

## PRE-CRIME AND COUNTER-TERRORISM

*Imagining Future Crime in the ‘War on Terror’*

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*This article looks at pre-crime in the context of counter-terrorism. Pre-crime links coercive state actions to suspicion without the need for charge, prosecution or conviction. It also includes measures that expand the remit of the criminal law to include activities or associations that are deemed to precede the substantive offence targeted for prevention. The trend towards anticipating risks as a driving principle in criminal justice was identified well before 2001. However, risk and threat anticipation have substantially expanded in the context of contemporary counter-terrorism frameworks. Although pre-crime counter-terrorism measures are rationalized on the grounds of preventing terrorism, these measures do not fit in the frame of conventional crime prevention. The article argues that the shift to pre-crime embodies a trend towards integrating national security into criminal justice along with a temporal and geographic shift that encompasses a blurring of the borders between the states’ internal and external coercive capacities. The counter-terrorism framework incorporates and combines elements of criminal justice and national security, giving rise to a number of tensions. One key tension is between the ideal of impartial criminal justice and the politically charged concept of national security. Pre-crime counter-terrorism measures can be traced through a number of interlinking historical trajectories including the wars on crime and drugs, criminalization and, more fundamentally, in colonial strategies of domination, control and repression. The article concludes by identifying a number of challenges and opportunities for criminology in the shift from post-crime criminal justice to pre-crime national security.*

*Introduction*

It will end the check and balance system. Pre-crime will no longer be an independent agency. The Senate will control the police, and after that .... They’ll absorb the Army too. (P. K. Dick, 1956, *The Minority Report*)

The accelerated and continuing integration of national security and criminal justice under counter-terrorism frameworks consolidates a tendency away from traditional criminal justice concerns. There is a shift in focus away from individual offending towards pre-emptive strategies that aim to identify threats and make interventions before crimes take place. Lucia Zedner refers to this development as a shift towards a pre-crime society ‘in which the possibility of forestalling risks competes with and even takes precedence over responding to wrongs done’, and where ‘the post-crime orientation of criminal justice is increasingly overshadowed by the pre-crime logic of security’ (Zedner 2007: 261–2). Anticipating future crime raises a myriad of practical and ethical concerns

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for the processes of criminal justice and society. These concerns are also necessarily the concerns of a criminology that is itself capable of anticipating the future and engaging with pressing contemporary issues.

This article aims to contribute to understanding the emerging pre-crime society in the context of counter-terrorism measures implemented after the 2001 attacks on the United States. It sets out to describe the contours of the shift from post to pre-crime in terms of changes to criminal justice implemented through domestic counter-terrorism measures and to map the implications of this emerging shift in terms of criminal justice and society more broadly. It argues that the move to pre-crime that is taking place embodies not only a trend towards integrating security into criminal justice, but also integrating *national* security into criminal justice. The shift from post to pre-crime and national security under counter-terrorism frameworks encompasses not only a temporal shift, but also a geographic one that involves a blurring of the borders between the states' internal and external coercive capacities. The article also attempts to trace the antecedents of the shift from post to pre-crime, taking the position that the significance of these developments for criminology and society cannot begin to be understood unless the historical precedents and genealogies are also understood. We argue that the shifts that have advanced under the mantle of counter-terrorism can be traced through a number of interlinking historical trajectories, including the wars on crime and drugs, criminalization and, at a deeper level, in colonial strategies of domination, control and repression embodied in counter-insurgency practice and theory. The article also identifies a number of challenges and opportunities for criminology in the shift from post-crime criminal justice to pre-crime national security.

#### *Pre-Crime and the New Paradigm in Prevention*

The word 'pre-crime' is borrowed from Phillip K. Dick's 1950s science fiction short story, *The Minority Report*, subsequently made into the 2002 Stephen Spielberg film, *Minority Report*. In Dick's fictional world, a police unit devoted to pre-crime is able to predict future murders and incapacitate future killers *prior* to the foretold deadly crime. The term 'pre-crime' is thus intimately linked to preventing crime and pre-empting threats. The trend towards anticipating risks as a driving principle in criminal justice was identified well before 2001 (Zedner 2000: 210; Loader and Sparks 2002; O'Malley 2004). Risk and threat anticipation have, however, undeniably consolidated and expanded in the context of the counter-terrorism frameworks and legislation implemented post 9/11: the 'politics of pre-emption draw on but go beyond the established language and techniques of risk' (Amoore and de Goede 2008: 8).

Although pre-crime is justified on the basis of preventing crimes, in this context, specifically terrorism, pre-crime is not crime prevention as it is widely understood within criminology. Crime prevention is understood as non-punitive measures that reduce opportunities to commit crime or address the broader context in which people commit crimes through a range of social and environmental strategies (Sutton *et al.* 2008). Counter-terrorism pre-crime measures envisage specific serious harms and criminalize those whom it is believed will commit these imaginary future harms, while ignoring broader social and environmental factors. In short, pre-crime focuses on rooting out future terrorists rather than what might be thought of as root causes. Pre-crime measures are those measures that link substantial coercive police or state action to suspicion

without the need for charge, prosecution or conviction. Pre-crime also includes laws and the police powers attached to them that expand the remit of the criminal law beyond the extant offences of conspiracy and attempts to include activities or associations that are deemed to precede the substantive offence targeted for prevention.

Counter-terrorism is a project uniquely suitable to advancing pre-crime frameworks because the label ‘terrorist’ is inherently pre-emptive. The word ‘criminal’ tells us that a person has, in the past, committed a crime. Formally, only a court can determine who is a criminal because, formally, the courts are the space in which verdicts are reached. The label ‘terrorist’ is not, however, one that is ascribed by a court. Under counter-terrorism legal frameworks, serious sanctions can be applied in advance of or without charge or trial and can be imposed or continued despite a not-guilty verdict (de Goede 2008: 9). Politics and politicians essentially determine who is or is not a terrorist and what constitutes an act of terrorism without the need for evidence and without even a widely agreed definition of what and who constitute terrorism and terrorists (see, e.g. Hocking 2004: 1–12; Golder and Williams 2004). The process of deeming or proscribing an organization as a terrorist organization, for example, is a political process, not a judicial process (Hocking 2003). As Edward Herman observes, ‘[t]o effectively label one’s enemy a terrorist is a vital step in the struggle with that enemy—it is like winning a court victory that identifies your opponent as a criminal’ (Herman 1993: 47). The label ‘terrorism’ precedes, extends beyond and exists independently of reasonable suspicion and evidence-based criminal justice processes.

Preventing harm through pre-empting threats is the foremost rationale for counter-terrorism measures implemented post 9/11. In what was to become the justification for undermining and denying civil liberties, human rights and international law in domestic criminal justice as well as international military measures, (former) United States President George W. Bush argued, after the 2001 attacks, that ‘if we wait for threats to fully materialize, we will have waited too long ... we must take the battle to the enemy, disrupt his plans, and confront the worst threats *before* they emerge’ (Bush 2002, *our emphasis*). In the international arena, pre-emption has been utilized most notably and controversially through the 2002 United States-led invasion of Iraq (Kramer and Michalowski 2005). There is a vast body of literature that critiques and analyses the military strategy of pre-emption as deployed by the United States post 9/11 (see, e.g. Bowring 2002; Crawford 2003; Byers 2003; Dershowitz 2006: Chapter 2). It is not our purpose here to canvass that literature and associated debates, but instead to note how the rationale of prevention and the associated strategy of pre-empting threats on the international front of the ‘war on terror’ parallels counter-terrorism measures implemented domestically in countries such as Australia, the United Kingdom and the United States. While the details of the laws and measures differ in each of these countries, the general trends away from post to pre-crime and from criminal justice to security frameworks are similar.

The former US Attorney General, John Ashcroft, dubbed domestic counter-terrorism measures that authorize coercive action before manifest threat, such as those embodied in the 2001 Patriot Act, as representing a ‘new paradigm in prevention’ (quoted in Cole 2006). In a similar vein, the (then) Australian federal Attorney General, Philip Ruddock, justified controversial counter-terrorism laws allowing for preventive detention and control orders without the need for criminal charge or conviction on the grounds that such measures ensure ‘we are in the strongest position possible to prevent new and

emerging threats' (Commonwealth 2005). This 'preventive' framework aims to reduce the risk of terrorism by using criminal justice processes and the coercive sanctions tied to them to confront, disrupt and target threats before they emerge. To this end, many of the counter-terrorism laws enacted after 2001 criminalize conduct and label it 'terrorist-related' even where there is no evidence of harm or intention to do harm, such as giving money to a charity or associating with what are deemed to be terrorist organizations (McCulloch and Pickering 2005; McCulloch and Carlton 2006; de Goede 2008).

The 'preventive' counter-terrorism framework is concerned less with gathering evidence, prosecution, conviction and subsequent punishment than in targeting and managing through disruption, restriction and incapacitation those individuals and groups considered to be a risk. These shifts fall broadly within the framework set out by Zedner, who argues that pre-crime is characterized by 'calculation, risk and uncertainty, surveillance, precaution, prudentialism, moral hazard, prevention and, arching over all of these, there is the pursuit of security' (Zedner 2007: 262).

In the post-9/11 context, it is not simply security that is being pursued through criminal justice measures, but *national security*. National security is a concept that extends beyond sovereign territory to target external threats and embrace international relations. National security embraces and extends the temporal shift to pre-crime along the same axis as security. Beyond this, however, national security, more than security generally, also champions and advances an additional shift, blurring the boundary between foreign and domestic and between law enforcement and military action. Setting out the US national security strategy in 2002, President George Bush argued that '[t]oday, the distinction between domestic and foreign affairs is diminishing'. In a chapter published in 2005, Jonathan White asked whether terrorism should 'be handled by the criminal justice system or should it be considered with the framework of national security'. He considers that 'Many countries ... have yet to answer this question' (White 2005: 68). It is more accurate to conclude that many countries, particularly Anglo-American countries, have embraced a hybrid framework that fuses criminal justice and national security.

Despite recent advances that have taken place under the counter-terrorism framework, the shift from post to pre-crime is not complete or even 'contorted temporalities ... infuse past, present and future with one another, sometimes out of phase and sometimes in sync' (Maurer 2008: 2). The counter-terrorism framework incorporates and combines elements of criminal justice *and* national security, giving rise to a number of tensions.

One key tension is between the ideal of impartial criminal justice and the politically charged concept of national security. Criminal justice notions of due process promise equal justice. The image of blind justice, long associated with the operation of the courts, symbolizes law operating at a level above and beyond the reach of politics. National security, in contrast, is intensely and openly partial, directly managed and controlled by government, and understood and executed through distinctions between friend and foe, ally and enemy. Another key tension exists between covert police and security agency operations aimed at monitoring and or disrupting activities and securing convictions on the basis of evidence presented in open court (White 2004; Pickering *et al.* 2008: 58; Royal Canadian Mounted Police 2005). In the hybrid and sometimes contradictory national security/criminal justice frameworks, prosecution and convictions are represented as less relevant or even irrelevant at the same time as being keenly

pursued and, when successful, pointed to as a measure of effectiveness (see, e.g. Pickering *et al.* 2008: 57).

*Crimes before Crime—Laws against Law*

The prevention rationale underpins a whole range of new domestic counter-measures. The logic is simple. Terrorists aim to create mass casualties and therefore they must be stopped before they act because the human costs incurred will be too high should a terrorist act take place. The political imperative to be seen to have done all that is necessary to prevent attacks was set out succinctly by the former British Prime Minister, Tony Blair, when he maintained that ‘What we are desperate to avoid is the situation where at a later point, people turn around and say: “If you’d only been vigilant as you should have been, we could have averted a terrorist attack”’ (quoted in Desroches 2005). Former Australian Prime Minister, John Howard, defending the actions of police in a terrorism investigation involving the extended detention, questioning, visa cancellation and aborted charges against an innocent man, likewise maintained in that ‘it’s better to be safe than sorry’ (*Sydney Morning Herald*, 31 July 2007).

Defending the indefinite detention of non-US citizens without charge or trial at Guantanamo Bay, Secretary of State, Condoleezza Rice, argued that ‘[w]e have never fought a war like this before where ... you can’t allow somebody to commit the crime before you detain them. Because if they commit the crime, thousands of innocent people die’ (Hudson 2005: 12). The UK anti-terrorist branch, in a document written after the July 2005 bombings, sets out the rationale for an altered domestic legislative framework and policing environment focused on preventing attacks. It maintains that:

The threat from international terrorism is so completely different that it has been necessary to adopt new ways of working .... The advent of terrorist attacks designed to cause mass casualties, with no warning, sometimes involving the use of suicide, and with the threat of chemical, biological, radiological or nuclear weapons means that we can no longer wait until the point of attack before intervening. The threat to the public is simply too great to run that risk ... the result of this is that there are occasions when suspected terrorists are arrested at an earlier stage in their planning and preparation than would have been the case in the past. (London Anti-terrorist Branch 2005)

In a similar vein, Australian police maintain that:

Quite properly the risk associated with acts of terrorism has been reflected in legislation that recognizes that the consequences of a terrorist act on Australian soil are significant and everything possible should be done to prevent that occurring. This legislation reflects the need to prevent and to intervene in the early stages of terrorism related behavior as an appropriate response to the level of threat or risk created by terrorism. (Queensland Police Service 2008)

Pre-crime’s anticipatory logic is the antithesis of the temporally linear post-crime criminal justice process that commences from the presumption of innocence and progresses through a number of discrete stages involving investigation and evidence collection, charge, trial and, in the case of a guilty verdict, punishment. After the Madrid train bombings, the British Home Secretary, David Blunkett, stated that ‘the norms of prosecution and punishment no longer apply’ (quoted in Wolfendale 2007: 75). Due process protections that underpin the presumption of innocence, including the right to silence, the right to a fair trial and the presumption in favour of bail, have been

significantly undermined and even eclipsed within counter-terrorism frameworks (see, e.g. Lynch and Williams 2006; Cole and Dempsey 2006). Ericson dubs counter-terrorism legislation ‘counter laws’ because, as he puts it, they are ‘laws against law’ that ‘erode or eliminate traditional principles, standards and procedures of criminal law that get in the way of preempting imagined sources of harm’ (Ericson 2008: 57).

Strategies aimed at preventing harmful acts and pre-empting the threat of terrorism through disruption, restriction and incapacitation include compulsory questioning, extended detention without charge, control orders that restrict movement and association, criminalizing membership of organizations deemed or judged to be terrorist organizations, criminalization of association and engagement with groups deemed to be terrorist organizations, freezing of assets and the criminalization of a wide range of conduct, not necessarily linked to any violent act, but deemed nevertheless to be terrorist-related (see, e.g. Lynch and Williams 2006; Cole and Dempsey 2006; Jagers 2008). Some coercive measures, such as control orders and, in Australia, compulsory questioning and detention at the hands of the Australian Security Intelligence Agency, can be used against even non-suspects, namely people, who even under the broad range of terrorist-related offences, are not suspected of committing any terrorist-related offence (Hocking 2004; McCulloch and Tham 2005).

All these laws involve a pre-crime logic of confronting and countering threats before they emerge. Some are pre-crime, in the sense that they link substantial and continuing coercive action to suspicion without the need for evidence, charge and conviction. Other measures, such as the criminalization of association and ‘preparatory’ offences, are pre-crimes that expand the remit of the criminal law by fulfilling the demand for security that ‘dictates earlier and earlier intervention to reduce opportunity’ (Zedner 2007: 265).

The terrorist organization and association offences are essentially ‘status offences’ that target people on the basis of whom they know and associate with rather than what they have done. The criminal law has long incorporated offences, such as consorting, that target association and identity as opposed to behaviour (Bronitt 2004). Historically, however, status offences were summary offences only. The status offences within the counter-terrorism legal framework are serious criminal offences that attract lengthy jail sentences (McSherry 2004). Post-crime criminal law frameworks encompassed attempts and conspiracy to commit crimes, namely action and planning preceding the commission of a substantive offence. Terrorism offences, particularly those enacted after 2001, criminalize ‘preparatory offences’, namely offences that do not require any specific, identified acts to be planned or attempted. In considering the nature of these offences, the Court or Criminal Appeal in the Australia state of New South Wales made the following observation:

Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special and, and in many ways unique, legislative regime. It was, in my opinion the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, eg well before an agreement has been reached for a conspiracy charge. (*Lodhi v. Regina* [2006] NSWCCA 121, Spigelman CJ)

The counter-terrorism pre-crime framework targets a broader range of actions and a broader range of people than post-crime criminal justice frameworks. The new crimes that intervene ‘before threats emerge’ create new frontlines in the progressively

regressing temporal space of national security laws: extant pre-crime laws become the ground from which future waves of (pre) pre-crime interventions are staged.

*Justice through the Crystal Ball: 'Sentence First—Verdict Afterwards'*<sup>1</sup>

Intelligence on threats and risk is particularly significant in the context of a pre-crime legislative framework and many of the changes to law have expanded the capacity of police and security agencies to gather intelligence: '... proactive measures demand increased intelligence and much of the information will have no relation to criminal activity' (White 2004: 67). The investigation of offences under counter-terrorism legislation will inevitably involve police in gathering political information because terrorism is essentially a political construct and understood to be violence motivated by politics (Hocking 2004). Intelligence involves a process of bringing a vast body of information, often meaningless in isolation, together in the hope of discerning links and underlying patterns that, over time, create a meaningful picture. Security intelligence agencies and their counterparts amongst police have always gathered information that is not linked to criminal activity, such as information on ethnic, non-government and political groups, on the basis that these groups could be fronts for terrorists or that they might, at some future time, engage in ideologically motivated violence themselves (Hocking 2003; McCulloch 2001: Chapter 8). The difference under the pre-crime framework that is emerging in the context of counter-terrorism is that such intelligence may be gathered coercively (as opposed to simply covertly) and it can also trigger coercive interventions such as preventive detention or control orders or be used to prosecute pre-crime offences.

A legal framework that tries to see into the future inevitably blurs the line between evidence and intelligence. Intelligence is of a lower level of reliability than evidence and is typically used as background information on threats rather than as a basis for criminal charges and prosecution (White 2004). The blurring of evidence and intelligence is demonstrated in the expanded intelligence-gathering roles of police agencies and the granting of coercive police powers to security intelligence agencies as well as the quality of information used to support terrorism charges. Intelligence agencies and intelligence are increasingly embedded in criminal justice processes (White 2004). In Australia, the Australian Security Intelligence Organisation, for example, has been given coercive powers to compulsorily question and detain people. Intelligence organizations act covertly and operate in a legal grey zone (Tham 2002). The laws that provide coercive powers to security intelligence agencies essentially provide for secret police (McCulloch and Tham 2005). Terrorism prosecutions under pre-crime regimes are typically commenced on the basis of vast amounts of 'circumstantial evidence' that has the flavour of intelligence in that it tends to be voluminous, disparate and unremarkable in isolation, thus requiring juries to 'join the dots' to reach meaningful conclusions. The Australian Federal Police Commissioner maintains that:

One of the biggest challenges we face is the acute need to manage risk .... [W]e must balance the needs of preventing an incident from occurring against the need to have gathered as much evidence as possible to ensure successful prosecution. As a result, we intervene in a terrorist matter earlier than we

<sup>1</sup>The Queen in *Alice's Adventures in Wonderland* (Carroll 1962: 157).

normally would in other criminal investigations. This sometimes means the subsequent prosecutions can be difficult and protracted because we are dealing with the elements of conspiracy, which often relies on circumstantial evidence. (Keelty 2007)

Terrorism-related trials tend, then, to be extremely lengthy and complex. A recently completed trial in Victoria, Australia, for example, lasted for six months and the jury took four weeks to reach their verdicts after hearing 482 covertly taped conversations (McCulloch and Pickering 2008). The failure to distinguish sufficiently between evidence and intelligence and unlawful processes associated with the gathering of intelligence or the deployment of coercive powers by intelligence agencies has led to numerous failed or aborted terrorism prosecutions (see, e.g. Aly 2008; McCulloch 2006).

The whole pre-crime project of accurately predicting threat through intelligence relies on accurate information on the variables associated with increased threat. Preventing terrorism and the pursuit of security has led to a growing and profitable field of 'crime science' that sees prediction and risk management as entirely feasible and objective (Zedner 2007: 267–8). However, there has been little headway made in efforts to establish relevant and meaningful variables contributing to the risk of terrorism. Effective profiling has been deemed difficult, if not impossible (Hoffman 2006: 7; Harris 2002: 1), and no statistical link has been demonstrated between 'psycho-sociological features, nationality or birthplace' and the risk of terrorism (Hayes 2005: 37). Reviews of the effectiveness of counter-terrorism tactics based on 'racial', ethnic and religious profiling since 11 September have found no positive results in identifying potential terrorists (Goldson 2006). Despite this, 'race', religion and ethnicity continue to be seen and used as proxies for risk under counter-terrorism frameworks (Cole 2006; Ansari 2005; Hagopian 2004; Harris 2002). In 2005, the Police Federation of Australia requested legislation to indemnify police against civil lawsuits for using racial profiling under newly introduced counter-terrorism laws (Kearney 2005).

Pre-crime laws and the coercive measures that travel with them mobilize prejudice around identity and lead to intensified politicization of policing and law. As Butler observes, although deeming someone dangerous 'is considered a state prerogative ... it is also a potential licence to prejudicial perceptions and a virtual mandate to heightened racialized ways of looking and judging in the name of national security' (Butler 2004: 77).

Embracing the logic of pre-crime mandates that in order to protect the innocent, suspects, and an even broader category of people considered risky types—who might also be innocent—are watched, prevented, controlled and disrupted. Anticipating risk or threat, and the inevitable profiling that accompanies it, while maintaining a veneer of scientific objectivity is animated through the lens of prejudice. The pre-crime project relies less on 'joining the dots' or putting the pieces of a puzzle together—metaphors that suggests some underlying pattern—than a wholly unscientific project of crystal ball gazing. The integration of national security into law enforcement under counter-terrorism frameworks redraws and fortifies the imaginary border between the community to be protected and those they are to be protected from.

In a pre-crime world, offenders, victims and the crime themselves are spectres that become tangible only through counter-measures. While 'race', ethnicity and religion are used as proxies for risk, counter-measures are used as proxies for crime and specifically terrorism (McCulloch 2007). Recurring references to terrorist threats and plots based on unverified 'intelligence sources' or linked to police action conjure images



of outrageous acts of mass murder, bombings and general catastrophe. Prosecutions for terrorist-related offences likewise work to produce a sense of imminent threat that stands in the place of extreme acts of politically motivated violence. Most terrorism convictions are not for charges reflecting dangerous crimes that have either taken place or are specifically and concretely planned (Cole 2006: 17; Ansari 2005: 77; Pickering *et al.* 2008: 53–4; McCulloch and Pickering 2008). Although most terrorist-related prosecutions are entirely unconnected to any actual violence, let alone the type of violence popularly connected with terrorism, the word ‘terrorism’ is so saturated with meaning that a publicized investigation and the public processes of charge, prosecution or conviction for a terrorist-related offence conjures images of extreme, even apocalyptic, violence. Although national security is highly secretive, pre-crime demands visible, even spectacular, counter-measures in order to ‘prove’ future crimes. Such performances are not, however, without political risk. Although police and politicians have great ‘defamation edge’ when it comes to labelling targets and enemies as ‘terrorists’ (Herman 1993: 48), the disjunction between reality and rhetoric, if exposed, may, in the longer term, undermine legitimacy and public trust.

#### *Before Pre-Crime*

Reflecting on the continuing trend from post to pre-crime and the ways that criminology can productively engage with this shift, it is necessary to connect with the historical antecedents of the contemporary counter-terrorism frameworks. A pre-emptive element has long existed in domestic criminal justice systems. ‘Dangerousness’, and the future risk that term connotes, has been an enduring and politically convenient label attached to individuals and groups to control, regulate and punish those considered a threat to the political, social and economic status quo (Hudson 2003).

The accelerating integration of national security into criminal justice and the associated shift from post to pre-crime under contemporary counter-terrorism frameworks find its origins in the interconnected histories of counter-insurgency, criminalization, paramilitary policing and the wars on crime and drugs. If, as we argue above, counter-terrorism is uniquely suited to effecting the temporal shift from post to pre-crime, it is also uniquely suitable in effecting the geographic shift that blurs the borders between the state’s external and internal coercive capacities. In Anglo-American liberal democracies, there has traditionally been a firm demarcation between police, which were used against citizens domestically, and the military, which were used against external enemies in times of war (McCulloch 2001: 15–31; White 2004: 57). Hybrid police and military/war and criminal justice frameworks are resonant of more totalitarian forms of government and colonial strategies aimed at maintaining power (Saada 2003). Under this hybrid crime/war framework, repressive policing, torture, detention without trial and extra-judicial executions all flourished (see, e.g. Rolston 2006; MacMaster 2004; Eisenstein 2004). Counter-terrorism frameworks have worked to reproduce colonial relations of power inside liberal democracies.

Counter-terrorist doctrine grew out of counter-insurgency doctrine, which was first developed by the French and British military in the face of nationalist struggles to overthrow colonial rule (Schlesinger 1978). The counter-insurgency framework, underpinned by a continuum view of violence that understands political activity and political violence as inextricably connected, is profoundly pre-emptive (Hocking 1993;

McCulloch 2001: 174–84). In the colonial context, this continuum view of political violence provided a framework for police intervention and state coercion targeted at political movements that sought to change the status quo. The exclusion from rights and the denial of political freedoms by colonial powers that practised democracy at home was justified on the imagined ‘racial’ inferiority of colonial subjects (Goldberg 1993).

Counter-terrorism frameworks drawing on counter-insurgency theory and practice were integrated into domestic policing in Australia, the United Kingdom and the United States in the 1970s. Counter-terrorism thus provided a ‘domestic, peacetime adaptation of strategies originally developed to deal with the essentially wartime exigencies of a colonial power’ (Hocking 1993: 19). The threat of terrorism provided one of the primary rationales for the incremental erosion of the border between police and military operations in the three decades prior to 9/11 (Andreas and Price 2001; McCulloch 2004). As part of a counter-terrorism strategy, police and military operations became less distinct, with the military increasingly involved in police training and ‘internal security’. The incorporation of military methods, training and units into policing signalled a move away from the presumption of innocence and minimum force towards a military philosophical and operational approach that tended to construct people as enemies, rather than suspects, and routinely used high and extreme levels of force (McCulloch 2001; Jefferson 1990; Kraska and Kappeler 1997).

The blurring of the boundary between police and military involves a breach of the democratic traditions that mandate that the military not be used as a repressive force against its own citizens. Counter-terrorism, and the counter-insurgency thinking that underpinned it, also provided the rationale for spying and collecting intelligence on a whole range of politically active individuals and organizations. In liberal democracies, counter-terrorism and the anti-democratic practices that accompanied it were implemented on the basis that terrorism involved an extreme threat and counter-terrorism was a discrete area that represented the exception to the normal rule (Hocking 1993). Over time, however, aspects of paramilitary policing were normalized into everyday policing, particularly the policing of marginalized groups and political protest (McCulloch 2001; Cole and Dempsey 2006: 21–57). In the current iteration of counter-terrorism frameworks, the integration of criminal justice with national security embodied in paramilitary policing and the operations of domestic intelligence agencies has moved beyond the policing and security intelligence realm to be taken up formally within the law (Sentas forthcoming).

The pre-emptive dimension of the contemporary counter-terrorism framework also finds its roots in criminalization, which is closely linked to a colonial rationality of difference (see Brown 2005: 44). Criminalization extends the painful legacies of slavery and colonization (James 1996; Davis 2003). A defining feature of neo-colonial relationships is the celebration of formal equality combined with ‘law and order’ frameworks that construct and reproduce ‘others’ through racialized frames as criminal (Cunneen 2001: 251; Mendelberg 2001). Criminalization is linked to over-policing, based on assumptions of high crime areas and crime-prone groups. These assumptions prove and sustain themselves through the criminalization of socially and economically marginal groups who are targeted for surveillance, and frequently provoked, and often arrested and charged with a range of victimless crimes or offences against police that rely entirely on police evidence as a basis of conviction (Cunneen 2001).

Criminalization, like counter-terrorism, is essentially a political process that happens outside of the courts. Counter-terrorism and the pre-crime framework it animates

formalizes the self-fulfilling prophesy of selective law enforcement by embedding pre-emption into formal law, increasing police powers and increasing the intensity and duration of coercion linked to police discretion and action. In settler countries, such as Australia, criminalization, expressed through the massive overrepresentation of Indigenous people at every stage of the criminal justice system, creates new colonial relationships of dominance, oppression and repression. Accounts of continuing histories of colonial policing in liberal democracies demonstrate that national security and criminal justice have always been interconnected (Sentas 2006). According to Cunneen:

The process of criminalization, the denial of human rights, marginalization and incarceration ensure that Aboriginal and Torres Strait Islander people are maintained as a dispossessed minority, rather than a people with legitimate political claims on the nation state. (Cunneen 2001: 250)

The current counter-terrorism framework also has much in common with the previous and continuing wars on drugs, crime and previous iterations of the 'war on terror': '... [t]he war on crime as a panoply of political technologies and mentalities has profoundly shaped the strategic context of the war on terror' (Simon 2008: 93). These previous 'wars on' have brought military metaphors and realities to bear on criminal justice systems, extending criminalization through increased police powers. The previous 'wars on', like the 'war on terror', have had an international as well as a domestic component that sees criminal justice extending beyond the internal security realm. The pattern has been discernable since the United States declared a 'war on drugs' from the late 1960s: a crime problem is discovered and then amplified to the level of national security threat against which the lexicon and technology of war are deployed internally and globally (Woodiwiss and Bewley-Taylor 2005). The diverse and recurring 'wars on ...' have deployed the same rhetoric and demonstrated the same pattern of facilitating the internally repressive and globally aggressive arsenals of globally dominant states, the United States pre-eminent amongst these.

The previous wars on drugs and crime, like current counter-terrorism frameworks, facilitated the extension of essentially domestic criminal justice initiatives internationally to champion what are, in reality, foreign policy goals (Andreas and Price 2001). As part of the 'war on drugs', for example, the United States invaded Panama purportedly in pursuit of 'narco-terrorists'. In the wake of the 1989 invasion, 5,000 Panamanians were held in detention inside Panama without charge for many years by the United States, violating basic human rights and denying due process (James 1996). The invasion and subsequent detentions provide an early example of the extension of the long arm of United States criminal justice outside of the domestic arena. Taking into account this history, the long understood role of the colonial periphery as a 'laboratory' (Saada 2003: 17) needs to be reconsidered to take account of the ways that domestic criminal justice is increasingly being exported from the centre to the periphery. An exchange or flow of strategies and tactics circulates between these spheres so that, increasingly, security at home parallels closely 'war' abroad (Kaplan 2003; McCulloch 2004).

#### *Criminology, Pre-Crime and Counter-Terrorism*

Understanding the historical antecedents and contemporary manifestations of pre-crime in counter-terrorism frameworks provides opportunities for criminology as well as

challenges. Analysing, understanding and researching processes that remain largely hidden are key challenges criminologists confront, as aspects of criminal justice associated with counter-terrorism take on the level of secrecy associated with national security (Manson 2007; Leuprecht 2007; Tham 2007). The integration of national security into criminal justice, under counter-terrorism frameworks, requires that criminologists be more alive to the dynamics and nuances of national politics, foreign policy, international relations and security studies. These are challenges that transnational crime and associated counter-measures have already put on the criminological agenda (see, e.g. Friedrichs 2007). Post-colonial studies and critical race scholarship are also likely to prove valuable in understanding the contemporary counter-terrorism framework in the context of the long established tendency of liberal democracies to deny rights to identifiable groups both at home and in 'their' colonies on the basis of a wholly imaginary inferiority or dangerousness.

Our own discipline can continue, however, to bring a unique and distinctive understanding not only to domestic criminal justice, but also to the ways criminal justice is influencing international events in the realm of the 'war on terror'. Might not, for example, the emergence of a US global carceral complex (see Gordon 2009) be seen productively and accurately, from a criminological point of view, as an extension of mass imprisonment in the United States and punitive penal policy more generally? Is the continued occupation of Iraq entirely different from the aggressive and militarized policing of African-American neighbourhoods in the United States or Indigenous people and communities in Australia? If the answer to these questions is 'yes', or even perhaps 'in some ways', then criminologists have much to contribute to understandings of 'the war on terror' and counter-terrorism in both its domestic and international dimensions.

Criminologists are already making substantial contributions to the field of counter-terrorism. A brief and non-exhaustive review reveals a range of criminological contributions to understanding and critiquing counter-terrorism laws and measures in both domestic and international contexts. The rich body of criminology that focuses on criminalization, spanning an array of theoretical perspectives, has been used to analyse the meaning and potential impacts of counter-terrorism frameworks (see, e.g. Poynting *et al.* 2004). State crime perspectives have been utilized to critique and analyse the invasion of Iraq and other aspects of the 'war on terror' and homeland security (see, e.g. Kramer and Michalowski 2005). There is a growing body of criminological literature that draws out the links between domestic prisons and imprisonment in America's global prisons, such as Guantanamo Bay (Carlton 2006; Gordon 2006; McCulloch and Scraton 2009), and criminological contributions that draw links between neo-liberalism, corruption and the 'war on terror' (Whyte 2007). All this suggest that criminology is taking up the various challenges and engaging with opportunities in the expanded terrain opened up by the changed temporal and geographic frameworks of pre-crime and national security.

### *Conclusion*

The imperative to prevent terrorist attacks has accelerated and consolidated a long established trend towards anticipating risks or threats and pursuing security in criminal justice. Counter-terrorism advances a 'pre-crime' logic aimed at pre-empting latent

threats. Countering terrorism is uniquely suited to a shift to pre-crime frameworks because the term 'terrorism' itself is pre-emptive, existing prior to and beyond any formal verdict. Terrorism is a label that arises primarily in the arena of politics rather than the courts.

Counter-terrorism measures, particularly those implemented in the wake of the 2001 attacks on the United States, have seen national security and criminal justice integrated to an unprecedented extent. The integration of national security and criminal justice necessarily involves the blurring of the boundaries between the state's internal and external coercive capacities. A pre-crime national security framework thus embraces not only a temporal shift that seeks to anticipate risk, but also a geographic shift that merges or blurs the domestic and international dimensions of criminal justice and national security.

While the shift to pre-crime linked to national security frameworks has advanced and accelerated to an unprecedented extent in the post-9/11 context, many elements of the post-crime criminal justice framework continue to exist. The integrated or hybrid criminal justice/national security frameworks have given rise to a number of tensions. These include the tensions between the ideal of an impartial criminal justice system and the politically charged practice of national security. Another key tension is between transparent justice, realized through the presentation of evidence at trial, and covert action designed to disrupt. Counter-terrorism is simultaneously a highly visible public spectacle and a highly secretive and broadly unaccountable function of the state.

The rationale for integrating national security into criminal justice and preventing terrorism through pre-crime measures is that the human costs of terrorist incidents are so high that the traditional post-crime due process protection is unreasonable or unaffordable. On this basis, a whole raft of new laws has been passed, which aim to preempt harmful acts and manage the risk of terrorism through disruption, restriction and incapacitation. These new laws target a broader range of people and a broader range of activities than the post-crime criminal law. The laws aim to intervene prior to harmful acts being executed or even being planned. Counter-terrorism laws and measures that target crimes before crime focus on threats before threat. The pre-crime security measures introduced to counter-terrorism have been termed 'laws against law' because they are the antithesis of criminal justice due process that commences with the presumption of innocence and moves through a number of discrete stages from investigation to charge, trial and verdict.

The counter-terrorism framework is described as a 'new paradigm' in prevention. The idea that prevention is better than cure is one that progressive scholars have adopted in a whole range of disciplines, including criminology. Preventing terrorism through a focus on social and environmental factors in the traditional frame of crime prevention raises none of the contentious issues associated with the pre-crime measures embodied in counter-terrorism legislation and measures. Prevention, a term familiar to criminology, has been coopted and distorted in the context of contemporary counter-terrorism laws and policing.

Pre-crime and the integration of national security and criminal justice frameworks finds its genesis in the histories of colonial strategies aimed at overcoming resistance to domination and the continuing and linked history of criminalization in domestic criminal justice systems. Counter-terrorism strategies are based on counter-insurgency theory and practice, which merges law enforcement with the military in paramilitary

configurations and understands politics and violence as intimately connected. On one level, the post-9/11 counter-terrorism pre-crime framework simply formalizes into law highly discriminatory pre-emptive policing strategies and the politically charged practices of security intelligence agencies. The pre-crime framework, however, does more than simply legitimize ‘facts on the ground’. The counter-terrorism legislation demarks a new frontline so that law is always catching up with the ‘reality’ of policing and the politically partisan practices of security intelligence agencies. The current shifts to pre-crime and national security, particularly the blurring of domestic and international policy, can also be traced in the previous wars on crime and drugs. The shift to hybrid national security and criminal justice frameworks works to deny both protections in international law and those found in post-crime criminal justice due process models.

The term ‘pre-crime’ captures the key problematic of the counter-terrorism legal regime. Pre-crime suggests that no crime has been committed, while *simultaneously* evoking the crime that hasn’t happened. Crime and pre-crime exist together as matter to shadow. Imagination animated through prejudice and stereotypes rather than objective fact or evidence that point to those facts form the basis of police and security intelligence action and even prosecution under counter-terrorism pre-crime frameworks. Science fiction writer Phillip K. Dick well understood that the promise of a crime-free society was also a threat. His story, centred on the police pre-crime unit, is a vision of a dystopian world of state power and the fate of an individual caught in its trap.

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