

## Controlling Risk

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Prevention has recently come in for greater academic scrutiny than it has ever received, especially in the context of terrorism. This is unsurprising. In the ten years since the 9/11 attacks, we have seen a wide range of innovations in and extensions of law that are primarily directed towards prevention including the extension of criminal law, immigration law and forms of civil detention.

This chapter is about preventive detention in order to prevent serious criminal wrongdoing. We can call preventive detention to reduce the risk of criminal wrongdoing by those detained preventive *criminal* detention. Preventive criminal detention typically has the following features. The liberty of a person who is deemed to pose a risk of committing, causing or contributing to a harmful and/or wrongful act is restricted in order to reduce or eliminate the risk that she will commit, cause or contribute to such an act.

Preventive detention might also be used where it is not wrongful acts, or acts at all, that the state wishes to prevent. Detention of dangerous individuals suffering from a serious mental disorder might be justified on preventive grounds. They are prevented from committing harmful acts, but not acts that they are responsible for committing. And prevention might be justified to avoid harm that does not come about through acts at all. For example, quarantine might sometimes be justified to prevent the spread of disease, but the spread of disease need not come about through acts.

Whilst the chapter focuses on preventive criminal detention, is also intended as a more general contribution to thinking about prevention, and in particular thinking about the role of risk in prevention. My aim is to explore one important moral question that will contribute to an overall analysis of preventive detention: the permissibility of harming people, through the restriction of their liberty, to reduce the risk that they will harm others.

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To provide focus for this discussion I consider one modern form of preventive detention found in UK law: control orders.<sup>1</sup> Many moral considerations are relevant to evaluating control orders. I will sketch these out below. I investigate only two of those considerations in any depth. First, to what extent is it wrong to deprive a responsible person of her liberty in order to prevent her from acting wrongfully? Does the respect that we owe to responsible agents require us to presume that they will not act wrongfully even when we can predict that they might? I will suggest that despite its popularity, this factor is less important than it may seem.

Secondly, to what extent is it permissible to restrict a person's liberty simply on the grounds that there is a risk that person we are concerned with will otherwise carry out a terrorist attack? That control orders are concerned with risk management has been widely noted, and many consider this a troubling feature of the regime.<sup>2</sup> However, a systematic evaluation of the moral significance of risk is still elusive. A familiar utilitarian approach to risk analysis has received criticism.<sup>3</sup> But no fully developed alternative model of risk evaluation has been proposed.

The utilitarian approach to risk, I will suggest, might be quite supportive of the control orders regime. Furthermore, it is quite difficult to find non-consequentialist arguments to resist this approach. I will suggest that one approach that might have some promise is to focus on the idea that utilitarianism of risk fails to do justice to the separateness of persons. But it is quite difficult to assess the significance of this argument.<sup>4</sup> There is promise in a non-consequentialist attack on control orders, then, but decisive arguments are difficult to come by.

## **I. Control Orders**

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<sup>1</sup> Control orders have been abolished in the UK, at least in name, and replaced by what are called Temporary Prevention and Investigation Measures (TPIMs). I will continue to refer to these as control orders for reasons outlined below.

<sup>2</sup> See, for example, L Zedner 'Preventive justice or pre-punishment? The case of control orders' (2007) 59 *Current Legal Problems* 174.

<sup>3</sup> See J Waldron *Torture, Terror and Trade-Offs: Philosophy for the White House* (Oxford: OUP, 2010) chs. 2 and 5; V Tadros 'Justice and Terrorism' (2007) 10 *New Criminal Law Review* 658 and 'Crimes and Security' (2008) 71 *Modern Law Review* 940. Utilitarianism is still endorsed by some. See E Posner and A Vermeule *Terror in the Balance: Security, Liberty, and the Courts* (Oxford: OUP, 2007).

<sup>4</sup> This general criticism of utilitarianism, though not the form that it takes in this paper, stems from J Rawls *A Theory of Justice* revised edn. (Oxford: OUP, 1999) 19-24, 160-68.

Since 9/11, the UK has adopted controversial measures to reduce the risk of terrorist attacks being carried out. The criminal law has been used, and no doubt part of the rationale for the expansion of terrorist offences is preventive. And some non-criminal, or perhaps better, quasi-criminal, legal techniques have been used. Part IV of the Anti-Terrorism, Crime and Security Act 2001 (ACTSA) created the power to restrict the liberty of terrorist suspects without trial, resulting in detention of a number of people in Belmarsh Prison. When the House of Lords held those provisions to violate the UK's human rights obligations in the celebrated case of *A v Secretary of State for the Home Department*,<sup>5</sup> they were repealed.

Part IV of ACTSA was replaced by a new set of provisions governed by the Prevention of Terrorism Act 2005 (PTA). The PTA created a set of powers that permit the state, through an action of the responsible Secretary of State (or in the case of derogating control orders, the courts), to restrict the liberty of terrorist suspects without trial. The restriction of liberty takes the form of 'house arrest', though the Labour government who developed these provisions resisted this phrase.<sup>6</sup> The orders that restrict liberty are called 'control orders'. They have generated a great deal of human rights jurisprudence, academic commentary and political criticism.

The coalition government has reviewed the scheme. At least some members of the coalition had the ambition to abolish it entirely. However, the latest review of the use of control orders conducted for the government by Lord Carlile found that control orders are still necessary for a small number of cases where robust information is available that the controlee poses a serious risk to the public and there is little prospect of a successful criminal prosecution.<sup>7</sup> The government agreed with this assessment.<sup>8</sup>

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<sup>5</sup> [2004] UKHL 56.

<sup>6</sup> Even the first reviewer of the provisions, Lord Carlile, who is hardly a champion of civil liberties, more or less admitted the appropriateness of this label. See *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (February 2006) para 43.

<sup>7</sup> See *Sixth Report of the Independent Review Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (February, 2011).

<sup>8</sup> See *Renewal of Control Orders Legislation 2011: The Government Response to the Eighth Report from the Joint Committee on Human Rights Session 2010-11* (HMSO: CM 8096).

It is now clear that there will be no substantial relaxation on the use of preventive detention in the face of the risk of terrorism. In the government's review of counter-terrorism policy, recommendations were made to abolish control orders and replace them with an alternative system called Terrorism Prevention and Investigation Measures (TPIMs). These proposals have been enacted in the Terrorism Prevention and Investigation Measures Act 2011 (TPIMs Act). TPIMs are sometimes referred to as 'control orders lite', though it is not clear just how 'lite' they will be.

The differences between TPIMs and control orders are relatively marginal – the main differences are that there is a stricter limit on relocation of controlees and there is a restriction on renewing TPIMs in the absence of new evidence of terrorism related activity.<sup>9</sup> Renaming control orders when claiming to abolish them is a shameful face-saving exercise by the government. This is not the kind of approach that citizens are entitled to expect to crucial questions of civil liberties and national security. In the light of this I will continue to refer to TPIMs as control orders.

The control orders regime is legally complex and I will make no attempt to cover all of its dimensions. The first controversial feature of the regime is the evidential threshold that must be crossed to warrant a restriction of the controlee's liberty. Sections 2 and 3 of the TPIMs Act provides that the Secretary of State may impose a control order if the following conditions are fulfilled: a) she reasonably believes that the individual is, or has been involved in terrorism-related activity, some of which is 'new'; b) she reasonably considers it necessary to impose such an order, with the particular measures contained in it, to protect members of the public from a risk of terrorism arising from the involvement in terrorism-related activity of the controlee. Involvement in terrorism related activity is 'new' if it occurred at any time unless a control order has already been imposed on the individual. If the latter is the case, the involvement must have occurred since the imposition of the most recent order.

The level of risk sufficient to justify the imposition of a control order is unclear from this provision. There are two dimensions to the test. One is backward looking. It concerns the involvement of the person in terrorism-related activity. The other is forward looking. It concerns the necessity of making the control order. The low evidential standard in the PTA, which used the phrase 'reasonably suspects' in

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<sup>9</sup> See *Liberty's Committee Stage Briefing on the Terrorism Prevention and Investigation Measures Bill in the House of Commons* (June 2011).

place of ‘reasonably believes’ came in for a great deal of criticism. The current government accepted this criticism and the TPIMs Act replaces the phrase ‘reasonably suspects’ with ‘reasonably believes’.

However, this also seems unsatisfactory – it is very unclear what the evidential standard intended is. The government, and the Joint Committee of Human Rights, appears to believe that this standard is lower than the ordinary civil standard of proof of a balance of probabilities.<sup>10</sup> But that is unclear from the wording of the legislation. In general, if, according to one’s evidence, p is probably not the case, it does not seem reasonable to believe that p. It is only reasonable to believe that p *might* be true. But an order can be imposed only if the Secretary of State reasonably believes that the individual is, or has been, involved in terrorism-related activity, not if he reasonably believes that the individual might be, or might have been involved in terrorism related activity. Hence, from the wording of the legislation, it seems that the evidential threshold is, contrary to the intentions of the government, higher than a balance of probabilities.

There is an even more puzzling aspect of the evidential threshold for a control order, however. In the TPIMs Act, in common with the PTA, the main focus of the judgement of the Secretary of State is backwards looking – it is concerned with whether the person whose liberty is restricted has been involved in terrorism-related activity in the past. The forward looking question – what level of risk warrants a restriction on liberty - is almost completely unspecified.<sup>11</sup> Whilst the backwards looking question seems important in helping to render control orders legitimate, it is surely the forward looking part of the test that ought to be the main focus – if control orders are to be justified, they are to be justified in virtue of their protective effects.

One problem with the forward-looking dimension of the test is that the word ‘necessary’ is ambiguous. It surely cannot mean that the imposition of the control order is the *only* way of preventing the threat – the threat could also be met by killing the individual, or by giving in to the demands of the organisation of which he is a part. Perhaps it might mean that no other way of preventing the threat is permissible.

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<sup>10</sup> See, for example, the Government response to Joint Committee on Human Rights report of 19 October 2011 on TPIM Bill.

<sup>11</sup> The TPIMs Act does add that the Secretary of State’s judgement must be reasonable, and that he or she must reasonably consider it necessary to impose the specific measures in the TPIM on the individual. See s.3. This improvement, though not insignificant, is hardly sufficient to correct the problem.

But this seems too demanding. Suppose that surveillance could meet the same threat, but surveillance would cost the whole of the budget for the arts. Spending that money on surveillance rather than on the arts might be permissible, at least if citizens consent to the money being spent in that way, but that would not seem to render the use of the control order wrong.

Furthermore, the required level of risk that the controlee must pose to the public is unclear. There must be 'a risk of terrorism'. But, from the wording of the TPIMs Act, it appears permissible to use a control order even if that risk is miniscule. Consider a person who has downloaded information from the al Qaida handbook, but who poses almost no risk of completing a terrorist attack because this person is an incompetent coward who no one in a terrorist organisation trusts. May her liberty be restricted even though she poses almost no risk to the public? Controlling her may be necessary to eliminate the risk that she poses. But doing so seems disproportionate to do so given the harm that will be done to her and the magnitude of the threat.

This draws on a familiar feature of the philosophy of defensive harm. Two of the conditions that need independently to be satisfied to render the imposition of defensive harm permissible are necessity and proportionality. It is wrong to harm a person to avert a threat where the threat could be averted through non-harmful means. If the threat is averted through harmful means, the harm imposed is unnecessary. But even if it is necessary to use harmful means to avert a threat the harm that is imposed on the threatening person may be disproportionate. For example, if the only way in which I can prevent a person from shooting me with a pea shooter is to shoot him in the head with a high powered rifle, it is wrong for me to shoot him. Shooting him is necessary to avert the threat but it is disproportionate.<sup>12</sup>

Whilst they are not the main focus of this paper, it is worth mentioning two further controversies about control orders. One concerns the role of the courts in control orders. To impose a control order on an individual, the Secretary of State makes an application to the court for permission. The role of the court at this stage is limited - to determine whether the decision of the Secretary of State is obviously flawed.

If an order is imposed, the controlee is entitled to a review hearing. The TPIMs Act does little to alter the process that was established in the PTA. This

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<sup>12</sup> See, for example, J McMahan *Killing in War* (Oxford: OUP, 2009) 23.

process has proved highly problematic. Ensuring that the use of control orders is compatible with Article 6 of the ECHR, which protects the right to a fair trial, has proved very difficult, and it has been thought by some that this difficulty alone would render control orders almost useless.

The central problem is that the evidential basis for the judgement that the controlee is a risk cannot typically be released to the public at large or to the controlee without compromising security. This has led to the use of closed proceedings to determine whether the use of a control order is warranted. Although the controlee is represented in these proceedings, representation is hardly ideal. A special advocate is assigned to the controlee who has severely limited opportunities to communicate with the controlee. This ensures that some central evidential defences, alibi being the most obvious example, are effectively unavailable to the controlee.

A significant advance in the control orders regime was made by the decision in *Secretary of State for the Home Department v AF*.<sup>13</sup> In that case, the House of Lords, somewhat reluctantly following the lead given to it by the European Court of Human Rights,<sup>14</sup> decided that the controlee has a core irreducible right to be told sufficient information to challenge the case against him by instructing his special advocate. It is not completely clear how far the TPIMs Act complies with the judgement in *AF*.<sup>15</sup> At any rate, the use of closed proceedings remains a troubling feature of the TPIMs regime.

The other controversy concerns the degree to which liberty may be restricted compatible with Article 5 of the ECHR. Article 5 protects the right to liberty. The ambition of human rights jurisprudence in this area is to determine when a deprivation of liberty is so severe that Article 5 is engaged. Imprisoning a person clearly violates Article 5, and exception is made in Article 5 for this in the case of those who have been convicted of a criminal offence. This is why successful derogation from Article 5 was a necessary condition of the human rights compatibility of Part IV of ACTSA.

The current state of the law with respect to control orders is outlined in *Secretary of State for the Home Department v JJ and others*.<sup>16</sup> One important decision taken in that case is that Article 5 can be breached by measures short of

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<sup>13</sup> [2009] UKHL 28

<sup>14</sup> In *A v United Kingdom* (Application No 3455/05, 19 February 2009).

<sup>15</sup> See TPIMs Act Schedule 4, Section 4(1), which does not require a summary of the relevant information to be provided to the controlee in all cases.

<sup>16</sup> [2007] UKHL 45.

imprisonment. Secondly, the test for the deprivation of liberty is counterfactual – whether there has been a deprivation of liberty contrary to Article 5 depends on a comparison between the life of the controlee and the life that he would have been living had he not been subject to a control order.<sup>17</sup> The counterfactual test is hardly ideal. It implies that imposing a curfew on me between 8pm and 10 am would not amount to *any* deprivation of my liberty if I never go out between 8pm and 10 am. This is unintuitive conceptually and unappealing normatively. My liberty clearly has been restricted in these conditions, and my liberty to go out at these times may be valuable to me even if I never go out. It may be valuable because having an option to do something can be valuable even if that option is not chosen,<sup>18</sup> and also because of the symbolic value that restricting a person’s options may have.<sup>19</sup>

Standard measures that are deemed compatible with Article 5 include, *inter alia*, determining the place of residence of the controlee, the requirement that he wear an electronic tag, the imposition of a curfew,<sup>20</sup> restrictions on the area that the controlee may travel when the curfew is not in effect, the requirement to report regularly to a monitoring company, the requirement not to possess unauthorised devices for communication, sometimes limiting the controlee to possession of a single landline telephone and no computer access, a limit on the person’s place of worship and restrictions on, and scrutiny of, visitors to the person’s flat.

The TPIMs regime helpfully specifies more clearly what measures the Secretary of State can impose on controlees,<sup>21</sup> but they are broadly in line with those typically imposed in control orders, and are quite extensive. The most important new restriction on the powers of the Secretary of State is that a TPIM cannot require the controlee to relocate away from his local area. This is so despite the government recently successfully defending a control order which relocated the controlee in *Secretary of State for the Home Department v CD*.<sup>22</sup> The government has also drawn up the Enhanced Terrorism Prevention and Investigation Measures Bill and subjected it to pre-legislative scrutiny, to be enacted if this proves necessary. This Bill, if

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<sup>17</sup> Para. 18.

<sup>18</sup> See, further, V Tadros *Criminal Responsibility* (Oxford: OUP, 2005) 200-7.

<sup>19</sup> See the related discussion in T M Scanlon *What We Owe to Each Other* (Cambridge, Mass.: Harvard UP, 1998) 352-3.

<sup>20</sup> The average length of curfews imposed by control orders is 11.9 hours. See *Sixth Report of the Independent Review* para.19.

<sup>21</sup> TPIMs Act, Schedule 1, Part 1.

<sup>22</sup> [2011] EWHC 2087 (Admin).



enacted, would permit the Secretary of State to relocate the controlee to a residence anywhere in the UK.

A further controversial feature of control orders was their duration. Control orders were imposed for 12 months, after which the Secretary of State may seek for it to be renewed. The time that a controlee may spend under a control order was potentially indefinite. Most controlees were subject to an order for less than two years, and the maximum duration that anyone has been a controlee is four years.<sup>23</sup> The new TPIMs regime will permit restrictions on a person's liberty for a maximum of two years unless there is evidence that the person has been involved in new terrorism related activity in that period.

In some cases, the restrictions imposed as part of control order that were intended to be non-derogating are so severe that they constitute a breach to Article 5. This was the case in *JJ* itself. In that case the controlee was under curfew for 18 hours a day and outside that curfew was required to remain in a geographical area in which he had no family or friends.<sup>24</sup> This effectively amounted to a form of social isolation. Where it is decided that there is a breach of Article 5 the court will quash the control order on the basis that the Secretary of State had no power to make it in the first place. The new TPIMs regime has the preferable feature that it allows the court to adjust the terms of the control order to ensure Article 5 compatibility without quashing it entirely.<sup>25</sup>

In evaluating control orders, it is also important to remember not only the direct effects of control orders on the liberty of controlees but also their psychological consequences, which may be severe and long term, and their effects on third parties, notably family members.<sup>26</sup> Whilst there can be no doubt that the imposition of a control order is typically a less severe restriction on liberty than imprisonment, its effects on the controlee and his family may be not far short of the effects of imprisonment.

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<sup>23</sup> See *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (HMSO 2011, cm 8004) 36-7.

<sup>24</sup> As the more recent case of *Secretary of State for the Home Department v AP* [2010] UKSC 24 makes clear, the extent to which some measure restricts a person's liberty depends on all of their circumstances, including decisions of their family and friends to visit them if they are relocated.

<sup>25</sup> TPIMs Act s.9(5)(b) and (c).

<sup>26</sup> See, further, L Zedner 'Preventive justice or pre-punishment'.

As my main focus is risk, I will assume some standard content of control orders that might also be imposed by a TPIM. The kind of restriction that I will assume is typical of control orders are somewhat short of those contested in *JJ*, but include the standard measures outlined above.

## II. The Moral Context

A full evaluation of control orders, in common with other forms of preventive detention, requires consideration of a very wide range of difficult moral and political issues. Here are some of the most important:

- 1) *Risk prevention*. The ambition of preventive detention is risk reduction or elimination. This raises a range of questions. How precise can we be about the degree of risk, and what is the moral significance of imprecision? What is the moral significance of the prevention of risk when compared with the prevention of certain harm? Does it make a difference how risks are distributed in a population? The first, and especially the second, of these questions will provide my main focus in this paper.<sup>27</sup>
- 2) *Doing/Allowing*. If a risky person is deprived of her liberty she is (typically) harmed. If we fail to detain the risky person we fail to prevent a risk, and if the risk is realised we fail to prevent harm. Many think that it is more difficult to justify harming than failing to prevent harm.<sup>28</sup>
- 3) *Intentions*. If we deprive a person of her liberty we harm her intentionally. Of course, in principle at least a person could be deprived of her liberty without being harmed. It is essential to our aim only that she is prevented from harming others, not that she is harmed. This distinguishes prevention from punishment – punishment aims at harm (either for its own sake, if one is a

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<sup>27</sup> For discussion of risk distribution, see J Waldron ‘Security and Liberty: the Image of Balance’ in *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford: OUP, 2010) and V Tadros ‘Crimes and Security’.

<sup>28</sup> There are some non-consequentialists who think the distinction is less important with respect to state action, but even amongst them some think that it retains importance when fundamental rights are at stake. See, for example, T Nagel *Equality and Partiality* (Oxford: OUP, 1991) 99-100.

retributivist, or for the sake of deterrence if one is not). But the harm imposed through preventive detention is nevertheless intentional.<sup>29</sup>

- 4) *Elimination*. Although intentional, the harm that we impose on a person through preventive detention does not amount to using the person as a means to an end. It may be more difficult to justify using a person (what I call *manipulative* harming) than it is to justify harming a person simply to prevent the realisation of a threat they pose (what I call *eliminative* harming).<sup>30</sup>
- 5) *Responsibility*. Depriving a person of her liberty in order to prevent her from committing a criminal offence aims to prevent her from harming people in a way that is under her control. This may make a difference to the justification of control orders. It is unclear, though, whether it is easier or harder to justify restricting a person's liberty on these grounds. I will discuss this issue further below.
- 6) *Wrongdoing*. Similarly, control orders aim to prevent wrongdoing rather than mere harm. Some might think that there are much stronger reasons to prevent wrongdoing than harm.<sup>31</sup>
- 7) *Separation of Powers*. The decision to impose a control order on a person is taken by the Secretary of State, and hence is under the control of the executive. Courts have the role of scrutinising the decision, but this relegates

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<sup>29</sup> For discussion of the significance of intentions, see V Tadros *The Ends of Harm* ch.7 and references therein. Again, some think that the fact that harming is intentional is not a relevant consideration with respect to state action even if it is with respect to individual action. See, for example D Enoch 'Intending, Foreseeing, and the State' (2007) 13 *Legal Theory* 69.

<sup>30</sup> The significance of the distinction between eliminative and manipulative (or what is sometimes called 'opportunistic') harming is receiving a great deal of attention in non-consequentialist ethics at the moment. See, for example, W Quinn 'Actions, Intentions, and Consequences: The Doctrine of Double Effect' in *Morality and Action* (Cambridge: CUP, 1993) 186, H Frowe 'Equating Innocent Threats and Bystanders' (2008) 25 *Journal of Applied Philosophy* 277, J McMahan *Killing in War* (Oxford: OUP, 2009), J Quong 'Killing in Self-Defence' (2009) 119 *Ethics* 507, F M Kamm *Ethics for Enemies: Terror, Torture, and War* (Oxford: OUP, 2011), and V Tadros *The Ends of Harm* (especially ch.11).

<sup>31</sup> For doubts, see J McMahan 'Humanitarian Intervention, Consent, and Proportionality' in N Ann Davis, R Keshen, and J McMahan *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover* (Oxford: OUP, 2010); V Tadros *The Ends of Harm* chs. 5 and 6.

the court to a secondary reviewing role.<sup>32</sup> This may be thought to wrongly provide the executive with direct control over the liberty of citizens, something that is particularly troubling in such a politically contentious context as terrorism.<sup>33</sup>

- 8) *Trials and Rights*. Relatedly, control orders deprive people of their liberty without the full set of protections that are offered to defendants in a criminal trial. This undermines public scrutiny of preventive detention, which in turn undermines our assurance that the regime is being applied fairly and without wrongful discrimination. Trials may also have a more fundamental and basic significance in ensuring that citizens are treated with the respect that they are due as responsible agents.<sup>34</sup>
- 9) *Risks caused*. A familiar question in preventive detention is whether it inflates as well as reduces the threat it is designed to meet. The risk of terrorist attack, for example, might be enhanced by control orders in one respect at least by motivating more people to sign up to terrorist causes. Any evaluation of this idea relies on speculative empirical judgements. But it also raises difficult normative issues. Is it always wrong to do more harm than good? Does the harm caused weigh in the moral balance as heavily as the harm prevented?
- 10) *Alternatives*. Preventive detention can be compared with other options that the detaining state has. This requires us to evaluate other ways that the state might meet the threat. Preventive detention might be wrong because criminal justice is better.<sup>35</sup> It might be wrong because immigration is better. It might be wrong because surveillance is better. It might be wrong because doing nothing is better.

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<sup>32</sup> See A Ashworth and L Zedner 'Preventive Orders: A Problem of Undercriminalization?' in *Boundaries of the Criminal Law* (Oxford: OUP, 2010).

<sup>33</sup> Political difficulties in determining the scope of terrorism are discussed in J Hodgson and V Tadros 'The Impossibility of Defining Terrorism' (unpublished ms. On file with the authors).

<sup>34</sup> See A Ashworth and L Zedner 'Preventive Orders: A Problem of Undercriminalization?'. For more general analysis of the significance of trials, see A Duff, L Farmer, S Marshall and V Tadros *The Trial on Trial 3: Towards a Normative Theory of the Criminal Trial* (Oxford: Hart, 2007).

<sup>35</sup> Civil libertarians often operate with the assumption that criminal justice, in this context, is preferable to protect the rights of terrorist suspects. Given the breadth, vagueness and incoherence of terrorism offences, this view seems naïve. See, further, V Tadros 'Justice and Terrorism'.

- 11) *Resources*. A related point. A state might act wrongly in doing something because doing that thing causes it to violate a duty that it has to do something else, something that it cannot do because it has done this. The resources required for preventive detention, by which I mean the finances and labour involved, need to be justified. In this regard, it is important to remember that any regime of control orders will be accompanied by a great deal of very expensive litigation. The use of resources is to be justified by demonstrating that the claims of others to those resources are less important than the claims of those who receive protection through preventive detention. We might spend the resources of preventive detention on development aid for poor countries, on the National Health Service, or on funding the arts.<sup>36</sup>
- 12) *Creep*. Relaxing traditional restrictions on preventive detention of dangerous responsible individuals, as we have done, may well result in overuse of the technique to avert risks. As is familiar in the area of terrorism law, exceptional methods of protection soon become normal and are extended further, often in ways that are difficult to justify, and often for illegitimate political motives. Evidence of the normalization of preventive measures is available in this context – whereas the PTA was implemented as a temporary measure which was required to be renewed by parliament each year, the new TPIMs bill is proposed to be permanent. If it is enacted, one central protection against overuse of state power – regular democratic scrutiny of the legal regime – will thus have been removed. Even were preventive justice to warrant the use of control orders in exceptional cases in principle, the risk of ‘creep’ may be too great to justify their use in practice.<sup>37</sup>

As other commentators have noted, the basic philosophical groundwork for an evaluation of preventive detention is underdeveloped.<sup>38</sup> Some of the most significant

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<sup>36</sup> For related discussion in the context of punishment, see V Tadros *The Ends of Harm* ch.15.

<sup>37</sup> Concern about creep clearly influenced the majority decision in the recent important case of *Al Rawi v the Security Service and Others* [2011] UKSC 34. The concern with creep is familiar from philosophical work on torture. See, for example, H Shue ‘Torture in Dreamland: Disposing of the Ticking Bomb’ (2006) 37 *Case Western Reserve Journal of International Law* 231.

<sup>38</sup> See, for example, L Farmer ‘The Jurisprudence of Security: The Police Power and the Criminal Law’ in M D Dubber and M Valverde *The New Police Science; the*

features of detention, such as the distinction between doing and allowing, have received considerable philosophical attention. But many others have not. Risk distribution, comparative approaches to risk prevention, the significance of resources, and the significance of trials, are all underexplored. Even the significance of intentions and the eliminative/manipulative distinction have only recently received sophisticated philosophical attention. And even where philosophical work is better developed, it has not been applied very carefully in the context of preventive detention.

Furthermore, many of the philosophical questions must be related to the facts, and we don't know the facts. For example, the level of risk that we face, the risks that preventive detention causes, the costs of preventive detention and the costs of the alternatives are all what Donald Rumsfeld calls known unknowns.

### **III. From Harm to Risk**

One of the most important dimensions of the problem of control orders concerns risk. When a control order is imposed on a person, it is done on the basis that this reduces the risk that this person will participate in or otherwise contribute to terrorist attacks. Terrorist attacks may result in various bad things occurring. For example, they may erode political stability, affect political decisions undemocratically, damage valuable buildings of cultural importance, create fear and alarm, and motivate people not to engage in some valuable activities (such as travelling or going to big cities). Most obviously, they will cause serious harm to people by killing and maiming them. I will primarily focus on the last kind of harm. Whilst philosophical writing on terrorism has focused on its other effects, especially its wide spread social and psychological effects,<sup>39</sup> killing and maiming are the most important harms that terrorism is likely to cause.<sup>40</sup> Of course, it should not be imagined that these are the only harms of

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*Police Power in Domestic and International Governance* (Stanford: Stanford University Press, 2006) and A Ashworth and L Zedner 'Preventive Orders: A Problem of Undercriminalization?'

<sup>39</sup> See, for example, S Scheffler 'Is Terrorism Morally Distinctive?' in *Equality and Tradition: Questions of Value in Moral and Political Theory* (Oxford: OUP, 2010) and J Waldron 'Terrorism and the Uses of Terror' in *Torture, Terror and Trade-Offs: Philosophy for the White House* (Oxford: OUP, 2010).

<sup>40</sup> See, also, F M Kamm *Ethics for Enemies: Terror, Torture, and War* (Oxford: OUP, 2011) 75-6.

terrorism relevant in evaluating the permissibility of prevention. Focusing only on them will usefully simplify our discussion.

The causal contribution that the person would otherwise make to acts of terrorism will likely differ from case to case. In some cases, the person would have made no contribution at all to acts of terrorism. In others, the person would have been a conspirator, or would have provided information, or weapons, or funds to help support acts of terrorism. Again, it will be helpful to concentrate on the simplest and most compelling case for restriction of liberty: where there is a risk that the person himself will engage in an act of terrorism that would not have occurred if his liberty had not been restricted. But again it must be remembered that this is a simplification.

One difficulty in this area that I have already alluded to is that the level of risk that we face from terrorism, in general or from any particular individual, is unknown and cannot be quantified. Our grip on the significance of risk is improved if we assign precise quantities to risks that we face. For example, we might compare imposing a 50% risk of some harm of degree  $n$  on  $X$  with imposing a 25% chance of risk of harm of degree  $2n$  on  $Y$ . Considering risk in this way crudely models reality.

Although we have no way of assigning numerical values to the various risks of terrorism we face, this is not a decisive objection to making judgements about risk by considering hypothetical cases involving precise levels of risk. After all, we must sometimes make a decision whether to eliminate a precise risk or a vague risk. We can make such judgements, and the natural way to do so is to assign a precise figure to approximate the vague risk. For example, suppose that I have a choice to save one person,  $A$ , from a 50% risk of harm or another person,  $B$ , from a risk of the same degree of harm where the risk is difficult to quantify. The right thing to do, in this case is to estimate the risk of harm to  $B$  is higher or lower than 50%. I have at least some reason to save  $B$  if the estimated risk of  $B$  being harmed is higher than 50% and some reason to save  $A$  if the estimated risk of  $B$  being harmed is lower than 50%. Perhaps that reason is not decisive. If the estimated risk is much higher or much lower, it surely may be decisive.

I now want to outline an argument which, if it is valid, would seem powerfully to support a broad set of policies of preventive detention. I don't claim that this argument, if valid, decides the matter. Some of the considerations that I outlined above may provide resources to resist the idea that it has expansive implications. But, if it is valid, it at least provides significant support to those who justify preventive

detention. Unimaginatively, I call it *The Argument for Preventive Detention* or *The Argument* for short:

- 1) It is permissible to restrict the liberty of a person by subjecting her to a control order for a number of years if doing so is necessary to prevent her from certainly killing one identifiable person.
- 2) It is permissible to restrict the liberty of a person to the same degree to prevent her from certainly killing one unidentified person from a group of 1000.
- 3) When the person's liberty is restricted in the previous case, each of the 1000 is saved from a 1 in 1000 chance of being killed.
- 4) We can conclude that it is permissible to restrict the liberty of a person to the same degree to save 1000 people from a 1 in 1000 chance of being killed.
- 5) It is permissible to restrict the liberty of a person to the same degree where there is a 1 in 1000 chance that this person will otherwise kill 1000 people.

*The Argument* seems to have implications that many people will find unpalatable. It implies that it is permissible to restrict the liberty of a person for a number of years in where it is almost certain that the person poses no threat to anyone.

Consider:

*Control Order*: A control order is imposed on X, severely restricting his liberty for a number of years. Were X's liberty not restricted there is a 1 in 1000 chance that he would set off a bomb killing 1000.

Many people will wish to resist the conclusion that it is permissible to restrict X's liberty for a number of years in *Control Order*. X can object that it is almost certain that he poses no risk to anyone. But it is not immediately obvious that *The Argument* is unsound, and hence it is not obvious that X has a valid objection to this policy.

I am unsure whether *The Argument* is valid. I will consider two ways in which it might be challenged. One challenge claims the following. When we are uncertain that a person will commit a wrongful act, respect for her responsible agency requires us to treat her as though she will not act wrongfully. This might be thought an



extension of the presumption of innocence. Hence, it is wrong to move from the claim that it is permissible to restrict the liberty of a person to prevent her from certainly killing 1 person in a group of 1000 to the claim that it is permissible to restrict the liberty of a person to the same degree to prevent a 1 in 1000 risk of her killing 1000. In the former case, we are certain that she will kill a person. Respect for her responsible agency cannot require us to presume that she won't do so. In the latter case, there is a very good chance that she won't kill the 1000. Respect for her responsible agency requires that we presume that she won't do so.

The other challenge claims that *The Argument* trades on an ambiguity about risk. In 2) each person faces a risk of being harmed. But it is certain that one person will be harmed. The quality of the outcome is certain – a person will be killed. It is only the identity of the person killed that is uncertain. In 3) and 4), though, this is not specified. Where a 1 in 1000 risk is imposed on each of 1000 people there is a range of possible outcomes ranging from no one being killed to 1000 people being killed. This difference, it might be argued, is morally significant.

The first challenge to *The Argument* draws on a popular idea – that we should treat people as though they won't commit wrongs unless they have demonstrated that they will. This idea is very difficult to defend. I doubt that it is true. The second challenge is less well known, and is much more difficult to mount. I am uncertain whether it is successful, but I will suggest that it has more promise than the first challenge.

#### IV. Respect for Responsible Agents

Morally responsible agents ought to be treated with respect. One way to respect them, it might be argued, is to presume that they will not act wrongly unless there is very powerful evidence that they will. To presume that a morally responsible agent will not act wrongly is to be distinguished from *predicting* that they will not act wrongly. To presume that *p* is to act as though *p* is true in the absence of decisive evidence that *p* is true. Where I know that *p* is true I need not presume that *p* is true.<sup>41</sup>

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<sup>41</sup> The idea that we should presume that a person will not act wrongly even if we can predict that they might is explicitly outlined as a reason against preventive detention in A Walen 'A Unified Theory of Detention, With Application to Preventive Detention for Suspected Terrorists (2011) 70 *Maryland Law Review* 871 and 'A

The idea that we ought to presume that a person will not act wrongly has moral significance only if it guides us to act, or refrain from acting, in a way that we would otherwise would on the basis of prediction alone. So, for example, we might predict that there is a 5% chance that a person will act wrongly. This might incline us to take precautions against the person so acting, precautions that might be burdensome to the person. The idea that we ought to presume that the person will not act in this way should, if it has force, lead us to refrain from acting on this inclination. It leads us not to act on a predictive judgement that would otherwise warrant precautionary measures.

In the light of this, return to *Control Order*. Restricting X's liberty in virtue of the fact that there is a 1 in 1000 chance that he will set a bomb off, it might be argued, fails to presume that X will not act wrongly unless there is very powerful evidence that he will. If we presume that X will not set the bomb off, we will not restrict his liberty. If we are required to presume that X will not set the bomb off unless there is powerful evidence that he will, we ought not to restrict X's liberty. This view holds that it is objectionable to restrict a person's liberty on a purely predictive basis. Even if we can predict that a person may act wrongly, it is wrong to act on this prediction. We might think of this as an extension of the ideal of the presumption of innocence.

The idea that we owe it to responsible agents to make presumptions of this kind is familiar from a range of contexts.<sup>42</sup> Andrew Simester and Andrew von Hirsch have defended it in the closely related context of criminalization of remove harms. They write:

When harmless conduct is proscribed merely because the actor, if she perpetrates it, may then be tempted to commit further acts that are harmful, she is being treated as one might a child: as someone who lacks the insight or self-

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Punitive Precondition for Preventive Detention: Lost Status as a Foundation for a Lost Immunity' (2011) 48 *San Diego Law Review* 1229. It should be noted that Walen does not think that control orders are necessarily unjustifiable. See 1241-2.

<sup>42</sup> Even some defenders of regimes of preventive detention such as control orders think that this idea is important. See, for example, K K Ferzan 'Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible' (2011) 96 *Minnesota Law Review* 141. Ferzan believes that respect for autonomy would be satisfied only were control orders to require proof that the controlee had a wrongful intention, on the grounds that we respect autonomy by treating people as though they will execute their intentions. Whilst I agree that this does respect their autonomy, I don't believe that control orders need to be restricted in this way.

control to resist the later temptation. Assuming she is a competent actor, such treatment would fail to respect her as a moral agent, capable of deliberation and self-control.<sup>43</sup>

It has also been used to argue against the use of previous convictions as evidence in criminal trials (including, I should say, by me).<sup>44</sup> It has been argued that the use of bad character evidence is inconsistent with the respect that we ought to have for responsible agents. Respect requires that we treat these agents as responsive to reasons, including the reasons against criminal offending. We ought not, then, merely to predict what they will do, we ought to consider how things will seem to them from the internal point of view.

These ideas now seem to me less powerful than they once seemed. Let me explain why. One very general difficulty is that it is not clear why treating a person with respect requires us refrain from making purely predictive judgements about that person. Consider Simester and von Hirsch's argument above. Suppose that it can accurately be predicted that if a person does x she is more likely to be tempted to commit some wrong, y. Does this treat the person like a child, as though she lacks insight or self-control to resist the temptation? It isn't obvious why. It simply treats the person as though she *might* lack the insight or self-control to resist the temptation.

Is it wrong to treat the person as though she might lack insight and self-control? I'm not sure that it is. Given that we can accurately predict that a person who does x is more likely to be tempted to do y, treating her in this way treats her as subject to ordinary human weaknesses to be tempted to do y. Requiring us to presume that the person won't be tempted to do y seems to require that we treat the person as infallible – as incapable of being tempted to do y. But it isn't at all obvious why respect for others requires us to treat the person in that way. Why not treat people in a way that is as accurate as possible with respect to the virtues and vices that they might possess?

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<sup>43</sup> *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart, 2011) 62.

<sup>44</sup> See A Duff, L Farmer, S Marshall and V Tadros *The Trial on Trial vol.(3): Towards a Normative Theory of the Criminal Trial* (Oxford: Hart, 2007) 110-117. For criticism, see M Redmayne 'The Ethics of Character Evidence' (2008) 61 *Current Legal Problems* 371.

It also isn't obvious why treating a person in this way treats her like a child, in the morally problematic sense. Suppose that, due to their lack of insight and self-control, children are more likely than adults to be tempted to do *y* if they do *x*. If we treat an adult as though they are as likely as a child to do *y* if they do *x* we treat the adult like a child. But if we treat the adult as though she is as likely to do *y* as any other adult who does *x* would be, we treat her in the same way as we treat any other adult, and not as we would treat a child. We have good reason to treat children and adults differently because of the different predictive judgements that we make about them. What we need is an argument why we should act on our predictive judgements with respect to children but not with respect to adults.

Against this, it might argue as follows: treating a person who does *x* as more likely to do *y*, even where this is true, treats her as though she lacks the *capacity* to resist doing *y*. Alec Walen argues for something like this: to subject a person to long term preventive detention, Walen claims, 'treats autonomous and accountable persons as though they do not have the free will to choose rightly'.<sup>45</sup> We treat a person with disrespect when we imply that she is incapable of acting morally, and this is what detaining a person prior to her having acted wrongly does.

But, against this, acting on our predictive judgements is consistent with the belief that she possesses the capacity to choose rightly – that she has free will, and that she could exercise that will in a way that is consistent with what duty requires of her. To see this, suppose that a person has a capacity to resist doing *y*. This does not imply that she will necessarily exercise her capacity to resist doing *y*. That depends on the judgements that she makes about *y*. For this reason, to act on the prediction that a person might do *y* does not imply that she could not refrain from doing *y*.

Furthermore, even if doing *y* did demonstrate a lack of capacity to resist doing *y*, in acting on the judgement that the person might do *y* we do not imply that she lacks the capacity to resist doing *y*. At most we imply that she *might* lack such a capacity. It is not obvious why this treats her with disrespect. There are people who do lack the capacity to resist doing *y*, and this person may be one of them. Perhaps, given that she has done *x*, she is more likely to be one of them. If we treat the person as though she *might* lack such a capacity, we treat her as we would treat any other person when we are uncertain of the capacities that they possess. Given that the

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<sup>45</sup> 'A Unified Theory of Detention', 881.

argument from respect grants that we can predict that a person who does x is more likely to do y, these judgements are hardly unwarranted.<sup>46</sup>

Appealing to the respect that we must have for autonomous agents, this suggests, does not provide the most promising way to attack *The Argument*. This view is also supported by our intuitive judgements about cases where our predictive abilities are held constant but responsibility is not. Reflecting on these cases yields the view that we typically have stronger reasons to impose burdens on responsible agents when we can predict that their bad motivations will result in them performing wrongful actions than we do to impose similar burdens on non-responsible agents. Considerations of responsibility, if anything, support rather than undermine *The Argument*.

Consider the following:

*Hostel*: It is a cold winter's night. X knocks on the door of a hostel for vulnerable people seeking shelter. Most of the people in the hostel are black. X is well-known to have both racist and violent tendencies as well as a lack of self-restraint. Jane is the person who is responsible for deciding who is let into the hostel. She has good reason to believe that X might well violently attack one of the vulnerable people staying in the hostel. It will be very difficult to prevent him succeeding if he does mount such an attack. If he is not admitted to the hostel, there is a good chance that X will suffer a serious illness as a result of exposure.

First let us suppose that X has racist and violent tendencies and a lack of self-restraint because he suffers from psychosis. Let us call this person *Xnonres*. In deciding whether to admit *Xnonres* Jane must consider the harm that he will likely suffer if he is not admitted. But she must also consider the potential harm that those within the hostel might suffer if he is admitted. There seems to be nothing wrong, in this case, with making predictive judgements. There is no reason to assume that *Xnonres* will not attack some of the people in the hostel.

Now suppose that X is a fully responsible agent. Let's call this person *Xres*. She is fully responsible for her racist judgements, violent tendencies and lack of self-

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<sup>46</sup> For a somewhat similar argument in the context of bad character evidence, See Redmayne 'The Ethics of Character Evidence' 386-7.

restraint and she would be fully responsible for any attack that she perpetrates on the vulnerable people in the hostel. The question is whether this should make any difference to Jane's judgement.

It is difficult to believe, in this case, that respect for *Xres* as a responsible person requires Jane to be more inclined to admit *Xres* into the hostel than *Xres*. In fact, if anything, the opposite seems true. If anything, Jane should be more inclined to admit *Xnonres* into the hostel than *Xres*. This is for the following powerful reason. It is much more difficult for *Xnonres* than it is for *Xres* to avoid the appearance that he is a threat to the vulnerable people. *Xres* could have done this simply by making better judgements and developing more self-restraint, something that he was, we can assume, capable of doing. *Xnonres*, in contrast, is not responsible for his judgements and lack of self-restraint to the same degree.<sup>47</sup>

This consideration seems much more significant than the idea that Jane must refrain from acting on her predictive judgements by presuming that *Xres* will not attack the vulnerable people in the hostel. It helps to explain the intuitive judgement that there are stronger reasons for Jane to admit *Xnonres* into the hostel than *Xres*. Overall, then, responsibility seems to provide reasons in favour of imposing burdens on a person to avert the threats that they might pose rather than reasons against doing so.

Now let us return to control orders. As I noted in the introduction, the judgement that that the Secretary of State makes in determining whether to impose a control order on a person has a backward looking as well as a forward looking dimension. The backward looking dimension is that the Secretary of State believes that the controlee is, or has been, involved in new terrorism related activity.<sup>48</sup> This dimension of control orders ensures that a person has at least some opportunity to avoid being subject to a control order. She could do this by refraining from being involved in such activity. The circumstances of controlees are, in this way, quite closely analogous to *Xres*. In fact, in a way they are offered better protection against being harmed than *Xres*, in that it is their actions rather than simply their attitudes that

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<sup>47</sup> For a more developed discussion of the relationship between avoidability and liability, see Tadros *The Ends of Harm*, especially chs.3 and 8, drawing in T M Scanlon *What We Owe to Each Other* ch.6.

<sup>48</sup> TPIMs Act s.3(1) and 3(2).

provide the backward looking dimension of the decision to impose the burden on them.<sup>49</sup>

Of course, it will forcefully be argued that the Secretary of State lacks the ability to identify accurately whether a person has been involved in such activity. This is, of course, true to a degree. It would be foolish to suppose that all of those who are subject to control orders have been involved in terrorist related activity given the low threshold that the Secretary of State must meet to justify imposing a control order on a person.

But this factor, whilst important, need not be decisive. Suppose, in *Hostel*, that the person responsible for the hostel is not completely sure whether X has racist and violent tendencies. This does not necessarily require her to admit X to the hostel. It is a relevant factor in the evaluation of the threat to those within the hostel. It also seems to do little to strengthen the reasons to admit *Xres* when compared with *Xnonres*.

The fact that the Secretary of State is unlikely to make perfect judgements about the actions of controlees may not be a decisive reason to deny her the power to make those judgements. Whether it is a decisive reason depends on her degree of accuracy, the magnitude of the threat, the harm that she imposes on those whose liberty is restricted, alternative way in which the threat can be met, and so on.

Furthermore, our confidence that those whose liberty is restricted do have the relevant judgements can be bolstered, if again only partially, by the existence of the appeals procedure. Whilst this procedure is notoriously problematic and inaccurate, it would be wrong to suggest that it makes no difference to the confidence that we ought to have that those whose liberty is restricted have been engaged in terrorist related activity. We should not be sure that this is the case. But we should also not think that this fact is decisive. It may be permissible to restrict a person's liberty on this basis where we are unsure whether the person has been engaged in terrorist related activity. Again, compare *Hostel*, in which the ability of the person responsible for the hostel to evaluate whether the person is a racist is quite limited and there is no robust appeals procedure.

Perhaps it might be argued that excluding *Xres* in hostel is importantly different from imposing a control order on a person in that excluding the person in

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<sup>49</sup> The idea that there should be an act requirement is defended in Ferzan 'Beyond Crime and Commitment', 180-1 on the grounds that this would be an appropriate restriction on state power.

*Xres* allows *Xres* to be harmed whereas imposing a control order on a person harms that person. The distinction between the two cases, in this respect, is not sharp. Excluding *Xres* might be understood as a form of harming. It prevents him from rescuing himself from harm by entering the hostel. But even if this factor is important, it is independent of the question that we are considering here.

Furthermore, it is not obvious that the distinction between doing and allowing leads us to make different judgements about responsible and non-responsible agents. Suppose that Jane has admitted X into the hostel not knowing of X's racist and violent tendencies. She is now concerned that X will attack one of the vulnerable people in the hostel. If it was permissible for her to exclude X from the hostel, it seems also permissible for her to restrict X's liberty whilst he is in the hostel to prevent him from carrying out such an attack. Again, whether she is permitted to do this seems not to depend on whether X is a responsible agent, or if it does, the fact that *Xres* is a responsible agent is a reason in favour of restricting his liberty on the grounds that he could have avoided having his liberty restricted in this way by making the appropriate judgements.

Overall, we can conclude that the argument that control orders involve a lack of respect for responsible agents is hardly decisive. If anything, the fact that controlees are responsible agents points in the other direction – it militates in favour of restricting their liberty on a predictive basis rather than against it.

## V. Evaluating Risks

If a decisive objection to *The Argument* cannot be derived from the idea that we must presume that responsible agents will not act wrongly, perhaps such an objection can be found in the way in which it handles risk. There is something intuitively problematic about restricting a person's liberty to protect each of a large number of people from facing a very small risk that they will suffer significant harm. This seems different from the restriction of a person's liberty to protect one person from certainly being significantly harmed. The fact that the risk that each person faces is modest seems in itself important, even if the expected outcome of imposing this modest risk on a large population is that one or more people will suffer the harm. Yet the idea that we evaluate risks by considering their expected outcomes is also in its own way intuitive. We need to find arguments for resisting this way of considering risks.



For ease of reference, let us begin by restating *The Argument*:

- 1) It is permissible to restrict the liberty of a person by subjecting her to a control order for a number of years if doing so is necessary to prevent her from certainly killing one identifiable person.
- 2) It is permissible to restrict the liberty of a person to the same degree to prevent her from certainly killing one unidentified person from a group of 1000.
- 3) When the person's liberty is restricted in the previous case, each of the 1000 is saved from a 1 in 1000 chance of being killed.
- 4) It follows that it is permissible to restrict the liberty of a person to the same degree to save 1000 people from a 1 in 1000 chance of being killed.
- 5) It is permissible to restrict the liberty of a person to the same degree where there is a 1 in 1000 chance that this person will kill 1000 people.

As I noted earlier, there is an ambiguity in the idea of risk in *The Argument*. The ambiguity can be highlighted in the following way. There are some cases of risk where it is certain that someone will suffer a certain outcome. But it is uncertain who, amongst a group of people, that person will be. I call these cases 'closed risks'. There are other cases of risk where it is not certain how many people will suffer the outcome. Each person is subject to a risk, but it is not clear whether anyone will in fact be harmed, or it may be the case that many people are harmed. I call these cases 'open risks'.

i) *Closed and Open Risks*

To see this difference more clearly, consider the following.

*Closed Risk.* There are two people, A and B who face a risk of harm. I can avert the threat only by flipping a coin. If I flip the coin and it comes up heads,

A will automatically be rescued. If it comes up tails, B will automatically be rescued.<sup>50</sup>

In this case, if I flip the coin, A and B each have a 50% chance of being rescued from harm and a 50% chance of being harmed. But if I flip the coin it is certain that *someone* will nevertheless be harmed, it is just not clear whom. Here are the two possible outcomes:

- 1) Heads: B but not A is harmed (50%)
- 2) Tails: A but not B is harmed (50%)

There is no outcome where neither A nor B is harmed and no outcome where both A and B is harmed.

Now compare

*Open Risk*. There are two people, C and D who face a threat of harm. If I flip a coin and it comes up heads, C will automatically be rescued. If it comes up tails, C will be harmed. If I flip another coin and it comes up heads, D will automatically be rescued. If it comes up tails, D will be harmed.

Suppose that I flip both coins. In that case, C and D each have a 50% chance of being harmed, just like in *Closed Risk*. However, it is not certain that either C or D will be harmed. It is also not certain that only one of C and D will be harmed. In *Open Risk* there are four possible outcomes:

- 3) Heads, heads: neither C nor D is harmed (25%)
- 4) Heads, tails: D but not C is harmed (25%)
- 5) Tails, heads: C but not D is harmed (25%)
- 6) Tails, tails: both C and D are harmed (25%)

Because the sum of the probabilities of C being harmed in 3) and 4) is 50%, C has a 50% chance of being harmed. Because the sum of the probabilities of D being harmed

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<sup>50</sup> I have introduced the idea that the harm is automatic to avoid complications that arise when there is intervening agency.

in 2) and 4) is 50%, D has a 50% chance of being harmed. Unlike *Closed Risk*, however, in *Open Risk* there is a significant chance that no one will be harmed. But there is also a significant risk that both C and D will be harmed.

ii) *Rescue, Harm and Closed Risks*

In the light of this, let us return to *The Argument*. First, let us consider step 1). There is little doubt that the proposition in step 1) is true. Step 1 does not involve any claim about the responsibility that the person will have for the threat that she will pose to others if she is released. We have already seen that this characteristic makes little difference in cases of this kind, or even militates in favour of the permissibility of restricting the person's liberty. But even absent responsibility, it is permissible to restrict a person's liberty for a number of years if that is necessary to prevent her from killing someone else. It is controversial whether it is permissible to harm a non-responsible threat to avert a threat of harm that is of the same magnitude or less than the harm that would be done to her.<sup>51</sup> I believe that this is permissible.<sup>52</sup> Even if I am wrong about that, it is surely permissible to harm that person to a degree that is significantly less than the harm that she will otherwise do to others. Restricting a person's liberty for a number of years is surely not a fate worse than death, or even a fate that is nearly as bad as death.

The transition from step 1) to step 2) is more controversial. It relies on the idea that when deciding whether to prevent harm, it does not matter that the identity of the person rescued is uncertain. An idea broadly like this should be familiar to criminal lawyers from the doctrine of transferred malice. In the criminal law, if D intends to kill X but actually kills Y, D is guilty of the murder of Y. It is enough that D intended to kill *someone* to render him liable for the murder of Y. It is not necessary that he intended to kill Y in particular.

Similarly, it might be argued, there is no important difference between rescuing an identifiable person from being harmed and rescuing one of two people

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<sup>51</sup> For doubts, see J McMahan 'Self-Defense and the Problem of the Innocent Attacker' (1994) 104 *Ethics* 252 and *The Ethics of Killing: Problems at the Margins of Life* (Oxford: OUP, 2002) 398-421; M Otsuka 'Killing the Innocent in Self-Defense' (1994) 23 *Philosophy and Public Affairs* 74 and D Rodin *War and Self-Defense* (Oxford: OUP, 2002) 79-87.

<sup>52</sup> See *The Ends of Harm* ch.11.

who face a closed risk of harm. In the latter case, it is certain that someone will be harmed. That D does not know whether it is A or B does not matter. Flipping a coin in *Closed Risk* simply saves a person. It is just not clear whom.

Perhaps it might be argued that there is some difference between saving an identifiable person and saving one of two people who face a closed risk. Suppose that I can either save an identifiable person or save one of two people and I do not know who will be saved. Some might argue that I ought to do the former. Consider:

*Storm.* Two boats, Known and Unknown have set sail each with one person on them. Harry is on Known. Either Ingrid or Jane is on Unknown and I don't know whom. They are caught in a storm and each is sinking fast. Either the person in Known (Harry) or the person in Unknown will certainly be killed. I can rescue only one person, and I can do so at no cost to myself.

Let us assume, as seems plausible, that were I to know either that Ingrid is in the boat or that Jane is in the boat, I ought to flip a coin to decide whom to rescue. Some might argue that if I don't know this I ought to rescue Harry. They might argue this on the following grounds. If I rescue the person in Unknown, Harry will certainly die. I owe a powerful duty to Harry to prevent his death. This duty is much more powerful than the duty that I owe to either Ingrid or Jane to prevent their deaths. Harry's objection at my failing to save him is much more powerful than Ingrid's objection to my failing to save the person in Unknown. It is much more powerful because I am not certain whether Ingrid is in Unknown.

In response, it might be argued that not only does Ingrid have an objection to me saving Harry. Jane has a similar objection. This is true. But it might be argued that we cannot simply add the objections that Ingrid and Jane have to each other to balance out Harry's objection. The reason for this, some might claim, is to do with the separateness of persons. Harry, Ingrid and Jane have a right to be treated as independently important.<sup>53</sup>

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<sup>53</sup> This idea is familiar from non-consequentialist morality. See, for example important examples, F M Kamm *Morality, Mortality: vol.1: Death and Whom to Save From It* (Oxford: OUP, 1993) Part II; T M Scanlon *What We Owe to Each Other* (Cambridge, Mass.: Harvard UP: 1998) ch.5.

This argument, even if it is persuasive in other contexts, is not powerful in this context. Here is why. There is some fact – the identity of the person in the boat – that I do not know. This fact could be either a) Ingrid is in the boat; or b) Jane is in the boat. If a) is true I lack a reason to prefer Harry to Ingrid and I ought to flip a coin. If b) is true I lack a reason to prefer Harry to Jane and I ought to flip a coin. Given this, it cannot be true that my ignorance of whether a) or b) is the case can render it wrong to flip a coin. If I ought to flip a coin if a) or if b), I ought to flip a coin if either a) or b).

Even if this argument is not decisive, it is difficult to believe that not knowing the identity of the person who will be harmed can make a very significant difference to the reasons that I have to rescue the person from harm. Suppose that rescuing Harry is risky whereas rescuing the person in Unknown is not risky. I am surely permitted to rescue the person in Unknown. Similarly, suppose that Harry faces a risk of the loss of a limb and the person in Unknown faces a risk of the loss of two limbs. Again, I am surely permitted to rescue the person in Unknown. Even if the transition from 1) to 2) is not completely smooth, it is insufficiently rough to make a significant difference to the importance of *The Argument*.

### iii) *The Moral Difference Between Closed and Open Risks*

If a person is deprived of her liberty by being subject to a control order, citizens are protected from an open rather than a closed risk. If controlee had not had her liberty restricted, a wide range of outcomes might have occurred ranging from nothing to the loss of very many lives. These also depend on what else would have been done had her liberty not been restricted. Assessing the probabilities of these outcomes is very difficult, but we have already seen that this does not provide a decisive objection to control orders.

What might be important, though, is that if the controlee does not have her liberty restricted, the risk that any person will be harmed is typically small. There is only a small chance that restricting the liberty of a person will prevent a harmful terrorist incident occurring that would not otherwise have occurred. This is partly because some controlees may lack any inclination to instigate or assist acts of terrorism. It is partly because any person with the relevant inclinations is quite unlikely to act on them. It is partly because any person acting on these inclinations is

quite unlikely to be successful. It is partly because the contribution that a person makes to a terrorist attack may be overdetermined – if this person does not provide the funding, or the information, or drive the car, someone else will. A result is that most controlees have their liberty restricted are harmed without anyone being benefited.

However, it is also true that if a terrorist attack occurs that would not otherwise have occurred, the harm caused may be very large. It is possible to cause multiple casualties through a terrorist attack. The risk of completion is small, then, but the number of lives lost may be very large.

The effect of depriving people of their liberty cannot be calculated on a purely individual basis. It may be that restricting the liberty of one person is completely ineffective unless the liberty of others is also restricted. This will be so, for example, if the contribution that a person would have made to a terrorist attack is overdetermined. The contribution that control orders make to security is, in consequence, very difficult to assess.

The idea that I will assess in this section is that there are stronger reasons to prevent closed risks than open risks. I will explore some reasons why this might be so. To make progress, it will be helpful to consider an example.

*Storm II.* Two boats, Unknown and Uncertain have set sail. Either Ingrid or Jane is on Unknown and I don't know whom. Unknown is sinking fast. If I do nothing, whoever is on Unknown will certainly be killed. Uncertain has set sail with Kevin and Larry aboard. Kevin and Larry have fallen into the water. However, they are near to an island and they are both good swimmers. Each has a 50% chance of surviving if I do nothing. I can either rescue the crew of Unknown or the crew of Uncertain but not both, and I can do so at no cost to myself.

If I do nothing in *Storm II*, there is a 50% chance that Ingrid will be killed, a 50% chance that Jane will be killed, a 50% chance that Kevin will be killed and a 50% chance that Larry will be killed.

Suppose that I rescue the crew of Unknown Ingrid and Jane survive. In that case, the following outcomes are possible:

- 1) Kevin and Larry both survive (25%)
- 2) Kevin survives and Larry dies (25%)
- 3) Kevin dies and Larry survives (25%)
- 4) Kevin and Larry both die (25%)

If I rescue the crew of Uncertain, Kevin and Larry survive. The following outcomes are possible:

- 5) Jane dies and Ingrid survives (50%)
- 6) Ingrid dies and Jane survives (50%)

Although the risk of death to each person is the same whether I rescue the crew of Unknown or Uncertain, the range of possible outcomes is not the same. If I rescue the crew of Unknown, there is a chance that no one will be killed. There is also a chance that two people will be killed. If I rescue the crew of Uncertain, in contrast, one person will certainly be killed, but there is no chance that two people will be killed.

In deciding whether to rescue the crew of Unknown or the crew of Uncertain, we need to evaluate the reasons to prevent the first set of probabilities compared with the second set of probabilities. It may be that the reasons to prevent the first set of probabilities are significantly weaker than the reasons to prevent the second set.

A first pass for an argument is as follows. If we save the crew of Unknown, there is a 25% chance that no one will be killed. There is an extremely powerful reason to preserve this possibility. The reason to preserve this possibility is much more powerful than the reason to exclude the possibility that two people will be killed.

This idea is, I think, intuitive. But we also need a more powerful argument for it. One argument that might be given for this conclusion draws on the separateness of persons, an idea that I considered earlier. The basic idea is this. Each person has an independent life to lead. She has her own unique and particular importance. For this reason, in deciding what to do we do not simply maximise the good without considering who will be recipients of that good. Rather we consider the significance of our decisions for each person considered independently. One implication of this idea is that the reasons to save two lives are not twice as powerful than the reasons to save one life.

We can illustrate this by considering the power of the objection that a person might have to us excluding the possibility of a certain outcome. Suppose that I rescue the crew of *Uncertain*. As a result one person dies. As we have already seen, the fact that we don't know who makes little difference, so let us suppose that the person is Ingrid. In rescuing the crew of *Uncertain*, things go much worse for Ingrid. She has a powerful objection to this result. Were the person on *Unknown* Jane, her objection would be equally as powerful.

Now compare rescuing the crew of *Unknown*. No one has an objection to outcome 1). All of the other outcomes are much worse for someone than outcome 1) is for anyone. There is no reason to prefer any of outcomes in the group 2), 3), 5) and 6) to any other. Kevin has a strong objection to outcome 3) and Larry has a strong objection to outcome 2). Now consider outcome 4). Outcome 4) is no worse for Kevin than outcome 3) and no worse for Larry than outcome 2). There is no person in outcome 4) who is worse off than a person in outcome 5) or 6). And this, it might be argued, suggests that the reasons to prevent outcome 4) are not much stronger than the reasons to prevent outcomes 5) or 6).

Perhaps there is a sense in which outcome 4) is worse than outcome 5) – it is worse impersonally. A world in which more people survive is better than a world where fewer survive. This seems to me highly intuitive. But whilst it is true that outcome 5) is better than outcome 4), the reason giving force of this fact may not be all that significant in this case. Impersonal goodness may not be all that matters in morality. Impersonal goodness and badness may not be as powerful in providing reasons for action than claims that particular people might make against us.

It might also be argued that not only is outcome 4) worse than outcome 5), a person also has a claim that we treat outcome 4) as more significant than outcome 5). The claim is as follows. Compare 4) with 5). We must treat Kevin as having the same importance as Jane. We could do so by treating the life of each of them as providing an equal reason for us to act. But were we to treat outcome 5) as equivalent to outcome 4) we would do as though *Larry's* life does not matter. If we treat Kevin's life and Jane's life as having equal reason giving force, were we to decide to rescue Jane rather than Kevin and Larry, we would treat Larry's life as unimportant. Larry may argue that he must be treated as having moral significance of his own.



This kind of argument has been given by some non-consequentialists in favour of saving the greater number in cases of conflict.<sup>54</sup> In deciding whether to save either A or both B and C, we must save both B and C. For if we treat A's life as equivalent to B's, we are left with C. We do not save B and C we do as though C's life is unimportant. C has an objection to being treated in this way.

But even if it is true that Larry does have an objection of this kind, we should not suppose that the objection is sufficiently powerful to justify the conclusion that there is no difference between rescuing the crew of Unknown and the crew of Uncertain. Ingrid has a very powerful objection to outcome 6), as powerful as the objection that either Kevin or Larry has to outcome 4). In arguing that they ought to be saved, Kevin and Larry must claim that their objections together are decisive. But they do not seem decisive. The reasons to prevent 6) rather than 1) are much more powerful than the reasons to prevent 4) rather than 6). This is because there is a person who is much worse off in 6) than any person is in 1). In contrast, there is no person who is much worse off in 4) than anyone is in 6). There are two people in 4) who are as badly off as Ingrid is in 6). But this fact would be sufficient to outweigh the significance of the reason to prefer 1) over 6) only if the force of the objections that the two have could be pooled. The separateness of persons denies that they can be pooled.

## **Conclusion**

I don't claim that the above argument about risk, even if it is valid, provides a decisive objection to control orders. I doubt that there is a single knock down philosophical argument against control orders. Evaluation of control orders requires us to consider a wide range of philosophical issues. The objection to *The Argument*, if it is valid, provides a reason to think that the utilitarian risk analysis that may well underpin policies like control orders is mistaken. It is mistaken not because respect for autonomous agents requires us to presume that they will not act wrongly, it is rather because respect for the separateness of persons requires us to take more

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<sup>54</sup> See, for example, F M Kamm *Morality, Mortality vol.1* ch.5 and T M Scanlon *What We Owe to Each Other* 229-234.

powerful measures to prevent harm and closed risks of harm than we do to prevent open risks of harm.