

Understanding Anti-Terrorism Policy: Values, Rationales and Principles

Stuart Macdonald*

Abstract

Although there has been a flurry of new anti-terrorism laws in the years since 9/11, which have had often far-reaching and significant effects, the framework which is most commonly used to explicate and evaluate these laws is widely regarded as unsatisfactory. The aim of this article is to develop an alternative framework. The article uses a number of practical examples to illustrate how the proposed framework's key features open up discussion of issues of critical importance. In the absence of an entrenched bill of rights in Australia, the article also uses the framework to outline some strategies and techniques which can be utilised by those concerned to protect individuals from state overreaching.

I Introduction

One feature of contemporary criminal justice policy is the regularity with which new legislation is enacted. New criminal offences and changes to the rules of evidence and procedure have become commonplace. In the UK, for example, it has been calculated that two-and-a-half times as many pages were needed in *Halsbury's Statutes of England and Wales* to cover the offences created in the 19 years between 1989 and 2008 than were needed to cover the offences created in the 637 years prior to that!¹ Anti-terrorism laws are no exception. In the decade since the events of 9/11 there has been a flurry of new anti-terrorism laws, both in the UK and in Australia. Yet in spite of the frequency of new anti-terrorism laws, and their often far-reaching and significant effects, the framework which is most commonly used to explicate and evaluate them — the metaphor of a

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¹ Law Commission, *Criminal Liability in Regulatory Contexts: A Consultation Paper*, Consultation Paper No 195 (2010), [1.17]. For discussion of this trend in Australia, see Arlie Loughnan, 'Drink Spiking and Rock Throwing: The Creation and Construction of Criminal Offences in the Current Era' (2010) 35 *Alternative Law Journal* 18.

‘balance’ — is widely regarded as unsatisfactory.² This article accordingly seeks to develop an alternative analytical framework.

The metaphor of a balance has rightly been emphatically criticised in a number of respects. One of its key failings is that, by assuming a shared understanding of the terms ‘security’ and ‘liberty’ and jumping straight to questions of balance, it forestalls consideration of issues of critical importance.³ The conceptual framework developed in this article, through a more careful examination of the nature and role of different types of principles, opens up discussion of such issues. A number of practical examples will be used to illustrate this. As a consequence of this more rigorous approach, the residual scope for a balancing mechanism will be seen to be extremely limited. The balance metaphor is also inherently tilted in favour of security.⁴ In contrast, the proposed framework can be used to outline some strategies and techniques which can be utilised by those who are concerned to protect individuals from state overreaching. In the absence of an entrenched bill of rights in Australia, this is a particularly important contribution.

The article begins with an overview of the proposed framework. The following three parts use a number of practical examples from debates on anti-terrorism policy to illustrate how the framework opens up discussion, analysis and evaluation. The article concludes by detailing some of the strategies and techniques which may be employed by those concerned to prevent state overreaching.

II Outline of the Conceptual Framework

Alternatives to the balancing metaphor have been advanced. Christopher Michaelsen has recently argued for the application of a proportionality framework.⁵ Frameworks based on international human rights and constitutional law have also been suggested,⁶ although the limited scope of the protection

² Ronald Dworkin, ‘The Threat to Patriotism’, *New York Review of Books* (New York), 28 February 2002, 44; Ronald Dworkin, ‘Terror & the Attack on Civil Liberties’, *New York Review of Books* (New York), 6 November 2003, 37; Stuart Macdonald, ‘Why We Should Abandon the Balance Metaphor: A New Approach to Counterterrorism Policy’ (2008) 15 *ILSA Journal of International and Comparative Law* 95; Stuart Macdonald, ‘The Unbalanced Imagery of Anti-Terrorism Policy’ (2009) 18 *Cornell Journal of Law and Public Policy* 519; Christopher Michaelsen, ‘Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric’ (2006) 29 *University of New South Wales Law Journal* 1; Jeremy Waldron, ‘Security and Liberty: The Image of Balance’ (2003) 11 *Journal of Political Philosophy* 191; Lucia Zedner, ‘Securing Liberty in the Face of Terror: Reflections from Criminal Justice’ (2005) 32 *Journal of Law and Society* 507.

³ Macdonald, ‘Why We Should Abandon the Balance Metaphor’, above n 2.

⁴ Zedner, above n 2; Greg Carne, ‘Brigitte and the French Connection: Security *Carte Blanche* or *A La Carte*?’ (2004) 9 *Deakin Law Review* 573, 614.

⁵ Christopher Michaelsen, ‘Reforming Australia’s National Security Laws: The Case for a Proportionality-Based Approach’ (2010) 29 *University of Tasmania Law Review* 31.

⁶ Sarah Joseph, ‘Australian Counter-Terrorism Legislation and the International Human Rights Framework’ (2004) 27 *University of New South Wales Law Journal* 428; Christopher Michaelsen, ‘International Human Rights on Trial — The United Kingdom’s and Australia’s Legal Response to 9/11’ (2003) 25 *Sydney Law Review* 275.

afforded by these has been illustrated starkly by the control order regime.⁷ There are three key features which distinguish the proposed framework (which is presented diagrammatically in the appendix) from these other frameworks. First, in order to develop a fuller account of the way society formulates principles, it is important to distinguish these from community values and rationales. Second, the proposed framework distinguishes between intrinsic, extrinsic and meta-principles in order to defeat common presumptions about the efficacy of these principles. Third, it recognises that a broad array of extra-municipal influences, prevailing community attitudes and individual sensibilities may all have an influence on the distinct processes of getting from community values to rationales, from rationales to intrinsic principles, and from community values to extrinsic principles. This part outlines these three features in turn.

John Braithwaite has explained that a value is ‘a single belief of a specific kind’ — a ‘trans-situational guide’ to a wide sweep of objects and situations. Values may be contrasted with attitudes, which are simply ‘an organised set of beliefs’ about a specific object or situation.⁸ While public debates over attitudes may be marked by division and dissensus, the empirical evidence from social psychological research has found that values are characterised by high levels of consensus. Importantly, Braithwaite explains that there may be some disparity between prevailing attitudes and community values:

[m]ost people do not have the time or interest on most issues to argue through the implications of their values for their attitudes on specific subjects like capital punishment. They do not have the expertise to marshal the empirical evidence on whether the introduction of capital punishment would reduce the homicide rate, or whether it would result in many executions of individuals who would subsequently be found to be innocent. As a result, populist attitudes are readily dominated by media stereotypes⁹

Braithwaite thus argues that, in the context of judicial deliberations, where ‘interpretative gaps remain and when changing circumstances require adaptation’, judges’ reasoning should be rooted in community values.¹⁰

It is community values that provide the underpinning for particular systems and legislative regimes. In other words, the rationale — or *raison d’être* — of a system or regime will be founded on, and derived from, that community’s values. As will be discussed further in Part IV, the interplay between the rationales of different systems and regimes — such as the criminal justice system and the control order regime — is a matter of considerable importance. It is also important to recognise that the rationale of a system/regime is not fixed. There may be express amendment, or changes may occur gradually, almost imperceptibly, and yet could nonetheless have far-reaching effects.

⁷ Andrew Lynch, ‘Terrorists and Bikies: The Constitutional Licence for Laws of Control’ (2009) 34 *Alternative Law Journal* 237; Lucia Zedner, ‘Preventive Justice or Pre-Punishment? The Case of Control Orders’ (2007) 60 *Current Legal Problems* 174, 183–7.

⁸ John Braithwaite, ‘Community Values and Australian Jurisprudence’ (1995) 17 *Sydney Law Review* 351, 354.

⁹ *Ibid* 353.

¹⁰ *Ibid*.

It should be stressed that this article is not concerned with the Dworkinian conception of principle which makes a hard distinction between rules and principles.¹¹ The Dworkinian distinction relies on a uniform use of principle, but, as has been explained by Andrew Halpin, there are four different uses of principle: as a weak formula of general but not universal application; as the underlying rationale for requiring particular conduct; to connote objectivity and authority, as opposed to subjective inclination and self-interest; and, as a broad synthesising conception.¹² It is impossible to sustain a sharp distinction between rules and principles once these other uses of principle are recognised.¹³ Moreover, while rules may be important when adjudicating disputes in specific proceedings, it is hard to envisage a prominent role for the notion of a rule in a conceptual framework whose stated purpose is to assess anti-terrorism laws and policy, particularly since even where reference to a rule is made in this context (which is not often) debate centres on the principle underlying the rule and not the rule itself.¹⁴

Whether it is possible to concoct a definition of principle which captures all of these uses may be doubted, and will not be attempted here. There is, however, one point to emphasise for the purposes of the proposed framework. A guiding consideration will not be regarded as a principle if the guidance it provides is not normative. So, for example, if a law-maker is driven by concerns about such things as departmental budgets and funding arrangements, the legislator is being guided by non-normative considerations, not by principle. This is not to suggest that resource implications have no bearing on anti-terrorism policy; on the contrary, financial considerations and operational efficiency may be highly relevant.¹⁵ They may affect both the translation of abstract principles into concrete legal provisions and how these provisions are applied in individual cases.¹⁶ Neither is it to suggest that principles will never be resource-related. One might, for example, advance as a principle the notion that no-one should be denied legal representation simply because of financial inability.

The proposed framework distinguishes between intrinsic, extrinsic and meta-principles. A principle's classification as either intrinsic or extrinsic is contextual. A principle will be regarded as intrinsic when it is derived from, and seeks to advance, the rationale of the legislative regime or system under consideration. By contrast, a principle will be regarded as extrinsic when it is not

¹¹ Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977).

¹² Andrew Halpin *Definition in the Criminal Law* (Hart Publishing, 2004), 6–10.

¹³ Halpin also identifies three features of rules which further erode the rule/principle distinction; *ibid* 16–21.

¹⁴ The obvious example is the prohibition on the use of torture, and whether this should be absolute or permit of exceptions. See especially, David Luban, 'Liberalism, Torture, and the Ticking Bomb' (2005) 91 *Virginia Law Review* 1425.

¹⁵ See generally, Macdonald, 'Why We Should Abandon the Balance Metaphor', above n 2.

¹⁶ For example, at an abstract level an individual might advocate the principle that screening at airports should be random, not targeted. However, if the reality is that a random screening process will involve delays for all passengers the individual might decide that the principle should not be implemented in practice. See, W Kip Viscusi and Richard J Zeckhauser, 'Sacrificing Civil Liberties to Reduce Terrorism Risks' (2003) 26 *Journal of Risk and Uncertainty* 99, in which a study found that the probability that an individual supported targeting was 19 per cent higher when the expected delay for all passengers was one hour than when it was 10 minutes.

derived from this rationale but from wider community values. Since there will often be conflicts both between and within these two categories of principle, there is a need for a third category: meta-principles. These provide guidance on how such conflicts should be resolved. The distinction between intrinsic, extrinsic and meta-principles clarifies issues which are obscured by a simplistic balance metaphor addressing a single set of principles. The more refined approach to principles assists in constructing an argumentative framework through which issues concerning the clashes of principles can be assessed in a more rigorous manner.

While community values enjoy a high level of consensus, this agreement is inter-subjective. Individuals have different personalities and preferences, hold different beliefs and world views, and possess different opinions and ideas. As explained in Part III, the consensus on community values is only possible because of the high level of abstraction at which these values are expressed. Along with a community's prevailing attitudes and extra-municipal influences (such as the dictates of international law and universal values¹⁷), these differences between individuals — which may be summarised as differing sensibilities — can have an important effect on the distinct processes of deriving extrinsic principles and rationales from community values and deriving intrinsic principles from rationales. While one person might derive (extrinsic) principle X from a particular community value, another person might derive a different (extrinsic) principle Y — which is capable of conflicting with X in some circumstances — from that same value. Conversely, two different people might both express their approval of principle Z, yet have different views of which community value Z is derived from. This difference could be critical if and when it becomes necessary to consider the principle's scope and/or stringency. It might be possible to countenance reducing the scope of the principle, or diminishing its stringency, when it is seen as being founded on one community value, but not if it is regarded as being founded on the other.¹⁸ The implications of this are explored in Part V.

The principal use of the proposed framework will be to assess anti-terrorism laws and policy. However, since the legislative process is a dynamic one of formulation, evaluation, and reformulation, the framework may also be used in the design of new laws. Unlike proportionalist¹⁹ and specificationist²⁰ accounts of how to resolve conflicts between rights, the aim of the proposed framework is not to achieve determinacy. On the contrary, by highlighting the role played by individual

¹⁷ A similar framework to the one proposed here might also be applied to the formulation of international law. This would highlight the particular difficulties of identifying values on which there is a high degree of consensus in the international community.

¹⁸ For example, whether or not one is prepared to countenance a 'makes no difference' exception to the principle that the subject of control order applications should be given sufficient information about the allegations against them to enable them to give effective instructions in relation to those allegations will depend to a large extent on whether the principle is regarded as being derived from instrumental or non-instrumental values: see *Secretary of State for the Home Department v AF* [2010] 2 AC 269; [2008] EWCA Civ 1148.

¹⁹ See, eg, Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, Oxford University Press, 2010) [trans of: *Theorie der Grundrechte* (first published 1985)].

²⁰ See, eg, José Juan Moreso, 'Ways of Solving Conflicts of Constitutional Rights: Proportionalism and Specificationism' (2012) 24 *Ratio Juris* 31.

sensibilities, prevailing community attitudes and extra-municipal influences, the proposed framework highlights that indeterminacy is inevitable. Instead, the aim of the framework is to improve discussion of anti-terrorism policy by allowing disagreements to be more precisely identified and openly discussed. In some instances, this discussion may result in agreement where otherwise there would have been none. In other instances it will not. Revealing the absence of community agreement signals the importance of reaching decisions using a procedure which the community accepts as being legitimate.

III The Contestability of Community Values

There are a number of values which enjoy overwhelming consensus in the Australian community. Among these are several which are of particular relevance to anti-terrorism policy, including national security, human dignity, the rule of law, freedom, equal opportunity for all, and procedural justice.²¹ The reason that such a high degree of consensus is possible is that the values are couched at a high level of abstraction. This part explores the implications of this indeterminacy, using the value of national security as an illustrative example. It argues that an overwhelming level of support for a value should not be allowed to conceal the fact that there may be widely diverging conceptions of both the value itself and the uses to which the value may be put. It uses the example of national security to show how those concerned to prevent state overreaching may challenge particular conceptions of a value and critically engage with prevailing community attitudes.

Proponents of draconian new anti-terrorism measures often seek to justify them by asserting the notion that security is a prerequisite for liberty. For example, having stated that 'being comes before well-being', former Attorney-General Philip Ruddock has defended Australian anti-terrorism legislation by saying that 'The necessary premise of any constitutional order and system of government is that people are alive. Serious threats to national security must be addressed'.²² Similar arguments have been advanced by others.²³ Such reasoning attempts to legitimise draconian anti-terrorism measures by securitising terrorism.²⁴ It presents terrorism as an existential threat in order to move it outside the realm of ordinary political dialogue and debate. The proposed framework may be used to assess this attempt to create support for an understanding of security which is statist,

²¹ Valerie Braithwaite and Russell Blamey, 'Consensus, Stability and Meaning in Abstract Social Values' (1998) 33 *Australian Journal of Political Science* 363; Tom R Tyler, *Why People Obey the Law* (Yale University Press, 1990).

²² Philip Ruddock, 'Law as a Preventative Weapon Against Terrorism' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 3, 3.

²³ See the examples in Michaelsen, above n 2.

²⁴ Barry Buzan, Ole Waever and Jaap de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Publishers, 1998).

exclusionary and militaristic,²⁵ and provide a basis for an alternative security discourse.

First, Ruddock's reasoning is heavily influenced by prevailing attitudes. As Braithwaite explains, while values transcend all domains and so are freer from specific dominations, attitudes are dominated by the circumstances of a particular situation. When moral progress comes, it is often the result of challenging the attitudes that exist at the time, whereas moral regress is frequently due to a failure to challenge prevailing attitudes.²⁶ This has a particular resonance with community attitudes to the terrorist threat. On the one hand, it is possible that over time a community might develop a sense of complacency, meaning that anti-terrorism policy suffers as a result of inertia.²⁷ On the other hand, research has found that people show a disproportionate fear of risks which are unfamiliar and which are hard to control²⁸ and that terrorism causes 'probability neglect'.²⁹ In the aftermath of a terrorist attack these cognitive processes are likely to result in an exaggerated perception of the terrorist threat and cause a community to believe that it should take drastic steps to preserve its very existence. The challenge is to try and avoid being swayed by these types of attitudes. So, to the extent that Ruddock's reasoning is based (or, even, seeks to capitalise) on a security panic, it results in a distorted concept of national security.

The manner in which Ruddock seeks to use the value of national security is also problematic. For a start, he focuses on the national security gains achieved by Australian anti-terrorism legislation but fails to consider the possibility that the legislation may also cause national security losses. Many commentators have warned that severe anti-terrorism laws will generate resentment and ill-feeling among ethnic minority communities, leading to greater recruitment by extremist groups and ultimately more individuals willing to commit terrorist acts.³⁰ This raises the possibility that Australian anti-terrorism legislation could actually result in a net national security loss. So it is wrong straightforwardly to assume that the shared community value of national security necessarily provides support for the Australian anti-terrorism laws. Moreover, Ruddock's depiction of the magnitude of the terrorist threat — as one which threatens the very existence of Australian

²⁵ Matt McDonald, 'Constructing Insecurity: Australian Security Discourse and Policy Post-2001' (2005) 19 *International Relations* 297; Matt McDonald, 'Be Alarmed? Australia's Anti-Terrorism Kit and the Politics of Security' (2005) 17 *Global Change, Peace & Security* 171.

²⁶ Braithwaite, above n 8, 361.

²⁷ Adrian Vermeule, 'Self-Defeating Proposals: Ackerman on Emergency Powers' (2006) 75 *Fordham Law Review* 631.

²⁸ Paul Slovic, *The Perception of Risk* (Earthscan, 2000).

²⁹ Cass R Sunstein, 'Terrorism and Probability Neglect' (2003) 26 *Journal of Risk and Uncertainty* 121.

³⁰ For example, in the parliamentary debates on the UK control order regime, the then shadow Home Secretary stated: 'If, however, the Government insist on rushing these measures through, I fear that they may do the opposite of what they want. They will create a sense of injustice among many British citizens, and do what I warned when we first discussed this: for every known terrorist that the Home Secretary confines, he may create 10 unknown terrorists, free to do harm to our people and to our nation' United Kingdom, *Parliamentary Debates*, House of Commons, 22 February 2005, vol 431, col 158 (David Davis).

society — may also be doubted. Although in *Belmarsh Detainees*³¹ the House of Lords deferred to the UK government's claim that there was a 'public emergency threatening the life of the nation',³² several of the Law Lords expressed grave misgivings.³³ While it may be true that the evolving market state terrorism is more lethal than the nation state terrorism which preceded it,³⁴ the fact remains that the threat has been 'overblown'.³⁵ Not only has there been no terrorist attack on the Australian mainland since 9/11, but, as Ben Saul has stated, 'Most terrorist acts exhibit nothing like the scale or intensity of military violence or armed attacks, and are more properly dealt with by the regular criminal law as acts of unlawful violence'.³⁶ This does not mean that communities should not equip themselves to respond to a truly existential threat;³⁷ in extreme situations it may be justifiable to resort to the use of emergency powers.³⁸ The difficulty with Ruddock's reasoning is that it seeks to normalise such powers and make them always available.

The third reason Ruddock's reasoning is flawed is that it seeks to prioritise national security on the basis that it is logically prior to the community's other values; if people are not alive there can be no constitutional order. This, however, is overly simplistic. As Michaelsen observes in his critique of the balancing rhetoric:

[L]iberty can be conceived as a precondition of security... Government ministers and other commentators over-emphasise the aspect of personal safety and national security as a precondition of liberty and tend to ignore the fact that individual freedom legitimises the existence of the State in the first place.³⁹

³¹ *A v Secretary of State for the Home Department* [2005] 2 AC 68 ('*Belmarsh Detainees*'). When the case reached the European Court of Human Rights, the Grand Chamber declined to interfere with the Lords' judgment on this issue, stating that national courts are best placed to assess a government's claim that a public emergency exists: *A and others v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 3455/05, 19 February 2009). This effectively means there is very little judicial oversight of such claims in the UK, as the European courts defer to the domestic courts, which in turn defer to the executive: see Sangeeta Shah, 'From Westminster to Strasbourg: *A and Others v United Kingdom*' (2009) 9 *Human Rights Law Review* 473.

³² *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010), art 15(1).

³³ Lords Bingham, Scott and Rodger confessed to 'misgiving', 'very grave doubt' and 'hesitation' as to whether there was a public emergency threatening the life of the nation: *Belmarsh Detainees* [2005] 2 AC 68, [26], [154], [165] respectively. By contrast, Lord Hope stated that there was 'ample evidence' to support the Government's assertion: *Belmarsh Detainees* [2005] 2 AC 68, [118].

³⁴ Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* (Allen Lane, 2008).

³⁵ John Mueller, *Overblown: How Politicians and the Terrorism Industry Inflate National Security Threats and Why We Believe Them* (Free Press, 2006).

³⁶ Ben Saul, 'Terrorism as Crime or War: Militarising Crime and Disrupting the Constitutional Settlement? Comment on *Thomas v Mowbray* (2007) 237 ALR 194; 81 ALJR 1414; [2007] HCA 33' (2008) 19 *Public Law Review* 20, 25.

³⁷ David Omand *Securing the State* (C Hurst & Co, 2010).

³⁸ See generally Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006).

³⁹ Michaelsen, 'Balancing Civil Liberties Against National Security?' above n 2, 5.

This more complex interrelationship has been succinctly captured by former President of the Supreme Court of Israel, Aharon Barak:

Only a strong, safe, and stable democracy may afford and protect human rights, and only a democracy built on the foundations of human rights can have security.⁴⁰

Ruddock has also invoked the concept of human security to argue that national security is logically prior to civil liberties. Human security, he has claimed, amounts to a 'new framework' for understanding counter-terrorism and the rule of law,⁴¹ in which 'national security and human rights are not considered to be mutually exclusive'.⁴² Arguing that national security can in fact promote civil liberties by preserving a society in which rights and freedoms can be exercised,⁴³ Ruddock has asserted that 'people will only be able to reach their full potential if they live in a secure environment where their fundamental human rights can be realised', and so 'the extent to which we can continue to enjoy our civil liberties rests upon the effectiveness of our counter-terrorism laws'.⁴⁴ Article 3 of the Universal Declaration of Human Rights has been invoked on numerous occasions in support of this presentation of human security.⁴⁵

This alternative formulation of the argument is equally problematic. For a start, as Greg Carne has explained, art 3 is 'textually and conceptually linked to liberty and security of the person in a context that articulates that right as a bulwark against state power'.⁴⁶ Yet, 'instead of shifting the referent of security away from the state and towards the individual', Ruddock's reasoning uses the concept of human security 'to assert and justify an executive-conceived and concentrated conception of state security'.⁴⁷ This is symptomatic of the failure to adopt a holistic approach to security. The exclusive focus on individuals' security against the terrorist threat, at the expense of other security threats including protection of individuals from the power of the state, is a far cry from the people-centred ethos of the concept.⁴⁸ Ruddock's reasoning is also at odds with one of the other defining features of the concept of human security. The concept 'does not selectively include or exclude particular human rights from the range of human rights on the basis of their pre-conceived compatibility with some particular conception of human security'.⁴⁹ Rather, the concept's connection with substantive human rights

⁴⁰ Aharon Barak 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 19, 155.

⁴¹ Philip Ruddock, 'A New Framework: Counter Terrorism and the Rule of Law' (Speech delivered at the Sydney Institute, Sydney, 20 April 2004).

⁴² Philip Ruddock, 'Australia's Legislative Response to the Ongoing Threat of Terrorism' (2004) 27 *University of New South Wales Law Journal* 254, 254.

⁴³ Philip Ruddock, 'International and Public Law Challenges for the Attorney-General' (Speech delivered at the Centre for International and Public Law, Australian National University, Canberra, 8 June 2004) <law.anu.edu.au/cipl/Lectures&Seminars/04%20Ruddockspeech%208June.pdf>.

⁴⁴ *Ibid* [82]–[83].

⁴⁵ See the references cited in Greg Carne, 'Reconstituting "Human Security" in a New Security Environment: One Australian, Two Canadians and Article 3 of the Universal Declaration of Human Rights' (2006) 25 *Australian Year Book of International Law* 1, 18 n 86.

⁴⁶ *Ibid* 21.

⁴⁷ *Ibid* 39.

⁴⁸ See generally Commission on Human Security, *Human Security Now* (2003).

⁴⁹ Carne, above n 45, 9.

law is both holistic and symbiotic. Last, the implication of Ruddock's argument is that civil liberties and human rights are not inherent to the individual but are created by the state and may only be enjoyed once the government has achieved a secure environment. For this reason, Michaelsen has suggested that the reasoning has disturbing parallels with: 'the political authoritarianism formulated by the German political and legal theorist Carl Schmitt during the political turmoil of the Weimar Republic'.⁵⁰

Although this example focuses on national security, similar points may be made about the other values listed above. There may be quite different conceptions of such values as human dignity and the rule of law, as the discussion of the possibility of a liberal conception of torture illustrates.⁵¹ Moreover, how one conceives these values may be heavily influenced by prevailing attitudes. The same kind of psychological mechanisms which produce security panics are also capable of producing 'libertarian panics'.⁵² So, while these values may enjoy overwhelming levels of support from the community, this consensus should not be allowed to conceal their contestability.

IV The Rationales of the Criminal Justice System and Control Order Regime

The focus of this part is on how the rationales of different systems and regimes interact. Using the criminal justice system and the control order regime as an example, it demonstrates how the interplay between the rationales of two systems can be used to structure discussion and analysis, and how one may appeal to the rationale of one system/regime in order to argue for restraints to be imposed on another.

At first there may appear to be a neat distinction between the rationale of the criminal justice system (which exists to apprehend, convict and sentence those who engage in conduct which has been defined as criminal)⁵³ and that of the control order regime (which exists to protect the public from terrorist acts by allowing the imposition of obligations and prohibitions on specified persons).⁵⁴ The former might be described as backward-looking, imposing punishment for past conduct, and the latter as forward-looking, imposing restrictions to prevent a future event. However, the neatness of this dichotomy is illusory. For a start, it would be misleading to describe applications for control orders as solely forward-looking. Of the two preconditions for the making of an order, the first will be satisfied if the court is satisfied on the balance of probabilities that the individual has *in the past* provided training to, or received training from, a listed terrorist organisation.⁵⁵ Moreover, the tests set out in the alternative limb of the first precondition — that

⁵⁰ Michaelsen, above n 2, 6.

⁵¹ See generally Luban, above n 14.

⁵² Adrian Vermeule, 'Libertarian Panics' (2005) 36 *Rutgers Law Journal* 871.

⁵³ See, eg, Andrew Ashworth, 'Concepts of Criminal Justice' [1979] *Criminal Law Review* 412.

⁵⁴ *Criminal Code Act 1995* (Cth) s 104.1 ('*Criminal Code*').

⁵⁵ *Ibid* s 104.4(1)(c)(ii) (making of interim control order); s 104.14(7) (confirming an interim control order).

making an order will ‘substantially assist in preventing a terrorist act’⁵⁶ — and the second precondition — that each of the restrictions is ‘reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act’⁵⁷ — can hardly be applied without looking at the individual’s past. In the criminal law, meanwhile, the inchoate offences of ‘incitement’,⁵⁸ ‘conspiracy’,⁵⁹ and ‘attempt’⁶⁰ exist in large part in order to prevent subsequent commission of the full offence.⁶¹ And criminal sanctions are not solely backward-looking. The factors which may be considered when determining the severity of a sentence include deterrence (both general and special), rehabilitation and incapacitation.⁶² So, to the extent that a sentence has a consequentialist undergirding, it may be described as being preventative as well as punitive. In short, the rationales of the criminal justice system and the control order regime are not distinct, but overlapping. This overlap has given rise to two, apparently contradictory, trends, both of which are serious causes of concern. The first is the use of the control order regime to circumvent the criminal justice system. The second is the creation of precursor offences which stretch the reach of the criminal law to utilise its preventative capability.

A *Circumvention of the Criminal Law*

The UK’s New Labour government created new criminal offences at a rate of almost one a day.⁶³ Yet, despite this proliferation of new offences, it frequently complained that the criminal law was ineffective at tackling certain kinds of behaviour.⁶⁴ It was this dissatisfaction with the criminal law that inspired the creation of the ‘two-step prohibition’⁶⁵ (‘TSP’) — the issuance of a civil order, with criminal penalties in the event of breach. New Labour’s first use of the TSP formula was in the anti-social behaviour order (‘ASBO’).⁶⁶ While in opposition New Labour claimed that the criminal law was incapable of tackling anti-social behaviour effectively, principally because victims of anti-social behaviour were often too afraid to testify in court which made it impossible to secure criminal

⁵⁶ Ibid s 104.4(1)(c)(i); s 104.14(7).

⁵⁷ Ibid s 104.4(1)(d); s 104.14(7).

⁵⁸ Ibid s 11.4.

⁵⁹ Ibid s 11.5.

⁶⁰ Ibid s 11.1.

⁶¹ See, eg, Law Commission, *Conspiracy and Attempts* Report No 318 (2009); Anthony Duff *Criminal Attempts* (Clarendon Press, 1996).

⁶² Of these factors, only rehabilitation and special deterrence are to be found in the list of matters to which a sentencing court is to have regard: *Crimes Act 1914* (Cth) s 16A(2). However, this list is expressly non-exhaustive.

⁶³ Nigel Morris, ‘Blair’s “Frenzied Law Making”’: A New Offence for Every Day Spent in Office’, *The Independent* (London), 16 August 2006, 2.

⁶⁴ Stuart Macdonald, ‘ASBOs and Control Orders: Two Recurring Themes, Two Apparent Contradictions’ (2007) 60 *Parliamentary Affairs* 601.

⁶⁵ Andrew P Simester and Andrew von Hirsch, ‘Regulating Offensive Conduct through Two-Step Prohibitions’ in Andrew von Hirsch and Andrew P Simester (eds), *Incivilities: Regulating Offensive Behaviour* (Hart Publishing, 2006) 173.

⁶⁶ *Crime and Disorder Act 1998* (UK) c 37, s 1.

convictions.⁶⁷ One of the perceived advantages of the ASBO was that, since applications for orders are civil proceedings, the rule against hearsay evidence would not apply, meaning that an order could, in principle, be obtained without intimidated witnesses needing to testify.⁶⁸ The TSP formula was thus used to evade the procedural protections of the criminal law. This is also true of the control order regime (in both the UK and Australia).⁶⁹ Most obviously, the standard of proof which applies at applications for control orders is lower than the criminal law standard of ‘beyond reasonable doubt’.⁷⁰ In addition, there are more limited disclosure requirements⁷¹ and, in the UK, the ban on the use of intercepted communications as evidence does not apply to control order proceedings.⁷²

As discussed further below, in the anti-terrorism context it may be possible to justify some form of preventative regime which operates outside the constraints of the criminal law. However, existing arrangements allow for ‘jurisprudential context-shopping’⁷³ in which the control order regime can be used to circumvent the criminal law. This is powerfully illustrated by the tale of Jack Thomas, or ‘Jihad Jack’ as he was dubbed by the media. In 2001 Thomas travelled to Pakistan and Afghanistan, where he undertook paramilitary training in a camp run by Al-Qaeda. He was detained at Karachi airport by Pakistani immigration officials as he attempted to return to Australia on 4 January 2003. He was detained for five

⁶⁷ The Finnie brothers case study was often used to illustrate this problem. See, eg, Stuart Macdonald ‘The Principle of Composite Sentencing: Its Centrality to, and Implications for, the ASBO [2006] *Criminal Law Review* 791.

⁶⁸ Although, since hearsay evidence does not carry the same weight as direct evidence, this design was frustrated, to some extent at least, by the House of Lords’ decision that the criminal standard of proof should always apply at ASBO applications: *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787. See, Simon Hoffman and Stuart Macdonald, ‘Should ASBOs be Civilized?’ [2010] *Criminal Law Review* 457.

⁶⁹ More recently, the TSP formula has also been used in the so-called ‘bikie laws’: *Crimes (Criminal Organisations Control) Act 2009* (NSW). The New South Wales legislation was modelled on the *Serious and Organised Crime (Control) Act 2008* (SA). See, Arlie Loughnan, ‘The Legislation We Had to Have?: The *Crimes (Criminal Organisations Control) Act 2009* (NSW)’ (2009) 20 *Current Issues in Criminal Justice* 457. The control order regime contained in the South Australian legislation was held to be unconstitutional by the High Court in *South Australia v Totani* (2010) 242 CLR 1.

⁷⁰ *Prevention of Terrorism Act 2005* (UK) c 2, s 2(1)(a) (non-derogating orders); s 4(7)(a) (derogating orders); *Criminal Code* s 104.4(1)(c)–(d).

⁷¹ In Australia, an individual may be denied access to material if disclosure of that material is likely to prejudice national security: *Criminal Code* s 104.12A(3). In the UK, control order applications may include closed sessions, in order to ensure that information is not disclosed contrary to the public interest: *Civil Procedure Rules*, pt 76.22(1). During these sessions the individual’s interests are represented by a Special Advocate, who may make submissions to the court and cross-examine witnesses: *Civil Procedure Rules*, pt 76.23–4. However, individuals must be informed of the essence of the case against them: *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269.

⁷² *Regulation of Investigatory Powers Act 2000* (UK) c 23, s 18(1)(da). In Australia, interception warrants may be issued for two purposes: national security and law enforcement. The process and criteria for issuing warrants are contained in the *Telecommunications (Interception and Access) Act 1979* (Cth).

⁷³ Lucia Zedner, ‘Seeking Security by Eroding Rights: The Side-Stepping of Due Process’ in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007) 257, 265.

months without charge, in solitary confinement and without consular or legal access. During this time he was interrogated by representatives from Pakistani and American intelligence agencies, as well as a joint Australian team comprising Australian Federal Police ('AFP') and Australian Security Intelligence Organisation ('ASIO') officials. Evidence suggests that he was subject to ill-treatment during these interrogations. On 8 March 2003, the AFP conducted a formal interview with Thomas. This interview was conducted, not to gather intelligence, but to obtain evidence for use in Australian criminal proceedings. Accordingly, it was conducted in compliance with the relevant provisions of Australian law. During the interview, confessional statements were obtained from Thomas. In November 2004, 17 months after his return to Australia, Thomas was arrested and charged with four offences: possessing a falsified Australian passport;⁷⁴ receiving funds from a terrorist organisation;⁷⁵ and two counts of intentionally providing resources to a terrorist organisation.⁷⁶ At trial, the confessional statements made during interview were held to be admissible. Thomas was found guilty by a Supreme Court of Victoria jury of the first two offences, and acquitted of the other two. At his subsequent appeal the Victorian Court of Appeal held that various aspects of Thomas' detention and interrogation in Pakistan rendered his confessional statements involuntary and inadmissible.⁷⁷ His convictions for the first two offences were therefore quashed. On the application of the Commonwealth Director of Public Prosecutions, the Court adjourned on the question of whether there should be directed acquittals or an order for a retrial.

While the court was adjourned, AFP Officer Ramzi Jabbour applied for an interim control order against Thomas. The application was granted by Mowbray FM on 27 August 2006.⁷⁸ This circumvented the criminal law in two respects.⁷⁹ First, no evidence was produced that Thomas had engaged in any activities since returning to Australia which pointed to future terrorist activity on his part. The evidence on which Mowbray FM relied consisted primarily of the confessional statements which the Victorian Court of Appeal had held to be involuntary. Although these were inadmissible in criminal proceedings, they were admissible at the application for an interim control order because it was an interlocutory civil case.⁸⁰ Second, the jury's decision to acquit Thomas on the two counts of intentionally providing resources to a terrorist organisation meant that (even having regard to the involuntary confessional statements) they had found that he did not have any intention to help Al-Qaeda to commit a terrorist act.⁸¹ Yet at the application for the interim control order the AFP made this very same allegation, using the same evidence. It is thus hard to resist the suggestion that in Thomas'

⁷⁴ *Passports Act 1938* (Cth) s 9A(1)(e).

⁷⁵ *Criminal Code* s 102.6.

⁷⁶ *Ibid* s 102.7(1).

⁷⁷ *R v Thomas* (2006) 14 VR 475.

⁷⁸ *Jabbour v Thomas* (2006) 165 A Crim R 32.

⁷⁹ See Andrew Lynch, 'Thomas v Mowbray — Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182, 1188.

⁸⁰ *Jabbour v Thomas* (2006) 165 A Crim R 32, 34.

⁸¹ Jude McCulloch, 'Australia's Anti-Terrorism Legislation and the Jack Thomas Case' (2006) 18 *Current Issues in Criminal Justice* 357.

case the control order regime was used as a ‘Trojan horse’,⁸² with onerous restrictions amounting to ‘a form of personalised criminal law’⁸³ being imposed on the basis of evidence which had failed to satisfy a criminal court. Using the control order regime in this way undermines the authority and the procedural protections of the criminal law.

B *Terrorism Precursor Offences*

Since the 1970s, there has been a growing recognition of the marginal role of the criminal justice system in responding to most criminal acts and of the limited effectiveness of the traditional policing strategies of random patrol and of sentencing and imprisonment.⁸⁴ This has resulted in an ambivalent pattern of policy development, as the state has adapted to this predicament by developing new modes of governing crime while simultaneously reasserting its power to govern by force of command and adopting a punitive law and order approach.⁸⁵ New criminologies have emerged which present crime not as an aberration but as a normal feature of everyday life, the result of opportunities, not predispositions. As crime is increasingly regarded as a risk to be managed, the focus has shifted from punishing crime to preventing it. So, while in a ‘post-crime’ society there are ‘crimes, offenders and victims, crime control, policing, investigation, trial and punishment’, in the emerging ‘pre-crime’ society there are ‘calculation, risk and uncertainty, surveillance, precaution, prudentialism, moral hazard, prevention and, arching over all these, there is the pursuit of security’.⁸⁶

Anti-terrorism laws are uniquely well suited to advancing pre-crime frameworks. The label ‘terrorism’ is inherently pre-emptive, and ‘precedes, extends beyond and exists independently of reasonable suspicion and evidence-based criminal justice processes’.⁸⁷ In addition, according to Robert Cornall, former Secretary of the Attorney-General’s Department, ‘conventional’ criminal offences ‘suffer from an almost fatal flaw when related to terrorism. They largely depend on the completion of an act — such as murder — before the offence is committed’. It follows that additional offences, which ‘focus on preparatory conduct’ and so allow earlier intervention, are ‘essential’.⁸⁸ Existing terrorism precursor offences accordingly stretch much further back, to an earlier stage of preparation, than the inchoate offences of incitement, conspiracy and attempt.⁸⁹ It is an offence to provide or receive training, possess a thing or collect or make a

⁸² This description has been applied to the ASBO: Andrew Ashworth, ‘Testing the Boundaries of the Criminal Law’ [1996] *Criminal Law Review* 761, 763.

⁸³ Roger Leng, Richard Taylor and Martin Wasik, *Blackstone’s Guide to the Crime and Disorder Act 1998* (Blackstone, 1998) 13.

⁸⁴ Adam Crawford, ‘“Contractual Governance” of Deviant Behaviour’ (2003) 30 *Journal of Law and Society* 479.

⁸⁵ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001).

⁸⁶ Lucia Zedner, ‘Pre-Crime and Post-Criminology?’ (2007) 11 *Theoretical Criminology* 261, 262.

⁸⁷ Jude McCulloch and Sharon Pickering, ‘Pre-Crime and Counter-Terrorism’ (2009) 49 *British Journal of Criminology* 628, 630.

⁸⁸ Robert Cornall, ‘The Effectiveness of Criminal Laws on Terrorism’ in Lynch, MacDonald and Williams above n 22, 50, 52–3.

⁸⁹ *Criminal Code* ss 11.1, 11.4, 11.5.

document if any of these are connected with preparation for, the engagement of a person in, or assistance in a terrorist act.⁹⁰ There is also a further catch-all offence of doing any act in preparation for, or planning, a terrorist act.⁹¹ All of these offences are committed even if a terrorist attack does not occur and the activity is not connected to a specific terrorist act.⁹²

While calls for greater prevention face significant predictive difficulties,⁹³ Andrew Goldsmith has highlighted the link between prevention and precaution, stating that 'A precautionary criminal law focused upon terrorism is one that, at least in part, tries to identify and criminalise acts that can be considered preparatory to terrorist attacks'.⁹⁴ In the face of uncertainty, precaution may be justified, he says, by the changing nature of the terrorist threat and the potential impact of a catastrophic attack (including the psychological and sociological impacts on a community following a disaster).⁹⁵ He adds that the use of the criminal law to advance this precautionary approach is also supported 'by comparison to other policy options... An important argument for the use of criminal law is that it is measured, accountable and targeted'.⁹⁶ However, while the moral legitimacy and fairness of the criminal law mean that its use is to be preferred, it is deeply problematic to use the criminal law as a pre-emptive tool to address what Clive Walker has called 'anticipatory risk'.⁹⁷ As Edwina MacDonald and George Williams have asserted:

Authorities are now empowered to act pre-emptively by arresting people before they have formed a definite plan to commit the criminal act... While stopping a terrorist act from taking place must be the aim, there are constraints on the extent to which the criminal law can be used to achieve this without compromising its integrity.⁹⁸

It is contradictory and ultimately self-defeating to employ the criminal law in a manner which will undermine the very moral legitimacy and fairness to which one is seeking to appeal.

Today, it is the due process protections of the criminal law that are regarded as the primary source of its moral legitimacy and fairness.⁹⁹ Social psychological research has found that people's views on authority are strongly connected to their judgments of the fairness of the procedures through which those authorities make

⁹⁰ Ibid ss 101.2, 101.4, 101.5.

⁹¹ Ibid s 101.6.

⁹² Ibid ss 101.2(3), 101.4(3), 101.5(3), 101.6(2).

⁹³ Zedner, above n 7.

⁹⁴ Andrew Goldsmith, 'Preparation for Terrorism: Catastrophic Risk and Precautionary Criminal Law' in Lynch, MacDonald and Williams above n 22, 59, 60.

⁹⁵ Ibid 62–3.

⁹⁶ Ibid 63.

⁹⁷ Clive Walker, 'The United Kingdom's Anti-Terrorism Laws: Lessons for Australia' in Lynch, MacDonald and Williams above n 22, 181, 186.

⁹⁸ Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's *Criminal Code* since September 11, 2001' (2007) 16 *Griffith Law Review* 27, 35.

⁹⁹ The idea that it is procedure that legitimates criminal justice is a historically contingent notion. See generally, Lindsay Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law 1747 to the Present* (Cambridge University Press, 1997).

decisions.¹⁰⁰ It is important to recognise, however, that ‘The fairness of a trial cannot be detached from the fairness of the offences which provide the basis of argument’.¹⁰¹ As well as the well-documented breadth of the definition of terrorism,¹⁰² many of the precursor offences are themselves very broadly defined. They often employ vague terminology; the offences mentioned above use such terms as ‘thing’, ‘document’ and ‘any act’ without defining them. The criminal law standard of proof — one of the key points of difference with a control order application — has little bite when it comes to definitions of offences that are so broad that almost all citizens will violate them. Moreover, while the ‘possessing a thing’ and ‘collecting or making a document’ offences state that the defendant bears an evidential burden in showing that the possession of the thing or collection or making of the document was ‘not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act’,¹⁰³ the ‘membership of a terrorist organisation’ offence places a legal burden on the defendant. (Defendants bear the legal burden in relation to proving that they took all reasonable steps to cease to be a member of the organisation as soon as they knew it was a terrorist organisation.) So does the ‘receiving funds from a terrorist organisation’ offence. (Defendants bear the legal burden in relation to proving that they received funds from a terrorist organisation for the provision of legal representation or to help the organisation comply with the law.)¹⁰⁴ Why the legal burden should be placed on the defendant in relation to these defences and not the others is not made clear.¹⁰⁵ When offences have features like these the procedural protections of the criminal law are rendered largely redundant. The fairness of trials for terrorism precursor offences may therefore justifiably be questioned.

The breadth of many precursor offences also creates other problems. As Victor Tadros has explained in his discussion of UK terrorism precursor offences, ‘the extension of the criminal law such that almost all citizens will violate the law invites the use of other criteria to determine when the offence will be prosecuted’.¹⁰⁶ For all crimes, the decision whether to prosecute involves an assessment of both the sufficiency of the evidence and the public interest.¹⁰⁷ When applying the public interest test to an individual accused of a terrorism precursor offence, it seems fair to assume that one important consideration will be whether

¹⁰⁰ Tyler, above n 21; Tom R Tyler, ‘Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority’ (2007) 56 *DePaul Law Review* 661.

¹⁰¹ Victor Tadros, ‘Justice and Terrorism’ (2007) 10 *New Criminal Law Review* 658, 677.

¹⁰² *Criminal Code* s 100.1. See generally, Ben Saul *Defining Terrorism in International Law* (Oxford University Press, 2006); Ben Golder and George Williams, ‘What is “Terrorism”? Problems of Legal Definition’ (2004) 27 *University of New South Wales Law Journal* 270.

¹⁰³ *Criminal Code* ss 101.4(5), 101.5(5).

¹⁰⁴ The membership of a terrorist organisation and receiving funds from a terrorist organisation offences: *Criminal Code* ss 102.3(2), 102.6(3).

¹⁰⁵ Bernadette McSherry, ‘Terrorism Offences in the *Criminal Code*: Broadening the Boundaries of Australian Criminal Laws’ (2004) 27 *University of New South Wales Law Journal* 354.

¹⁰⁶ Tadros, above n 101, 684.

¹⁰⁷ Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (Commonwealth Director of Public Prosecutions, November 2008).

the individual poses a threat to national security.¹⁰⁸ Yet this blurs the boundary between intelligence and crime:

Traditionally, intelligence agencies would be concerned with assessing the risk of a terrorist activity occurring whereas the police would be focussed on specific acts. Now that links with any terrorist activity are subject to explicit criminal sanction, police are empowered to intervene and charge individuals on the basis of what might otherwise have been generalised risks. Previously those would have been left to ASIO.¹⁰⁹

Furthermore, when an individual is tried for a precursor offence, that individual does not have the opportunity to challenge the national security considerations which led to the decision to prosecute. The national security case sits in the background. At an application for a control order the individual at least has the opportunity to contest the allegation that he poses a risk:

Those subject to control orders are entitled to make representations, challenging the decision to impose the order, aimed at showing that they do not pose a risk to others. Of course under the present scheme that entitlement is very limited. That is one of the most controversial aspects of the scheme. But control orders at least have the potential to be subject to the right kind of scrutiny and challenge by the defendant, for they are at least imposed on grounds of security in a direct way. This also suggests that control orders are more likely to be accurate than the expanded criminal law in identifying the individuals that actually pose a risk.¹¹⁰

In this sense, then, control orders are preferable to broadly drafted precursor offences.

In summary, the desire to use the criminal law as a pre-emptive tool in cases of anticipatory risk has resulted in its preventative capabilities being overstretched. At the same time, the control order regime has been used to circumvent the procedural protections of the criminal law. In other words, the control order regime has been used to do the work of the criminal law and the criminal law has been used to do the work of the control order regime. To resolve this, attention first needs to focus on questions of criminalisation.¹¹¹ How far may the preventative capabilities of the criminal law justifiably be utilised in the anti-terrorism context? The next question will be whether it is both necessary and appropriate to have a preventative regime of control orders which operates in the space that is left. In answering this question it will be important to distinguish between: the use of control orders to intervene at an earlier stage than is possible under the criminal law; and, the use of control orders in a case where prosecution is not possible, not

¹⁰⁸ Though not always: see, Jacqueline Hodgson and Victor Tadros, 'How to Make a Terrorist out of Nothing' (2009) 72 *Modern Law Review* 984.

¹⁰⁹ Andrew Lynch, 'Legislating with Urgency — The Enactment of the Anti-Terrorism Act [No 1] 2005' (2006) 30 *Melbourne University Law Review* 747, 780. See also McCulloch, above n 81, 361.

¹¹⁰ Tadros, above n 101, 687.

¹¹¹ See generally, Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008); Andrew P Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011); Anthony Duff et al (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010).

because it is too early for the criminal law to intervene, but because the case against the individual cannot be proven within the criminal rules of evidence and procedure to the criminal standard. One's answer to the question may differ in each of these settings. Finally, if it is decided that a regime of control orders is both necessary and appropriate in one or both of these settings, the remaining task will be to design this regime. The tools for this task are principles.

V Principles

When reasoning with principles, there are three tasks which must be completed before turning to the meta-principles. The relevant intrinsic and extrinsic principles must be identified, the demands of these principles must be articulated, and the weight to be attached to these demands must be determined. The first three sections of this part work through each of these tasks in turn. Examples will be used to show that each of these tasks is a potential source of disagreement, and so engaging in them will open up issues which are of key importance in contemporary anti-terrorism policy. Jumping straight to the meta-principles — in other words, to questions of balance — obscures these issues, and risks overlooking them altogether.

The final section of the part turns to meta-principles. By identifying three different meta-principles, it clarifies the choice that must be made in situations where principles conflict. It also explains that, while frameworks based on balancing and proportionality focus on the realm of the meta-principle, in the proposed argumentative framework much of the key critical work can be done by working through the three prior tasks in a systematic manner. In some situations involving conflicting principles, these prior tasks will have an important influence in determining which meta-principle to apply. In other situations, the prior tasks will reveal that in fact there is no conflict of principles at all.

A *Identifying the Relevant Principles*

When analysing and evaluating a particular feature of a legislative regime, the first task is to identify the relevant intrinsic and extrinsic principles. My aim here is not to attempt to list every principle which might be of relevance to anti-terrorism policy; rather it is to use the control order regime as an example to illustrate that, contrary to the oft-heard suggestion that anti-terrorism debates pit principle against policy, there are in fact principles involved on all sides of these debates.

One principle which has had an important influence on the design of the control order regime is the precautionary principle. This principle, which was first developed in the field of environmental regulation, posits that, where the threat to human safety and health is sufficiently high, lack of scientific certainty in relation to the threatened harm is no justification for inaction. In the realm of anti-terrorism

policy, the precautionary principle may displace risk-based or evidence-based approaches.¹¹² Simon Bronitt has observed how:

the discourse of public policy has shifted from one based on risk assessment and risk management (where policy-makers claim to weigh the likelihood of attack against the costs and benefits of particular strategies) to one based, in the face of uncertainty, on the need for precautionary action.¹¹³

One possible use of the precautionary principle is to support over-inclusiveness in the pursuit of social objectives.¹¹⁴ For example, the precautionary principle would support the imposition of a strict prohibition on the possession of guns by members of the public in order to further the objective of tackling gun crime. Similarly, within the control order regime examples of what one commentator has described as ‘legislative overreach’¹¹⁵ might in fact also be understood as over-inclusivity borne of the precautionary principle. The most obvious example is the insistence that the criminal standard of proof should not apply at applications for control orders.¹¹⁶ In this respect, the precautionary principle has exerted a greater influence in the UK than in Australia. In the UK, the standard of proof for non-derogating orders (the only species of order to have been employed) is reasonable suspicion, whereas in the Australian regime the standard of proof is on the balance of probabilities.¹¹⁷ There is also another respect in which the invocation of the principle is stronger in the UK. In Australia an order may only be imposed for the purpose of protecting the public from a terrorist *act*,¹¹⁸ whereas in the UK an order may be imposed if it is considered necessary to prevent or restrict the individual’s involvement in terrorism-related *activity*¹¹⁹ — with activity defined extremely broadly to include such things as conduct which is intended to give encouragement to the commission, preparation or instigation of acts of terrorism (even if it does not in fact do so) and conduct which gives support or assistance to individuals known to be involved in the commission, preparation or instigation of acts of terrorism, or the facilitation or encouragement of such acts.¹²⁰

¹¹² For another example of the precautionary principle seeping into criminal justice, see Peter Ramsay, ‘Imprisonment Under the Precautionary Principle (IPP)’ in Ian Dennis and Robert Sullivan (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart Publishing, 2012).

¹¹³ Simon Bronitt, ‘Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform’ in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the ‘War on Terror’* (ANU E Press, 2008) 65, 79.

¹¹⁴ Halpin, above n 12, 8.

¹¹⁵ Oscar I Roos, ‘Alarmed, but not Alert in the “War on Terror”? The High Court, *Thomas v Mowbray* and the Defence Power’ (2008) 15 *James Cook University Law Review* 169, 189.

¹¹⁶ Zedner, above n 7, 188.

¹¹⁷ *Prevention of Terrorism Act 2005* (UK) c 2, s 2(1)(a); *Criminal Code* s 104.4(1)(c)–(d) (making of interim control order); s 104.14(7) (confirming an interim control order).

¹¹⁸ *Criminal Code* s 104.4(1)(d).

¹¹⁹ *Prevention of Terrorism Act 2005* (UK) c 2, s 1(3). This is the necessity test which applies to the drafting of individual obligations. Curiously, it differs from the necessity test which applies to the decision to make an order. The latter is even more widely drafted (the order must be considered necessary ‘for purposes connected with protecting members of the public from a risk of terrorism’: *Prevention of Terrorism Act 2005* (UK) c 2, ss 2(1)(b), 4(7)(b) (non-derogating and derogating orders respectively)).

¹²⁰ *Ibid* c 2, s 1(9).

However, there are other aspects of the Australian regime which do reflect a strong use of the precautionary principle. First, the wording of the statutory preconditions for the making of an order means that it is possible to impose an order on an individual in the absence of any evidence that the individual is *presently* involved in any activities or associations which might point to planned or likely future terrorist activity on that individual's part.¹²¹ As noted previously, this was what happened in the case of Jack Thomas, where the order was imposed on the basis that Thomas was a sleeper agent. Second, the fact that it is sufficient to secure the imposition of an order to show, on the balance of probabilities, that the order would substantially assist in preventing a terrorist act and that the restrictions are reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act,¹²² means that it is possible to impose an order on an individual on the basis of the threat posed by the actions of others — a possibility that was strongly criticised by Kirby J in his dissenting judgment in *Thomas v Mowbray*.¹²³

Extrinsic principles are also evident in the Australian control order regime. The explicit statutory instruction that, when drafting the terms of an order, 'the court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances)',¹²⁴ is (at least token) recognition of the principle that the state should not unjustifiably interfere with the liberty of the individual; a principle grounded in the community values of human dignity and freedom.¹²⁵ Another extrinsic principle is that individuals should be given sufficient information to be able to respond to the case against them. As well as human dignity and freedom, this principle is grounded in the community value of procedural justice. One critical facet of public evaluations of procedural justice is whether the person affected had the opportunity to state their case to the legal authorities.¹²⁶ The principle is evident in the requirement that, if the decision is made to apply for confirmation of the order, the AFP must provide the controlee with sufficient details to enable them 'to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order'.¹²⁷ This requirement is offset, however, by the stipulation that no information should be disclosed if doing so would be likely to prejudice national security, put at risk ongoing law enforcement or intelligence operations, or risk the safety of the community or law enforcement or intelligence officers.¹²⁸ This is a significant restriction which is grounded in the community value of national security.

Individuals may disagree sharply on what is required to meet the demands of the principles that have just been identified. For example, views may differ on

¹²¹ Lynch, above n 79, 1187.

¹²² *Criminal Code* s 104.4(1)(c)–(d).

¹²³ (2007) 233 CLR 307, 431 [355].

¹²⁴ *Criminal Code* s 104.4(2).

¹²⁵ Braithwaite and Blamey, above n 21 371.

¹²⁶ Tyler, above n 100.

¹²⁷ *Criminal Code* s 104.12A(2)(a)(iii).

¹²⁸ *Ibid* s 104.12A(3).

whether the precautionary principle requires the possibility of imposing a control order on an individual on the basis of the threat posed by the actions of others, on whether a particular set of obligations amounts to an unjustifiable interference with an individual's liberty, and on whether the information given to an individual is sufficient for them to be able to respond to the case against them. There may, in other words, be very different views on what the demands of a particular principle require. For this reason, once the relevant intrinsic and extrinsic principles have been identified, the next task is to articulate those principles' demands.

B *Articulating the Demands of the Principles*

According to the balance metaphor, the anti-terrorism laws which have been introduced since 9/11 traded off some liberty for enhanced security.¹²⁹ Yet policymakers themselves appear to have a different view, frequently insisting that the legislation has not involved any sacrifice of liberty. Philip Ruddock, for example, has stated that 'The Federal Government's legislative response to September 11 has involved enacting laws that both enhance our national security and *protect our civil liberties*'.¹³⁰ In a similar vein, Geoff McDonald has insisted that the use of control orders and preventative detention orders 'to deal with terrorism is very limited, measured and *still consistent with the democratic ideals* of a society I hope we all believed should be protected'.¹³¹ And Nicola Roxon, when Shadow Attorney-General, said that the amendments made by the *Anti-Terrorism Act (No 2) 2005* (Cth) '*protect our basic freedoms* without in any way compromising the effectiveness of the regime to fight terrorists'.¹³² These statements may of course involve some element of not ceding the rhetorical ground. However, they are also indicative of another possibility — that extra-municipal influences, prevailing community attitudes and individual sensibilities may cause people to have different views of what the demands of particular principles require. If individuals hold different views of the demands of principle X, then a measure which one person regards as consistent with the requirements of principle X might in another person's eyes involve a significant erosion of that principle's demands.

The conflicting views in *Thomas v Mowbray*¹³³ on whether the control order regime violates the separation of powers provide a useful example. In terms of the proposed framework, the separation of powers may be understood as a cluster of principles which are derived from the community value of the rule of law.¹³⁴ Two

¹²⁹ Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press, 2007); Richard A Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press, 2006).

¹³⁰ Ruddock, above n 42, 254 (emphasis added).

¹³¹ Geoff McDonald, 'Control Orders and Preventative Detention — Why Alarm is Misguided' in Lynch, MacDonald and Williams, above n 22, 106, 115 (emphasis added). Geoff McDonald is the Assistant Secretary of the National Security Law and Policy Division, Attorney-General's Department.

¹³² Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 2005, 82 (Nicola Roxon, Shadow Attorney-General) (emphasis added).

¹³³ (2007) 233 CLR 307.

¹³⁴ Braithwaite and Blamey, above n 21, 371.

of these principles are that a federal court should not exercise power which, by its nature, is non-judicial, and that power that is judicial should not be exercised in a manner that is non-judicial. In *Thomas v Mowbray* the High Court had to decide, inter alia,¹³⁵ whether the control order regime is invalid under ch III of the *Constitution* on the basis that it violates one, or both, of these principles.

According to the two dissenting judges, the control order regime violates each of these principles. Hayne J explained that, since the criterion for whether to impose an order is protection of the public from a terrorist act, the decision:

does not depend upon the application of any norm or standard of conduct either to the person against whom the order is to be made, or to any past, present or future conduct of that person... The question that an issuing court is to address is not a question that is to be decided by the application of legal norms that are identified in the legislation¹³⁶

Instead the legislation requires 'the court to apply its own idiosyncratic notion as to what is just'.¹³⁷ Therefore it does not confer judicial power. Kirby J agreed, saying:

the stated criteria attempt to confer on federal judges powers and discretions that, in their nebulous generality, are unchecked and unguided. In matters affecting individual liberty, this is to condone a form of judicial tyranny alien to federal judicial office in this country.¹³⁸

The dissenting judges went on to say that, even if the power was by its nature judicial, the legislation requires this power to be exercised in a manner that is inconsistent with the nature of judicial power. Kirby J explained:

Requiring such courts, as of ordinary course, to issue orders ex parte, that deprive an individual of basic civil rights, on the application of officers of the executive branch of government and upon proof to the civil standard alone that the measures are reasonably necessary to protect the public from a future terrorist act, departs from the manner in which, for more than a century, the judicial power of the Commonwealth has been exercised under the *Constitution*.¹³⁹

The views of the dissenting judges differed markedly from those of the majority. Stating that there are other examples of judicial power which create new rights and obligations (as opposed to adjudicating existing ones), and that there is no rigid rule that restrictions of liberty (falling short of a deprivation of liberty) may only be imposed by judicial order following an adjudication of criminal guilt, the majority concluded that the power to issue control orders is, by its nature, judicial power.¹⁴⁰ Interestingly, some support for this view may be found from the

¹³⁵ The High Court also had to decide whether the control order regime is supported by one or more express or implied heads of legislative power under the *Constitution*. For discussion, see Lynch, above n 79; Roos, above n 115; Saul, above n 36.

¹³⁶ *Thomas v Mowbray* (2007) 233 CLR 307, 447-8 [406] (Hayne J).

¹³⁷ *Ibid* 479 [516] (Hayne J).

¹³⁸ *Ibid* 419 [322] (Kirby J).

¹³⁹ *Ibid* 436 [366] (Kirby J).

¹⁴⁰ *Ibid* 326-34 [10]-[29] (Gleeson CJ), 342-55 [64]-[110] (Gummow and Crennan JJ), 507-8 [594]-[598] (Callinan J).

UK Parliament's Joint Committee on Human Rights. When the New Labour Government first announced its intention to create the control order, it was proposed that the power to issue both species of order should be vested in the Home Secretary. The Joint Committee strongly criticised this, arguing that the power to issue control orders should be vested in the courts since 'Both Parliament and the Executive have long accepted and respected the judiciary's responsibility for the liberty of the individual'.¹⁴¹ It added that the argument that the power should be vested in the Home Secretary rested on an 'eccentric interpretation of the constitutional doctrine of the separation of powers'.¹⁴² In a similar vein, Gleeson CJ sought to defend the decision of the majority by saying the following:

[t]he argument for the plaintiff is that the power involved in making anti-terrorist control orders is exclusively non-judicial and, in its nature, antithetical to the judicial function... The corollary appears to be that it can only be exercised by the executive branch of government. The advantages, in terms of protecting human rights, of such a conclusion are not self-evident. In *Fardon*, I indicated that the exercise of powers, independently, impartially and judicially, especially when such powers affect the liberty of the individual, would ordinarily be regarded as a good thing, not something to be avoided.¹⁴³

Having concluded that the power to issue control orders is judicial in nature, the majority then held that the legislation does not require the power to be exercised in a manner that is inconsistent with the nature of judicial power.¹⁴⁴ Here, the majority emphasised that the criteria for making an order are not inherently too vague, since judges are familiar with such concepts as 'reasonably necessary' and 'reasonably appropriate and adapted', and stressed that confirmation hearings take place in open court, applying the rules of evidence, with the provision of documents, an opportunity for cross-examination and the burden of proof resting on the applicant.

Unsurprisingly, the outcome of *Thomas v Mowbray* has proved contentious. In the eyes of the dissenting judges and several commentators,¹⁴⁵ the decision flouted the demands of the principles that a federal court should only exercise judicial power, and should exercise it in a judicial manner. In the eyes of the majority, however, their decision did not involve any erosion of the demands of these principles. In fact, Gleeson CJ sought to defend the decision by appealing to the principle that an individual's human rights and liberty should be protected. These different views thus stem not from different levels of willingness to sacrifice liberty in the pursuit of security, but from different opinions on what the demands of those principles comprising the separation of powers require.¹⁴⁶

¹⁴¹ Joint Committee on Human Rights, *Prevention of Terrorism Bill: Preliminary Report*, House of Commons Paper No 389, Session 2004–05 (2005) 5.

¹⁴² *Ibid.*

¹⁴³ *Thomas v Mowbray* (2007) 233 CLR 307, 329 [17] (citations omitted).

¹⁴⁴ *Ibid* 335 [30] (Gleeson CJ), 355–8 [111]–[126] (Gummow and Crennan JJ), 508–9 [599] (Callinan J).

¹⁴⁵ See, eg, Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders under Federal Law: The Case for a Bill of Rights' (2007) 31 *Melbourne University Law Review* 1072; Lynch, above n 79; Denise Meyerson, 'Using Judges to Manage Risk: The case of *Thomas v Mowbray*' (2008) 36 *Federal Law Review* 209.

¹⁴⁶ A similar point is made by David Dyzenhaus and Rayner Thwaites. They distinguish two different cycles of legality — one involving a substantive conception of the rule of law, and the other

C *Determining the Weight that Should Be Attached to these Demands*

Having articulated the demands of the relevant principles, the next task is to determine the weight that should be attached to these demands. A useful illustration here is the debate as to whether the definition of terrorism should include a motive requirement. On both sides of the debate are arguments which invoke the principle that individuals' human rights and liberty should be protected. However, since the inclusion of a motive requirement potentially affects the human rights and liberty of different groups of individuals in different ways, the principle exerts a number of different demands. The different opinions stem in part from different views on the relative weight of these demands.

In Canada, the inclusion within a definition of terrorism of a requirement of a political or religious motive has been held to unconstitutionally infringe freedom of speech, religion, thought, belief, expression and association.¹⁴⁷ Agreeing that the definition should not include a political and religious motive requirement, Kent Roach has argued that, as well as concerns about privacy and freedom of religion and expression, such a requirement could contribute to an increased risk of racial, religious or ethnic profiling and greater focus on particular communities.¹⁴⁸ He also asserts that a political and religious motive requirement should be resisted 'in order to protect the accused and others from discrimination on the basis that they are members of an unpopular religious group or that they express unpopular religious or political views'.¹⁴⁹

Opposing arguments have been advanced by Ben Saul.¹⁵⁰ While he concedes that a motive element will necessarily draw more attention to political, religious or ideological beliefs, he stresses that 'such attention is only triggered where such beliefs are connected with acts of, or threats or plans to commit, unlawful physical violence as enumerated in terrorism definitions' and so '[p]eaceful politics, religions or ideologies are not at risk'.¹⁵¹ Moreover, he points out that law enforcement officials themselves have doubted the usefulness of racial and religious profiling in investigations and intelligence assessments, and adds that, to the extent that there are concerns about profiling, the solution lies in better safeguards and training and supervision of officers.¹⁵² In fact, according to Saul,

understanding the content of legality in a more formal manner — and state: 'The central question in the topic of the judicial role in a time of alleged war on terror is thus not whether judges will play a role in policing the legality of legislative and executive responses to terror. Rather, it is whether judges can avoid participating in the second cycle of legality — the one that results in the mere appearance, even the pretence of legality': David Dyzenhaus and Rayner Thwaites, 'Legality and Emergency — The Judiciary in a Time of Terror' in Lynch, MacDonald and Williams (above n 22, 9, 11). In other words, the 'central question' is how legality should be understood, not the level of willingness to sacrifice it.

¹⁴⁷ *R v Khawaja* [2006] OJ 4245.

¹⁴⁸ Kent Roach, 'The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive' in Lynch, MacDonald and Williams above n 22, 39.

¹⁴⁹ *Ibid* 43.

¹⁵⁰ Ben Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?' in Lynch, MacDonald and Williams (above n 22, 28).

¹⁵¹ *Ibid* 35.

¹⁵² *Ibid*.

‘the inclusion of a motive element ultimately serves to protect, rather than diminish, basic human rights’.¹⁵³ The effect of a motive requirement is to reserve the stigmatising label ‘terrorist’ for ‘serious violent political or religious criminals...excluding private violence, which does not challenge democratic politics in the same way’.¹⁵⁴ And, as well as placing individuals with a ‘private’ motive outside the reach of anti-terrorism laws, the inclusion of a motive requirement sends out a strong symbolic message about how the state views the actions of those ‘who would terrorise others in the pursuit of racial supremacy or eugenic fantasies’.¹⁵⁵

Two important points emerge from this brief overview. First, it provides an example of how a principle may exert several, not necessarily compatible, demands. While both Roach and Saul invoke the principle that individuals’ human rights and liberty should be protected, Roach focuses on the rights of Muslim and Arab communities, raising concerns about freedom of expression and religion and the possibility of profiling, while Saul focuses on the rights of those who commit acts of serious violence with a non-political or religious motive and of those communities who are subjected to racial or religious hatred. This is thus a powerful example of the fact that debates on anti-terrorism laws and policy should not simply be ‘characterised solely as situations where opponents of the laws care about human rights, while proponents are demonstrating reckless disregard for human rights’.¹⁵⁶

Second, the discussion demonstrates that, once the demands of a principle have been articulated, it is then necessary to determine the weight that should be attached to those demands. This explains how Saul and Roach can both apply the same principle (that individuals’ human rights and liberty should be protected) and yet arrive at different conclusions. Saul does not dispute that the principle demands that freedom of expression and religion should be protected and that Muslim and Arab communities should be protected from profiling. Rather, he argues that in this context these demands carry less weight than the competing demands he outlines, since: the authorities will only concern themselves with an individuals’ beliefs where those beliefs are connected with acts, or threats or plans to commit unlawful serious violence; and in practice profiling is not widely used and there are other methods available to deal with it. The different views of the relative weight of these demands are thus an important source of the varying opinions on the appropriateness of a motive requirement.

D *Meta-Principles*

Under the conventional approach to anti-terrorism policy, the examination of all of the material considered above is carried out under the pretence of balancing. This is mistaken. For a start, it obscures key issues. For example, to try and use

¹⁵³ Ibid 36.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid 37.

¹⁵⁶ Joo-Cheong Tham and Keith D Ewing, ‘Limitations of a Charter of Rights in the Age of Counter-Terrorism’ (2007) 31 *Melbourne University Law Review* 462, 474.

the image of a balance to depict attempts to challenge the government's efforts to securitise terrorism and so provide a basis for an alternative security discourse does not capture what is at stake in the discussion. Moreover, this all-embracing use of the balance metaphor is prone to misrepresent specific issues of critical importance. As we have seen, the key disagreement between Roach and Saul was the extent to which the inclusion within a definition of terrorism of a requirement of a political or religious motive would risk invasions of privacy, increased profiling and discrimination against unpopular religious and political groups. The task here is not one of balance, with the competing viewpoints placed in each pan of an imaginary set of scales. Rather, the extent of the risk is a factual question which can only be properly answered by empirical investigation.

Once the discussion of anti-terrorism policy has been liberated from the distorting grip of the balance metaphor, much of the effective critical work can be done through a systematic application of the framework as it has been developed so far, by determining the particular demands of the principles involved and the weight that should be attached to these demands. The proposed framework's emphasis on these tasks also distinguishes it from a proportionality framework. A proportionality framework like the one suggested by Michaelsen requires an assessment of whether there is 'a reasonable relationship between the means employed and the aims sought'.¹⁵⁷ The erosion of the demands of one principle must be assessed in light of the importance of the demands of the conflicting principle, with more justification being required the greater the erosion of the first principle's demands. The proportionality approach thus presupposes a conflict between the demands of the two principles. In the proposed framework, by contrast, closely engaging with the prior tasks before turning to the realm of the meta-principles may reveal that there is in fact no conflict to be addressed. In *Thomas v Mowbray*,¹⁵⁸ for example, once it had been determined that the power to issue control orders is, by its nature, judicial power and that the legislation does not require this power to be exercised in a non-judicial manner, it followed that the facts fell outside the scope of the principle that a federal court should not exercise power which, by its nature, is non-judicial, and the principle that power that is judicial should not be exercised in a non-judicial manner. There was thus no issue of conflicting principles, and no further work to be done.

Nevertheless, the framework proposed here does leave open some possibility of the relevant principles for discussing a particular policy being found to be in a state of conflict. Even where the demands of principles do conflict, neither the uniform image of a balance nor a proportionality framework adequately captures the full range of responses that can be made to that conflict. In such situations, it would be more accurate to recognise a number of meta-principles which may determine how the conflict should be resolved. At least three meta-principles can be recognised as offering quite distinct approaches to 'balancing', which I shall label reconciliation, compromise and prioritisation. Where the reconciliation meta-principle is applied, there may be some limited erosion of the competing principles but an arrangement will be reached which preserves the

¹⁵⁷ Michaelsen, above n 5, 36.

¹⁵⁸ (2007) 233 CLR 307.

essence of the competing demands. By contrast, when the compromise meta-principle is applied an arrangement will be reached which does erode the essence of both competing demands. When the prioritisation meta-principle is applied the demands of one principle are prioritised at the expense of the other, so the essence of that principle is preserved whilst the essence of the other is eroded. Of the three meta-principles, it is preferable to apply the reconciliation principle (unless the demands of one of the competing principles are deemed to be illegitimate or undesirable). However, in practice it will often prove impossible to find an arrangement which preserves the essence of both principles. For example, when determining the standard of proof which should apply at control order applications, it is impossible to reconcile the principle of proof beyond reasonable doubt with the precautionary principle's demand that the standard of proof be set at a much lower level. In such situations a choice must be made between the compromise and prioritisation meta-principles. To speak simply of 'balance' or 'proportionality' obscures the differences between the three meta-principles and the choice that must be made between them.

Distinguishing the three meta-principles and emphasising the choice that must be made between them should not be isolated from the critical work that may already have been done when determining the demands of the principles and the weight that should be attached to these demands. For example, if the demands of principle X could be understood as supporting requirement 1 or requirement 2, and it is only in the latter case that it conflicts with the demands of principle Y, then a prior determination that principle X should be understood as supporting requirement 1 will mean it is unnecessary to turn to the meta-principles. So if empirical investigation were to reveal that the inclusion of a requirement of a political or religious motive within the definition of terrorism would not create any significant risk of invasions of privacy, increased profiling or discrimination against unpopular religious and political groups, the apparent conflict between the different demands of the principle that individuals' human rights and liberty should be protected would evaporate. In short, wherever the strategic part of the debate is undertaken, the proposed framework is able to make it transparent, and highlights the fundamental point that balancing is not the sole, or even the central, task in anti-terrorism policy.

VI Conclusion

The examples discussed illustrate some of the inadequacies of the metaphor of a balance. To try and analyse the different views, held by the majority and minority judges in *Thomas v Mowbray*, of what the separation of powers requires, or the different opinions on the weight that should be attached to concerns about the effect of a motive requirement in definitions of terrorism, in terms of security versus liberty, is to find oneself in an analytical straitjacket. Moreover, given the fact that, when the balance metaphor is employed, the scales are invariably tipped in favour of security, those concerned to protect individuals from state overreaching would be well advised to move away from its use and utilise a framework which opens up fuller engagement with key issues. For example, while the balance metaphor presupposes that there is a common

understanding of what is meant by security, the earlier discussion showed that there are a variety of security discourses. The proposed framework opens up the possibility of a broader conception of security, which also includes security against the powers of the state and the potential for anti-terrorism laws to create not just security gains, but also security losses. In so doing, it offers an opportunity to challenge the government's attempt to securitise terrorism by developing an alternative security discourse. Perpetuating the simplistic assumptions of the balance metaphor forestalls such opportunities.

The prevailing attitudes of a community may have an important effect on discussions of anti-terrorism laws and policy, particularly in the aftermath of a terrorist attack. First, they may affect how values are conceived and how conflicts between values are resolved. To use national security to argue that powers are needed which are designed to deal with an existential threat, and to present civil liberties as "luxury goods" for enjoyment in times of peace,¹⁵⁹ is to ingratiate prevailing anxieties and panic. Second, a community's prevailing attitudes may affect the process of deriving intrinsic and extrinsic principles from a rationale or community value, how the demands of those principles are construed, and the weight that is attached to these demands. So, for example, not only has the precautionary principle been derived from the rationale of the control order regime, but the demands of this principle have been construed more expansively as over-inclusivity has appeared more attractive and growing weight has been attached to these demands. Conversely, prevailing attitudes could lead to the demands of other principles being given less weight; it hardly takes much to imagine sections of the media stating that the demands of the principle that an individual's human rights and liberty should be protected carry little weight when dealing with suspected terrorists. Third, the rationale of a system/regime may be diluted or distorted. The creation of numerous broadly drafted terrorism precursor offences has so stretched the preventative capabilities of the criminal law that these offences threaten the very moral legitimacy and fairness to which they seek to appeal. In all of these instances, it is important that those concerned to prevent state overreaching seek to challenge prevailing attitudes by accurately identifying them and critically engaging with them. This is the basis for an effective challenge to the 'politics of fear',¹⁶⁰ instead of replacing a security panic with a libertarian one.

It is also important to have regard to the interplay between the rationales of different systems and regimes. A useful example here are the stipulations in the UK's control order regime (which are not mirrored in the Australian regime) that: before making (or, in the case of derogating orders, applying for) a control order, the Home Secretary must consult with the police about 'whether there is evidence available that could realistically be used for the purposes of a prosecution of the individual for an offence relating to terrorism';¹⁶¹ and, once an order has been made, the relevant chief police officer has a duty to keep the possibility of prosecution for a terrorism-related offence under review for the duration of the

¹⁵⁹ Michaelsen, above n 2, 6.

¹⁶⁰ David L Altheide, *Terrorism and the Politics of Fear* (AltaMira Press, 2006).

¹⁶¹ *Prevention of Terrorism Act 2005* (UK) c 2, s 8(2).

order.¹⁶² While these provisions may be of only limited utility,¹⁶³ they do at least illustrate the potential to appeal to the rationale of one system in order to argue for restraints to be imposed on another.

Finally, the distinction between intrinsic and extrinsic principles highlights further methods for challenging the reach of anti-terrorism legislation. Before invoking extrinsic principles which are derived from such values as the rule of law, human dignity and freedom, the demands of the intrinsic principles and the weight attached to these demands should first be scrutinised and, if appropriate, challenged. It can plausibly be argued, for example, that, given the other methods of disrupting terrorist activity which are available, the precautionary principle should not be construed to require the ability to impose a control order on an individual: (1) on the basis of the threat posed by the actions of others; or (2) in the absence of any evidence that the individual is presently involved in any activities or associations which might point to planned or likely future terrorist activity on their part. Alternatively, if it is determined that this is required by the demands of the precautionary principle, it may be argued that the other methods of disruption mean that relatively little weight should be attached to these demands. Moreover, the demands of the intrinsic principles should be tested to check that they are coherent. The UK's control order regime fails this test in one obvious respect: for non-derogating orders, when there is no 'public emergency threatening the life of the nation',¹⁶⁴ the standard of proof is 'reasonable suspicion', yet for derogating orders, when there is a public emergency, the standard of proof is increased to 'the balance of probabilities'. From a preventative perspective this is perverse. The concession that the civil standard of proof should apply at applications for derogating orders should have been taken as foreclosing the claim that the reasonable suspicion standard should apply at applications for non-derogating orders.

These illustrations demonstrate how the proposed conceptual framework may be used to open up a number of strategies and techniques which can be employed by those concerned to protect individuals from state overreaching. Given the proliferation of new anti-terrorism laws in the years since 9/11, and the absence of an entrenched bill of rights in Australia, these methods are of considerable practical importance.

¹⁶² Ibid s 8(4).

¹⁶³ In the UK, none of the 48 individuals who have been subject to a control order have subsequently been prosecuted, except for breach of the order. See Lord Carlile of Berriew, *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (The Stationery Office, 2011).

¹⁶⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010), art 15(1).

VII Appendix: The Proposed Conceptual Framework

