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## A Communitarian Justification for Measures to Prevent Terrorism in the UK

by Ian Turner

### Abstract

The threat to the UK and its Western allies from Al-Qaeda related terrorism has declined but groups such as Islamic State in Iraq and the Levant (ISIL) have filled the 'void'. In response the UK has introduced a raft of measures to increase its security, fulfilling many of its international and regional responsibilities to prevent terrorism. Human rights law is particularly important in this regard as it imposes obligations on states such as the UK to prevent violations of rights, such as the right to life, by non-state actors such as terrorists. This article seeks to employ a theoretical justification for a reading of this approach to human rights and focuses on legislative measures the UK has introduced to protect them. The philosophy for doing so is communitarianism, notably its critique of liberalism, and the post 9/11 revisions to it by communitarians such as Amitai Etzioni in particular.

**Keywords:** Preventing terrorism, Terrorism Prevention and Investigation Measures (TPIMs), human rights, communitarianism, Amitai Etzioni

### Introduction

Terrorism is a crime in international law [1] (though there is little common agreement amongst UN member states as to its precise meaning[2]). Yet countries must not leave it to the international community and its courts to prosecute its terrorist perpetrators: they themselves have a primary duty to prevent terrorism by pursuing suspected terrorists and bringing them to justice in their national courts. Following the '9/11' terrorist attacks on the United States, the United Nations (UN) Security Council adopted Resolution 1373 (2001). This obliged states to criminalise terrorism through their domestic laws, including defining appropriate punishments. This resolution also called on states to work together urgently to prevent and suppress terrorist attacks, including through increased cooperation and full implementation of the relevant conventions relating to terrorism. In subsequent years the UN Security Council has gone further in its attempts to prevent terrorism. Resolution 1624 (2005), for example, extended the duty of states to prosecute alleged terrorists in their domestic courts by obliging them to include legislation to prevent incitement to commit terrorist acts within their criminal codes. More recently Resolution 2178 (2014) has sought to impose further obligations on states. It seeks to deter foreign terrorist fighters from transiting countries' borders, identifying the particular problem of individuals travelling across countries such as Turkey to join the Islamic State of Iraq and the Levant (ISIL). Many of the principles identified by the UN to prevent terrorism are contained in its *Global Counter-Terrorism Strategy*, 2006 which was unanimously adopted by the General Assembly.

Preventing terrorism has not been the preserve of the international community. At regional levels, there is the *Organisation of American States Convention* (1986); the *Arab Convention on the Suppression of Terrorism* (1998); and the *Organisation for African Unity Convention on the Prevention and Combating of Terrorism* (1999). Within Europe there is the Council of Europe's *Convention on the Prevention of Terrorism* (2005). Article 5, for example, mirrors UN Security Council Resolution 1624 (2005), in that it calls on states to criminalise 'public provocation to commit a terrorist offence'. Articles 6 and 7 are also relevant to the prevention of terrorism, in that they outlaw terrorist recruitment and training respectively. And following the UN's concern about individuals travelling to join Islamist groups abroad, as per UN Security Council

Resolution 2178 (2014), the Council of Europe, too, has sought to address this problem with its *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism* (2015). The European Union (EU) also calls on its member states to take a series of anti-terrorism measures: it has its own *Counter Terrorism Strategy* (2005), and an *Action Plan on Combating Terrorism*, (2005).

Human rights law is relevant to the prevention of terrorism, too, in that individuals have rights, including the right to life. At the international level there is the *Universal Declaration of Human Rights* (UDHR) and the *International Covenant on Civil and Political Rights* (ICCPR). Both documents contain references to the right to life: Article 3 in the UDHR and Articles 6 in the ICCPR. Regionally, this right is, inter alia, protected in the *American Convention on Human Rights* (ACHR) and the *African Charter on Human and Peoples' Rights* (ACHPR), as well as the *European Convention on Human Rights* (ECHR). In reference to the latter, Article 2(1) of the ECHR is particularly significant in this regard as it imposes a 'positive' or 'substantive' obligation on states to protect life.

Traditionally, human rights act 'negatively' (or 'vertically'): they are individual 'freedoms from' the state, such as 'freedom from' torture. Historically, these reflect liberal concerns that the government can pose a threat to the freedoms of the individual. But rights, especially fundamental ones such as the right to life, also act 'positively' (or 'horizontally'). States must take measures to prevent their violations by third parties: see the ruling of the European Court of Human Rights (ECtHR) in *Osman v. United Kingdom*,<sup>[3]</sup> for example. This duty is not absolute but states cannot turn a blind eye to concrete threats of harm to individuals by non-state actors such as terrorists. Thus, in clearly defined circumstances, human rights law will be engaged where a state has failed to prevent a person from being killed as a result of a terror attack. There are therefore clear obligations imposed on countries such as the UK to prevent terrorism, whether it be international or regional law, of which human rights is a significant part.

Following 9/11, the UK has been at a significant threat from Islamist terrorism: the 'Ricin case', a plot to spread the deadly poison ricin on British streets, in 2003; the '7/7' suicide attacks on the London transport network, as well as four failed suicide bombings two weeks later, in 2005; the 'Airline Bomb Plot', a plot to blow up planes flying from London to America with home-made liquids, in 2006 (ten men were convicted of crimes relating to this between 2008 and 2010); car bomb attacks in London and Glasgow in 2007; a failed suicide bombing in Exeter in 2008; the discovery of an explosive device on a cargo plane at East Midlands airport in 2010; the convictions of eight men conspiring to detonate suicide vests across various parts of the UK, including the London Stock Exchange, Big Ben and Westminster Abbey, in 2012; and the bludgeoning to death of an army soldier, Lee Rigby, in a London street in 2013. In recent years there has been the spectacular rise of ISIL, targeting primarily close allies of the UK: its shootings at the Jewish Museum in Brussels, Belgium, in May 2014; the offices of the satirical magazine, Charlie Hebdo, in Paris, France, in January 2015; and a café and a synagogue in Copenhagen, Denmark, in February 2015. Lately, ISIL committed a massacre in Paris, primarily at the Bataclan Theatre, where 89 people were killed, in November 2015, detonated two bombs in Brussels in March 2016 and murdered an 85-year-old Catholic priest in Normandy, France, in July 2016. And at the time of writing this article there has been an Islamist atrocity in the Southern French city of Nice where 84 people were killed by a man deliberately running them over in a truck. Following the attacks in Nice, Bernard Hogan-Howe, the Chief Constable of the Metropolitan Police Service, Britain's most senior police officer, said that a similar terror attack in the UK was a matter of 'when, not if'.<sup>[4]</sup> There seems to be no lessening, therefore, in the dangers facing the UK and its allies. Noting this, and the clear international and regional obligations imposed on states to prevent terrorism, this article seeks to support recent British counter-terror measures by providing a theoretical justification based on communitarianism, especially its critique of liberalism. As the author is UK based, naturally, he examines his own state's domestic anti-terror laws. But the communitarian approach adopted here is significantly influenced by American human rights discourse, and is sufficiently wide to provide a defence of other countries' counter-terrorism provisions. Thus, this line of argumentation should also be of interest to other countries.

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*The Prevention of Terrorism in the United Kingdom*

In the prevention of terrorism, of particular concern to states such as the UK is what to do with those that are strongly suspected of engagement in terrorism in the absence of sufficient evidence to satisfy the criminal standard of proof. Without such a level of evidence suspects who are foreigners cannot be deported. In the case of the UK, ordinarily, the government would deport foreign nationals to their countries of origin if there is a suspicion that the individuals' presence in the country was 'not conducive to the public good,' as per section 3(5) of the Immigration Act 1971. But in the interpretation of Article 2 of the ECHR, the right to life, and the later Protocol 13, the abolition of the death penalty, the ECtHR has ruled that authorities cannot deport a person to a country where there is a 'real risk' that the death penalty will be executed: see, for example, *Al Sadoon and Mufdhi v. United Kingdom*.<sup>[5]</sup> In many countries in the world there is every chance that such a punishment will be imposed on individuals whom the UK suspects have been engaged in terrorism. Of course states like the UK are not going to permit individuals who cannot be deported unfettered freedom to plot terror attacks in their countries. There will, therefore, be many strategies in place to disrupt them. This section examines the measures adopted by the UK. Ultimately, the author wishes to justify these measures on communitarian grounds. But in the short term, to provide this piece with more balance, he will emphasise the effects these provisions have or have had on the human rights of the suspects involved, since a communitarian perspective draws the balance between the competing interests of the state and the individual much more in favour of the former rather than the latter.

*1. The Anti-Terrorism, Crime and Security Act 2001*

A few weeks after the 9/11 attacks in the United States, Britain passed the Anti-Terrorism, Crime and Security Act 2001 (ATCSA). This introduced the indefinite detention of international terrorist suspects. As per section 21(1), the test for detention was satisfied if the Home Secretary reasonably believed that the terrorist suspect's presence in the UK was a risk to national security, and s/he suspected that the detained person was a terrorist. Regarding the human rights of the detainees, firstly, there were concerns raised about unlawful deprivations of liberty in contravention of Article 5(1) of the ECHR.<sup>[6]</sup> The standard of proof for imposing detention was very low—'reasonable suspicion,' which is the standard of proof required to merely arrest a person, as per Article 5(1)(a)—and the length of detention was indefinite. And the provisions only applied to 'international' suspects, not those who had been born in Britain, so were maybe in violation of Article 14 of the ECHR, the prohibition on the discrimination of Convention rights. Moreover, detaining a person indefinitely, merely on the basis of a suspicion, possibly contravened Article 3 of the ECHR, the prohibition on torture and inhuman and degrading treatment and punishment. This was arguably so since many of the detainees were said to have suffered from depression and suicidal thoughts. Indeed, 'detainee G' was granted bail after England's Court of Appeal accepted that his detention had triggered 'psychotic episodes: *G v. Secretary of State for the Home Department*.<sup>[7]</sup>

The UK government was particularly concerned about the liberty issue of indefinite detention, so to make the measures more human rights compliant, it derogated from Article 5(1) of the ECHR, by virtue of Article 15(1) of the ECHR, 'derogation in time of emergency'. The legality of the derogation issue was considered by the UK's highest court, the House of Lords (now Supreme Court), in 2004 in *A. v. Secretary of State for the Home Department*.<sup>[8]</sup> The House of Lords found that the threat to the UK from international terrorism post 9/11 had been a public emergency threatening the life of the nation for the purposes of Article 15(1). But the state's detention provisions were not proportionate to this public emergency, as they were not 'strictly required by the exigencies of the situation'. Lord Hoffman, for example, said: 'The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.'<sup>[9]</sup> The court also ruled that the measures were a disproportionate interference with Article 14 of the ECHR, in that detention applied only to foreign suspects (this not being the subject of an original derogation by the UK government under Article 15(1)).

## 2. *The Prevention of Terrorism Act 2005*

Following the ruling of the House of Lords in the case of *A.*, the UK government replaced the offending provisions of ATCSA with the Prevention of Terrorism Act 2005 (PTA). This introduced ‘control orders’ for all terror suspects whether they were British or foreign. According to section 1(1) of the PTA a ‘control order’ was an order against an individual that imposed obligations on them for purposes connected with protecting members of the public from a risk of terrorism. A control order made by the Secretary of State was called a ‘non-derogating’ control order, as per section 2(3). It was valid for a period of 12 months, but could have been renewed on one or more occasions (section 2(4)). Section 1(4) of the PTA stated what these obligations might be: for example, electronic tagging, curfews, restrictions on visitors and meeting others, a ban on the use of the Internet and limits on phone communication. The British Home Office stated that conditions imposed under a control order were tailored to each case to ensure that a person could not take part in terrorist activity.[10]

Compared to the previous prevention regime under ATCSA, control orders were clearly a relaxation of the state’s power over terror suspects: individuals were no longer being detained in prison, indefinitely—they were free to live at home. But orders were arguably still significantly intrusive of the human rights of suspects, such as the liberty of the subject. The low standard of proof required for indefinite detention under the previous measures—‘reasonable suspicion’—was retained (section 2(1)). And, although the legislation imposed a maximum period of 12 months for an order, since it could be renewed, there was a sense that it was indefinite. The British Parliamentary Joint Committee on Human Rights (JCHR) also believed that the combination of obligations imposed on a suspect could themselves constitute an unlawful deprivation of liberty.[11] The House of Lords seemingly agreed in a couple of cases: see, for example, *Secretary of State for the Home Department v. JJ.*[12] Here the suspect was subject to the following conditions: residency at a one bedroom flat, away from his normal home, for 18 hours per day (16:00 to 10:00); electronic tagging; compulsory attendance at a police station twice a day; visitors to have been approved by the Home Office; limited use of the telephone; and a ban on the use of the Internet.

The JCHR was also concerned about possible violations of Article 8(1) of the ECHR, the right to private and family life. It believed that control orders were unjustifiably interfering with the human rights of members of a controlee’s family.<sup>13</sup> Of particular concern was the condition requiring some controlees to move away from their normal place of residence, ‘relocation’, often far away from their family and friends.<sup>14</sup> Like the ATCSA provisions before them, there were also concerns that control orders might contravene Article 3 of the ECHR, the prohibition on torture and inhuman and degrading treatment and punishment. In 2006 the European Committee for the Prevention of Torture (CPT) reported on its findings following a visit to the UK during 2005. It was able to interview some individuals subject to control orders. In reference to one individual, P, the CPT stated that he was severely depressed and anxious, in considerable distress and despair, with symptoms of post-traumatic stress disorder. It noted that the depression could not be treated as long as the control order restrictions remained in place. So the risk of self-harm and even suicide was significant.[15]

Other organisations with a particular interest in human rights, such as Amnesty International, were concerned about a lack of procedural rights for suspects subject to a control order. Controlees were being accused by the authorities of involvement in terrorism-related activity. But, as they had not been charged with an offence, they were not entitled to many of the safeguards accorded to those suspected of a crime, such as a right to see the evidence against them, as per Articles 6(2) and 6(3) of the ECHR.[16] The legality of this issue was considered by the House of Lords in *Secretary of State for the Home Department v. MB, AF*,[17] where the court found that control orders were in fact civil orders, not criminal ones. Thus, the protections afforded to those accused of a crime in Articles 6(2) and 6(3) of the ECHR did not apply to suspects.[18]

Upon coming to power in July 2010, the then coalition government of Conservatives and Liberal Democrats announced a review of the previous Labour administration’s many counter-terrorism measures,

one of which was the control order scheme.[19] It said that over the past decade the British state had become 'too authoritarian' and the review was 'an important first step in meeting our commitment to... creating a counter-terrorism regime that is proportionate, focussed and transparent, striking the right balance between security and civil liberties.'[20] The Government's review was published in 2011 and recommended the abolition of control orders.[21]

### *3. The Terrorism Prevention and Investigation Measures Act 2011*

The Terrorism Prevention and Investigation Measures Act 2011 abolished control orders and replaced them with terrorism prevention and investigation measures ('TPIMs'). Persons affected were permitted a home phone and a mobile one, together with a computer with Internet access. Instead of curfews there was an overnight residence requirement; and 'relocation' to another part of the country without a person's consent was not permitted. Significantly, the standard of proof for the imposition of a TPIM was higher than that previously for a control order: 'reasonable belief' as opposed to 'reasonable suspicion'. TPIMs were time limited to two years, and could only be re-imposed after that period where there was a reasonable belief that the individual had been engaged in terrorist activity during the currency of the order. So with TPIMs there was an attempt to redress, again, the balance in favour of the individual. A relaxation of the obligations imposed on suspects were, collectively, less likely to infringe Article 5(1) of the ECHR, as was the raising of the standard of proof. And the abolition of 'relocation' without consent went some considerable way in fulfilling the state's duty to respect a person's right to private and family life, as per Article 8(1) of the ECHR. In addition, because of the greater liberties granted to suspects, those subject to a TPIM were less likely to suffer a mental disorder such as depression, so the risks of a violation of Article 3 of the ECHR decreased significantly, too. But in relaxing the freedoms of individuals still further, the state seemingly failed to exercise proper control over some of the suspects. This was especially so after several high profile cases of people absconding, such as Ibrahim Magag in December 2012,[22] and Mohammed Ahmed Mohamed in November 2013; the latter famously escaped by dressing in a burka and disappearing during a visit to a mosque.[23]

Moreover, it will also be recalled that TPIMs could only be imposed for a maximum of two years, unless a person had engaged in terrorism during the currency of the order. The TPIMS legislation came into effect in January 2012 so concern was raised about what the state would do from January 2014 onwards when the first TPIMs would cease. For example, Diana Johnson, then Shadow Crime and Security Minister, said at the time: 'These are suspects that only this year the Home Secretary was arguing were too dangerous to be left uncontrolled and that was agreed to by judges. We need an urgent independent threat assessment of whether TPIMs on any of the January suspects needs to be extended.'[24] Indeed, at a similar time, a former independent reviewer of anti-terrorism legislation in the UK, Lord Carlile QC, had called for the reintroduction of control orders, to increase security. Carlile was particularly anxious about the threat to the UK from Britons returning to the country after having travelled abroad to join ISIL.[25]

In March 2014 David Anderson QC, the UK's current Independent Reviewer on Anti-Terror Legislation, published an annual report of the operation of the TPIM scheme in 2013. He said that there were (at the time of writing his report) 10 TPIM subjects, of whom nine had been transferred from control orders in early 2012. All were men believed to have been involved in al-Qaida related terrorism, some at the highest end of seriousness (the planning of credible mass casualty attacks).[26] To this end, Anderson recommended that the power to impose TPIMs should continue, but like any measure short of imprisonment, they would never provide a full guarantee of safety. But properly deployed 'as a last resort', they were a 'useful means of disrupting potentially dangerous terrorists for up to two years'.[27] But this was not without some suggestions for reform. Anderson said that some significant changes were needed if TPIMs 'were to remain fully credible', and if they were to perform 'more than just a containing function'. First, locational constraints on some TPIM subjects should be stronger than had been the case, 'in order more effectively to disrupt networks and deter or prevent absconds';[28] secondly, the standard of proof for involvement in terror activity should be raised from 'reasonable belief' to the civil standard, a 'balance of probabilities'.[29]

#### 4. *The Counter-Terrorism and Security Act 2015*

Following calls for the reintroduction of control orders, or at least a significant reform of TPIMS, the then Prime Minister, David Cameron, announced new statutory measures in 2014. These included temporarily stopping suspects from travelling abroad by seizing passports and temporarily preventing individuals from returning to the UK. These provisions are now contained in the Counter-Terrorism and Security Act 2015. Section 1 refers to the seizure of passports etc. from persons suspected of involvement in terrorism and section 2 imposes temporary exclusion orders from entering the UK. In particular, the government also reformed TPIMs, which is Part 2 of the statute. Section 16 amends the TPIMS Act, allowing for a residence specified by the Secretary of State, including at least 200 miles away from a suspect's home. The reintroduction of 'relocation' raises concerns, again, about the subject's right to private and family life, as per Article 8(1) of the ECHR. That said, section 20 of the legislation amends the standard of proof for the imposition of a TPIM, in raising it from 'reasonable belief' to a 'balance of probabilities'. From the perspective of the right to liberty of a subject, as per Article 5(1) of the ECHR, this is a welcome development. The reform of TPIMS in 2015 represents the UK's current attempts to prevent acts of terrorism by those it cannot either deport on human rights grounds or prosecute because of a lack of evidence to satisfy the criminal standard of proof.

#### ***The Prevention of Terrorism: Balancing Rights and Security***

The previous section analysed a raft of measures the UK has employed to disrupt the activities of suspected terrorists, particularly since 9/11. It is well recognised, however, that in states' efforts to prevent terrorism there is a corresponding obligation imposed on them to respect human rights: see, for example, UN General Assembly Resolution 60/158 *The Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, 2005, and Pillar IV of the *UN Global Counter-Terrorism Strategy*, 2006. Often a respect for the human rights of the individual is premised on the basis that it prevents terrorism: a disregard for fundamental freedoms in fact increases the risk of terrorism, thus making states less safe. In reference to the UK's history of preventing terrorism in Northern Ireland, for example, the UN's Special Rapporteur on Counter Terrorism and Human Rights, Ben Emmerson QC, has said: 'Human rights-abusive policies increase the presence of terrorism. You only have to look at the recent past in Northern Ireland where internment without trial turned the IRA [Irish Republican Army] from a group with little support into a much larger organisation.'<sup>[30]</sup> Furthermore, a genuine respect for the human rights of the individual necessitates limitations on the powers of the state, especially in times of public emergency; the views of commentators such as Ronald Dworkin,<sup>[31]</sup> David Luban,<sup>[32]</sup> Jeremy Waldron,<sup>[33]</sup> and Lucia Zedner<sup>[34]</sup> are important in this regard. Waldron, for example, says that whilst reductions in individual freedoms may prevent a terror action taking place, they necessarily also increase the power of the state, and there is a corresponding risk that these enhanced powers may also be used to cause harm.<sup>[35]</sup> (Here, one may recall Lord Hoffman's cautioning against the UK introducing the indefinite detention of terror suspects in the House of Lords in *A v. Secretary of State for the Home Department*.<sup>[36]</sup>) Waldron also says that the state is 'always looking to limit liberty', and a terrorist emergency 'provides a fine opportunity': he believes that people become more than usually deferential to the demands of their rulers in these circumstances and more than usually fearful that if they criticize the proposed adjustments they will be reproached for being insufficiently patriotic.<sup>[37]</sup> In addition, he noted that often those who advocate greater security at the expense of liberty have no idea what difference it will actually make to the terrorist threat.<sup>[38]</sup> Assuming that this is indeed the case, he concludes that we should not give up our liberties for the sake of 'purely symbolic gains in the war against terrorism.'<sup>[39]</sup>

In the various legislative measures the UK has enacted since 2001 it is obvious that the country has struggled with the competing claims of human rights and security. The earlier measures such as the indefinite detention of terror suspects, as per ATCSA, certainly point to a balance much more in favour of the state at the expense of the freedoms of the individual: they were unlawful infringements of the right to liberty, as per Article 5(1) of the ECHR; and the psychological harm they caused to detainees were maybe violations of Article 3 of the ECHR. The repeal of indefinite detention, in the Prevention of

Terrorism Act 2005, still caused concern because of the possible effects control orders had on the human rights of suspects: an unlawful deprivation of liberty, as per Article 5(1) of the ECHR; a denial of a fair trial, as per Articles 6(2) and 6(3) of the ECHR; and a disproportionate interference with a controlee's right to family life, as per Article 8(1) of the ECHR, namely 'relocation'. These issues affected significantly the government's decision to repeal them in the Terrorism Prevention and Investigation Measures Act (TPIMS) 2011, relaxing the controls imposed on a terror suspect still further. Pointedly, the standard of proof for the imposition of a TPIM was raised from 'reasonable suspicion' to 'reasonable belief', 'curfews' were replaced with an 'overnight residency' and 'relocation' was abolished. But with some high profile individuals absconding, and the growing terror threat from ISIL, the balance tipped back in favour of the state with the reform of TPIMs in the Counter-Terrorism and Security Act 2015. Revised TPIMs are clearly not a return to indefinite detention. But the reintroduction of a 'relocation' provision suggests a return to the old control order scheme in all but name. This further curtailment of the liberty of the individual, in violation of Article 8(1) of the ECHR, annexing a person from their associates, particularly their family, will in all likelihood increase their marginalisation, thus increasing the risk that they will engage or reengage in terrorism.

To perhaps offset this further intrusion into a person's liberty, the standard of proof for the imposition of a TPIM has been raised to a 'balance of probabilities'. But TPIMs, like control orders before them, are still civil orders, thus the procedural rights accorded to those suspected of a crime, such as Articles 6(2) and 6(3) of the ECHR, are still denied them. And a combination of controls over a suspect may still amount to an unlawful deprivation of liberty, in contravention of Article 5(1) of the ECHR. This is particularly problematic if liberty has been denied merely on the basis of the civil law, rather than a conviction following a criminal trial—see Article 5(1)(a). It remains an open question, therefore, whether the UK's current balance between the rights of a suspected terrorist and its competing interest of maintaining security intrudes too much on the fundamental freedoms of individuals serving a TPIM, in violation of UN General Assembly Resolution 60/158 *The Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, 2005.

In summary, existing TPIMs still have significant implications for the rights of suspects; and, to draw on Ben Emmerson QC, the ensuing risks to security which these human rights violations might entail should not be overlooked. TPIMs also confer substantial powers on the state that could be used to cause harm, as Jeremy Waldron has argued. However, the reforms to TPIMs were welcomed by David Anderson QC in 2015, in his annual report of the operation of the TPIM scheme in 2014.[40] Thus, notwithstanding the obvious consequences outlined here, there is arguably still a case to be made for supporting them. This is the aim of the next section of this piece.

### *A Communitarian Justification for TPIMs*

According to the *Global Terrorism Index*, 2015, 32,658 people were killed by terrorism in 2014 compared to 18,111 in 2013: the largest ever increase recorded. Countries suffering over 500 deaths increased by 120% to 11 countries. 78% of all deaths and 57% of all attacks occurred in just five countries: Afghanistan, Iraq, Nigeria, Pakistan and Syria.[41] Excluding the 9/11 attacks, only 0.5% of deaths from terrorism have occurred in the West since 2000.[42] Globally, therefore, the UK and its allies are relatively safe compared to other countries. That said, this is not to ignore the continuous attacks by Islamist terrorists such as ISIL in Western Europe: Brussels in 2014; Paris in January 2015; Brussels again in January 2015; Copenhagen in February 2015; Paris again in November 2015; and Nice in July 2016. It is perhaps no surprise, therefore, that senior police officers across Europe now claim that the continent faces its highest terror threat since 9/11.[43] Domestically, because of the significant risk posed to the UK by Islamist groups such as ISIL, the British government increased its national terrorism threat level from 'substantial' to 'severe', meaning an attack was 'highly likely', in 2014.<sup>44</sup> The UK threat level from international terrorism is still at 'severe' some two years later. Indeed, discussing this level of threat to the UK, Andrew Parker, the Director-General of Britain's Security Service ('MI5'), noted: 'We face a very serious threat that is complex to combat and unlikely to abate significantly for some time.'<sup>45</sup> Evidentially, therefore, a continuation of measures to

prevent terrorism in the UK such as TPIMS, as well as newer approaches to stop individuals leaving the country to join ISIL, such as the seizure of passports, is required. Here the author seeks to justify the imposition of these measures to prevent terrorism on theoretical grounds, namely ‘communitarianism’. But as ‘communitarianism’ grew out of a criticism of liberalism, notably the approaches articulated by John Rawls in *A Theory of Justice*, it is necessary to begin with a brief discussion of liberalism to understand fully the communitarian approach.

Historically, liberalism is associated with philosophers such as John Locke and his ‘social contract’ theory. Locke’s principal work was the *Two Treatises of Government*, published in 1689. In the *Second Treatise* Locke argued that individuals covenanted with the state for reasons of security. But Locke was hostile to too much liberty being sacrificed in this bargain of protection, in that this, too, compromised the security of the individual.[46] Locke therefore advocated a minimal state whose power was limited to the public good of society and its preservation, and could not be used ‘to destroy, enslave, or designedly to impoverish the subjects.’[47] Thus, Locke believed individuals possessed ‘natural rights’ against the sovereign such as ‘life, liberty, and estate [property]’, which could not be removed without their consent.[48] Of these property was the most important, the protection of which was the chief reason for instituting government.[49] In comparison to Locke, a more moderate—and modern—approach to liberalism is epitomised in the writings of another John, John Rawls. Liberalism, for Rawls, was also very much concerned with individual autonomy; people should be free to live their lives, to choose and pursue values for themselves, so the state should remain neutral, or at least act only in an advisory capacity, on issues such as these.[50] Thus, in terms of freedom of expression, for example, censorship by the state imposes the state’s values on individuals, thus compromising a person’s freedom to choose.

In *A Theory of Justice* Rawls founded a conception of justice on, perhaps unsurprisingly, respect for the individual. Rawls arrived at his notion of justice by considering what individuals in the ‘original position’ would choose as principles of justice for the basic structure of society. They would decide behind a ‘veil of ignorance’, which prevented them from knowing their place in society, their class position or social status, their fortune in the distribution of natural assets and abilities, their intelligence and their strength. This ensured that no one was advantaged or disadvantaged in the choice of principles.[51] Because of the uncertainty of the ‘veil’ process, Rawls believed two principles of justice would be chosen in the ‘original position’. The first of these, the ‘liberty principle’, which had priority over the second, was—‘each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.’ [52] That is, each person would have the maximum amount of liberty compatible with the same amount of liberty for everyone else, which even the general welfare could not override. These ‘basic liberties’ are political freedoms, such as speech, assembly and conscience, freedom from arbitrary arrest and freedom of personal property.[53] Rawls’s second principle of justice, which is perhaps less important to this article, was divided into two: ‘fair equality of opportunity’ and the ‘difference principle’. The former, which prevailed over the latter, suggests that individuals with the same talents and willingness to use them had the same educational and economic opportunities regardless of whether they were born rich or poor.[54] The latter, ‘the difference principle’, is concerned with the distribution of social and economic advantages,[55] that is, goods, wealth and authority to the least advantaged of society.[56]

In this article, the author is justifying recent anti-terror measures in the UK, such as TPIMS, on the basis of communitarianism. TPIMs are anti-liberty—or at least significantly intrusive of liberty—so logically are not conducive to liberalist ideas about the individual and the state, such as Rawls’s ‘liberty principle’; and certainly not compatible with liberalism’s traditional Lockean ideals of ‘natural rights’. This then introduces communitarianism’s critique of liberalism as a natural theoretical basis for the UK’s counter-terror measures. Modern-day communitarianism, such as that proposed by Alasdair MacIntyre,[57] Michael J Sandel,[58] Charles Taylor[59] and Michael Walzer,[60] began in the form of a critical reaction to *A Theory of Justice*. Sandel states, for example:

‘At issue is...whether the principles of justice that govern the basic structure of society can be neutral with respect to the competing moral and religious convictions its citizens espouse...

One way of linking justice with the conceptions of the good holds that principles of justice derive their moral force from values commonly espoused or widely shared in a particular community or tradition. This way of linking justice and the good is communitarian in the sense that the values of the community define what counts as just or unjust.[61]

Thus, the main theme of communitarianism is that there are common formulations of the public good rather than leaving it to be determined by each individual; the state cannot remain neutral on the issue. And in further rejecting Rawls's 'veil of ignorance' hypothetical exercise, communitarians do not believe that individuals are born free and unencumbered, wholly autonomous agents:[62] they are 'bundles of particularistic attributes'.[63] We are bearers of a particular social identity; we are someone's son or daughter, someone's cousin or uncle; we are citizens of this or that city, members of this or that guild or profession; we belong to this clan, that tribe, this nation. We inherit from the past of our family, our city, our tribe, our nation, a variety of debts, inheritances, rightful expectations and obligations. These constitute the given of our lives, our starting point.[64]

More recent theories of communitarianism are those advanced by Amitai Etzioni[65] and Mary Ann Glendon.[66] In attacking liberalism's seemingly unhealthy emphasis on the individual, Etzioni claims that communitarians seek to rebuild community: there needs to be a strengthening of the bonds that tie people to one another, enabling them to overcome the isolation and alienation of liberalism.[67] Indeed, Etzioni notes that communitarianism is reflected in the preamble to the Constitution of the United States: 'to form a more perfect Union'.[68] For Etzioni – and Glendon – an important communitarian principle is redressing the balance between liberalism's emphasis on the rights of the individual and social responsibilities,[69] believing that no society can survive if people only want rights and are unwilling to assume responsibilities.[70] The liberal emphasis on individualism – and neglect of social responsibilities – inherits much from Locke, which significantly influenced the tradition of 'absolute' human rights in the US. *Rights Talk: The Impoverishment of Political Discourse* by Mary Ann Glendon is especially important in this regard:

'[American] rights talk, in its absoluteness promotes unrealistic expectations, heightens social conflict and inhibits dialogue that might lead toward consensus, accommodation or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare states, without accepting the corresponding personal civic obligations. In its relentless individualism, it fosters a climate that is inhospitable to society's losers, and that systematically disadvantages caretakers and dependents, young and old. In its neglect of civil society, it undermines the principal seedbeds of civic and personal virtue.'[71]

Drawing on communitarianism as a theoretical foundation for the justification of the erosion of rights of terror suspects, particularly through the imposition of TPIMs, the author does struggle with this approach, however: it is in fact wedded to notions of liberalism, at least according to its modern interpreters. Etzioni, for example, is seemingly supportive of traditional liberal concerns about conferring too much power on the state. In his vision of communitarianism, Etzioni claims that free individuals require a 'community that protects them from the state', and sustains morality by drawing on 'the gentle prodding of kin, friends, neighbours, and other community members'.[72] As a source for guiding behaviour, he says that this moral encouragement is preferable to government controls or fear of authorities.[73] This obvious scepticism about the state is further reflected in Etzioni's seemingly unconditional faith in freedom of speech, as reflected, for example, in the First Amendment to the Constitution of the United States. He dismisses suggestions that it should be curbed to bar expressions of racism, sexism, and 'other slurs'.[74] Elsewhere he has discussed other forms of expression such as hate speech and argued that all regulations and codes that limit it should be voided.<sup>75</sup> This liberal approach to communitarianism has not gone unnoticed by earlier exponents of the philosophy, such as Alasdair MacIntyre. In a later edition of *After Virtue*, MacIntyre takes specific issue with Etzioni:

I see no value in community as such—many types of community are nastily oppressive—and the values of community, as understood by the American spokespersons of contemporary communitarianism, such as Amitai Etzioni, are compatible with and supportive of the values of the liberalism that I reject.[76]

Thus, utilising this more contemporary form of communitarianism as a justification for measures to prevent terrorism, particularly in the UK, is going to prove problematic. Indeed, whilst the author is concentrating on attempts to disrupt the terrorist activities of individuals, such as TPIMS, other measures adopted by the UK to curb terrorism are particularly relevant here as well, especially if we are referring to Etzioni's hostility towards limiting freedom of speech. For example, following Article 5 of the *Council of Europe Convention on the Prevention of Terrorism, 2005* – 'public provocation to commit a terror offence' – the UK has outlawed 'encouragement of terrorism', as per section 1 of the Terrorism Act 2006; this is aimed at verbal support for terrorism. If the support is written, then there is a corresponding offence of 'dissemination of terrorist publications', as per section 2. Presumably, the communitarianism of Amitai Etzioni would view this as an unnecessary violation of the constitutional right of freedom of speech and seek to have it overruled by the Supreme Court (assuming, for the sake of argument, British law was in fact under the authority of American Constitutional Law)?[77] This would be especially so as these terrorist offences in the UK are drawn very widely: individuals can be encouraged indirectly, not just directly, to commit terrorism; and the perpetrators can be committing the offences recklessly, not just intentionally.[78]

Why, therefore, is this author seeking to justify a significant portion of anti-terror law in the UK on the basis of communitarianism, and seemingly its more liberal elements as reflected in the writings of Amitai Etzioni? First, of the so called communitarians, Etzioni is the person who has written most about security post 9/11; and, maybe more importantly, he has seemingly become much less liberal – and much more pro-state – since the attacks on the Twin Towers in New York and the Pentagon in Washington. Liberals in the classic sense such as A. C. Grayling have attacked further incursions of individual freedoms for the 'good' of security as a 'mistake of crisis proportions' and an 'act of self-harm', claiming they hand 'the victory to the terrorists at no further cost to them'.[79] This is not the language and tone of the 'new Etzioni' post 9/11; in fact Etzioni takes an opposite view to Grayling. Democracy, Etzioni believes, is threatened when measures to protect it are not taken.[80] He proclaims:

True patriots...realize that one must protect the nation from all enemies and the essence of what it means to be patriotic is to protect our Constitution and its Bill of Rights with all our might...Only when we have failed to this will have done the terrorists' job for them.[81]

In a separate piece of writing, Etzioni elaborates on what states must do to protect themselves from terrorism. He believes all kinds of terrorists – those who use Weapons of Mass Destruction (WMDs), suicide bombs, and 'mere' fanatics – cannot be effectively deterred by the ordinary criminal justice system, suggesting a separate system of justice is required for them.[82] Seemingly sharing this author's belief in the significant curtailment of the rights of terrorist suspects for reasons of public protection, Etzioni criticises those who urge that suspected terrorists are to be treated like other criminals; assumed innocent until proven guilty; tried in ordinary courts according to similar procedures employed in the trying of other criminals; afforded several layers of appeals if found guilty; and incarcerated and released once they have served their terms. Importantly, he suggests that such an approach accords 'terrorists more rights than they are entitled to, and unduly and significantly increases risks to the security of innocent citizens'.[83] Etzioni's explanation for why terrorists cannot be treated as ordinary criminals is that they need to be prevented rather than deterred: 'you cannot punish people who commit suicide after the fact'.[84]

That said, Etzioni does express support for limitations to the power of the state, in its attempts to prevent terrorism. He believes that liberty and security are both important but neither has a priority. Their relative importance changes from time to time and from situation to situation. The safer the nation feels, the more weight judges will be willing to give to the liberty interests. The greater the threat that an activity poses to the nation's safety, the stronger will the grounds appear for seeking to repress that activity even

at some cost of liberty. He claims that this 'fluid approach' is only 'common sense'.<sup>[85]</sup> With the existing terror threat from ISIL in Western Europe—three atrocities committed in France alone between 2015 and 2016—Etzioni would surely balance the liberty/security divide here much more in favour of the state than the individual. But of course as the terrorist threat declines there would be much more emphasis on the rights of the suspect. Furthermore, even in the most extreme of cases, Etzioni believes that terrorists should 'indisputably be guaranteed some basic rights'. They should be captured rather than killed. They should not be tortured or turned over to other states that are likely to kill or torture them. And seemingly rejecting the UK's indefinite detention provisions, as per ATCSA, suspects should be subject to a defined period of administrative detention, rather than holding them indefinitely, which could be extended through legally established channels if necessary.<sup>[86]</sup> (This approach therefore also excludes counter-terrorism provisions in other countries such as America's National Defense Authorization Act for Fiscal Year 2012, permitting indefinite detention.) In saying this, therefore, Etzioni impliedly supports less intrusive prevent measures in the UK such as TPIMs, and maybe even control orders before them.

Actions to prevent terrorism, particularly in the UK, can be justified further on the basis of human rights law, that is, the state's substantive duty to protect life, as per Article 2(1) of the ECHR, which was stated above. Indeed, Etzioni is keen to premise his approach to security post 9/11 on the basis of the right to life, too, saying that in all declarations and charters enumerating human rights, this freedom trumps all others.<sup>[87]</sup> And, from an American perspective, he notes that, significantly, life precedes both liberty and the pursuit of happiness in the Declaration of Independence.<sup>[88]</sup>

### *Conclusion*

Since the atrocities in America in 2001 year after year there have been terror attacks by Islamists. Afghanistan, Iraq, Nigeria, Pakistan and Syria have borne the brunt of these, accounting for 57% of the world's attacks in 2014. But the security of the UK and its Western allies is not to be ignored. The threat to these countries from Al-Qaeda in Pakistan and Afghanistan has abated, since its leader, Osama Bin Laden, was killed by American special forces in Pakistan in May 2011. In addition, the threat from Al-Qaeda in the Arabian Peninsula has declined following the killing of its main glorifier, Anwar al-Awlaki, by an American drone strike in Yemen in September 2011. But ISIL appears to have filled this Islamist 'void'. In recent years, France and Belgium, geographically close neighbours of the UK, have been its principal European victims. The last significant Islamist outrage in the UK was eleven years ago, in 2005. But this is maybe more to do with the successes of the police and security forces in foiling terror plots rather than due to a lack of trying on the part of the terrorists. The convictions of ten men for the 'Airline Bomb Plot' between 2008 and 2010, and the convictions of eight men for conspiring to detonate suicide vests across various parts of the UK in 2012, serve as reminders to this. Indeed, Britain's senior police officer, Bernard Hogan-Howe, has warned that an attack in the UK, in severity to those recently in France, is only a question of 'when, not if'. All in all, therefore, the UK should expect further threats to its collective security from Islamists such as ISIL.

States are under an obligation, internationally and regionally, to prevent terrorism. They fulfil this duty, inter alia, by prosecuting alleged offenders. However, there are occasions when governments have insufficient evidence to bring a case to trial, though there are strong grounds for suspecting the engagement of individuals in acts of terrorism. In these instances, states have introduced a range of measures to disrupt the activities of suspects. In so doing, they must also respect their corresponding duty to respect the human rights of individuals. Countries that sacrifice too much individual freedoms in the furtherance of security seriously risk undermining their duties in preventing terrorism, in that they encourage further attacks. In the last fifteen years or so the UK, for example, has struggled with harmonising its obligations to protect its citizens with respect for the human rights of terrorist suspects, particularly following the 9/11 attacks in 2001. The measures it introduced in ATCSA were unlawful deprivations of liberty, and possibly inhuman and degrading treatment. The UK's latest attempt at striking the right balance between liberty and security is the Counter-Terrorism and Security Act 2015. This has reintroduced the 'relocation' power for TPIMs (though this has maybe been offset with the raising of the standard of proof from 'reasonable belief' to a

‘balance of probabilities’). The statute also created new provisions to deter individuals from joining ISIL in Syria and Iraq, such as the seizure of passports and the temporary prevention of individuals from returning to the UK.

Human rights law imposes duties on states, in certain circumstances, to prevent death from non-state actors such as terror suspects. The author of this article supports recent counter-terror measures in Britain ironically on the basis of human rights. Indeed, he aims to go further in offering a theoretical justification for this reading of human rights: a communitarian critique of liberalism. The communitarianism of Alasdair MacIntyre, Michael Sandel and others developed as a direct criticism of John Rawls’s *A Theory of Justice*, in rejecting Rawls’s ‘neutral’ ‘veil of ignorance’ exercise. These communitarians also disputed the idea that individuals were born as free, wholly autonomous agents. Later communitarians such as Amitai Etzioni and Mary Ann Glendon sought to position the philosophy within a culture of responsibilities, distinguishing it from liberalism’s traditional approach to absolute freedoms, notably in America. Thus, as a theoretical justification for the infringement of the rights of terror suspects, communitarianism’s attempt to rebalance ‘rights talk’ away from the historical liberal emphasis on respect for the individual to the community is suited to the more expansive, ‘collective’ interpretation of human rights articulated here. That said, communitarianism’s early suitors such as Alasdair MacIntyre came to fundamentally disagree with its later proponents, such as Amitai Etzioni, viewing them as essentially liberal. This author’s analysis of Etzioni’s approach to freedom of speech and the First Amendment of the US Constitution supports this.

Post 9/11, however, Etzioni has clearly adopted a much less liberal approach to his style of communitarianism by embracing the obvious realisation that to preserve democracy requires an incursion—even a significant incursion—into the rights of terrorist suspects. This is the approach to communitarianism that the present author locates for his theoretical justification for measures to prevent Islamist terrorism in Britain. Etzioni impliedly rejects the UK’s previous indefinite detention measures, as per ATCSA (as well as similar measures in other countries such as America’s National Defense Authorization Act for Fiscal Year 2012), but appears to support a more intrusive framework for the UK than TPIMs, or at least prior to the reform of TPIMs in 2015. Whilst this author analyses his own country’s domestic anti-terror laws, it is hoped that the communitarian approach he employs here, which is significantly influenced by American human rights discourse, is sufficiently wide to be attractive to critical observers in other countries.

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## Notes

[1] Fiona de Londras, ‘Terrorism as an International Crime’, in William Schabas and Nadia Bernaz (Eds.), *Routledge Handbook on International Criminal Law* Routledge, 2010, chapter 12; Ben Saul, ‘Terrorism in International and Transnational Criminal Law’ in Ben Saul (Ed.), *Research Handbook on International Law and Terrorism*. Cheltenham: Edward Elgar, 2014, chapter 13.

[2] There is a UN Comprehensive Convention against International Terrorism, but it still exists only in draft form. A working definition for the purposes of the international community is, say, clause 3 of the UN Security Council Resolution 1566 (2004). See also: Ben Saul, ‘Defining Terrorism: a Conceptual Minefield’, in Andreas Gofas, Richard English *et al* (Eds.), *The Oxford Handbook of Terrorism*. Oxford: University Press, forthcoming.

[3] (2000) 29 EHRR 245.

[4] Samuel Osborne, ‘UK Terror Attack is a Matter of ‘When, not If’, Met Chief Warns’. *The Independent*, 31 July 2016. URL: <http://www.independent.co.uk/news/uk/home-news/uk-terror-threat-attack-chance-risk-security-isis-london-met-police-a7164756.html> (Accessed 2nd September 2016).

[5] [2010] ECHR 282.

[6] See, for example: Helen Fenwick, ‘A Proportionate Response to 11 September?’ 65 (2002) *Modern Law Review*, pp.724-762; and Human Rights Watch, ‘Neither Just nor Effective’ 24<sup>th</sup> June 2004 <http://www.hrw.org/legacy/background/eca/uk/index.htm> (Accessed 13th May 2015).

- [7] [2004] EWCA Civ 265.
- [8] [2004] UKHL 56.
- [9] *Ibid.*, at para 97.
- [10] Home Office, 'The Facts About Control Orders' URL: <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/control-orders/?version=4#> (Accessed 13<sup>th</sup> October 2008).
- [11] JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006*, 12<sup>th</sup> Report of Session 2005-06, 2006, at para 37.
- [12] [2007] UKHL 45.
- [13] JCHR, *op.cit.* (2006), at para 85.
- [14] *Op.cit.* (2010), at para 72. The House of Lords considered the legality of 'relocation' in *Secretary of State for the Home Department v. AP* [2010] UKSC 24. Here the suspect was required to live in the Midlands 200 miles away from his family in London. The court decided that this indeed was a violation of Article 8(1) of the ECHR, but the provision was still lawful, as per Article 8(2), since it was in proportion to the state's objective of protecting national security.
- [15] CPT, *Report to the Government of the United Kingdom on the Visit to the United Kingdom Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 25 November 2005*. 10<sup>th</sup> August 2006. URL: <http://www.cpt.coe.int/documents/gbr/2006-28-inf-eng.pdf> (Accessed 21<sup>st</sup> October 2010), at para 46.
- [16] Amnesty International, *United Kingdom: Five Years On: Time to End the Control Orders Regime*. August 2010. URL: [http://www.amnesty.org.uk/uploads/documents/doc\\_20571.pdf](http://www.amnesty.org.uk/uploads/documents/doc_20571.pdf) (Accessed 17<sup>th</sup> September 2010), p.4.
- [17] [2007] UKHL 46.
- [18] *Ibid.*, at para 24. But the court did say that in any case in which a person was at risk of a control order containing obligations of the stringency found in this case – AF was subject to a 14 hours long daily curfew, for example – s/he was entitled to a 'measure of procedural protection as is commensurate with the gravity of the potential consequences' (at para 24).
- [19] Home Office, *Rapid Review of Counter-Terrorism Powers* 13<sup>th</sup> July 2010; URL: <http://www.homeoffice.gov.uk/media-centre/press-releases/counter-powers> (Accessed 15<sup>th</sup> July 2010).
- [20] Home Office, 'Taking Urgent Action to Restore Rights' 14<sup>th</sup> July 2010; URL: <http://www.homeoffice.gov.uk/media-centre/news/taking-urgent-action> (Accessed 15<sup>th</sup> July 2010)
- [21] HM Government, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*. CM 8004, January 2011; URL: <http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary> (Accessed 24<sup>th</sup> February 2011).
- [22] Shiv Malik, 'Terror Suspect's Disappearance Sparks Criticism of Control-Order Regime' 1<sup>st</sup> January 2013 *The Guardian*. URL: <http://www.theguardian.com/uk/2013/jan/01/terror-suspects-disappearance-control-order> (Accessed 25<sup>th</sup> March 2015).
- [23] Tom Whitehead, 'Terror Control To Be Strengthened After Burka Case'. *The Telegraph*, 10 November 2013. URL: <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10439127/Terror-controls-to-be-strengthened-after-burka-case.html> (Accessed 24<sup>th</sup> March 2015).
- [24] Tom Whitehead and David Barrett, 'Terror Suspects to Remain Anonymous Despite Controls on Them Lifted'. *The Telegraph*, 17 January 2014; URL: <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10580397/Terror-suspects-to-remain-anonymous-despite-controls-on-them-lifted.html> (Accessed 24<sup>th</sup> March 2015).
- [25] Matthew Holehouse, 'ISIL: Call to Bring back Blair's Control Orders for Terror Suspects' 22<sup>nd</sup> August 2014 *The Telegraph*; URL: <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/11050330/Isil-call-to-bring-back-Blairs-Control-Orders-for-terror-suspects.html> (Accessed 24<sup>th</sup> March 2015).
- [26] David Anderson, *Terrorism Prevention and Investigation Measures in 2013: Second Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011*. March 2014, p.2. URL: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/298486/Un\\_Act\\_Independent\\_Review\\_web\\_accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/298486/Un_Act_Independent_Review_web_accessible.pdf) (Accessed 24<sup>th</sup> March 2015). But he also noted that no new TPIM notices had been in force since February 2014; the TPIMs on seven subjects had expired after reaching their two-year limit, and the other three subjects had absconded or were in prison.
- [27] *Ibid.*, at p.4.
- [28] *Ibid.*
- [29] *Ibid.*, at p.5.
- [30] Owen Bowcott, 'Ben Emmerson QC: Abuse of Human Rights Policies Increases Terrorism'. *The Guardian* 22 May 2012; URL: <https://www.theguardian.com/law/2012/may/22/ben-emmerson-human-rights> (Accessed 1<sup>st</sup> September 2016).
- [31] Ronald Dworkin, 'The Threat to Patriotism', in Craig Calhoun (Ed.), *Understanding September 11*. New York: New Press, 2002, pp.273-285.
- [32] David Luban, 'Eight Fallacies About Liberty and Security', in Richard Ashby Wilson (Ed.), *Human Rights in the 'War on Terror'*. Cambridge: University Press, 2005, pp. 242-257.
- [33] Jeremy Waldron, 'Security and Liberty: The Image of Balance' 11(2) (2003) *Journal of Political Philosophy*, pp.191-210.
- [34] Lucia Zedner, 'Too Much Security?' 31 (2003) *International Journal of Sociology of Law*, pp.155-184.
- [35] *Op. cit.*, p.205.
- [36] [2004] UKHL, 56.
- [37] *Op. cit.*, p.191.
- [38] *Ibid.*, p.195.
- [39] *Ibid.*, p. 210.
- [40] David Anderson, *Terrorism Prevention and Investigation Measures in 2014: Third Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011*. March 2015, p.20; URL: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/411824/IRTL\\_TPIMs\\_2014\\_final\\_report\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411824/IRTL_TPIMs_2014_final_report_web.pdf) (Accessed 14<sup>th</sup> July 2016).

- [41] Institute for Economics and Peace, *Global Terrorism Index 2015*, November 2015; URL: <http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf> (Accessed 2nd September 2016), pp. 2-4.
- [42] Ibid., p.5.
- [43] V. Dodd, 'Europe Faces Highest Terror Threat Since 9/11, MPs Told' *The Guardian*, 13 January 2015; URL: <https://www.theguardian.com/uk-news/2015/jan/13/europe-highest-terror-threat-911-europol-fighting-overseas> (Accessed 31st August 2016).
- [44] David Cameron, 'Threat Level From International Terrorism Raised: PM Press Statement' 29<sup>th</sup> August 2014; URL: <https://www.gov.uk/government/speeches/threat-level-from-international-terrorism-raised-pm-press-conference> (Accessed 24<sup>th</sup> March 2015).
- [45] Andrew Parker, *Terrorism, Technology and Accountability*. 8<sup>th</sup> January 2015; URL: <https://www.mi5.gov.uk/news/director-general-speaks-on-terrorism-technology-and-oversight> (Accessed 2nd September 2016), at para 21.
- [46] John Locke, *Two Treatises of Government In the Former, The False Principles and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown: The Latter, Is an Essay Concerning the Original, Extent, and End, of Civil Government*. URL: <http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/locke/government.pdf> accessed 10 October 2014 (accessed 10th October 2014), p.163.
- [47] Ibid.
- [48] Ibid.
- [49] Bertrand Russell, *History of Western Philosophy*. London: Allen and Unwin, 1961, p. 604. But what happens if the removal of an individual's property without their consent was conducive to, say, the well-being of the majority, such as taxation to fund war for reasons of security? Russell argues that Locke did not adequately address this obvious contradiction (p.609).
- [50] John Rawls, *A Theory of Justice*. Cambridge, Mass.: Harvard University Press, 1971, p.448.
- [51] Ibid., p.7.
- [52] Ibid., p.53.
- [53] Ibid., p.54.
- [54] Ibid., p.59.
- [55] Ibid., p.61.
- [56] But not an equal redistribution of wealth and income – See: Michael J Sandel, *Justice: What's the Right Thing to Do?* Harmondsworth: Penguin Books, 2010, p.142.
- [57] Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*. Notre Dame, Ind: University of Notre Dame Press, 1981.
- [58] Michael J Sandel, *Liberalism and the Limits of Justice*. Cambridge: University Press, 1982.
- [59] Charles Taylor, *Sources of the Self: The Making of Modern Identity*. Cambridge, Mass.:Harvard University Press, 1989.
- [60] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books, 1983.
- [61] Michael J Sandel, op.cit. (1982), preface, pp. ix-x.
- [62] Michael Walzer, 'The Communitarian Critique of Liberalism' in Amitai Etzioni (Ed.), *New Communitarian Thinking: Persons, Virtues, Institutions and Communities*. Charlottesville: University of Virginia Press, 1995, pp.53-54.
- [63] Amitai Etzioni, 'Communitarianism Revisited' 19(3) (2014) *Journal of Political Ideologies*, p. 242.
- [64] Alasdair MacIntyre, op.cit.,pp. 204-205.
- [65] Amitai Etzioni, *The Spirit of Community: The Reinvention of American Society*. Touchstone, 1994; Amitai Etzioni, *The New Golden Rule: Community and Morality in a Democratic Society*, New York: Basic Books, 1996; Amitai Etzioni (Ed.), *The Essential Communitarian Reader*. Lanham: Rowman and Littlefield Publishers, 1998.
- [66] Mary Ann Glendon, 'Rights in Twentieth Century Constitutions' in Amitai Etzioni (Ed.), *Rights and the Common Good: The Communitarian Perspective*. New York: St Martin's Press, 1995, pp. 27-36.
- [67] Amitai Etzioni, 'Preface: We, the Communitarians' in Amitai Etzioni (Ed.), op.cit. (1995), p. iii.
- [68] Amitai Etzioni, op.cit. (1994), p.10.
- [69] Amitai Etzioni, 'Preface: We, the Communitarians' in Amitai Etzioni (Ed.), op.cit. (1995), p. iii.
- [70] Amitai Etzioni, 'Introduction' in Amitai Etzioni (Ed.). op.cit. (1995), p.1.
- [71] Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*. New York: Free Press, 1991, p.14.
- [72] Amitai Etzioni, 'Preface: We, the Communitarians' in Amitai Etzioni (Ed.), op. cit. (1995b), p. iv.
- [73] Ibid.
- [74] Amitai Etzioni, 'The Responsive Communitarian Platform: Rights and Responsibilities' in Amitai Etzioni (Ed.). op. cit. (1995), p.19.
- [75] Amitai Etzioni, 'Communitarian Solutions/What Communitarians Think' 65(1) (1992) *Journal of State Government*, p.10. That said, Etzioni does believe that victims of such abuse should not be ignored. But he calls for greater education surrounding issues of responsibility, rather than censorship, particularly legal restrictions. And he does support the criminalisation of some forms of 'speech' such as child pornography: Amitai Etzioni, 'Right Does Not Make it Right' 29<sup>th</sup> September 2015 *The American Scholar*. URL: <https://theamericanscholar.org/right-does-not-make-it-right/#.V4dkQIUv7Eg> (Accessed 15<sup>th</sup> July 2016).
- [76] Alasdair MacIntyre, *After Virtue (Bloomsbury Revelations)*, London: Bloomsbury, 2013, Prologue.
- [77] After very kindly reading an earlier draft of this article, Amitai Etzioni challenged this claim by the author: 'Regarding free speech, indeed, I do hold that speech should be limited only when it *directly* [Etzioni's emphasis] incites violence, which ISIL does. The main problem is that any attempts to define which words do and which don't have failed, at least in the US. However, I would argue that if a speech or text is, in its totality, an incitement it should be banned.' (Email to the author, dated 28<sup>th</sup> July 2016).
- [78] See, for example: Adrian Hunt, 'Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism' [2007] *Criminal Law Review*, pp. 441-459.
- [79] A. C. Grayling, *Liberty in the Age of Terror: A Defence of Civil Liberties and Enlightenment Values*, Bloomsbury, 2009, p.4.

[80] Amitai Etzioni, *How Patriotic is the Patriot Act? Freedom Versus Security in the Age of Terrorism*. Routledge. 2005, p.24.

[81] *Ibid.*, pp.1-3.

[82] Amitai Etzioni, 'A Liberal Communitarian Paradigm for Counterterrorism' 49(2) (2013) *Stanford Journal of International Law*, 330-370, p.347.

[83] *Ibid.*

[84] Again, after very kindly reading an earlier draft of this article, Amitai Etzioni wished to explain this point. (Email to the author, dated 28<sup>th</sup> July 2016).

[85] Richard A. Posner, 'The Truth About Our Liberties' in Amitai Etzioni and Jason H. Marsh (Eds.). *Rights vs. Public Safety After 9/11: America in the Age of Terrorism*. Lanham: Rowman and Littlefield Publishers, 2003, p.26.

[86] Amitai Etzioni, *op.cit.* (2013), pp.358-359.

[87] Amitai Etzioni, 'Life: The Most Basic Human Right' 9(1) (2010) *Journal of Human Rights* pp.100-110, p.105. Again, after very reading an earlier draft of this article, Amitai Etzioni wished to clarify this point: 'Just before the conclusion, you write that freedom trumps all. I believe it should be the right to be alive.' (Email to the author, dated 28<sup>th</sup> July 2016).

[88] Amitai Etzioni, *Security First: For a Muscular, Moral Foreign Policy*. New Haven: Yale University Press, 2007, p.5.