JUSTICE AND TERRORISM

*Victor Tadros**

This article is concerned with the ways in which we might understand the relationship between two obligations of the state: retributive justice and security. It develops this analysis in the context of terrorism law in the UK, focusing both on control orders and on the range of criminal offenses that are available for the prosecution, conviction, and punishment of suspected terrorists. The ambition of the article is to outline a normative framework that might be useful in evaluating these different responses, as well as providing critique of particular provisions and policies.

INTRODUCTION

With respect to terrorism, in common with crime in general, modern liberal states have two broadly conceived obligations: the obligation of retributive justice and the obligation of security from crime, or what I will call criminal security. Given that these are obligations of the state, they can be subjected to critical scrutiny. We can legitimately ask whether the state has *met* its obligations of retributive justice and of criminal security. This invites us to develop a normative theory of retributive justice and a normative theory of criminal security. And, if possible, those theories should be integrated. We should aim to show the proper relationship between the pursuit of retributive justice and the pursuit of criminal security. Some

*School of Law, University of Warwick. Email: v.tadros@warwick.ac.uk. This paper arose from a conference on the response of the criminal law to terrorism at the University at Buffalo. Thanks go to the participants at that conference for a valuable discussion of the paper. Thanks also go to Octavio Ferraz, Andrew Williams, and Lucia Zedner for comments.

New Criminal Law Review, Vol. 10, Number 4, pps 658–689. ISSN 1933-4192, electronic ISSN 1933-4206. DOI: 10.1525/nclr.2007.10.4.658.

aspects of this project have been pursued in great detail. Others remain almost untouched. As far as I know, there is no well established integrated theory of retributive justice and criminal security. Even sketching a plausible theory of that kind would be an achievement.

Let me begin by sketching out what a theory of retributive justice should include as I at least have some grasp of the appropriate questions to be asked here, as well as a view about what some of the answers should be. A theory of retributive justice is a theory of what justice requires in terms of a response to serious wrongdoing when it occurs. A theory of the proper response will include five main components which can be understood as answers to the following questions.

(1) *What should amount to a crime?* What wrongs is it the responsibility of the state to see prosecuted and convicted for the purposes of punishment? The most plausible view, I think, is that crimes are public wrongs: wrongs which the public have an appropriate role in seeing condemned through a public forum and in the name of the public.[1] A theory of crimes is a theory of what wrongs should be seen as public in this sense. While there is some theoretical work on the moral limits of the criminal law, that work has not as yet provided a convincing set of restraints on a rapidly expanding criminal law.[2] Furthermore, there is a much less substantial literature concerning how crimes should be defined and distinguished from each other.

(2) *What should make individuals responsible for those crimes?* What is required is a theory of what it means for an individual to be both responsible for committing a crime and to have the appropriate kind and degree of fault to be held responsible for that crime. I have outlined the contours of a character theory of criminal responsibility and the implications of that theory.[3] On that theory, the basic answer to the question of responsibility is that an agent will be responsible for an action insofar as that action is attributable to his character. The basic answer to the question of fault is that an agent will be criminally responsible for his conduct only if his conduct manifested the kind of vice worthy of at least moral

1. See Sandra Marshall & Antony Duff, Criminalization and Sharing Wrongs, 11 Canadian J.L. & Jurisprudence 7, (1998); Antony Duff, Punishment, Communication and Community (2001).

2. The project has recently been furthered. See Douglas N. Husak, Overcriminalization (2007).

3. Victor Tadros, Criminal Responsibility (2005).

indignation. Choice theories[4] and capacity theories[5] are alternatives to character theory, as are theories that attempt to diffuse the tension between these alternatives.[6]

(3) *What is the proper method of investigating and trying criminal cases?* Most criminal justice scholarship implies that a theory of investigations and trials is instrumental: it aims to establish who has perpetrated crimes in order that they can then be punished for them. Antony Duff, Lindsay Farmer, Sandra Marshall, and I defend a different view:[7] that the criminal trial should be a process of calling an individual to answer a charge and to account for his conduct. On this view, the trial should be a communicative process of establishing that the defendant is criminally responsible and liable for his conduct. It is thus integrated with a theory of criminal responsibility. That theory should also help us to outline the requirements for proof of wrongdoing. A theory of evidence should be integrated into a theory of the criminal trial.[8]

A theory of the criminal trial should ground a theory of criminal investigation. The appropriate methods of criminal investigation should be determined by the criminal trial. For a criminal investigation attempts to put together a case against an individual which can then be prosecuted in a criminal trial. Here I have as yet little to offer in the way of a more developed answer, and normative theorizing about the criminal investigation, like the criminal trial, remains relatively undeveloped.[9]

---

4. See, e.g., Michael S. Moore, Placing Blame (1997).

5. See, e.g., H.L.A. Hart, Punishment and Responsibility (1968).

6. See Antony Duff, Criminal Attempts (1996).

7. 3 The Trial on Trial: Toward a Normative Theory of the Criminal Trial (Antony Duff, Lindsay Farmer, Sandra Marshall, & Victor Tadros eds., 2007).

8. See also Victor Tadros, Rethinking the Presumption of Innocence, 1 Crim. L. & Phil. 193 (2007).

9. That is not to say that no philosophical work is done here either. For example, there is quite a bit of work done on the legitimacy of racial profiling in investigation. See, e.g., Matthias Risse & Richard Zeckhauser, Racial Profiling, 32 Phil. & Pub. Aff. 131 (2004); Annabelle Lever, Why Racial Profiling Is Hard to Justify, 33 Phil. & Pub. Aff. 94 (2005). And there is some philosophical work on the right to privacy and its implications for criminal investigations. See Privacy and the Criminal Law (Erik Claes, Antony Duff, & Serge Gutwirth eds., 2006). On the relationship between policing and criminal offenses, see Markus Dirk Dubber, The Possession Paradigm: the Special Part and the Police Power Model of the Criminal Process, in Defining Crimes: Essays on the Special Part of the Criminal Law 91 (R.A. Duff & Stuart P. Green eds., 2005).

(4) *What (if anything) justifies punishment, and what principles of sentencing follow from that?* We need a justification of practices of punishment, if one is available, and a corresponding theory of sentencing. There is a range of coherently defended plausible theories of punishment available from which to choose, or with which to contrast new theories. I am confident that we should not take a utilitarian view of punishment,[10] and I think that the primary rationale should be some sort of humane retributivism. But I remain unclear how unified our theory should be,[11] what kinds of punishment the right theory would warrant, and what the sentencing implications of the right theory are. I suspect that some kinds of deprivation of liberty or property will provide the most adequate and humane forms of punishment, even if the deprivation of liberty should not take the form of imprisonment as commonly as it presently does.

(5) *What are the proper political principles and institutions that should govern the criminal law?* This question has been more or less neglected by normative criminal theorists. It involves investigating the relationship between criminal law, by which I mean to include procedural law and the law of evidence, as well as substantive criminal law, and our political and constitutional institutions. In the UK and the U.S. crime has been thrust firmly onto the political agenda, but without the kind of political processes to ensure that crime policy is likely to be sensitive to concerns of retributive justice.[12] This suggests an important agenda for normative theorists: an agenda that would reengage criminal law theory with political theory.

Despite the inadequacies alluded to above, we can say that a number the major questions worth addressing in a theory of retributive justice have been thoroughly considered by criminal law theorists. When we compare normative theory about criminal security our understanding is

10. See Andrew von Hirsch, Censure and Sanctions (1993); Duff, supra note 1; John Tasioulas, Punishment and Repentance, 81 Phil. 279 (2006).

11. For doubts about a unified theory, see Tasioulas, supra note 10.

12. For recent examples of analysis of the politics of crime in the UK and the U.S. respectively, see Ian Loader, Fall of the "Platonic Guardians": Liberalism, Criminology and Political Responses to Crime in England and Wales, 46 Brit. J. Criminology 561 (2006); Jonathan Simon, Governing Through Crime (2007).

much less well developed.[13] Here the central question is what the state should do to make its citizens and others secure from crime by addressing the risk that they will be offended against.[14] The ambition in this respect is primarily forward looking rather than responsive. It invites us to investigate what the state can do to protect its citizens and others from future criminal offending. The fact that theoretical work on this issue is less well developed can be seen as something of a tragedy, given that the agenda of retributive justice seems to be being sacrificed in part at least to pursue an agenda of security.

The main theoretical contributions in this field, as far as I am aware, have been from constitutional theorists,[15] and from social theorists and criminologists. The former group of scholars has considered the kinds of constitutional protections that it is appropriate for courts to provide in the light of government responses to the demand for security, in relation to crime in general and terrorism in particular. The latter group has traced the development of the political discourse of security and its relationship with the development of security techniques, particularly those of surveillance and risk management.[16]

These techniques can be understood in the light of Michel Foucault's more general analysis of the ambitions of the modern state. Foucault describes the responsibility which the state takes on in modern society to manage the lives of its population. This responsibility is contrasted with the primarily defensive mode in which the state operated, for him at least,

13. It would be wrong to say that there is no work at all with this agenda. See Andrew Ashworth & Lucia Zedner, Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions, Crim. L. & Phil. (forthcoming) (assessing and critiquing some important trends); see also Lucia Zedner, The Concept of Security: An Agenda for Comparative Analysis, 23 Legal Stud. 153 (2003) [hereinafter The Concept of Security]; Lucia Zedner, Securing Liberty in the Face of Terror: Reflections from Criminal Justice, 32 J.L. & Soc'y 507 (2005) (providing a theoretical critique of security in general and security in relation to terrorism).

14. The term security is, as noted in Zedner, The Concept of Security, supra note 13, slippery, but I intend to take as my focus simply the objective risk of being offended against. There is also an important issue about the role that the state has in making citizens *feel* secure, see Zedner supra note 13, and democratic processes may have a role in addressing that as well, see Ian Loader & Neil Walker, Civilizing Security (2007).

15. See, e.g., Cass Sunstein, The Laws of Fear (2005); David Dyzenhaus The Constitution of Law: Legality in a Time of Emergency (2006).

16. See Loader & Walker, supra note 14 (connecting these two discourses).

prior to the eighteenth century, what he calls a juridical network of power relations.[17] He describes the ambition as follows:

> Regulatory mechanisms must be established to establish an equilibrium, maintain an average, establish a sort of homeostasis, and compensate for variations within this general population and its aleatory field. In a word, security mechanisms have to be installed around the random element inherent in a population of living beings so as to optimise a state of life.[18]

Although Foucault himself was dismissive of the political theory of his day, as well as being skeptical about whether philosophy should have normative ambitions at all, we can see Foucault's socio-theoretical analysis of the power relations as describing shifts in the field of politics and power, which then open those fields up to normative critique. There is no realistic possibility of rolling back the regulatory state even if this were in principle desirable.[19] But once the state claims this responsibility to manage the lives of its citizens, it must be subject to appropriate normative scrutiny that will help to ensure that the responsibility is discharged in a way that can be justified to those citizens.

If the lack of a normative analysis of criminal security is a pressing concern in relation to crime in general, it is particularly pressing with respect to the state's response to terrorism. For when it comes to terrorism, the demands of security are considered particularly urgent, and this has led to a very public erosion of the ambition to achieve retributive justice for terrorist suspects. The most visible case, detention of terrorist suspects without trial, has been defended in terms of security rather than retributive justice. And that is so even though the mode of detention without trial, in Belmarsh Prison or Guantanamo Bay, has been punitive. The more recent control orders in the UK are more difficult to assess on that score. Control orders, which amounted to severe restrictions on the liberty of subjects of the order, were established in response to a declaration of incompatibility

17. I attempted some analysis of Foucault's contrast between juridical power and biopower. See Victor Tadros, Between Governance and Discipline: The Law and Michel Foucault, 18 Oxford J. Legal Stud. 75 (1998).

18. Michel Foucault, Society Must be Defended 246 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 2003).

19. In that light, Nozick's *Anarchy, State and Utopia* seems not only normatively unattractive but also unrealistic about what can be achieved with respect to the modern state. See Robert Nozick, Anarchy, State and Utopia, (1974).

with the UK's human rights obligations by the House of Lords respecting detention in Belmarsh.[20] Perhaps they only have security as their ambition, even if they are not uniformly perceived in that way.

Obviously, in this article, I won't be able to make much progress in developing the agenda that I just sketched out. However, I do want to make a small contribution to that agenda. The contribution that I hope to make will be in raising some questions about the pursuit of the security agenda in relation to terrorism in the UK by looking at the two main ways in which those suspected of involvement in terrorism are deprived of their liberty: criminal prosecutions and control orders. While the latter have received quite a bit of public attention, and some academic critique, the former tend to attract less public and academic scrutiny. I will then sketch in a general way some of the central issues that should be addressed in a normative theory of security from a broadly egalitarian perspective: a concern with treating all citizens as equals. In the light of this I will suggest that it will be difficult to justify developments in the substantive criminal law or the use of control orders, and I will argue that the former are probably even more problematic than the latter.

I. CRIME AND SECURITY: THE CONTROL OF TERRORISM IN THE UK

Since the Labour government came to power in 1997, the UK Parliament has enacted four major pieces of legislation concerned with terrorism: the Terrorism Act 2000, the Anti-Terrorism, Crime and Security Act 2001, The Prevention of Terrorism Act 2005, and the Terrorism Act 2006. The first of these pieces of legislation, however, is in part a consolidation and in part an extension of previous terrorism law. Undoubtedly, terrorism law in the UK has been extended since 9/11, but the law prior to that was already extensive and controversial.

A whole range of law primarily concerned with security has been enacted. Some of that is direct, for example extending police powers with respect to terrorist suspects,[21] or extending the length that a person can be detained

20. Prevention of Terrorism Act, 2005.

21. See, e.g., Anti-Terrorism, Crime and Security Act, 2001, pt. 10.

without being charged with committing a criminal offense.[22] Some powers are less direct than that. For example, parts 1 and 2 of the 2001 act are concerned with the seizure, forfeiture, and freezing of terrorist cash and assets. These security measures all compromise the liberty of citizens, but by far the most controversial security measures enacted concern indefinite deprivation of liberty without trial.

There has also been important and powerful development and use of the substantive criminal law. The extension of the criminal law has not only affected the terms in which a person can be prosecuted and convicted of a terrorist offense, it has also extended the scope of police powers by making citizens subject to more intrusive forms of investigation and arrest in relation to those offenses. The direct extension of investigatory powers in relation to the terrorist threat operates in conjunction with this broadened criminal law, permitting raids of premises and stop and search of individuals where the conduct of those individuals is only suspected to be at the very furthest margins of terrorist activity. Liberal outrage at detention without trial, while perhaps warranted, has not focused on the main site of injustice, retributive injustice: investigation, prosecution, conviction, and punishment in the light of unjust criminal offenses.[23]

In this section I will focus on deprivation of liberty without trial through the use of control orders and with the expansion of substantive criminal law. I do this to show the relationship between two approaches to security with respect to terrorism. One approach is to restrict the liberty of terrorist suspects without prosecution and conviction. The other approach is to expand the criminal law to allow the prosecution and conviction of terrorist suspects of criminal offenses, depriving them of liberty through punishment.

22. This length, after heated parliamentary debate, currently stands at twenty-eight days.

23. To take a prominent example, Dworkin argues against detention without trial in Guantanamo Bay on the grounds that it is incompatible with equal citizenship to do this given the normal operation of criminal justice. R.M. Dworkin, Is Democracy Possible Here? (2006). But the normal operation of criminal justice in the U.S. can hardly be called justice at all in the light of the very extensive range of offenses available for prosecution and conviction. See, e.g., Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims' Rights (2002); Dubber, supra note 9; Husak, supra note 2.

A. Control Orders

By far the most controversial legal response to 9/11 in the UK with respect to terrorism was the enactment of part IV of the 2001 act. Part IV was concerned with individuals who the UK would have deported, but where deportation to the available destination country would have compromised their human rights. The government believed that these individuals posed a risk to security through terrorist activities, but, for various reasons, were unwilling to have them prosecuted for perpetrating a criminal offense. Section 23 of the 2001 act consequently allowed detention of those individuals without trial. An appeal procedure was set up to oversee and review detention, entitled the Special Immigration Appeals Commission, although the rights of the detainees to a fair hearing were severely curtailed by denying them access to information regarding their detention. This procedure involved derogation from art. 5(1) of the European Convention of Human Rights (ECHR), protecting the right to liberty. A (relatively small) number of individuals were held in Belmarsh Prison. The compatibility of the derogation with Parliament's human rights obligations under the Human Rights Act 1998 was then tested in *A v. Secretary of State for the Home Department*.[24] Derogation was permitted by section 14 of the Human Rights Act. Although article 15 of the ECHR was not incorporated into the law of the UK, it was accepted by the Attorney General that the derogation was permitted only if the terms of that article were satisfied. Article 15 provides that

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.[25]

In *A*, it was held that, while the House of Lords was prepared to defer to Parliament that there was a public emergency threatening the life of the nation (although a number of Lords expressed doubt that this was in fact the case),[26] detention in Belmarsh could not be regarded as strictly

24. A (FC) and Others (FC) v. Secretary of State for the Home Department, [2004] UKHL 56.

25. European Convention on Human Rights, art. 15.

26. See Lord Hoffmann's dissent. A (FC) and Others (FC) v. Secretary of State for the Home Department, [2004] UKHL 56, paras. 86–97.

required by the exigencies of the situation. The crucial point, for the House of Lords, was that the threat of terrorism was common amongst foreign nationals and UK citizens, but it was only members of the former group that was subject to detention without trial. As Parliament obviously did not think that it was necessary to detain members of the latter group without trial, it could not be necessary to detain the former group without trial either.[27] Consequently part IV was declared incompatible with the UK's obligations under the ECHR.[28] This important case has been subjected to thorough analysis, particularly regarding the competence and legitimacy of the courts in assessing issues of national security,[29] and I will not dwell on it further here. The case, however, led to enactment of the Prevention of Terrorism Act 2005, which replaced detention without trial in Belmarsh with a regime of control orders that are currently in force.

Control orders apply both to UK nationals and nonnationals, and hence are not susceptible to the kind of argument that the House of Lords developed with respect to part IV of the 2001 act. There are two types of control order: derogating and non-derogating orders. A derogating order is an order which is sufficiently restrictive that it interferes with the human rights of the subject as protected by the (ECHR). A non-derogating order is an order which does not so interfere.

Derogating control orders may be made at a preliminary hearing, and then later confirmed (or rejected) at a full hearing, by the courts following applications by the Home Secretary. They can be imposed only with respect to an existing article 5(1) derogation. The order will be imposed if

> the obligations that there are reasonable grounds for believing should be imposed on the individual are or include derogating obligations of a description set out for the purposes of the designated derogation in the designation order.[30]

---

27. See particularly the judgment of Lord Bingham. Id. paras. 43–44.

28. It should be noted that the Human Rights Act 1998 does not provide the courts with the power to strike down legislation, but only to declare it incompatible with the ECHR. See Human Rights Act, 1998, § 4. This meant that in principle Parliament could have dug its heels in and part IV of the Crime and Security Act 2001 would have remained in force.

29. See, e.g., Adam Tomkins, Readings of A v. Secretary of State for the Home Department, 2005 Pub. L. 259; Special Issue on A v. Secretary of State for the Home Department, 68 Mod. L. Rev. 654, (2005); Dyzenhaus, supra note 15, at 174-90. One central concern is that even in this case the House of Lords was overly deferential to Parliament on that issue.

30. Prevention of Terrorism Act, 2005, § 4(3)(d).

Hence, the order is not on its surface restricted to controls which are strictly necessary in the face of the threat, but rather may be imposed where there are "reasonable grounds" for believing that they "should" be imposed. This is a weak test.

Non-derogating orders may be made either in cases of emergency, by application to the court for permission,[31] or with respect to those previously detained in Belmarsh prison under the Anti-Terrorism, Crime and Security Act 2001. They may be made with respect to those that the Secretary of State reasonably suspects are or have been involved in terrorism related activity, and where

> He considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.[32]

Reasonable suspicion of being involved in terrorism related activity is undoubtedly a problematically low threshold, and it is difficult to see how that can justifiably play a part in the legislative scheme.[33]

The court may reject an application by the Secretary of State if that application is obviously flawed. If the order is made, the court then has powers to quash the order at a full hearing. It may do if it considers that the order was flawed. In determining whether the order was flawed, the court is to apply the principles and practices of judicial review. Here it should be noted that, with a culture of a deferential judiciary, judicial review in the UK is quite limited.[34] If an order is non-derogating, then, the Secretary of State has very wide discretion indeed about its imposition, providing him with worrying executive control over liberty.[35] Executive power is less extensive if the subject's human rights are interfered with.

Although the Secretary of State declares which kind of order he intends to impose, the court is the ultimate arbiter of whether a control order

31. Id. § 3(1).

32. Id. § 2.

33. See also Lucia Zedner, Preventive Justice or Pre-Punishment? The Case of Control Orders, 60 Current Legal Probs. (2007).

34. Although where there is interference with human rights, including the right to liberty, judicial review may include review on grounds of proportionality. See Secretary of State for the Home Department ex parte Daly, [2001] UKHL 26.

35. For concerns about restrictions on liberty imposed by the executive against particular individuals or classes of individual, see Sunstein, supra note 15.

breaches the applicant's article 5 rights or not, and hence whether it would require the use of the derogation from that article. For example, in *E*'s case[36] the Home Secretary had declared that the control order imposed was non-derogating. The restrictions included, amongst other things, electronic tagging; a curfew restricting E from leaving his home outside the hours of 7:00 a.m. and 7:00 p.m.; a restriction on E receiving visitors other than his wife and family, those under ten years old, emergency services if required, and E's legal representative, to his home; a prohibition on the use of the internet and any other communication devices; and an obligation to submit himself to police searches. This was held to be incompatible with E's article 5 right to liberty.

In the case of both derogating and non-derogating control orders, the continued imposition of a control order is subject to review by the courts to determine whether the interference with the subject's liberty is consistent with the threat posed, and in assessing that the judge must consider both the continuing nature of the threat and the degree of interference of the rights of the person subject to the order. Control orders are consequently subject to challenge by the person controlled, and that is intended to ensure the person's right to a fair trial.[37]

With respect to derogating control orders, the court must evaluate whether there is material which (if not disproved) is capable of establishing that the individual is or has been involved in terrorism related activity, that there are reasonable grounds for believing that the imposition of obligations on that individual is necessary to protect the public from a risk of terrorism, that the risk arises out of a public emergency in respect of which there is a designated derogation from article 5 of the ECHR, which has been accepted by the House of Lords,[38] and that the obligations imposed on the individual should include those within the order.[39] Such orders are required to be renewed every six months.[40]

---

36. Secretary of State for the Home Department v. E, [2007] EWHC 233 (Admin). See also Secretary of State for the Home Department v. JJ and Others, [2006] EWCA Civ 1141 (an earlier case in which six control orders were declared incompatible with article 5).

37. See Secretary of State for the Home Department v. MB, [2006] EWCA (Civ) 1140.

38. A v. Secretary of State for the Home Department, [2004] UKHL 56. But see Lord Hoffman's dissent in that case for a question mark about that aspect of the case.

39. Prevention of Terrorism Act, 2005, § 4(3).

40. Id. § 4(8).

However, there are severe limits to the procedural protections provided with respect to control orders.[41] There will be cases where the person subject to the order will not be provided with the information which forms the basis for the order (although possible summaries will be provided) and where they are represented at hearings by a special representative appointed by the Attorney General (or other relevant law officer in Scotland and Northern Ireland). Protection of information may be one of the main reasons for using control orders rather than prosecuting individuals for perpetrating one of the broad offenses considered below.

The use of control orders, derogating or non-derogating, undoubtedly imposes serious restrictions on the liberty of those subject to them. They have been imposed on individuals who have already been wrongly detained in prison without trial in breach of their human rights, resulting in the psychiatric injury of some, as well as impacting profoundly on their families.[42] The present use of control orders seems very difficult to justify, and, as we will see, part of that justification is based on the resources that would need to be spent to mount effective surveillance operations against these individuals to meet security concerns without such a severe deprivation of liberty.

B. Terrorist Offenses and Prosecutions

I will now outline the detail of some of the offenses available for prosecution in the UK before focusing on two recent cases. The detail of the offenses is important, because the detail not only affects the scope of our liberties, it determines what must be proved at trial to convict defendants, and it guides the police in their investigations. The broader the scope of offenses, the broader the range of conduct which can be tried and convicted for criminal offenses, and the broader the scope of police powers to investigate crime. The relationship between criminal offenses and policing is very important.[43] Some criminal offenses are used primarily by the police as tools to put pressure on individuals to cooperate with their investigations rather than for prosecution and conviction. And when assessing

41. See the Schedule to the Prevention of Terrorism Act, 2005.

42. See Zedner, supra note 33.

43. In the context of terrorism, see Clive Walker, The Legal Definition of "Terrorism" in United Kingdom Law and Beyond, 2007 Pub. L. 331; see generally Dubber, supra note 9.

the legitimacy of the legal response to terrorism, we need to know not only whether prosecutions and convictions of the relevant offenses are warranted, but also whether the resultant extension of police power is warranted.

It is difficult to categorize offenses of terrorism. Many of the offenses extend the range of inchoate offenses available for prosecution of terrorism. For example, there is an offense of preparation of terrorist offenses, which extends the scope of attempts liability before the perpetration stage. There is a recently enacted offense of encouragement of terrorism, an offense that has something in common with the inchoate offense of incitement.[44] The scope of this offense is very broad. If D publishes a statement which some members of the public are likely to see as direct or indirect encouragement of acts of terrorism and he knows that there is a risk of this occurring, he is guilty of the offense of encouraging terrorism. Obviously encouraging terrorism doesn't actually require one to encourage terrorism. I am at a loss to know what "indirect" encouragement of terrorism is supposed to include, although we are helpfully told in subsection 1(3) that it "includes" statements which glorify the commission or preparation of terrorist acts in the past or the future if the public could reasonably be expected to infer that what is being glorified as conduct that should be emulated by them in "existing circumstances."[45]

There are various possession offenses some of which are very broad. For example, it is an offense for a person to possess an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation, or instigation of an act of terrorism (with a defense for those that can show that they did not possess the article for those purposes).[46] There is an offense of collecting information "of a kind likely to be useful to a person committing or preparing an act of terrorism, or possessing a document or record containing information of that kind" (with a defense to those who can show that they

44. Terrorism Act, 2006, § 1. The offense was partly motivated by the Council of Europe Convention on the Prevention of Terrorism (ETS No.196). See Adrian Hunt, The Council of Europe Convention on the Prevention of Terrorism, 12 Eur. Pub. L. 603, (2006).

45. For further analysis of the lack of clarity about the scope of this offense, see Adrian Hunt, Prohibitions on Direct and Indirect Encouragement of Terrorism, Crim. L. Rev. 441, (2007).

46. Terrorism Act, 2000, § 57.

"had a reasonable excuse for his action or possession").[47] This suggests that one requires a reasonable excuse for possessing train timetables, maps, or computer manuals.

There are various financial offenses and again some are very broad. For example, it is an offense to invite another to provide money or property where one "has reasonable cause to suspect" that it may be used for the purposes of terrorism.[48] So if A asks B to give money to a religious group with reasonable cause to suspect that the money may be used for terrorism, but A doesn't in fact suspect that to be the case, he can nevertheless be convicted of the offense. It is an offense to become concerned in an arrangement which facilitates the retention or control by or on behalf of another person of terrorist property. This is a strict liability offense, with a reverse-burden defense available if D can "prove that he did not know and had no reasonable cause to suspect that the arrangement related to terrorist property."[49] If a bank holds funds for X and it turns out that X is a terrorist, all of the bank employees are guilty of the offense unless they can prove that they had no reasonable cause to suspect that the bank was holding money for terrorists.

There are offenses concerned with terrorist organizations. For example, it is an offense to be a member of a proscribed organization, to profess to be a member of a proscribed organization,[50] to support a proscribed organization,[51] or to wear the uniform of a proscribed organization.[52] There are limited defenses available to the first three offenses. With respect to the first two, which are probably the most important, there is a defense for those who joined the organizations before they were proscribed and had not been active since. The burden of proof of showing this was intended to be placed on the defendant to civil standards, but the House of Lords recently held that the burden was to be evidential only, on the grounds that it would be very difficult for the defendant to establish that he fell within the conditions of the defence.[53]

---

47. Id. § 58.
48. Id. § 15.
49. Id. § 18.
50. Id. § 11.
51. Id. § 12.
52. Id. § 13.
53. Attorney General's Reference No.4 of 2002, [2004] UKHL 43. See also Tadros, supra note 8.

Furthermore, there are some terrorist offenses of omission. The first relates to the previous set of financial offenses. If any person believes or suspects that any other person has committed one of these offenses, and bases his belief or suspicion on information which comes to his attention in the course of a trade, profession, business, or employment, it is a criminal offense if he does not disclose this fact to the police as soon as is reasonably practicable to the police (again without a reasonable excuse).[54] Even broader is section 38B of the Terrorism Act 2000,[55] which makes it a criminal offense for a person who "has information which he knows or believes might be of material assistance" in preventing an act of terrorism or apprehending, prosecuting, and convicting another person for the commission, preparation, or instigation of an act of terrorism, not to disclose that information to a constable without reasonable excuse.

Some of these offenses are resulting in prosecutions and convictions, and lengthy prison sentences. I will focus here on two cases prosecuted under section 58 of the Terrorism Act 2000, which is one of the broadest offenses in the criminal law of England and Wales. These cases provide some indication of different ways in which terrorist offenses in England and Wales may be regarded as broad. They are broad with regard to the kind of conduct prohibited, and they are broad with respect to what counts as terrorism.

The first case is *R v. Mansha*.[56] In that case, the defendant's home was raided and the name of a soldier who had served in Iraq was found on a piece of paper, along with the address at which the soldier had previously lived. There were also DVDs with anti-Western propaganda, Islamic propaganda praising martyrdom, and information about suicide bombings. A dismantled pistol used for firing blanks was found as well as a balaclava with the eyes cut out. The defendant claimed that others had access to his flat and that some of this material did not belong to him. No approach had been made to the soldier, and no evidence was presented of any plan to do so. D was twenty-one years old, with very low intelligence. He was convicted under section 58(1)(b) of the Terrorism Act 2000 and sentenced to six years imprisonment, and his appeal against sentence was

54. Terrorism Act, 2000, § 19.

55. Id. § 38B, as amended by Anti-terrorism, Crime and Security Act, 2001, § 117(2).

56. [2006] EWCA Crim 2051M.

dismissed. The importance of deterrence was emphasised as a significant factor in the decision.[57]

Still more interesting is the case of *R v. F*.[58] In that case, the defendant had been granted asylum from Libya after friends and family members had been killed by the Gaddafi regime. His home was raided and material was taken from it and analyzed. In his possession was a CD with twenty-one files downloaded from a Jihadist website. One file was entitled "a special training course on the manufacture of explosives for the righteous fighting group until God's will is established." Also found was a handwritten document which apparently described in detail how a terrorist cell could be set up, to be aimed at the removal of Colonel Gaddafi from power in Libya. On that basis he was charged under section 58(1)(b). The case is an appeal against a decision at a preliminary hearing about the proper construction of sections 1 and 58 of the Terrorism Act 2000.

Section 1 of the 2000 Act "defines" terrorism as acts which use or threaten violence, serious destruction of property, risks the life or health of citizens and which are designed to influence the government or to intimate to the public or a section of the public and that use or threat is made for the purpose of advancing a political, religious or ideological cause.[59] Section 1 does not, on its surface, discriminate between such acts in relation to legitimate governments and in relation to tyrannical regimes. In *R v. F*, F argued that it ought to be constructed to rule out legitimate resistance to tyrannical governments, and claimed that the plan to which the document related posed no risk to civilians. In other words, F claimed that even if he had otherwise contravened section 58, he should be regarded as a freedom fighter rather than as a terrorist. The Court of Appeal decided against that construction, even though the targeting of civilians is often thought central to what terrorism is and what makes it distinctively wrong.[60]

---

57. It is worth noting that, in 2002, research by the Sentencing Advisory Panel showed that the average sentence for rape was seven years and four months in prison. Alan Clarke, Jo Moran-Ellis & Judith Sleney, Attitudes to Date Rape and Relationship Rape: A Qualitative Study (2002).

58. [2007] EWCA 243.

59. For critique, see Walker, supra note 43.

60. See, e.g., Tony Coady, The Morality of Terrorism, 60 Phil. 47 (1985); Tony Coady, Terrorism, Morality, and Supreme Emergency, 114 Ethics 772 (2004); Samuel Scheffler, Is Terrorism Morally Distinctive?, 14 J. Pol. Phil. 1 (2006).

Secondly, he claimed that that even if that was not the right construction of section 1, the reasonable excuse defense provided in section 58(3) may include excuses based on the legitimacy of resistance to a tyrannical regime. The judge at first instance had ruled this out of the scope of the excuse, and F contested that on the basis that the judge was usurping the role of the jury. His appeal on that ground was also rejected. His claim that the activities that the documents related to were in support of legitimate resistance to tyrannical government were thus deemed legally irrelevant. This case implies that those who supported resistance to Saddam Hussein's Iraqi regime or who currently support resistance to Robert Mugabe's regime in Zimbabwe, to take two of the least politically controversial cases, are committing terrorist offenses in this country. And that is so even if the resistance takes the form of serious destruction of property or serious disruption to electronic systems without affecting the lives of civilians.

The decision in *R v. F* is in part an attempt to insulate decisions in criminal trials from the messy business of politics. Without wishing to take a stance about the facts of the case (for reasons of ignorance about what exactly was intended and with what political motivation) given the breadth of both the definition of terrorism and of the offense, the reasonable excuse defense is the only thing that provides any safeguard against conviction of the innocent, or indeed, of those whose resistance to oppressive and tyrannous governments could only be described as noble and brave.

C. Retributive Injustice in Terrorist Cases

While there are those who argue that due process rights can play an important role in protecting the right to liberty of citizens against an overzealous pursuit of security,[61] without substantial paring back of the criminal law, due process rights remain toothless. The model of retributive justice that I sketched at the beginning of this paper is extensively departed from in a number of crucial respects in these cases. First the offense definitions don't appropriately describe public wrongs. The mere collecting of information, or possessing documents or records containing information, that would be useful to terrorists is not worthy of moral criticism, let alone

61. See, e.g., Zedner, supra note 13; Dworkin, supra note 23.

condemnation. That is not to say that there are no instances of the offense which are worthy of such condemnation. But the terms in which the offense is described cannot be regarded as constituting a criminal wrong. It is not even clear from the definition of the offense that the defendant must have been collecting the information *for* use in pursuing terrorist aims. Much of the information that one might gather will have multiple potential uses, and so the offense does nothing to distinguish between those who are involved in terrorist activities and those who are not. If offense definitions are supposed to provide the terms in which a person can be condemned for their conduct,[62] this offense manifestly fails in that respect.

Furthermore, it is not clear that just conditions of criminal responsibility are satisfied by the offense. The defendant is entitled to a defense if he proves that he had a reasonable excuse for his action or possession. It isn't clear at first sight what might constitute a reasonable excuse, and so perhaps it will be claimed that the defense gives plenty of scope to defendants who are not at fault in their conduct to escape criminal liability. However, the first thing to note about this is that the terms of the offense are so broad, and so obviously not wrongful in most instances, that it is difficult to see why much of the behavior falling within the scope of the offense needs to be excused. Justifications and excuses only need to be provided to prima facie wrongs.[63] But as there is no wrong here, there is no moral obligation to provide an excuse. A person who collects information about flight times between the UK and the U.S. collects information that is likely to be useful to terrorists. But he doesn't need to have a reasonable excuse for *that*.

Furthermore, the offense is one of strict liability. The prosecution need not prove mens rea to establish the conditions of the offense. Mere possession of a document containing information of the kind that is likely to be useful to a person committing or preparing an act of terrorism falls within the offense even if the defendant was unaware that such a document was in his possession. The fault conditions are all potentially determined by the defense. The defendant will not have the burden of proving the he lacked the relevant knowledge, but he will have the obligation at least to raise an issue about that to satisfy what is sometimes called the "evidential burden

62. See Tadros, supra note 3, ch. 4.

63. See John Gardner, Justifications and Reasons, in Harm and Culpability 103 (A.P. Simester & A.T.H. Smith eds., 1996).

of proof" if he is to utilize the defense on that basis, and only if he is successful will the burden be placed on the prosecution to prove beyond reasonable doubt that the defendant is not entitled to the defense.[64]

We have seen from *R v. F* that the courts are beginning to narrow the grounds on which the defendant might be provided with an excuse for his conduct in law, which hardly fills one with confidence about the use of the offense. Considering the complexity of a theory of criminal responsibility, it seems unlikely that a broad "reasonable excuse" defense will be normatively satisfactory in its application.

It is also questionable whether the defendant's trial on the basis of this offense can be regarded as fair. A vague and broad criminal offense with a defense that is being restricted to preclude important moral argument hardly provides a proper basis for a criminal trial. The fairness of a trial cannot be detached from the fairness of the offenses which provide the basis of argument, and scrutiny of the legitimacy of offenses should, within some limits, be available at trial.[65] The separation of supposedly procedural principles, such as the presumption of innocence, and the substantive law, has been exploited by legislatures to erode the very protections that trials were intended to provide to citizens against the coercive power of the state.[66]

Furthermore, we should critically scrutinize why the court in *R v. F* wishes to preclude political argument about the justification of the cause supported from the courtroom. Perhaps this has to do with the separation of powers. Perhaps the argument is that if Parliament had wished to define terrorism according to the justification of the action, it would have done that through the definition of terrorism. As Parliament did not distinguish between freedom fighters and terrorists in the definition of terrorism, it intended to include all freedom fighters within the definition of terrorism. And in that case, the defendant cannot argue that being a freedom fighter he was not a terrorist. But if that is true, what was *Parliament's* motive for excluding such political argument from the courtroom, given that by Parliament's own lights, those who supported resistance to Saddam Hussein's Iraqi regime from the UK cannot plausibly be treated as terrorists?

64. See Terrorism Act, 2000, § 118.

65. See 3 The Trial on Trial, supra note 7.

66. For further argument in the context of the presumption of innocence, see Victor Tadros & Stephen Tierney, The Presumption of Innocence and the Human Rights Act, 67 Mod. L. Rev. 402 (2004); Tadros, supra note 8.

These concerns also call into question the legitimacy of the investigation. In *R v. F* the articles which formed the basis of the prosecution were found following a raid on the defendant's house. An application to search premises can be made by a constable to a justice of the peace, who will grant the application if he is satisfied that there are "reasonable grounds for suspecting that a person whom the constable reasonably suspects" to be a terrorist is to be found there.[67] A terrorist is defined in section 40(1) of the Terrorism Act 2000 as a person who has committed an offense under sections 11, 12, 15 to 18, 54 and 56 to 63 of the act, or who has been concerned in the commission, preparation, or instigation of an act of terrorism. It is to be noted that it is sufficient in law, for the application to be granted, that the defendant is reasonably suspected of committing the offense whether or not he may be entitled to a defense. Hence, the defendant in *R v. F* is defined in law as a terrorist, even if he had a reasonable excuse for possessing the relevant material. But given the breadth of the offense, this cannot provide a legitimate basis on which to search a private dwelling.

It is worth reflecting on the fact that the law not only determines who has perpetrated criminal offenses, but also determines who "is a terrorist." Section 40(1) ensures that it is very easy to become a terrorist in the UK. One certainly doesn't have to have perpetrated any acts of terrorism to do so. It is interesting to note the difference here between the discourse of terrorism and the discourse of other crimes. To become a rapist, one has to have raped, and to become a murderer one has to have murdered. Even *attempting* to rape or *attempting* to murder will only make one an attempted rapist or an attempted murderer. But becoming a terrorist, in social discourse and in law, is much easier than that. One can become a terrorist simply by collecting information, or by possessing articles which might be useful to terrorists. One is a terrorist by holding funds that might be used for terrorist activities. And one's status as a terrorist isn't in any way diminished even if one has an excuse for these activities. We should not be blind to the oppressive potential of this discourse both within and without the law. When a person is arrested as a suspected terrorist, we should be aware of just what that means. It is not just that the suspicions may turn out to be unfounded, but also that even if the suspicions are true that indicates nothing worthy of moral criticism about the person arrested.

67. Terrorism Act, 2000, § 42.

If I am right that the basis for criminal investigations, prosecutions, and convictions is rendered unjust by the breadth of terrorist offenses, it will not be surprising to learn that punishment for those offenses is unjust as well. As I noted in the introduction, punishment is quite hard to justify in general, but punishing someone for collecting information, or possessing a record of information, that is likely to be of use in the preparation or commission of terrorism is obviously unjust. How can we justify retribution *for that*?

Finally with respect to punishment, in *R v. Mansha* the deterrent effect of heavy sentences for those on the fringes of terrorist organizations was given as the primary reason for regarding the six-year sentence of the defendant as acceptable. No argument was developed about the deterrent rationale of punishment in general, of its likely effectiveness in general or in this case in particular. The deterrence rationale, at least when it is applied without retributive limits, has been thoroughly discredited by punishment theorists.[68] The argument implicit in the decision is that disproportionate sentences may be warranted to deter others from participating with individuals or organizations which may lead them to go on to commit more serious offenses. That is a very dangerous argument, with unpalatable extension, no sound empirical basis, and a startling lack of regard for the moral significance of fundamental rights.

II. JUSTICE, LIBERTY, AND THE PURSUIT OF SECURITY

It might be argued that convictions under the extended criminal law are justified not on grounds of retributive justice but rather on grounds of criminal security. This, I suspect, is the main rationale for the expanded criminal law: the model of retributive justice that I sketched in the introduction, were it adhered to in a purist way, is considered inadequate to pursue the security agenda demanded of the state.[69]

68. See the work cited in supra note 9.

69. It is sometimes claimed that there might be justifications for "pre-punishment," for those intending to commit criminal offenses. See Zedner, supra note 13; Zedner, supra note 29. There are, of course, some justifiable inchoate offenses, such as attempts, for which actual punishment is deserved. For the best account, see Duff, supra note 6. Beyond that, I see no role for the idea of "pre-punishment." We should retain a clear distinction between the state's obligations of retributive justice and security. The idea of pre-punishment, I think, muddies the waters with no benefit.

In order to see whether the obligation of security can justify either the expanded criminal law, or the use of control orders, or both, we need to know something about what a just security policy would be. Security policies include domestic and international aspects. The latter include international arrangements and agreements and asylum and immigration policy.[70] I will restrict myself to domestic issues. As far as domestic control of security goes, there is a relationship between security and liberty that will play a crucial role in evaluating security policy decisions.

I begin by taking for granted that the state has an obligation of criminal security, and that obligation is part of its more general protective functions. Those functions include, inter alia, protection from illness and disease, protection from invasion, and protection from environmental disasters. Those obligations are primarily owed to citizens, and the state has a duty not only to ensure that the risk of these things occurring is at an appropriate level, but that those risks are appropriately distributed between citizens: increasing the security of one citizen at the expense of another may be unjust if the latter is already less secure than the former. The distribution of security is morally significant.

Criminal security, in common with other protective goods, has a public aspect, and for two reasons. First, if the good is provided to one person, it would often be difficult and expensive to exclude others from it creating the problem of free riders; and second, provision of the good is much more efficient when managed by the state.[71] These are good reasons for the state to provide, or at least manage, security.[72] It would be inefficient and unjust to provide citizens with resources to take full responsibility for their own criminal security.

Of course, to different degrees citizens will contribute to their own criminal security, for example by purchasing houses in low crime areas and by putting locks on their doors. Spending private resources is, however, one of a wide array of factors that lead to unequal levels of security.

---

70. On some worrying trends regarding the latter, see Clive Walker, The Treatment of Foreign Terror Suspects, 70 Mod. L. Rev. 427 (2007).

71. Loader & Walker, supra note 14, also argue that security is a public good, but primarily on the ground that the common enterprise of developing a public policy on security is constitutive of security itself.

72. Private security firms are now common as security providers, although they are often subject to government regulation. There may be normative concerns about private security, but they do not flow from the arguments here.

Socioeconomic background, family, gender, age, and ethnicity will probably all play some role in determining a person's level of criminal security. Differences in criminal security between citizens are likely to vary widely in a way that is difficult for citizens to control. Furthermore, if one is relatively insecure, there are costs involved in increasing one's level of security. For example, citizens in high crime neighborhoods may go out less often at night to increase their level of security, but only at the cost of failing to pursue valuable personal projects of various kinds. In this sense, distribution of security creates unequal liberty amongst citizens. While citizens with equal resources but unequal levels of security are equally at liberty to pursue the same projects, the costs of doing so, in terms of the risks they expose themselves to, will be different. Furthermore, being exposed to greater risks of crime will rationally motivate spending proportionally greater personal resources on security (locks, burglar alarms, etc), reducing liberty to spend those resources on other things.

If the security of all citizens is of equal concern, it is unlikely that policies that maximally reduce the crime rate will be just. Compare two equally expensive potential policies, A and B. Policy A would reduce the aggregate crime rate to a greater degree than policy B, but the risk of crime will fall entirely in one geographical area where citizens are already relatively insecure. Policy B will result in all citizens suffering the same risk of crime. It may be just to pursue policy B on the grounds that citizens are disadvantaged not only by being victims of crime, but by being exposed to greater risk of being a victim of crime. This is consistent with the general idea, defended by John Rawls, that the state should give priority to the worst off not only in terms of resources but also in terms of liberty. He writes, "it is always those with the lesser liberty who must be compensated. We are always to appraise the situation from their point of view."[73]

So far I have been proceeding as though there is some general and undifferentiated category of criminal security that is unequally distributed across society. But of course this is not the case. Different individuals are subject to different levels of threat of different kinds of criminal wrong. Young men may be more likely to be assaulted when compared with young women. Young women are more likely to be raped than young men (assuming we include male rape within the wrong of rape). This makes comparing the overall level of security of citizens difficult. One's level of

73. John Rawls, A Theory of Justice 28 (1999).

security is dependent on the magnitude of the wrongs that one is secure from as well as the likelihood of those wrongs occurring, and as wrongs are incommensurable it may be indeterminate whether one person is more secure than another.

How should we see the threat posed by terrorism in the light of these comments? First, unlike most crime, terrorism is relatively egalitarian. One thing that is feared most about terrorism, that we don't know when and where the terrorists will strike, ensures that the burden of the risk of terrorism is shared by us all. Admittedly, some are more likely to suffer than others. Frequent users of public transport, and especially those working on public transport, might be exposed to greater than average risks, for example. Those living the country life may be exposed to a less than average risk. Furthermore, the risk of any particular person being a victim of a terrorist attack is likely to be relatively small. And altering one's behavior to substantially reduce the risks being a victim of a terrorist attack is likely to be very burdensome with little benefit. For example, avoiding flying poses a substantial cost on many people with respect to the pursuit of their personal projects, and the reduction in risk on any individual who doesn't fly is likely to be very modest. This is in contrast with "ordinary" crime: staying in at night may substantially increase the security of the least secure, leading them to have good reason to give up some valuable projects.

Overall, this provides some reason to be more concerned about "ordinary" crime than terrorism: the situation of the most insecure is very marginally improved by reducing the threat of a terrorist attack. The resources required to reduce the threat of terrorism are very substantial, leading to a small increase in security for all, but particularly for those who are already relatively secure. Using the same resources to improve the situation of the least secure would not only have aggregate benefits, it would also benefit the most insecure. And given that insecurity is often associated with lack of financial resources, it may well be that reducing the risk of ordinary crime for the worst off has more value, not only in terms of the aggregate of valuable projects pursued, but particularly for the worst off.

Counterbalancing this, we should not see the wrongs caused by a terrorist attack as simply the aggregate of the wrongs suffered by the individuals who are attacked. Criminal wrongs are sometimes seen as attacks on the state, but terrorist attacks are often *real* and *direct* attacks on the state: they are intended to have a political impact, and indeed terrorist attacks

often *do* have that impact, if not always in the way that was intended. It would take a very serious terrorist attack to make any profound impact on the nature of our political institutions as such, rather than on particular policies pursued. And ordinary crime could have either effect. Widespread homicide or looting, for example, might also lead to the suspension of democracy. And increase in crime levels obviously has an impact on government policies. But that is what terrorists *intend*, which is not true of ordinary criminals. This might provide some reason to be particularly concerned with the prevention of terrorism. Furthermore, terrorist attacks are often intended to cause terror, and they are sometimes successful in that. Being in a terrified society has a number of costs. It leads people to treat each other with suspicion, causing racial and religious tension, alienating minorities, and giving rise to a problematic conception of nationalism. These provide reasons to be especially concerned about security from terrorism when compared with security from ordinary crime.

Even if it is true that we should be particularly concerned with terrorism, however, we should primarily think about a just security policy as a whole, or even a just protective policy that takes into consideration, inter alia, risks from illness and disease, risks of invasion, and risks from the environment as well as the risk of crime. And we should think about how to distribute resources between these citizens in a way that would do justice between citizens.

Let me begin introducing a distinction between individualized and non-individualized laws. Individualized laws are laws which aim at conduct indirectly by identifying the kinds of individual who is most likely to perpetrate the conduct in question. Non-individualized laws, which are the norm, are laws which regulate conduct directly. Consider three different possible driving laws. The first prohibits dangerous driving. The second prohibits driving above a certain speed. The third prohibits driving above a certain speed only for men below the age of twenty-five. All of these laws aim to regulate dangerous driving, but only the first does so directly. The second and the third pick out other things that dangerous driving is perceived as tracking: speed in the first case and speed, age, and gender in the second. However, only the third law is individualized. The rationale of the second law is dependent on the extent to which one kind of conduct, fast driving, tracks the conduct that is intended to be controlled, dangerous driving. The rationale of the third law, on the other hand, is dependent on the extent to which individuals of a certain kind,

young men, tend to perform the conduct that is intended to be controlled, dangerous driving.

Laws that are individualized impact on equality in a distinctive respect. They make generalizations about the likely conduct of individuals as members of a class, aiming at conduct only indirectly. The general value of equal treatment of citizens might have an impact on both senses of equality on the grounds that laws will impact differently on citizens depending on their personal projects. However, we should be particularly concerned with laws that violate equal treatment in the second sense: that pick out some individuals as particularly risky. A man below the age of twenty-five can see that driving above a certain speed is likely to be dangerous, but he cannot see *himself* as posing an extra risk of driving dangerously because of his age. Hence, these laws normally fail to engage citizens in terms that they could accept for themselves as justified. And in that sense they treat individuals as objects of control rather than as citizens to be engaged with.

Now, both an expanded criminal law *and* control orders should be seen as individualized. That is obvious with respect to control orders, but less so with respect to the expanded criminal law. On its surface, the expanded criminal law picks out conduct which tends to track the violent or dangerous conduct that is intended to be controlled by the law. However, the extension of the criminal law such that almost all citizens will violate the law invites the use of other criteria to determine when the offense will be prosecuted. And it is difficult to imagine that features that are deemed to make an individual pose a particular risk of committing a more serious offense will be excluded from such decisions. For example, while almost everyone has committed the offense of collecting information "of a kind likely to be useful to a person committing or preparing an act of terrorism, or possessing a document or record containing information of that kind," contrary to section 58B of the Terrorism Act 2000, the offense will very likely only be used against those who are deemed to be risky for other reasons, for example because the person is a Muslim and has attended the wrong mosque.

Could deprivation of liberty through individualized laws and practices ever be justified on grounds of security? The first thing to note is that at least some state policies may justifiably be individualized in the sense indicated. Surveillance policies, for example, will pick out individuals for extra scrutiny given features which make them suspicious from an external

point of view, but which the individual concerned cannot see as posing a risk. But this is a different case from an individualized law, which has an impact on the equal right to liberty, particularly given that a right not to be subject to surveillance is itself quite difficult to explain.[74] Nevertheless, this may provide some reason to think that the right not to be treated in a way that one cannot accept from the internal perspective, for the purposes of deprivation of liberty, is not absolute. As is almost always the case with fundamental rights, we should be reluctant to say that there could be *no* justification for such a law under *any* social conditions.

But there are reasons to be very suspicious of laws of this kind. Although both insecurity and individualized laws and practices have implications for liberty and equality, there is something particularly valuable about the aspect of the right to equal liberty that is violated in the case of individualized criminal laws. Depriving a person of liberty in a way that cannot be defended to her as a citizen is especially demeaning. It is a form of political exclusion, which should be practiced only in the most extreme circumstances. And that is not only because it violates fundamental rights, but also because it is likely to be especially alienating to those minorities who are especially subject to that exclusion.

Being treated as an object *by the state* is being treated by an object in the name of one's fellow citizens, and is for that reason particularly alienating. It is for this reason that we should reject the kind of crude utilitarian thinking that tends to drive criminal policy in this area. As Thomas Nagel puts it

> That the state is obliged to prevent its citizens from violating one another's rights is not controversial—but its positive responsibility not to violate them is even stronger, and in some cases this may override the claims of negative responsibility to rule out policies which, if adopted, would diminish the overall quantity of rights violations.[75]

State violations of rights have a significance that is qualitatively different from non-state violations, grounding the important idea that there is a fundamental right of citizens against the state to equal liberty. It is this right that is violated by the imposition of individualized laws.

---

74. See Privacy and the Criminal Law, supra note 9.

75. Thomas Nagel, Equality and Partiality 142 (1991).

For this reason in particular protection of that fundamental right should, in all but the most extreme circumstances, take priority over resources. Even under social conditions where the principles of justice are not widely accepted, the principle of equal liberty should be the priority, for other than in extreme cases we must attempt to remove injustice with respect to liberty before we remove injustice with respect to resources.[76] The use of control orders is often justified in part on the grounds that managing the risk that the subject is deemed to pose without the control order through, for example, intensive surveillance, is regarded as costly and time-consuming.[77] Here the resource implications of extra surveillance are almost certainly insufficiently significant to justify differential interference with the liberty of those subject to control orders.

The state's obligation to its citizens is to provide a fully justified set of policies aimed at criminal security. Suppose that, from the objective point of view, an individual is deemed risky as far as acts of terrorism are concerned. Where the choice is between restricting the liberty of that individual and providing greater resources to other ways of meeting the terrorist threat, or the threat of other criminal offenses, it is difficult to imagine that the deprivation of liberty of some individuals on the grounds that they are risky will be justified in any but the most extreme circumstances. This is particularly so when there are members of society who are exposed to high risks of non-terrorist but nevertheless serious crime, where dedication of resources to greater surveillance and policing of their communities may well not only improve the overall crime rate, but would benefit those who live with the greatest level of insecurity. Individualized criminal laws should be used only if there is no less draconian security policy that can be used to achieve a similar impact on the overall package of security measures that would be realistic in terms of resources. Given that individualized laws violate the basic right of citizens to equal treatment, such laws cannot be justified if a similar impact on security could be made through a raise in taxation.

Nevertheless, given the distinctive quality of some terrorist attacks that I alluded to above, the terrorist threat may be such that extra resources devoted to security are not a realistic alternative to the use of individualized

76. See also Rawls, supra note 73, at 216–17.

77. See Secretary of State for the Home Department v. MB [2006] EWCA Civ 1140. See also Secretary of State for the Home Department v. E, [2007] EWHC 233 (Admin).

criminal laws. I doubt that this is the case. But if it is, what should be done? Here we must evaluate the pros and cons of different kinds of interference with equal citizenship; of the expanded criminal law and of control orders.

As I have noted above, control orders are often regarded as more draconian than the expanded criminal law on the grounds that criminal prosecution gives the defendant the right to a fair trial. I have suggested that, where the criminal law is absurdly broad, as it is in the UK, the right to a fair trial is more or less meaningless. However, there is one respect in which a criminal law that is expanded in the right way is preferable to the use of control orders. The expanded criminal law at least gives notice to citizens about one necessary condition for the deprivation of liberty. Citizens know that if they don't fall within the content of the offense, they cannot be deprived of their liberty. Of course, where the offense is as broad as collecting information of a kind likely to be useful to a person committing or preparing an act of terrorism, or possessing a document or record containing information of that kind, this fact is of no comfort, for one could never hope to avoid perpetrating the offense while pursuing any legitimate project. But there may be examples of laws which are more restricted in scope than this that have at least this benefit.

On the other hand, the use of control orders has two benefits to those subject to them over the use of the expanded criminal law. The first is that those subject to control orders are not publicly declared to be criminals. In using a control order rather than prosecuting the individual for a criminal offense, the state openly admits that deprivation of liberty of those citizens is in violation of their rights, and therefore requires justification. In a just state, this might also give rise to compensation.

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

In contrast, the relevant security information sits in the background of the use of the expanded criminal law. Even though the pursuit of security is central to the justification for the law itself, it is not open to challenge by the defendant with respect to his particular case. The defendant in *Mansha*, for example, did not even have a fair opportunity to challenge the explicit grounds of his lengthy sentence, its deterrence effect. The rationale of the offense was almost certainly to allow the criminal justice system to control individuals who appear to the police to be dangerous, but who cannot be proved to have committed a genuine criminal offense. The defendant in the case was not able to show that his detention was unwarranted on the grounds that he was not dangerous.

All things considered, then, I suspect that if the state is to violate the rights of its citizens through the individualized deprivation of liberty, it will more often be justified in doing so using some version of control orders rather than the expansion of the criminal law.

CONCLUSIONS

A central plank of the government's pursuit of security in relation to terrorism in the UK is through an expanded and distorted criminal law. But if a purist approach to retributive justice, as outlined at the beginning of this paper, is insufficient to meet the demands of security, what is to be done? What is required, I suggest, is a thorough analysis of the implications of a theory of justice for questions of security in cases where interference with the equal right to liberty cannot be justified on retributive grounds. Perhaps some kind of control orders would be acceptable, though I doubt that anything like the current scheme will be justifiable, when it is used in the current political climate with our current constitutional arrangements. There is too much risk of an overzealous executive using the orders for utilitarian or political ends rather than in a way that adheres to what justice requires, and there is too little opportunity to scrutinize and correct these mistakes by the courts and too little attempt to provide those subject to the orders with a proper opportunity to contest their basis. An acceptable pursuit of security would thus require both a thoroughgoing agenda of decriminalization and also the development of the kind of legal and constitutional arrangements that might better ensure that the pursuit of security meets rather than violates the state's obligations to do justice to its citizens.

If that is right, even in these nonideal conditions, perhaps the best solution would be to adhere in a very strict way to the principle of equal liberty. Even if in theory there were some ways in which interference with that principle could be justified, we should not have much confidence in the state to recognize the extent of that justification and its proper method of application. Sometimes, we are better defending the ideal on the grounds that if the state thinks that it has the right to depart from the ideal, it will make serious mistakes about how and when this is properly done, moving us further and further away from the conditions under which real equality of liberty could be achieved.