided that he thinks he has created a risk.)

The minimalism of this approach can be illustrated by envisaging D a violent paedophile who is in a public park where children are playing. He has in his possession a kitchen knife, masking tape and rope (all non-contraband items) and the plain clothes policemen who are keeping D under surveillance are aware that

¹² See ch 4 of this volume at 79.

¹³ At 100.

¹⁴ At *ibid.*

¹⁵ One example Horder provides is s 9 of the Animal Welfare Act 2006 which prescribes the conditions in which animals must be kept.

¹⁶ At 101.

¹⁷ However, see Duff in ch 6 of this volume who demonstrates that the Alexander/Ferzan formula does allow some surprisingly early interventions.

he plans to kidnap a child. D is now very close to a group of children absorbed in their play. Suppose a criminal jurisdiction which has a criminal code drafted in compliance with the limits on early intervention proposed by Alexander and Ferzan.¹⁸ If D is to be arrested for a criminal offence, the police officers must stay their hand until D has taken hold of a child because only then can D be said to have placed himself in the red zone. Up until that point D is free to resile from his atrocious project.

In favour of the Alexander/Ferzan take on minimalism is its simplicity and clarity: one avoids the labour that comes with the intractable task of formulating prophylactic offences which are compatible with retributivism. More fundamentally, Alexander and Ferzan argue that their version of minimalism is the only version that can be squared with retributivism. Until D thinks that he has unleashed an irrevocable risk to the legally protected interests of others beyond his power of recall, he has done nothing that on his own estimation has adversely altered the state of the world. Intentions are revisable. Up to the point of no return, there is no harm or risk of harm for which he may hold himself responsible and culpable. If he does renounce his intent nothing as it were has happened. Likewise, up to the point of irrevocability something has yet to happen.

Even if it is accepted that retributivism requires the minimalism set down by Alexander and Ferzan, any society preoccupied with diminishing unacceptable risks might well reject such a limited criminal law. It is unlikely in the extreme that the electorate would accept a law that stayed its hand until the gunman was squeezing the trigger or wait until the bomber had begun the process of detonating the bomb. If retributivism necessitates that degree of forbearance, then many people would say so much the worse for retributivism. For Antony Duff there is no need to renounce retributivism for this reason, because, if properly understood, it does allow interventions prior to unleashing irrevocable risks. According to Duff, 'we can be morally culpable for actions that fall far short of irrevocably unleashing a risk'.¹⁹ Indeed for him a person can be culpable for forming an 'illegitimate intention'.²⁰ The culpability that arises at the point of D resolving an intention to perpetrate a wrong is, for Duff, confirmed and aggravated when D takes steps to bring to fruition his illicit intention. He instances D conceiving a scheme to defraud V. He does work on the scheme but his fraudulent intentions are discovered well before the last act stage of the plan. As Duff observes, V's feelings towards D are unlikely to lighten should it be pointed out to him that it remained possible for D to abandon his plan at a point where there was no harm done to V. Moreover, even if D's scheme was not discovered but abandoned and confessed to by D because of a genuine change of heart, it would be asking a lot of V to relinquish all of his hard feelings about D.

¹⁸ Alexander and Ferzan have given detailed consideration to the specifics of, to use their formulation, a culpability based code: *Crime and Culpability: A Theory of Criminal Law* (Cambridge, Cambridge University Press, 2009) ch 8.

¹⁹ This volume at 139.

²⁰ At 133.

To reconcile prophylactic offences with the strictures of retributivism in the manner of Duff is an attractive prospect. However, there are difficulties. To be sure, it is natural to think less of a person who conceives a fraudulent scheme to which he or she intends to give effect. But the criminal law as a system of public ordering should not be concerned with the state of a person's soul but with the things that person has overtly done or failed to do. What constitutes a wrong for the purposes of the criminal law should reflect this public dimension of legitimate criminalisation. Returning to the fraudulent D, suppose D aspires to obtain employment with V plc in order to defraud this company. To further this fraudulent project, he researches in detail the scope and nature of V's business from publicly accessible sources. Before he can apply for a position with V, his fraudulent intent is revealed by way of a boastful email to an honest friend. What has D done that is wrong in terms of the institutional purposes of the criminal law? The difficulties here are not merely the ancillary issues of intrusion, privacy and problems of proof, important though these matters are. They go to the heart of what things can be legitimately criminalised. To use Simester's expression, we are back to criminalising 'inherently innocent conduct', such things as buying airline tickets or maps of the London underground. We are back to the possibility of using preventative detention in the guise of retributivist punishment.

One means of escape from these difficulties is to seek public security through means other than the criminal law. The most obvious and drastic way of doing that is civil internment but without dilating on the obvious any peacetime government would be loath to go that route even in the case of persons suspected to be dangerous terrorists. The control order regime for all its controversial features²¹ falls well short of anything that can be described as internment. Something almost as unsettling as internment would be a general jurisdiction to detain persons considered to be dangerous, a detention that need not require a criminal conviction. The former Labour Government at one time had well advanced plans for the civil incarceration of persons who in the jargon had severe anti-social personality disorder,²² plans that were shelved not least because of the opposition of the NHS psychiatrists who would have been allocated a gate keeping role in that enterprise. A long standing jurisdiction to detain dangerous persons has existed under mental health legislation. The current legislation²³ allows, subject to a civil process, the indefinite detention of, among others, persons who are mentally disordered and if left at liberty might be threatening in the sense that they might harm others. Although treatment for the patient's condition must be available, the treatment need not aspire to anything more than seeking to achieve some form of calm and stability. The mentally disordered include those with learning disability.

²¹ Considered by Dennis in ch 8 of this volume.

²² *Managing Dangerous People with Severe Personality Disorder: Proposals for Policy Development* (London, Home Office, 1999).

²³ Mental Health Act 1983 (as amended).

John Stanton-Ife scrutinises the current legislation from the perspective of a question raised by Baroness Hale in her academic capacity:²⁴ ‘have we created a crime of antisocial mental disorder?’ Stanton-Ife’s response to the question that the Baroness herself did not answer is ultimately negative. However, it is a close run thing. He notes the stigma that is associated with being ‘sectioned’ with a consequent loss of liberty that might be of long duration. He observes that the threat to others is merely one of ‘harm’ which includes psychological harm. Most disturbing of all perhaps is that among those detained will be persons who have sufficient understanding to be well aware of what is happening to them, what it entails, and who wish to remain at liberty. As Stanton-Ife observes, persons not considered mentally disordered, who may yet be far more dangerous than persons subject to detention under mental health act legislation, remain free in all aspects of their lives while those detained under the legislation must endure treatments they do not want and which are not necessarily in their own best interests. He accepts that some mentally disordered persons lack responsiveness to reason and that in their case compulsory detention may be a regrettable necessity. However, he insists that mental disorder of itself provides no reason for compulsory detention and that too few obstacles lie in the way of detaining persons who are capable of a measure of autonomy, notwithstanding a mental disorder.

In the course of his evaluation of the compulsory detention of mentally disordered persons, by way of comparison and contrast, Stanton-Ife subjects to scrutiny the antisocial behaviour order (ASBO) regime²⁵ and concludes that such orders make for ‘a subversion of the criminal law’.²⁶ In coming to that verdict he joins a long running chorus of disapproval of the ASBO, a chorus that contains some very prominent voices.²⁷ Ian Dennis, in his careful appraisal of civil preventative orders, can be said to turn the volume down. While he endorses some of the criticisms, he advises a sense of perspective. Although civil preventative orders flourished and proliferated under the former Labour Government, in concept they are in no sense novel. As he points out, the jurisdiction to bind over for breach of the peace has for centuries subjected to sanction socially disruptive conduct which need not of itself fulfil the requirements of any criminal offence. This capacity to prevent rather than cure was eulogised by Blackstone²⁸ and those sentiments are echoed by Horder in this volume. Dennis notes that many ASBOS are issued post conviction as an adjunct to the sentence, and for other orders anti-social behaviour causing, ‘harassment, alarm and distress’ must be proved to the criminal standard. This does not negate the fact that breach of an order constitutes a serious criminal offence and may make criminal, by a two step process, conduct not otherwise criminal. Yet the preventative

²⁴ *Mental Health Law*, 5th edn (London, Sweet and Maxwell, 2010).

²⁵ Crime and Disorder Act 1998 s 1; Anti-Social Behaviour Act 2003.

²⁶ This volume at 145.

²⁷ For a recent critique see Simester and von Hirsch (n 10) ch 12.

²⁸ 4Bl Comm., chapter xviii, 251.

rationale backing these orders is powerful, and conduct that causes alarm, harassment and distress raises a red flag. Enactment of the currently tentative proposal to limit the consequences for breach of an ASBO to civil law sanctions²⁹ would do much to mollify all but the most intransigent critics of these orders.

The order most uncomfortably reminiscent of the techniques employed by authoritarian regimes is the control order.³⁰ The problem that these orders address is grave. There may be reliable intelligence that D has committed terrorist offences and/or is minded to commit such offences or offer material support to those that will do so. But D cannot be deported as he might be a UK subject or tortured in the country to which he is returned. To bring D to open trial may be seriously detrimental to general security by exposing valuable informants and other covert means of gathering intelligence. Consequently, D may find himself placed under virtual house arrest by the terms of a control order imposed after a hearing where the decisive evidence was of the closed variety, beyond effective challenge by D and his lawyers. Or at least that was the case. In *Secretary of State for the Home Department v AF (No 3)*,³¹ the House of Lords ruled that before D was subjected to a control order he had to be given sufficient information to enable him to instruct his lawyers effectively. As Dennis explains, this infusion of due process into the control order regime threatens its very continuance. In cases where the open evidence establishes a reasonable suspicion of terrorist connections, closed hearings with accredited counsel are unnecessary. Where closed evidence is decisive, the hearings are likely to be found unfair.

Control orders were created and defended as essential to combating the terrorist threat. But as Dennis relates, the numbers of such orders are few: as of the end of 2010, eight orders were in force, all against UK subjects. The 48 orders that have been imposed since the inception of the regime in 2005 have led to a spate of litigation causing Dennis to ponder the financial cost of sustaining this regime. While it seems plausible that the regime has increased security by ending freedom of movement and communications of individuals suspected of terrorist connections, Dennis very reasonably surmises that there has been a countervailing loss of the intelligence which might have been acquired had the suspects been left at liberty but under close surveillance. Scepticism about the utility of ASBOS is also in order. The prime target for these orders were those aged between 10 and 17: 65 per cent of these child defendants breached the conditions of their orders, on average 4.2 times. Both control orders and ASBOS are under review.³² It will be interesting to see if there is realistic reform grounded in the realities of what is achievable in security terms in a manner commensurate with constitutional values, or whether the other imperatives which have influenced criminal justice policy for over two decades will prevail.

²⁹ *More Effective Responses to Anti-Social Behaviour – A Consultation* (Home Office, 2011).

³⁰ Prevention of Terrorism Act 2005 s 3.

³¹ *Secretary of State for the Home Department v AF (No 3)* (2009) UKHL 28; [2009] 3 ALL ER 643.

³² *Review of Counter-Terrorism and Security Powers* (Cm8004, The Stationery Office (TSO), 2011). See n 29 above for proposals relating to ASBOS.

Security requires the incarceration of dangerous persons. Retributivism in all its versions requires the length of incarceration to be tethered to desert. An obvious tension arises between a concern with public safety and the strictures of retributivism when a dangerous person has paid his or her dues but remains in prison on account of the danger that the person poses or is taken to pose. As alluded to already, some form of retributivist posture is the critical stance of most Anglophone academic criminal lawyers and criminal law theorists. For them preventative detention of persons convicted of crimes is simply a moral mistake, something that should be castigated. Meanwhile, the world goes about its business. In England and Wales for example, any offender who has been convicted of a specified (but wide) range of violent and sexual offences and is judicially assessed to be likely to commit further specified offences of significant risk to members of the public will, depending on the offence he or she has committed and his or her previous convictions, receive a life sentence, or indefinite imprisonment for public protection or an extended sentence.³³ If we add those prisoners who have received the mandatory life sentences for murder,³⁴ we fully account for the thousands of prisoners serving time beyond their due.

Release may be a distant and uncertain prospect for many of these prisoners. For prisoners serving life terms or imprisonment for public protection, the sentencing judge will fix a minimum term assessed on retributivist grounds. After that term has expired, the prisoner can apply to the Parole Board for a release date. Essentially, the prisoner must prove he or she no longer constitutes a risk to particular persons or persons generally. Attendance at vocational and anger management courses is helpful to show a commitment to new ways but the availability of such courses is contingent. Any protestation of innocence will jeopardise the prospect of release. Besides all that, the Parole Board is very busy working through a backlog of cases.³⁵ In terms of orthodox penal theory, there is grave injustice here. Yet it is remarkable how little impact this system of indeterminate detention has made on the conscience of the general public. To be sure, in newspapers such as *The Guardian* and *The Independent* there has been plenty of discussion of expanding and overcrowded prisons and penal populism. However, even in those havens of liberal thought, there has been no defence of the proposition that given that a prisoner has served his or her retributivist term, the prisoner should thereupon be released even if there is reason to think he or she remains dangerous. This commonplace of classic retributivism has no hold on any significant segment of public opinion.

Peter Ramsey addresses the current lack of purchase of retributivism in the public sphere. The obvious point of opposition to retributivism is utilitarianism, but as Ramsey comments there is no sense that those who advocate and apply preventative detention do so with a sense that they are overriding deonto-

³³ Criminal Justice Act 2003 pt 12 as amended by the Criminal Justice and Immigration Act 2008.

³⁴ Murder (Abolition of Death Penalty) Act 1965; Criminal Justice Act 2003 s 269 sch 21.

³⁵ In March 2011, the Parole Board published a business plan for the period 2011–15 which acknowledges the extent of the backlog.

logical restraints on punishment in the interests of a greater good. There is a sense that what is being done is appropriate not merely expedient. Ramsey notes the salience of the precautionary principle in modern governance and administration. Applied to penal contexts, it has led to an elevation of the interests of persons at risk of criminal harms over the proportionate punishment of wrongdoers. The application of precautionary principles to wrongdoers, with an inflationary effect on punishment, has been underpinned and fortified by extending the conception of wrongdoing to include not merely the harms done by D but any disposition on his part to occasion harm even to unidentified victims at some unspecified future time. Ramsey notes the withering away of any aspirations in penal practice to reform adult, serious offenders and re-integrate them back into mainstream society. Rather, if an offender is assessed as risky that sets the offender apart and obliges him or her to demonstrate as a condition for release that he or she is not risky. According to Ramsey, one influence on the public acceptance of indefinite detention has been the resurgence of religious beliefs which emphasise the fallen and corruptible nature of humankind. In penal contexts, this cashes out as a pre-occupation with the prevention of sin at the expense of redemption. Ramsey's chapter on imprisonment on the basis of adverse risk assessment seeks to explain rather than justify or condemn the practice. Of one thing he is sure, namely that no significant changes will be made to the practice by refighting the battles between retributivism and utilitarianism.

By contrast, Lucia Zedner powerfully asserts the continuing relevance of retributivist principles to the just operation of the penal system. For her, the incarceration of persons beyond the limits of just deserts contravenes any fair reading of the entailments of the presumption of innocence. A served term of imprisonment determined by retributivist principles clears the account. From that point the prisoner, like any other subject in good standing, is entitled to be presumed innocent. Continued incarceration of the prisoner is tantamount to punishment for some unproved wrong. That is her fundamental objection to indeterminate detention, but she also objects to the flawed practice of prevention. She is highly critical of the senior judiciary who have interpreted the relevant statutes in a manner which endorses the priority of any discernible risk of future harm to persons unknown over the freedom of the prisoner before them.³⁶ Because of these interpretations, the judges are aware that the risk that licences further imprisonment may be unfounded in fact even if present on some actuarial calculation to be found in the statute. As she puts it, judges have imposed on themselves the 'duty to get it wrong'³⁷ if such errors considered within the process overall can be said to advance general security. She draws a contrast between the willingness of the judges to endorse and fortify statutory presumptions of risk notwithstanding the injustice thereby caused, with the serious

³⁶ She is particularly critical of the judgment of Lord Bingham in *A and Others v Secretary of State for the Home Department* [2004] UKHL 56.

³⁷ Chapter 10 of this volume at 219.

reservations of prominent mental health professionals as to the methods and ethics of the risk assessment procedures found in recent legislation.

The contribution of Martin Wasik to the indeterminate detention debate is of particular interest, given that Wasik is not only a prominent criminal law/justice academic but also sits as a sentencing judge. His conclusion, following a meticulous examination of the legislation and its interpretation, has particular weight: 'the provisions were poorly drafted and over-inclusive, and have perpetrated great injustice'.³⁸ Although far from an enthusiast for the continuance of preventative provisions, Wasik recognises the political realities. He lays down the minimum conditions that must be satisfied if indeterminate sentences are to have a vestige of legitimacy. The current offence must be very serious not merely of itself but when placed in the context of the nature and extent of the previous convictions of the prisoner. The penal regime under which such sentences are served must be designed to offer the prisoners the opportunity to demonstrate they no longer constitute a risk to the public and must be funded in a manner that gives practical effect to that aspiration.

So far we have looked at the pursuit of greater security by way of the processes of the criminal law, civil law preventative measures and imprisonment. However, sometimes effective crime prevention may require immediate and direct action on the part of state officials and even by private subjects. Jonathan Rogers offers a rethinking of the use of force in self defence and crime prevention. In the case of state officials he is particularly concerned with the excusatory weight the current law gives to D's subjective beliefs as to dangers confronted and with what he instinctively thought to be necessary to deal with the perceived dangers. Offering a careful examination of incidents which culminated in the use of fatal force employed by way of reaction to dangers apparent to D but unfounded by the facts, Rogers concludes that the current law is insufficiently concerned with why D erred in the way that he did. From his study of these fatal incidents, Rogers considers that the current law allows too much latitude to the use of force with a punitive motivation or with an attitude of indifference to the safety of others. As he believes that the presence of these attitudes should lead to a forfeiture of any defence, he argues that courts should be receptive to evidence that may reveal their presence, evidence which could include an extraordinary pattern of similar but unsubstantiated complaints against D. While the kind of evidence that could be adduced would need the most careful consideration, Rogers is clearly right to be uneasy about the current form and application of the current law of justifiable/excusable force, particularly the matter of the routine vindication of police officers whose conduct has been the subject of complaint. And, as he notes, his concerns carry over to private persons employed in the security industry and, one might add, those troublesome cases involving the use of fatal force to defend homes and possessions.

³⁸ Chapter 11 of this volume at 262.

Robert Sullivan's chapter engages with questions relating to the forceful treatment of innocent persons by state officials who believe such interventions to be necessary in order to prevent or mitigate large scale and imminent terrorist attacks. One class of innocents considered are persons who seem destined to die along with many other innocent persons should the terrorists carry out their attack but who also will be killed by the preventative measures state officials are minded to employ. In other words should the highjacked passenger plane be destroyed before it is flown into the densely populated skyscraper? An affirmative answer is given essentially on the grounds that numbers should matter even for deontologists when the prospects for the rescue of the persons killed were reasonably estimated as much bleaker than for the persons whose rescue is sought by means of the intervention. Indeed, where the prospects for rescue for one group seem set at zero, numbers may cease to matter if there are reasonable prospects for the rescue of the other group. Of course these conclusions will be hotly contested by those who believe that any deontologist worthy of the description must favour an unwavering proscription of the direct and intentional killing of innocent persons.

Consideration is also given to the forceful interrogation of various classes of persons who might have information or whose harsh treatment might release information which would prevent or mitigate a large scale and imminent terrorist attack. The absolute proscription of torture³⁹ on any members of these classes is defended. Particular issue is taken with theorists who maintain that even a deontologist can excuse or even justify torture *in extremis* in a manner compatible with core deontological commitments. These attempts to turn the flank of the absolute proscription are found wanting. Acknowledgment is made of the fearful prospect of terrorist attacks of a magnitude and impact far greater than anything achieved so far.⁴⁰ What measures should be considered legitimate in response to truly existential threats should be openly debated by politicians, officials and the public. While debate about 'ticking bomb' scenarios is a staple of academic papers and student seminars, there has been nothing approaching a serious debate about these unsettling matters in Parliament.

Returning to the beginning of this introduction, a depiction of a society based on liberal values with a limited, circumspect criminal law based on retributive principles was described as a travesty if it were offered as a true picture of the criminal law of England and Wales. Of course, many criminal trials will be for harms fully realised, harms which will be punished in a manner which reflects the gravity of D's conduct. But this is far from always the case. The conduct punished may have done no harm at all, if harm is conceived as implying a concrete event having a detrimental impact on to a legally protected interest. The punishment endured may far surpass any sanction based on a retributivist calculation. This challenges major suppositions of legitimate criminalisation.

³⁹ UN Convention on Torture 1984; Criminal Justice Act 1988 s 134.

⁴⁰ See n 4 above.

With disturbing frequency, particular trials culminating in long terms of imprisonment raise unresolved issues relating to harms, wrongs, culpability and punishment.⁴¹ Although there is considerable criticism of this state of affairs, in academic settings these criticisms evoke little by way of positive response from the general public officials, legislators and the judiciary. This is likely to be the way it is unless some unforeseen and beneficent changes in the state of the world enhance our sense of security.

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⁴¹ One may note the recent sentence of 12 years imprisonment for incitement to murder imposed on one Bilal Zaheer Ahmad who posted a message on an Islamist extremist website urging Muslims to 'raise the knife of jihad' and kill MPs who voted in favour of the Iraq war.