

MEETING THE CHALLENGE OF THE PREVENTIVE STATE: DUE PROCESS RIGHTS AND THE TERRORISM SUPPRESSION (CONTROL ORDERS) ACT 2019

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This article focuses on the control order regime introduced by the Terrorism Suppression (Control Orders) Act 2019 and its implications for due process rights. Control orders are formally civil, and so the heightened criminal procedural protections in the New Zealand Bill of Rights Act 1990 (the NZ Bill of Rights) ostensibly do not apply. But the simplicity of the criminal–civil binary belies the hybridity of control orders. In this respect, control orders capture in microcosm the larger policy shift towards a "preventive state" which, rather than relying on ex post facto denunciation, pre-emptively incapacitates threatening individuals before they commit harm. This article assesses how we should deal with control orders' hybridity. It suggests that on the basis of current authority, control orders would not attract the criminal procedural protection in s 25 of the NZ Bill of Rights. Instead, they will be governed by s 27(1), which secures a right to natural justice. It then critically assesses this result. Drawing on the work of Andrew Ashworth and Lucia Zedner, it canvasses four possible approaches to control orders. It argues that, in order to facilitate engagement with their distinctive and problematic features, control orders ought to be distinguished from punishment and dealt with under other provisions of the NZ Bill of Rights. This should stimulate discussion about the kind of procedural protections that are appropriate to safely balance the liberty interests of the subject against legitimate security concerns.

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I INTRODUCTION

On 19 December 2019, just over a month after its introduction, the Terrorism Suppression (Control Orders) Act 2019 (the Control Orders Act) became law in New Zealand. The Act institutes a system of putatively civil orders which allow for the supervision and monitoring of individuals who are suspected of engaging in terrorism-related activities overseas, and who pose a "real risk" of engaging in terrorism-related activity in the future.¹ Primarily, it provides a mechanism for managing foreign terrorist fighters (FTFs) who have returned to New Zealand from conflict zones in Iraq and Syria.² The foreign fighter problem is complex, involving important national security and human rights concerns, and control orders are a controversial solution. Like its overseas models,³ the Control Orders Act has vocal detractors, some of whom object to the Act's harshness⁴ and others to its perceived weakness.⁵

This article focuses on control orders' implications for due process rights. The New Zealand Bill of Rights Act 1990 (the NZ Bill of Rights) distinguishes between criminal and civil proceedings, affording enhanced procedural protections to defendants in the determination of a criminal charge.⁶ Control orders are formally civil, and so these procedural protections ostensibly do not apply.⁷ However, the simplicity of the civil-criminal binary belies the hybridity of control orders. Here, I use the term "hybridity" to denote two characteristics of the regime. First, that control orders, though imposed through a civil process,⁸ may entail onerous restrictions more typical of criminal sentencing.⁹ Secondly, that breach of a control order is a criminal offence punishable by fine or imprisonment.¹⁰ In this respect, control orders capture in microcosm the larger policy shift towards a "preventive state" which, rather than relying on *ex-post facto* denunciation of wrongdoers, seeks to identify and then

1 Terrorism Suppression (Control Orders) Act 2019, s 12 [Control Orders Act].

2 (24 October 2019) 742 NZPD 14686 per Hon Andrew Little MP.

3 Prevention of Terrorism Act 2005 (UK); Terrorism Prevention and Investigation Measures Act 2011 (UK); Criminal Code Act 1995 (Cth), Division 104; and Criminal Code Act RSC 1985 c C-46, ss 83.3 and 810.011.

4 See for example Zane Small "Privacy Commissioner blasts 'obnoxious', 'fundamentally flawed' anti-terror law" (12 November 2019) Newshub <www.newshub.co.nz>.

5 See the National Party view in Terrorism Suppression (Control Orders) Bill (183-2) (select committee report) at 8–9.

6 New Zealand Bill of Rights Act 1990, s 25.

7 (12 December 2019) 743 NZPD 15921 per Hon Andrew Little MP.

8 Control Orders Act, s 31.

9 Compare Control Orders Act, ss 17–20; and Sentencing Act 2002, s 69E.

10 Control Orders Act, s 32.

pre-emptively incapacitate threatening individuals before they commit harm.¹¹ This article draws on the wealth of preventive state scholarship, exploring how concerns about prevention might be synthesised in the New Zealand context.

My central concern in this article is how we should deal with control orders' hybridity, and what that means for the criminal-civil divide in the NZ Bill of Rights. This raises first a legal question: do control orders trigger the enhanced procedural protections in s 25? Consideration of New Zealand and overseas authority suggests that control order proceedings likely do not equate to the bringing of a criminal charge and, therefore, do not engage these protections. They are governed instead by s 27, which embodies common law principles of natural justice. This legal conclusion then provides a basis for normative critique. I draw on the work of Andrew Ashworth and Lucia Zedner to assess whether New Zealand's current procedural framework responds adequately to the challenges presented by the preventive state, as represented in the control order regime.

Following this introduction, Parts II and III contextualise the control order regime and identify some of its key features, before Part IV situates the regime in the context of the preventive state. Part V surveys and then critically evaluates New Zealand case law on the criminal-civil divide by reference to Ashworth and Zedner's four options for managing preventive measures.¹²

II NEW ZEALAND FOREIGN FIGHTERS

A New Zealand Foreign Fighters in Syria and the Likelihood of Their Return

It is important to note at the outset that the Control Orders Act applies to all New Zealanders who engage in terrorism-related activity overseas – and in the wake of the 2019 Christchurch terror attack and the Royal Commission of Inquiry into this attack, there is (quite rightly) a sharper focus on the threat posed by right-wing terrorism.¹³

However, the legislative history of the Control Orders Act and the design of the control order scheme, suggest a primary focus on FTFs.¹⁴ The definition of a "foreign terrorist fighter" is itself

11 Preventive state scholarship was seeded by Carol Steiker's landmark article: Carol S Steiker "The Limits of the Preventive State" (1998) 88 J Crim L & Criminology 771.

12 Andrew Ashworth and Lucia Zedner "Just Prevention: Preventive Rationales and the Limits of the Criminal Law" in RA Duff and Stuart Green (eds) *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 279.

13 See generally Hon William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (8 December 2020).

14 (24 October 2019) 742 NZPD 14686 per Hon Andrew Little MP; and Ministry of Justice *Regulatory Impact Assessment: Control Orders* (16 October 2019) at 9–10.

deeply contested.¹⁵ United Nations Security Council Resolution 2178, which exhorts states to take various actions to address the security threat posed by FTFs,¹⁶ leaves "terrorism" – a notoriously elusive and pliable concept – "conspicuously" undefined. "Foreign" and "fighter" prove likewise difficult to parse, invoking further questions about the significance of kinship ties, and combatant versus non-combatant roles.¹⁷ But in this context, legislators and policy-makers appear to be targeting New Zealanders who travelled overseas to join extremist groups in Iraq and Syria and who now seek to return home.¹⁸ Among the 40,000 foreign recruits who flooded into Syria as anti-regime uprisings escalated into a bitter sectarian conflict,¹⁹ there were a "small number" of New Zealanders.²⁰ As of 2019, the Government believed four or five individuals remained in Syria, though it was uncertain whether all were still alive.²¹

At the time the Act was passed, the Government believed there was a "real risk" FTFs would return in the near future.²² In March 2019, the Islamic State lost its final stronghold of Baghouz in Syria, scattering its fighters. Many were captured or surrendered to the Syrian Democratic Forces (SDF), a majority Kurdish force led by the Kurdish Yekîneyên Parastina Gel (YPG) and backed by the United States. By September, the SDF held some 10,000 prisoners,²³ among them New Zealander Mark Taylor.²⁴ Concern grew that the SDF would be unable to contain its Islamic State prisoners, and this concern was ultimately borne out when, in October 2019, a Turkish offensive into north-

15 For a summary, see David Malet "Foreign Fighter Mobilization and Persistence in a Global Context" (2015) 27 *Terrorism and Political Violence* 454. The perennial difficulty of defining "terrorism" has led some to suggest that the counter-terrorism paradigm is entirely inappropriate to address the phenomenon of foreign fighting, and that neutrality law offers more promising prospects in this area: see for example Craig Forcese and Ani Mamikon "Neutrality Law, Anti-Terrorism, and Foreign Fighters: Solutions to the Recruitment of Canadians to Foreign Insurgencies" (2015) 48 *UBC L Rev* 305; and John Ip "Reconceptualising the Legal Response to Foreign Fighters" (2020) 69 *ICLQ* 103.

16 SC Res 2178 (2014).

17 Ip, above n 15, at 104–107.

18 (24 October 2019) 742 NZPD 14686 per Hon Andrew Little MP; and Ministry of Justice *Regulatory Impact Assessment: Control Orders*, above n 14, at 9–10.

19 Jessie Blackbourn, Deniz Kayis and Nicola McGarrity *Anti-Terrorism Law and Foreign Terrorist Fighters* (Routledge, New York, 2018) at 5.

20 New Zealand Security Intelligence Service *Advice to the Foreign Affairs, Defence and Trade Committee: Terrorism Suppression (Control Orders) Bill* (14 November 2019) at 1–2.

21 Tova O'Brien "What the new 'Mark Taylor law' would mean for returning 'high-risk' New Zealanders" (16 October 2019) Newshub <www.newshub.co.nz>.

22 (24 October 2019) 742 NZPD 14686 per Hon Andrew Little MP.

23 "ISIS Foreign Fighters after the Fall of the Caliphate" (2020) 6 *Armed Conflict Survey* 23 at 26.

24 Adam Harvey and Suzanne Dredge "New Zealand jihadist Mark Taylor captured in Syria and jailed in Kurdish prison" (4 March 2019) RNZ <www.rnz.co.nz>.

eastern Syria threw the SDF into chaos.²⁵ Compounding the problem for New Zealand, as Turkey gained control of territories in the region, it announced that it would deport FTFs to their countries of origin and commenced repatriation efforts.²⁶

Despite these fears, no control orders have yet been sought,²⁷ suggesting either that no FTFs have returned since the Act was passed, or that they have been managed through other means. In any event, there remains a possibility that control orders will be issued in the future. The recent arrest of suspected Islamic State defector Suhayra Aden and her children by Turkish authorities demonstrates that the issue remains live. Aden had dual Australian-New Zealand citizenship before Australia revoked her citizenship.²⁸ The following sections briefly discuss the risks posed by returning FTFs and the attraction of a control order regime as a management mechanism.

B The Returnee Threat

How dangerous are FTFs? The question is difficult to answer: FTFs' ideologies, motivations and experience are both diverse and complex, defying attempts to map a single risk profile for returnees.²⁹ For some, conflict will only have invigorated their commitment to terrorist ideology. These returnees, whom Clarke and Amarasingam classify as "operational", are unquestionably the most dangerous: They "attempt to resuscitate dormant networks, recruit new members, or conduct lone-wolf style attacks" in their home countries.³⁰ Just how many returnees fall into this category is difficult to gauge, though the proportion is likely higher among the current crop of returnees. Those who joined the Syrian conflict in its early stages more typically conceived of foreign fighting as a humanitarian endeavour in the context of a just war against the Assad regime. The arc of today's returnees is

25 "ISIS Foreign Fighters after the Fall of the Caliphate", above n 23, at 26. There were reports of breakouts in October 2019: "Hundreds of ISIL prisoners escape Syrian camp, Kurds say" (14 October 2019) Al Jazeera <www.aljazeera.com>.

26 Carlotta Gall "Turkey Starts Sending Captured Foreign Fighters Home From Syria" *The New York Times* (online ed, New York, 11 November 2019).

27 "Request for Information from the New Zealand Police" (September 2020) IR-01-20-22032 (Obtained under Official Information Act 1982 Request to the New Zealand Police).

28 "Turkey catches New Zealanders linked to Isis entering from Syria" *The Guardian* (online ed, London, 15 February 2021); and Thomas Manch "New Zealand 'terrorist' detained in Turkey becomes trans-Tasman issue" (16 February 2021) Stuff <www.stuff.co.nz>.

29 Radicalisation Awareness Network *Responses to returnees: Foreign terrorist fighters and their families* (RAN Manual, July 2017) at 16.

30 Colin P Clarke and Amarnath Amarasingam "Where Do ISIS Fighters Go When the Caliphate Falls?" *The Atlantic* (online ed, the United States, 6 March 2017).

different: They have weathered the paroxysms of an extremely brutal conflict and may be "more battle-hardened and ideologically committed" as a result.³¹

One metric for risk is the number of returnees who perpetrate attacks in their home countries. Vidino, Marone and Entenmann put the "blowback rate" at around 1 in 500, with FTFs participating in 18 per cent of terrorist attacks in the period from 2014 to 2017.³² Malet and Hayes' analysis showed that most attacks occur within five months of the perpetrator's return; after five months, the risk of an attack decreases significantly.³³ Despite the relatively low probability of their occurrence, attacks by FTFs have the potential to cause significant harm. The Paris and Brussels attacks are grim examples of FTFs deploying their training and experience in conflict theatres to catastrophic effect.³⁴

The "blowback rate", however, is not fully representative. Statistical analyses of FTF returnees are necessarily approximate because the cohort's numerical parameters remain ill-defined. These analyses also tend to rely on open-source information and, therefore, may not capture more covert forms of participation in terrorist networks, for example, by recruitment or financial support. It is important to remember that even returnees who are, in Clarke and Amarasingam's taxonomy, "disillusioned" or "disengaged but not disillusioned",³⁵ still pose some risk. All have experienced horrific violence, whether as perpetrators, witnesses or victims, and will suffer its psychological impacts.³⁶ Furthermore, these individuals may be "reactivated" after their return. Some will leave the frontlines for pragmatic reasons and remain committed to terrorist ideology, if not to specific organisations.³⁷ For those who *have* recanted, the risk is far lower, but still present. Whatever it was that propelled them towards extremism (their motivations are complex, ranging from marginalisation

31 Radicalisation Awareness Network, above n 29, at 3 and 20.

32 Lorenzo Vidino, Francesco Marone and Eva Entenmann *Fear Thy Neighbour: Radicalization and Jihadist Attacks in the West* (International Centre for Counter-Terrorism – The Hague, Italian Institute for International Political Studies, and George Washington University Program on Extremism, 14 June 2017) at 60–61.

33 David Malet and Rachel Hayes "Foreign Fighter Returnees: An Indefinite Threat?" (2020) 32 *Terrorism and Political Violence* 1617 at 1632.

34 Daniel Byman *Road Warriors: Foreign Fighters in the Armies of Jihad* (Oxford University Press, New York, 2019) at 429–433; and Amandine Scherrer, Francesco Ragazzi and Josh Walmsley *The return of foreign fighters to EU soil* (European Parliamentary Research Service, Ex-post evaluation, May 2018) at 26.

35 Clarke and Amarasingam, above n 30.

36 Anne Speckhard, Ardian Shajkovci and Ahmet S Yayla "Defected from ISIS or Simply Returned, and for How Long? Challenges for the West in Dealing with Returning Foreign Fighters" (2018) 14 *Homeland Security Affairs* 1 at 16.

37 Clarke and Amarasingam, above n 30.

and difficult personal circumstances to deeper spiritual ennui)³⁸ is unlikely to have changed upon their return, and a small number may drift back to terrorist groups in the future.³⁹

C Why Control Orders?

New Zealand has not taken positive steps to repatriate detained FTFs, but neither has it adopted a policy of citizenship revocation.⁴⁰ This means that some FTFs may eventually return to New Zealand – and those who do will require at least some state supervision or support in order to de-radicalise and re-integrate into society.

However, at the time the Control Orders Act was passed, New Zealand only had a narrow range of legal tools available to manage returnees.⁴¹ Terrorism prosecutions appeared out of the question: Not only was it difficult to gather sufficient evidence, the complexity of New Zealand's governing anti-terrorism legislation – the Terrorism Suppression Act 2002 – meant that any charges were unlikely to succeed.⁴² Prosecution for ordinary crimes under the Crimes Act 1961 was an alternative and an arrest warrant was issued for Mark Taylor on the charge of threatening grievous bodily harm to New Zealand police officers and soldiers.⁴³ But this too encounters evidential challenges, and it may not assist in dealing with non-combatant returnees.

Control orders promised to fill the perceived lacuna in New Zealand's counter-terrorism response. The principal attraction of the regime was that it provided a civil channel for managing returnees, thereby jettisoning the legal and evidential burdens of prosecution, but preserving relatively wide powers of restriction and monitoring.⁴⁴ This attraction remains, and in post-Christchurch New Zealand, the Control Orders Act will figure in a revamped and strengthened counter-terrorism programme. Following the release of the Royal Commission's report into the attack, the current Government has proposed several legislative changes, among them amendments to allow post-

38 See for example Speckhard, Shajkovi and Yayla, above n 36; Lorne L Dawson and Amarnath Amarasingam "Talking to Foreign Fighters: Insights into the Motivations for *Hijrah* to Syria and Iraq" (2017) 40 *Studies in Conflict & Terrorism* 191; and Azadeh Moaveni *Guesthouse for Young Widows: Among the Women of ISIS* (Scribe Publications, Melbourne, 2019).

39 See for example Speckhard, Shajkovi and Yayla, above n 36, at 10–17.

40 Mike Ives "New Zealand Won't Revoke ISIS Member's Citizenship, but He May Face Charges" *The New York Times* (online ed, the United States, 4 March 2019).

41 See generally Ministry of Justice *Regulatory Impact Assessment: Control Orders*, above n 14..

42 "Current laws may make it difficult for prosecutors to charge NZ's 'bumbling jihadi', law professor says" (14 October 2019) 1 News <www.tvnz.co.nz/one-news>.

43 "Warrant that would stop the man called the Kiwi jihadi at the border" (18 October 2019) Stuff <www.stuff.co.nz>.

44 See generally Ministry of Justice *Regulatory Impact Assessment: Control Orders*, above n 14.

sentence imposition of control orders.⁴⁵ In the future then, it appears control orders will be used in different contexts to address different types of threats.

On one level, the Control Orders Act affords New Zealanders greater security. It facilitates the effective management of FTF returnees and assists in preventing terrorism. However, the use of a civil process, with the less demanding procedural standards it entails, is also disquieting. The next part of this article sketches the contours of the control order regime, before engaging with the issues surrounding control order procedure.

III THE CONTROL ORDERS ACT

A Purpose of the Act

The Act has three purposes. Its main purposes are to "protect the public from terrorism" and "prevent engagement in terrorism-related activities".⁴⁶ Unusually, it also has an incidental purpose: supporting returnees' "reintegration into New Zealand or rehabilitation, or both".⁴⁷

B Prerequisites for Imposition of a Control Order

There are two prerequisites for the imposition of an order, both of which must be established to the civil standard of proof (the balance of probabilities).⁴⁸ The person must be a "relevant person" within the meaning of s 6 of the Act. And under s 12, the person must pose a "real risk of engaging in terrorism-related activities" in the future.

1 Relevant person

The Act applies to people aged 18 or older who are in, coming, or may be coming, to New Zealand.⁴⁹ Section 6(1) sets out the characteristics which qualify an individual as a "relevant person". An individual is a relevant person if they meet one of the criteria in s 6(1)(a)–(e). The first grounds for a control order relate to past conduct: An order may be imposed against a person who has "engaged in terrorism-related activities in a foreign country"⁵⁰ or has "travelled, or attempted to travel, to a foreign country" for that purpose.⁵¹ A court may also issue an order on the basis of an individual's

45 Hon Kris Faafoi MP "Counter terrorism laws to be strengthened" (8 December 2020) Beehive <www.beehive.govt.nz>.

46 Control Orders Act, s 3(a)–(b).

47 Section 3(c).

48 Section 31.

49 Section 6.

50 Section 6(1)(a).

51 Section 6(1)(b).

legal history; overseas convictions⁵² or control orders⁵³ for terrorism-related activity will qualify the individual as a "relevant person", as will certain immigration decisions.⁵⁴ The issuing court must have regard to the "source ... validity, authenticity, and reliability" of evidence used to establish that an individual meets the s 6 criteria;⁵⁵ offsetting concerns about reliance on decisions from jurisdictions where terrorism is weaponised to suppress political dissent.⁵⁶

Section 8 of the Act defines "terrorism-related activity" expansively. This was deliberate: The Ministry of Justice advised the Foreign Affairs, Defence and Trade Select Committee that the test was "intentionally broad in order to recognise the wide range of conduct that enables terrorism to be carried out".⁵⁷ "Related activity" thus includes not only the carrying out of terrorism or preparatory acts thereto, but also conduct which *facilitates* or *materially supports* terrorism.

In this context, "terrorism" takes its meaning from the definition of "terrorist act" in s 5(1) of the Terrorism Suppression Act 2002, which encompasses three sub-types of terrorist activity: terrorist acts in violation of specified international conventions;⁵⁸ terrorist acts in armed conflict;⁵⁹ and terrorist acts fitting the general definition in s 5(2). Section 5(2) requires that the perpetrator:

- (1) carry out the act for the purpose of advancing an ideological, political, or religious cause; and
- (2) intend to either: induce terror in a civilian population; or unduly compel or force a government or an international organisation to do or abstain from doing any act; and
- (3) intend to cause one of the outcomes in s 5(3), such as death or serious bodily injury to other persons.

The inclusion of material support and facilitation under the umbrella of "terrorism-related activity" is significant. Constructive knowledge that the conduct facilitates or materially supports terrorism suffices for s 8 of the Control Orders Act, and the facilitator or supporter need not be aware of any specific terrorist act. It is immaterial whether any act is actually carried out.⁶⁰ Advising the Committee, the Ministry of Justice suggested that the inquiry into whether a person has materially

52 Section 6(1)(c).

53 Section 6(1)(e).

54 Section 6(1)(d).

55 Section 7.

56 See for example (24 October 2019) 742 NZPD 14696 per Golriz Ghahraman MP.

57 Ministry of Justice *Terrorism Suppression (Control Orders) Bill – Initial Briefing* (7 November 2019) at [11].

58 See Terrorism Suppression Act 2002, sch 3.

59 Section 4(1).

60 Control Orders Act, s 8.

supported or facilitated terrorism would be "highly contextual" and fact dependent.⁶¹ Their examples give a flavour of the kinds of conduct that might qualify, such as dissemination of terrorist propaganda or provision of care to members of a terrorist group.

2 "Real risk"

Once it is established that the person is a relevant person, the issuing court must be satisfied that the person poses a "real risk of engaging in terrorism-related activities in a country".⁶²

C Control Order Requirements

Section 17 of the Control Orders Act empowers the issuing court to impose a range of restrictions under a control order. The list in s 17(a)–(o) is exhaustive, subject to the additional constraints in ss 18, 19 and 20. From these, the court devises a bespoke set of restrictions which is tailored to the particular security threat posed by the individual. The requirements available under s 17 restrict movement, association, activities and finances; as well as access to technology, information and other items. For example, the court may compel the person to obey a curfew of up to 12 hours per day.⁶³ A control order may also mandate search and surveillance including electronic monitoring,⁶⁴ though this is to be used only as a last resort.⁶⁵ The person may be required to undertake alcohol, drug and rehabilitative needs assessments.⁶⁶ If the person has consented, the court may also require them to engage with rehabilitative services.⁶⁷

There must be a nexus between the conditions of the order and the purposes of the Control Orders Act.⁶⁸ The court must be satisfied that requirements imposed for the Act's main purposes of "protect[ing] the public from terrorism" and "prevent[ing] engagement in terrorism-related activities in a [foreign] country" are "necessary and appropriate, and are only those necessary and appropriate" to achieve those purposes.⁶⁹ The same applies to any requirements imposed for the purpose of supporting the relevant person's reintegration and/or rehabilitation.⁷⁰ Section 12 stipulates further

61 Ministry of Justice *Departmental Report: Terrorism Suppression (Control Orders) Bill* (3 December 2019) at [67].

62 Control Orders Act, s 12(2)(a).

63 Sections 17(j) and 18.

64 Sections 17(l)–(n).

65 Sections 17(n) and 19.

66 Section 17(o).

67 Sections 17(p) and 20.

68 Section 12(1)(b).

69 Section 12(2)(b).

70 Section 12(2)(c).

mandatory relevant considerations for the issuing court. The court must consider the impact of the control order requirements on "the person's personal circumstances", such as their "financial position, health, and privacy" and "whether [the] requirements are justified limits on rights and freedoms in the New Zealand Bill of Rights Act 1990".⁷¹

D Application and Determination Procedure

1 Interim control orders

The Commissioner of Police may apply for an interim order before or within one month of the person's arrival in New Zealand, provided that the Commissioner "believes on reasonable grounds that it is necessary and appropriate that the ... order is made as soon as practicable ... to manage the [security risks] posed by the relevant person".⁷² Pre-arrival applications will be made, heard and determined without notice, though the Commissioner may decide to make the application on notice in certain circumstances.⁷³ Conversely, post-arrival applications may only be made without notice where the Commissioner reasonably believes that it is "necessary and appropriate".⁷⁴

2 Final control orders

All final control order applications must be made on notice after the person has arrived in New Zealand.⁷⁵ The Commissioner may apply for a final order in one of three circumstances: First, where a person is already subject to an interim order, within three months of service of the interim order or "within any longer or shorter period" set down by the court "on or after making the interim order and during that 3-month period";⁷⁶ second, where an interim order has been declined, within 12 months of the person's arrival if there has been "a material change in circumstances" since the order was declined;⁷⁷ third, the Commissioner may bypass the interim order procedure entirely and seek a final order outright within 12 months of the person's arrival in New Zealand.⁷⁸

E Duration, Renewal and Breach

Interim control orders run from the date they are imposed until they expire. An interim order expires when one of the events in s 25(1)(a)–(c) occurs. Service of a final control order displaces the

71 Section 12(3).

72 Section 15(1)(b).

73 Section 15(2)(a)(i) and (ii).

74 Section 15(2)(b).

75 Control Orders Act, s 16.

76 Section 16(1)(b)(ii).

77 Section 16(1)(c).

78 Section 16(1)(a).

original interim order.⁷⁹ Alternatively, the interim order may lapse where no final order is sought,⁸⁰ or a final order is sought and declined.⁸¹ The default position is that an interim control order lasts for three months, though the issuing court may direct that the Commissioner has a longer or shorter period within which to apply for a final order, after which, the interim order terminates if no final order is issued.⁸²

Final control orders have a maximum duration of two years (including the period of a previous interim order), though in each case the order's duration "must not be longer than the court considers necessary having regard to the purposes" of the Control Orders Act.⁸³ Unlike interim orders,⁸⁴ final control orders are renewable and may be renewed twice.⁸⁵ Thus, the maximum period of supervision under a control order is six years.

Breach of a control order – whether an interim or final order – is a criminal offence. A breach is punishable by imprisonment for up to a year, or a maximum fine of \$2,000.⁸⁶

IV THE CHALLENGE OF CONTROL ORDERS: CONTROL ORDERS AND THE PREVENTATIVE STATE

Before embarking on the analysis of the control order regime, it is helpful to locate control orders within the broader context of the preventive state. At first glance, it is tempting to explain counter-terrorism measures as an example of legislative exceptionalism, governed by singularly acute policy considerations and, therefore, deserving of their own analytical paradigm. But to compartmentalise control orders obscures their role in the larger project of prevention which spans areas including, for example, crime, immigration and mental health.⁸⁷ Thus, although not without its limitations,⁸⁸ the preventive state holds real value as a theoretical device for parsing the structure and implications of

79 Section 25(1)(a).

80 Section 25(1)(b).

81 Section 25(1)(c).

82 Sections 15(5), 16(1)(b) and 25(1).

83 Section 25(2).

84 Sections 25–27.

85 Section 26.

86 Section 32.

87 Lucia Zedner "Preventive Justice or Pre-Punishment? The Case of Control Orders" (2006) 60 CLP 174 at 190.

88 See generally Tamara Tulich "Critical Reflections on Preventive Justice" in Tamara Tulich and others (eds) *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, London, 2017) 1.

the control order regime. It enables comparison and synthesis across the spectrum of preventive policy and ultimately, a more fruitful analysis.⁸⁹

As a criminological concept, the preventive state describes a policy shift. Whereas traditionally, the state has focused its resources on denouncing and punishing wrongdoers after they commit crimes, in the preventive state, *guilt* becomes secondary to *dangerousness* and the focus shifts to "identify[ing] and neutraliz[ing] dangerous individuals before they commit crimes".⁹⁰ To be sure, "preventive justice" is nothing new. Ashworth and Zedner trace its genealogy to Blackstone, who talks in the *Commentaries* of a "justice [that] may bind over all ... persons not of good fame".⁹¹ We find the germ of the concept even earlier, in the first accounts of a liberal theory of government: preventive justice is nascent in Hobbes' and Locke's conception of a social contract wherein citizens sacrifice some degree of their personal autonomy in exchange for the security provided by the state.⁹² Prevention is thus inextricably bound up in the structures and rationales of the criminal justice system itself. Inchoate and pre-inchoate crimes, crimes of possession and crimes of risk creation are all preventive in nature.⁹³

Ashworth and Zedner are right to be wary of "grandiose epochal claims" about the preventive state. However, they are also right to acknowledge that there *is* something new in the scale and intensity of intervention which the preventive state now permits and the psychology which sustains its increasingly aggressive posture.⁹⁴ The expansion of the preventive state dovetails with other societal changes which scholars have conceptualised in a variety of ways.⁹⁵ Writing in the 1990s, Ericson and Haggerty observed the increasing significance of security as a social good and an attendant preoccupation with risk.⁹⁶ In their view, the attempt to master risk creates a negative

89 Tamara Tulich "The Preventive State? Prevention and pre-emption in mental health, high risk offender and anti-terror laws" (PhD thesis, University of New South Wales, 2014) at 318–323 and 331–336.

90 Steiker "The Limits of the Preventive State", above n 11, at 774.

91 Andrew Ashworth and Lucia Zedner *Preventive Justice* (Oxford University Press, Oxford, 2014) at 29, citing William Blackstone *Commentaries on the Laws of England in Four Books* (Routledge, London, 2001; 1753) vol 4 at 251.

92 Andrew Ashworth and Lucia Zedner "Punishment Paradigms and the Role of the Preventive State" in AP Simester and others (eds) *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing, Oxford, 2014) 3 at 9–11.

93 Ashworth and Zedner "Just Prevention: Preventive Rationales and the Limits of the Criminal Law", above n 12, at 283–293.

94 Andrew Ashworth and Lucia Zedner "The Rise and Restraint of the Preventive State" (2019) 2 *Annual Review of Criminology* 429 at 432–434.

95 See Tulich "The Preventive State?", above n 89, at 27–49.

96 Kevin D Haggerty and Richard V Ericson *Policing the Risk Society* (Clarendon Press, Oxford, 1997) at 85–86.

feedback loop: As society identifies risks and maps their statistical constellations, it invariably reaches the limits of its own scientific capabilities, revealing the new and potent threat of the unknowable.⁹⁷ Subsequent accounts emphasise the catalytic effect of 9/11, which has focalised uncertainty and precaution.⁹⁸ For 9/11 not only furnished a rhetorically powerful justification for preventive action, it also generated a suite of international resolutions that exhorted states to take action to address the terrorist threat.⁹⁹ Driven by "core" states, the international counter-terrorism framework has expanded rapidly. It co-opts "peripheral" states, producing a state of emergency that is "multiplied across a whole field of nation-states and results in parallel emergencies coordinated centrally as part of a global campaign".¹⁰⁰

The result of all this is a proliferation of measures which are, to use Janus' term, "radically preventive" in that they do not so much respond to the commission or attempted commission of harm as *pre-empt* the commission or attempt itself. Their touchstone is not proven harm, but the far more nebulous concept of individual "propensity" to certain types of proscribed activity.¹⁰¹ Ericson puts it starkly when he writes that the organising concepts of *actus reus* and *mens rea* have been eschewed in favour of the "finus reus" of domestic security; laws "assign criminal status on the basis of imaginary extrapolation to unknown futures" with risk deployed as a "forensic resource of stigma and taboo against whomever is judged threatening in local contexts of domestic security".¹⁰² Likewise, Janus illustrates the process by which risk founds "a new outsider jurisprudence". In Janus' view, preventive measures "reify risk, make it concrete and ascribe it to the individual" so that it becomes constitutive of that person's identity and legitimates differential treatment, sustaining the person's status as "the degraded other".¹⁰³

Most relevantly for my purposes, the preventive state implements prevention *outside* the confines of the criminal justice process, developing an arsenal of coercive civil measures which "sidestep" the

97 At 88–91 and 96–99.

98 Ashworth and Zedner "The Rise and Restraint of the Preventive State", above n 94, at 431–433.

99 See for example SC Res 1373 (2001) and SC Res 2178 (2014).

100 Kim Lane Scheppele "The Empire's New Laws: Terrorism and the New Security Empire after 9/11" in George Steinmetz (ed) *Sociology and Empire: The Imperial Entanglements of a Discipline* (Duke University Press, Durham NC, 2013) 245 at 274.

101 Eric Janus "The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence" (William Mitchell College of Law, Working Paper No 11, May 2005) at 1–2.

102 Richard V Ericson *Crime in an Insecure World* (Polity Press, Cambridge, 2007) at 157–158.

103 Janus, above n 101, at 22–27.

requirements of criminal procedure.¹⁰⁴ This is perhaps an unfortunate side effect of the accretion of ever more exacting criminal procedural protections; though a laudable development of itself, it has indirectly encouraged resort to "less procedurally rigorous" channels.¹⁰⁵ Thus, we might understand preventive measures in light of the development of what Ericson has memorably, if a touch apocalyptically,¹⁰⁶ labelled "counter-law": The propagation of measures which, by their subversion of established norms, contribute to the disassembly of the law's own carefully crafted procedural architecture.¹⁰⁷

The salient point is that the innovation of coercive civil measures problematises the traditional binary between civil and criminal law. The regime described in Part III elides criminal and civil forms to create a composite measure which does not appear to fit comfortably in either category. It uses a civil process and applies a civil standard of proof. Its basis is adjudication of risk, rather than of criminal conduct.¹⁰⁸ However, the control order regime fuses this civil process with elements more typical of the criminal paradigm. Most obviously, it threatens a criminal sanction for breach.¹⁰⁹ This feature has led von Hirsch and Simester, for example, to characterise civil preventive orders as *ex ante* criminal prohibitions.¹¹⁰ In addition, as Zedner has observed of control orders in the United Kingdom, the conditions imposed under a control order may be highly restrictive.¹¹¹

V DEALING WITH THE CHALLENGE: MANAGING CONTROL ORDER PROCEEDINGS

A Classifying Control Orders Under the NZ Bill of Rights

As demonstrated in Parts III and IV, the regime created by the Control Orders Act challenges current civil and criminal paradigms. The Crown Law Office noted this difficulty in its s 7 advice on the Bill, observing that control orders were "problematic from a human rights perspective" because they allow for "a significant degree of intrusion into a person's life and activities" which is usually

104 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, Portland (Oregon), 2007) 257 at 264–267.

105 Zedner "Preventive Justice or Pre-Punishment?", above n 87, at 201.

106 Ashworth and Zedner "The Rise and Restraint of the Preventive State", above n 94, at 438.

107 Ericson, above n 102, at 24–26.

108 Andreas von Hirsch and AP Simester *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Publishing, Oxford, 2011) at 216.

109 Control Orders Act, s 32.

110 Von Hirsch and Simester, above n 108, at 217.

111 Zedner "Preventive Justice or Pre-Punishment?", above n 87, at 195–196.

only possible "pursuant to criminal conviction".¹¹² In this section, I explore the criminal-civil divide in the NZ Bill of Rights Act and where, on that dividing line, control orders are likely to fall. My conclusion – that, based on current authority, a court would likely agree with the Crown Law Office that control orders are "primarily civil in nature"¹¹³ – provides a basis for the critique in the next section.

1 The criminal-civil divide in the NZ Bill of Rights and its implications for control orders

In keeping with the common law tradition, the NZ Bill of Rights distinguishes between criminal and civil proceedings, affording enhanced protections in the determination of the former. Section 25 provides that persons who are "charged with an offence" are entitled to the observance of minimum standards of criminal procedure "in relation to the determination of the charge". It protects the right to a "fair and public hearing by an independent and impartial court",¹¹⁴ and lists various component rights.¹¹⁵ Its complement is s 27(1), which guarantees observance of the principles of natural justice in both civil and criminal proceedings. If control order proceedings are criminal proceedings, they are protected by both ss 25 and 27. If they are civil proceedings, then only s 27(1) is engaged.

The first question, therefore, is whether a person against whom a control order is sought is charged with an "offence" and thus benefits from the panoply of protections in s 25 of the NZ Bill of Rights. In its current form, the Control Orders Act is prima facie inconsistent with several s 25 rights. The provision for proof on the balance of probabilities, rather than to the criminal standard of beyond reasonable doubt, infringes the s 25(c) right to be presumed innocent until proven guilty.¹¹⁶ As a matter of course, interim order applications under the Control Orders Act will be made, heard and determined without notice, which limits the accused's s 25(e) and (f) right under the NZ Bill of Rights to be present at the trial and to present a defence, and to present and examine witnesses. Heavy reliance on non-disclosable information may also impair the rights provided by s 25(e) and (f) of the NZ Bill of Rights. The retrospective application of control orders (they are made in respect of past conduct, which may have been committed before the Act came into force) raises a further issue in relation to the immunity from increased penalty in s 25(g) in the NZ Bill of Rights. Cumulatively, these inconsistencies may also engage the s 25(a) right to a fair and public hearing.

112 Crown Law Office *Terrorism Suppression (Control Orders) Bill (version 22): Consistency with the New Zealand Bill of Rights Act 1990* (7 October 2019) at [2].

113 At [26].

114 New Zealand Bill of Rights Act, s 25(a).

115 Section 25(b)–(i).

116 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [23.4.19], citing *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [193]–[199] and [202] per McGrath J, at [51] per Blanchard J, and at [100] per Tipping J.

2 *Control orders in overseas courts*

The control order regime has not yet been litigated in New Zealand, so the leading overseas case, *Secretary of State for the Home Department v MB*, is instructive. In *MB*, which was cited by the Crown Law Office in its s 7 advice on the Bill,¹¹⁷ the House of Lords ruled that control orders were civil, not criminal, in nature.¹¹⁸ The House of Lords heard appeals from *MB* and *AF*, who were subject to control orders under the Prevention of Terrorism Act 2005.¹¹⁹ The Act empowered the Home Secretary to issue an order against an individual if they had reasonable grounds to suspect that individual's involvement in terrorism-related activity and considered an order was "necessary, for purposes connected with protecting members of the public from a risk of terrorism".¹²⁰ The requirements of *AF*'s control order were onerous – far more so than would be permitted under the Control Orders Act. *AF* was under a 14-hour night-time curfew and confined to an area of nine square miles during the day with constant electronic monitoring. He had to surrender his passport and could not visit airports, seaports and certain train stations. Additionally, *AF* was obliged to report to police regularly and the police were entitled to search his flat at any time. The order further restricted *AF*'s interactions with others, his financial activities and access to communications equipment.¹²¹ *AF*'s wellbeing suffered as a result: he was isolated from his family and community; he felt inhibited from practising his religion; and he found the restrictions on his daily life frustrating and stigmatising.¹²²

AF challenged the control order on several grounds, including the compliance of control order procedure with art 6 of the European Convention on Human Rights (ECHR).¹²³ Article 6 is bifurcated into a criminal and civil limb. The criminal limb encompasses not only the right in 6(1) to a "fair trial", but also the additional protections in 6(2) and (3), which respectively provide for the presumption of innocence and various rights relating to communication of the charge, preparation of a defence and participation in the trial. *AF* claimed that control order proceedings amounted to the determination of a criminal charge, engaging the criminal limb.

The autonomous definition of "criminal charge" in the ECHR, first articulated in *Engel v Netherlands*, demands a substance-over-form approach which focuses on "[the] nature of the offence"

117 Crown Law Office, above n 112, at [23].

118 *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] AC 440.

119 Control orders have since been replaced by Terrorism Prevention and Investigation Measures under the Terrorism Prevention and Investigation Measures Act 2011 (UK).

120 Prevention of Terrorism Act 2005 (UK), ss 1–2.

121 *Secretary of State for the Home Department v MB*, above n 118, at [7] per Lord Bingham.

122 *Secretary of State for the Home Department v AF* [2007] EWHC 651 (Admin) at [24] and following.

123 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), art 6.

and "[the] severity of the penalty that the person concerned risks incurring".¹²⁴ Counsel for AF argued that a control order alleged past participation in terrorism-related activity, which is "conduct ... of exceptional gravity ... a serious crime".¹²⁵ Therefore, control orders were "a paradigm example of the type of procedural device depriving an individual of his Convention rights which the autonomous definition ... exists to prevent".¹²⁶ They were not purely preventive, but rather "introduce[ed] an element of condemnation for past criminal conduct and an element of punishment". Furthermore, the consequences of a control order were severe and could "[amount] in substance to a deprivation of liberty of potentially indefinite duration combined with other significant restrictions on individual freedom".¹²⁷

The House of Lords disagreed, holding that control order proceedings did not meet the definition of a "criminal charge".¹²⁸

... [T]here is no assertion of criminal conduct, only a foundation of suspicion; no identification of any specific criminal offence is provided for; the order made is preventative in purpose, not punitive or retributive; and the obligations imposed must be no more restrictive than are judged necessary to achieve the preventative object of the order.

Lord Bingham acknowledged that punishment served diverse purposes including prevention, and there was, therefore, no "watertight distinction" between the two. By the same token, a nominally preventive measure with draconian stipulations might "be penal in its effects if not in its intention".¹²⁹ But in Lord Bingham's view, AF's case did not reach the threshold and could be adequately administered under the civil limb of art 6 of the ECHR, which would "entitle [AF] to such measure of procedural protection as is commensurate with the gravity of the potential circumstances".¹³⁰

3 *The meaning of "charged with an offence" in New Zealand jurisprudence*

Consideration of the New Zealand authorities suggests a similar conclusion: Control orders fall outside the boundaries of what is considered "criminal". As noted above, the relevant inquiry is whether the subject of a control order application is "charged with an offence". New Zealand

¹²⁴ *Engel v Netherlands* [1976] ECHR 3, (1976) 1 EHRR 647 at [82].

¹²⁵ *Secretary of State for the Home Department v MB* [2008] 1 AC 440, above n 118, at 454.

¹²⁶ At 455.

¹²⁷ At 454–456.

¹²⁸ At [24] per Lord Bingham.

¹²⁹ At [23].

¹³⁰ At [24], citing *B v Chief Constable of the Avon and Somerset Constabulary* [2001] 1 All ER 562 (QB); *Gough v Chief Constable of the Derbyshire Constabulary* [2002] EWCA Civ 351; and *R (McCann) v Crown Court at Manchester* [2002] UKHL 39.

jurisprudence lacks a clear, universal definition of "offence".¹³¹ The general trend appears to be towards a narrow reading of "offence" broadly consistent with the approach taken by the Canadian courts in cases such as *R v Wigglesworth* and *Canada v Schmidt*.¹³² That is to say, s 25 of the NZ Bill of Rights Act is confined to proceedings that are criminal "by their very nature", or that impose "true penal consequences" – defined by the Canadian courts as imprisonment or a substantial fine.¹³³

Judicial excavation of the civil-criminal divide in the specific context of prevention appears to be relatively limited. As pointed out in the advice from the Crown Law Office,¹³⁴ a helpful analogy may be drawn between control orders and post-sentence supervision of certain repeat offenders under Extended Supervision Orders (ESOs)¹³⁵ and Public Protection Orders (PPOs).¹³⁶ Two decisions have assessed the compliance of these regimes with the NZ Bill of Rights: *Belcher v Chief Executive of the Department of Corrections* (ESOs)¹³⁷ and; more recently, *Chisnall v Chief Executive of the Department of Corrections* (ESOs and PPOs).¹³⁸ Both Courts in *Belcher* and *Chisnall* held that an ESO was a criminal penalty.¹³⁹ In *Chisnall*, however, Whata J ruled that PPOs were non-penal.¹⁴⁰ At the time of writing, the decision in *Chisnall* is under appeal.

Belcher and *Chisnall* focus not on the definition of "offence" for the purposes of Bill of Rights Act ss 24 and 25, but on the definition of "penalty" for the purposes of ss 25(g) and 26. However, I argue that they are nonetheless relevant to determining the procedural protections applicable to control orders. In *Belcher*, the Court of Appeal appeared to envisage that ESOs triggered other s 25 rights – for example, the presumption of innocence.¹⁴¹ While *McDonnell v Chief Executive of the Department of Corrections* subsequently limited this dictum,¹⁴² that was in the context of sentencing and there is no such barrier to rights like the presumption of innocence in control order proceedings where past conduct and future risk are adjudicated concurrently. Moreover, the same preventive impulse

131 Butler and Butler, above n 116, at [21.5.1].

132 At [21.5.35] citing *R v Wigglesworth* [1987] 2 SCR 541 (SCC); and *Canada v Schmidt* [1987] 1 SCR 500.

133 *R v Wigglesworth*, above n 132, at 561.

134 Crown Law, above n 112, at [25]–[26].

135 Parole Act 2002, pt 1A.

136 Public Safety (Public Protection Orders) Act 2014.

137 *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 [*Belcher*].

138 *Chisnall v Chief Executive of the Department of Corrections* [2019] NZHC 3126 [*Chisnall*].

139 *Belcher*, above n 137, at [49]; *Chisnall* above n 138, at [190].

140 *Chisnall*, above n 138, at [190].

141 *Belcher*, above n 137, at [38].

142 *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352 at [38]–[39].

energising the PPO and ESO regimes is also at the core of the Control Orders Act. Because the regimes invoke similar policy concerns, the courts' analysis is likely to be instructive.

For the Court of Appeal in *Belcher*, the trigger for ss 25 and 26 was "the imposition through the criminal justice system of significant restrictions (including detention) on offenders in response to criminal behaviour".¹⁴³ The indicia supplied by Whata J in *Chisnall* are similar:¹⁴⁴

- (a) The measure is imposed following a conviction;
- (b) The measure forms part of an arsenal of sanctions imposed in furtherance of sentencing purposes and principles and/or has a significant impact on the liberty of the person;
- (c) The purpose of the measure is punitive or partially punitive;
- (d) The process used to impose the measure is a criminal process;
- (e) The measure is given effect to in a prison or a prison-like institution or may result in imprisonment;
- (f) The measure is non-therapeutic or not implemented in a therapeutic way;
- (g) The severity of the conditions of the measure.

It is significant that, unlike either ESOs or PPOs, control orders are entirely divorced from the criminal justice process and are not contingent upon prior offending; only one qualifying criterion under s 8 aligns with offences in the Terrorism Suppression Act.¹⁴⁵ Furthermore, many of the procedural factors that typified the ESO regime as criminal in *Belcher* and *Chisnall* are conspicuously absent: in interim order proceedings, the relevant person is most often not required to appear at the hearing and may in fact be barred from doing so;¹⁴⁶ the application for a control order is not governed by criminal procedure statutes;¹⁴⁷ and while legal aid is available, it is not classified as legal aid for a criminal proceeding.¹⁴⁸

In terms of substantive effect, control orders also do not appear to meet the definition of a criminal sanction. Granted, control orders do have some criminal features. For example, control order requirements such as curfews and electronic monitoring are comparable to ESO standard

¹⁴³ *Belcher*, above n 137, at [49].

¹⁴⁴ *Chisnall*, above n 138, at [51].

¹⁴⁵ Crown Law Office, above n 112, at [26], n 23; See Control Orders Act, ss 6 and 8 and compare Terrorism Suppression Act, s 6A.

¹⁴⁶ Control Orders Act, ss 15 and 36. Compare Parole Act 2002, s 107G.

¹⁴⁷ Contrast *Belcher*, above n 137, at [47(i)]. An application for an ESO was then subject to "[s]ections 71, 201, 203, 204 and 206 of the the Summary Proceedings Act 1957, ss 138–141 of the Criminal Justice Act 1985 and the Costs in Criminal Cases Act 1967. See also Parole Act 2002, s 107G.

¹⁴⁸ Control Orders Act, s 37; and Legal Services Act 2011, s 4(1); and compare Parole Act, s 107X. See *Chisnall*, above n 138, at [136] and [140].

conditions.¹⁴⁹ Breach of a control order is a criminal and imprisonable offence.¹⁵⁰ Furthermore, control orders lack the strong therapeutic orientation that swayed *Whata J* to conclude that PPOs were non-criminal. PPOs are expressly non-punitive.¹⁵¹ They are predicated upon "a severe disturbance in behavioural functioning established by evidence to a high level," of characteristics including "intense drive or urge" to offend; "limited self-regulatory capacity"; "absence of understanding or concern" for victims; and "poor interpersonal relationships or social isolation".¹⁵² A person under a PPO has a right to rehabilitative treatment.¹⁵³ Further, it merits mention that public discourse stigmatises and pathologises sexual offending in particular; it tends to single sexual offenders out as especially depraved and often incurable.¹⁵⁴

However, countervailing factors suggest that control orders are non-criminal overall. Control order requirements are tightly restricted, and they are less intrusive than those available under ESOs or PPOs. PPOs allow for confinement in designated residences or, in certain circumstances, prison.¹⁵⁵ The regime entails further and significant encroachment on individual freedoms, for example, requirements to submit to invasive bodily searches.¹⁵⁶ ESOs are less restrictive, but still more so than control orders. Importantly, the Parole Board has jurisdiction to impose special conditions. These may include court-approved "intensive monitoring condition[s]", under which an offender must "submit to being accompanied and monitored, for up to 24 hours a day" by an approved person.¹⁵⁷

As to rehabilitation, although this arm of the Control Orders Act is underdeveloped, it *does* provide for the rehabilitation and reintegration of individuals as an incidental purpose of an order.¹⁵⁸ Subject to the relevant individual's consent, an order may require a needs assessment and engagement with rehabilitative services.¹⁵⁹

149 Crown Law Office, above n 112, at [25.1] and [25.2]; Control Orders Act, s 17; and compare Parole Act s 107JA.

150 Crown Law Office, above n 112, at [25.1] and [25.2]; and Control Orders Act, s 32.

151 Public Safety (Public Protection Orders) Act 2014, s 5.

152 Section 13(2).

153 Section 36.

154 Jasmin Moran "The Public Safety (Public Protection Orders) Bill 2012: Is Post-Sentence Detention of Sex Offenders Consistent With Human Rights?" (2014) 45 VUWLR 133 at 141–144.

155 Public Safety (Public Protection Orders) Act, sub pt 6.

156 Sections 20–23 and sub pt 4. See *Chisnall*, above n 138, at [111]–[113].

157 Parole Act, ss 107IAC, 107J and 107K. See also Crown Law Office, above n 112, at [25.1].

158 Control Orders Act, s 3.

159 Sections 17 and 20.

These formal and substantive differences suggest that control orders do not qualify as "criminal" and, therefore, do not engage criminal procedural rights. But is this the correct result? The next section assesses whether the current configuration of procedural rights in the NZ Bill of Rights adequately addresses the challenge of preventive civil measures.

B Is the Current Framework in the NZ Bill of Rights Fit for Purpose?

Ashworth and Zedner suggest four options for regulating "coercive preventive measures".¹⁶⁰ The first and barest proposition is that courts should adhere strictly to the formal classification of a particular regime as civil or criminal. But as the authors point out, this approach is a dangerous one. It abdicates judicial oversight entirely, deferring to the legislature and encouraging a cynical resort to civil procedure to circumvent due process rights.¹⁶¹ This leaves three remaining alternatives: treating preventive measures as criminal; retaining their civil classification, but importing criminal procedural protections; or recognising a new "middle-ground" of civil punishment.

1 Are criminal procedural protections appropriate?

A possible solution is an assertive approach that treats the substantive impacts of a measure as determinative, rather than its procedural form. Under this proposal, courts rigorously scrutinise ostensibly civil measures and are free to depart from the legislature's classification where necessary.¹⁶² Control orders, the argument goes, impugn conduct which is so serious, and impose restrictions on individual freedoms which are so onerous, that they amount to punishment and ought to attract the full gamut of criminal procedural protections.¹⁶³

The failure of the current law to recognise control orders as such is, therefore, cast as a defect in the current threshold test. Remedying this defect appears to require an enlargement of the definition of "offence" along the lines Mahoney suggests in *The New Zealand Bill of Rights*. Rather than a strict and formalistic *Wigglesworth* approach, he suggests a "policy analysis" which is not tethered to double jeopardy jurisprudence and which considers carefully the "separate questions ... raised when considering who should be entitled to the many rights set forth in sections 23–25".¹⁶⁴

The authors of the White Paper *A Bill of Rights for New Zealand* noted that "offence" is used in "differing contexts", and while "[i]t primarily means acts punishable under criminal law", "[t]he

¹⁶⁰ Ashworth and Zedner "Just Prevention: Preventive Rationales and the Limits of the Criminal Law", above n 12, at 294–302.

¹⁶¹ At 294–295.

¹⁶² At 295–297.

¹⁶³ This argument is summarised in Zedner "Preventive Justice or Pre-Punishment? The Case of Control Orders", above n 87, at 193–196.

¹⁶⁴ Richard Mahoney "The Concepts of 'Offence' and 'Charge'" in Paul Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 585 at 589–591.

character and importance" of some proceedings "might suggest that ... people subject to such proceedings should be entitled to the protection of the [criminal] provisions". However, the authors were also quick to point out that debates about the coverage of criminal procedural protections were "less critical" in New Zealand, because of the provision for "a general guarantee of natural justice".¹⁶⁵

This approach is attractive because it harmonises with traditional common law concepts of the relationship between state and citizen, in particular the desire to maximise individual liberty and to shore up due process as a bulwark against abuses of state power. However, although this approach is instinctive, it may do more harm than good.¹⁶⁶ Interrogation of its underlying premises reveals a problematic equation of punishment with prevention. This endangers the theoretical coherence of the civil-criminal divide because it allows "the human rights tail [to wag] the definitional dog, ... subordinat[ing] the definition of punishment to the question of which procedural protections should apply".¹⁶⁷ By the same token, assimilating prevention into the category of punishment stunts the development of specific principles and safeguards which address the issues unique to radical prevention.¹⁶⁸

Criminal procedural protections exist, Steiker reminds us, because punishment is the province of the criminal law. Punishment entails not only "sanction" but "censure",¹⁶⁹ and it must, therefore, be tightly controlled to ensure its penetrative psychic impact is not abused by the state.¹⁷⁰ But equally, criminal procedural rules function to demarcate punishment from other exercises of coercive power and thereby to preserve its potency as a means of social control.¹⁷¹

To justify the application of criminal procedural rules then, prevention must be treated as punishment. And this in turn requires "a type of temporal neutrality", or the erasure of the temporal difference between retrospectively-oriented punishment and prospectively-oriented prevention.¹⁷² Scholars such as Husak and Schauer emphasise the extent to which prevention is already embedded

165 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [10.112].

166 Sandra G Mayson "Collateral Consequences and the Preventive State" (2015) 91 Notre Dame L Rev 301 at 340.

167 Lucia Zedner "Penal Subversions: When is a punishment not punishment, who decides and on what grounds?" (2016) 20 *Theor Criminol* 3 at 14–15.

168 See for example Mayson, above n 166, at 340.

169 Zedner "Penal Subversions: When is a punishment not punishment, who decides and on what grounds?", above n 167, at 6.

170 Carol S Steiker "Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide" (1997) 85 *Geo LJ* 775 at 806–807.

171 At 808.

172 Zedner "Preventive Justice or Pre-Punishment?", above n 87, at 197.

in the criminal law,¹⁷³ and the uncertainty inherent in *all* determinations of criminal responsibility.¹⁷⁴ For Husak, a retributivist theory of punishment accommodates preventive measures: If we can predict with reasonable certainty that particular characteristics will produce a proscribed behaviour, then preventive detention can amount to punishment of a person for *possessing* those characteristics; in other words, desert attaches to possession of the prohibited trait rather than its consummation in the wrongful act.¹⁷⁵

But in my view, this approach obscures the distinctive and problematic features of radical prevention. Mayson distinguishes between "judgment[s] of culpability" on the one hand, and "judgment[s] of future risk" on the other, arguing that risk-based measures pose separate epistemological and moral issues.¹⁷⁶ There is a "powerful epistemological objection" to radical prevention, because it is impossible to definitively predict how individuals will behave in the future.¹⁷⁷ Zedner notes the concerning error rates of risk assessment tools, suggesting that these tools have acquired "an appurtenance of accuracy that may simply be misleading when applied to the messier context of human behaviour".¹⁷⁸

Beyond this epistemological barrier, Mayson identifies a moral one: Preventive measures diminish the individual's moral agency by denying them the opportunity to choose good.¹⁷⁹ And insofar as "moral autonomy ... has special value", measures that "[pre-empt] moral choices may have a special cost".¹⁸⁰

A further and concerning implication of prevention is that it extrapolates risk from the *groups* to which an individual belongs.¹⁸¹ This ultimately allows the identification of risk with certain demographic characteristics, such as ethnicity or religion, that are deemed to be predictive of criminal

173 See generally Douglas Husak "Lifting the Cloak: Preventive Detention as Punishment" (2011) 48 San Diego L Rev 1173; and Frederick Schauer "The Ubiquity of Prevention" in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds) *Prevention and the Limits of the Criminal Law* (Oxford University Press, Oxford, 2013) 10.

174 See generally Schauer, above n 173.

175 Husak, above n 173, at 1180 and 1187–1199.

176 Mayson, above n 166, at 335.

177 At 323.

178 Zedner "Seeking Security by Eroding Rights", above n 104 at 269–270.

179 Mayson, above n 166, at 323.

180 At 323, citing Saul Smilansky "The Time to Punish" (1994) 54 Analysis 50 at 52.

181 David Cole "The Difference Prevention Makes: Regulating Preventive Justice" (2015) 9 Crim Law and Philos 501 at 504; and Janus, above n 101, at 25–28.

behaviour.¹⁸² Counter-terrorism is a case in point: Patel demonstrates the ways in which counter-terrorism policies have "presented" as "commonsensical" the fallacious "view that extremism and radicalization is inherent within Muslim culture".¹⁸³

More generally, Cole observes that prevention is a kind of self-fulfilling prophecy. There is no way to reliably gauge how effective preventive measures are because we cannot know whether crimes would have occurred without them.¹⁸⁴ Relatedly, "false positives" are masked whilst "false negatives" are "vivid and visible".¹⁸⁵ This distorts perceptions of the threat, exaggerating its dimensions and providing an imperative to ever more "aggressive enforcement".¹⁸⁶

2 *Making space for prevention: the role for s 27(1) in control order proceedings*

Here, Ashworth and Zedner's third option comes into play. This "approach is to permit coercive preventive measures designated civil to continue to reside on the civil side of the boundary but to import such criminal procedural protections as appear apposite or necessary", such that "the proceedings remain civil but selected criminal procedural rights or evidential standards are applied".¹⁸⁷

The New Zealand courts currently apply something like Ashworth and Zedner's third approach by relying on s 27(1) of the NZ Bill of Rights Act in hybrid civil-criminal proceedings.¹⁸⁸ Section 27(1) guarantees observance of the principles of natural justice. It codifies a common law concept of natural justice¹⁸⁹ which has two elements: the administrative law principle of *audi alteram partem* (comprising the right to notice and the opportunity to be heard); and the rule against bias.¹⁹⁰ Because it covers such a wide range of proceedings, the concept of natural justice in s 27(1) is necessarily open

182 Cole, above n 181, at 504–505.

183 Tina G Patel "It's not about security, it's about racism: counter-terror strategies, civilizing processes and the post-race fiction" (2017) 3 *Palgrave Communications* 1 at 3 and 6.

184 Cole, above n 81, at 505–506 and 515.

185 At 505–506.

186 At 506.

187 Ashworth and Zedner "Just Prevention: Preventive Rationales and the Limits of the Criminal Law", above n 12, at 297–298.

188 Butler and Butler, above n 116, at [21.5.38]–[21.5.40], citing *Greer v Police* [2001] BCL 754 (HC); *Dotcom v United States of America* [2014] NZSC 24; and *Drew v Attorney-General* [2002] 1 NZLR 58.

189 Palmer, above n 165, at [10.168].

190 *Combined Beneficiaries Union v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [11].

textured. It is therefore difficult to determine the precise scope of the procedural protection it affords and its relationship to the criminal procedural rights in s 25.

Unlike s 25, which explicitly stipulates procedural standards, s 27(1) is not prescriptive; the content of the right to justice is defined contextually, such that the procedural standards required to vindicate the right vary from case to case.¹⁹¹ In *Ali v Deportation Review Tribunal*, Elias J observed that as the severity of a decision's potential consequences increase, so too does the stringency of the requisite protections.¹⁹² This definitional elasticity creates space for analogical reasoning and importantly, some cross-pollination between criminal and civil procedure.

The right to natural justice has been considered to be co-extensive with criminal procedural protections,¹⁹³ and picking up on comments in the White Paper,¹⁹⁴ the leading texts on the NZ Bill of Rights observe that there is "considerable overlap" between s 27 and ss 23–25.¹⁹⁵ Rishworth and Optican summarise that, because of its:¹⁹⁶

...broad terms ... s 27(1) could have done the work of s 25(a) – and much of the remainder of s 25 as well. But because it is there, s 25(a) is now the obvious focal point for natural justice in criminal matters.

Dotcom v United States of America is illustrative on this point. The case concerned the level of disclosure required in extradition proceedings. Because the hearing functioned only to determine eligibility for extradition, rather than criminal culpability, the majority resolved it did not trigger the criminal procedural protections in ss 24 and 25.¹⁹⁷ However, s 27(1) *did* govern the disclosure process,¹⁹⁸ and the opinions of Elias CJ and Glazebrook J indicated that s 27(1) could approximate the functions of ss 24 and 25 relating to disclosure. Elias CJ considered that ss 24 and 25 should apply

191 See for example *Dotcom v United States of America*, above n 188, at [117]–[120] per McGrath and Blanchard JJ.

192 *Ali v Deportation Review Tribunal* [1997] NZAR 208 (HC) at 220.

193 *Chapman v Attorney-General* [2011] NZSC 110, [2012] 1 NZLR 462 at [94] per McGrath and William Young JJ (see in particular n 180). But see the observations of Anderson J at [222].

194 Palmer, above n 165, at [10.112], and [10.168].

195 See Grant Huscroft "The Right to Justice" in Paul Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 753 at 753; and Butler and Butler, above n 116, at [25.2.17].

196 Scott Optican and Paul Rishworth "Minimum Standards of Criminal Procedure for Trial, Sentencing and Appeals" in Paul Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 663 at 664.

197 *Dotcom v United States of America*, above n 188, at [110] and [115]–[120] per McGrath and Blanchard JJ as discussed in Butler and Butler, above n 116, at [21.5.10].

198 At [110] and [115]–[120] per McGrath and Blanchard JJ as discussed in Butler and Butler, above n 116.

but, alternatively, the contents of s 27(1) fell to be determined by *reference* to those provisions.¹⁹⁹ In an eligibility hearing, fairness did not demand the full disclosure applicable to a domestic criminal trial.²⁰⁰ So, in Glazebrook J's view, "in this case, it is unlikely that ss 24 and 25 add anything to the s 27 rights [the majority] accept apply to the extradition hearing".²⁰¹

But other s 25 guarantees appear to fall outside the purview of s 27. Take, for example, the presumption of innocence.²⁰² In *Z v Dental Complaints Assessment Committee*, the Supreme Court ruled by majority that New Zealand law did not accommodate a "heightened civil standard" of the kind contemplated by the House of Lords in several cases dealing with civil preventive orders.²⁰³ The standard, which was virtually "indistinguishable from the criminal standard",²⁰⁴ was ultimately abandoned in *Re B*.²⁰⁵ The Supreme Court majority in *Z* offered a workaround: While in civil proceedings the standard of proof remained the balance of probabilities, it was "flexibly applied" so that stronger evidence would be required to discharge the burden in more serious cases.²⁰⁶ This was "not a legal proposition",²⁰⁷ and in the minority, Elias CJ criticised its "loose" formulation.²⁰⁸

Although its ameliorative capacity is therefore limited, s 27(1) appears relatively well able to "provide the necessary flexibility and context-sensitivity to ensure the observance of a fair process".²⁰⁹ It therefore serves as a useful starting point from which to engage with preventive measures. Its scope for analogy with s 25 ensures a relatively high degree of procedural protection, but it allows for modification to fit the specific challenges prevention poses (as discussed in the

199 At [51]–[52] per Elias CJ (dissenting) as discussed in Butler and Butler, above n 116, at [21.5.12]–[21.5.13].

200 At [87] per Elias CJ (dissenting) as discussed in Butler and Butler, above n 116, at [21.5.12]–[21.5.13].

201 At [281] per Glazebrook J (dissenting) as discussed in Butler and Butler, above n 116, at [21.5.12]–[21.5.13].

202 New Zealand Bill of Rights Act, s 25(c).

203 See for example *R (McCann) v Crown Court at Manchester* [2002] UKHL 39; *Gough v Chief Constable of the Derbyshire Constabulary* [2002] EWCA Civ 351; and *B v Chief Constable of the Avon and Somerset Constabulary* [2001] 1 WLR 340 (QB), above n 130.

204 *B v Chief Constable of the Avon and Somerset Constabulary*, above n 130, at 354 per Lord Bingham.

205 *Re B (children)* [2008] UKHL 35. See Lord Hoffmann's criticisms of the heightened standard at [5]–[15] and Lady Hale's comments at [62]–[73], but note that both opinions accept that an outright application of the criminal standard may be appropriate in other contexts: at [5] and [13] per Lord Hoffmann; and at [69] per Lady Hale. See also subsequent treatment of *Re B* in, for example, *Jones v Birmingham City Council* [2018] EWCA Civ 1189; and *Chief Constable of Lancashire v Wilson* [2015] EWHC 2763 (QB).

206 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [102] per Blanchard, Tipping and McGrath JJ.

207 At [105].

208 At [4] per Elias CJ (dissenting).

209 Butler and Butler, above n 116, at [21.5.39].

previous section). This approach, I argue, is preferable to a simple extension of the coverage of s 25. By resisting the temptation to sweep prevention under the proverbial rug of punishment, this approach facilitates engagement with preventive measures on their own terms. It may serve as a helpful reminder that prevention should be an aberrational, rather than routine, exercise of state power – and one that demands close scrutiny.

This approach is also preferable to the fourth option offered by Ashworth and Zedner, which draws on Mann's "middle-ground" theory.²¹⁰ Mann's analysis, which focuses primarily on pecuniary sanctions rather than preventive measures, tolerates punishment through civil channels.²¹¹ But this proposed new jurisprudence is perhaps too radical: it overlooks the importance of the criminal-civil divide and its role in both limiting and protecting punishment as discussed above.²¹²

Administering control orders and other preventive measures under s 27(1) is the first step towards addressing "[the] larger ... question [of] what legal or moral limits we ought to place upon preventive action which falls outside that considered punitive".²¹³ However, more work must be done to determine what s 27(1) requires in such proceedings. The answer lies beyond the scope of this article. As a starting point for future inquiry, I join other preventative state scholars in suggesting that we need to think beyond case-by-case importation of criminal procedural protections, and work to develop an appropriate set of minimum procedural standards and governing principles which can apply to all preventive measures.

VI CONCLUSION

The Control Orders Act 2019 is a significant development for New Zealand law, both with regard to counter-terrorism powers and to preventive policy more generally. The regime raises a host of issues and this article examines only one: due process rights. I have argued here that we should not subsume control orders into the category of criminal punishment. Separating preventive measures from punishment by applying s 27(1) rather than s 25 of the NZ Bill of Rights enables the development of an appropriate jurisprudential vocabulary capable of addressing issues specific to preventive regimes. To this extent, the NZ Bill of Rights responds adequately to the challenge of the preventive state. But there is more work to be done here to formulate a set of procedural protections that safely balance the liberty interests of the subject against broader security concerns.

210 Ashworth and Zedner "Just Prevention: Preventive Rationales and the Limits of the Criminal Law", above n 12, at 297–298, citing Kenneth Mann "Punitive Civil Sanctions: The Middleground between Criminal and Civil Law" (1992) 101 Yale LJ 1795.

211 Mann, above n 210.

212 Steiker "Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide", above n 170, at 814.

213 Zedner "Preventive Justice or Pre-Punishment?", above n 87, at 87.

The salience of these issues will likely increase in the coming years as New Zealand's preventive policy continues to expand. In the counter-terrorism sphere, the Christchurch attack has jolted New Zealand out of its relative complacency to domestic terrorism and emphasised the need for robust policies to ensure such horrific events never reoccur. And panning out to the preventive state more generally, the experience of the COVID-19 pandemic has fundamentally reaffirmed and legitimised a precautionary approach to decision making, which will continue to frame debates about rights and collective security.

The point of this article is not to say that prevention is never legitimate. In some cases, it may be amply justified. Rather, through the case study of control orders, I aim to encourage continued and determined scrutiny of these and other preventive measures.

