Neighbor Terrorism and the All-Risks Policing of Terrorism

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INTRODUCTION

Debate continues as to the transformations in terrorism evidenced by the September 11 attacks and since that time. Some, including the former U.S. President,[1] point to changes in the nature of terrorism and argue that September 11 constituted a wholly new form of terrorism that demanded a novel response.[2] Given the prior events of the World Trade Center bombing in 1993[3] and the East African embassy bombings in 1998,[4] it would appear more appropriate to depict a transformation in scale and tactics rather than nature. This article seeks to explore a third perspective. It accepts the fact that there have been transformations in terrorism, but it focuses on the actors rather than on their actions. It suggests that one's neighbor has become a potential foe and that this trend became apparent only gradually after September 11. There are important consequences for law enforcement beyond the major adaptations already incurred. The move toward neighbor terrorism has perhaps been masked by the other more brutal changes, but it is this trend that has the potential to cause the most lasting and insidious impact on everyone's lives.

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1. The claim that the attacks on September 11 created a new war on terrorism was first made by President Bush on September 20, 2001: "Our war on terror begins with Al Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated. . . . And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make: Either you are with us, or you are with the terrorists." Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141, 1142 (Sept. 20, 2001).

2. *See* BRUCE HOFFMAN, INSIDE TERRORISM (1998); WALTER LACQUER, THE NEW TERRORISM: FANATICISM AND THE ARMS OF MASS DESTRUCTION (1999); Xavier Raufer, *New World Disorder, New Terrorisms: New Threats for Europe and the Western World*, 11 TERRORISM & POL. VIOLENCE 30 (1999); HOUSE OF COMMONS DEFENCE SELECT COMMITTEE, THE THREAT FROM TERRORISM (2001), H.C. 348-I (Session 2001-02); HOME OFFICE, COUNTER-TERRORISM POWERS: RECONCILING SECURITY AND LIBERTY IN AN OPEN SOCIETY: A DISCUSSION PAPER (2004), Cm. 6147, at ¶¶5, 7.

3. *See* United States v. Rahman, 189 F.3d 88 (2d Cir. 1999); United States v. Salameh, 152 F.3d 88 (2d Cir. 1998); Kiareldeen v. Ashcroft, 273 F.3d 542 (3d Cir. 2001); United States v. Yousef, 327 F.3d 56 (2d Cir. 2003); Andrew C. McCarthy, *Terrorism on Trial: The Trials of al Qaeda*, 36 CASE W. RES. J. INT'L L. 513, 514-515 (2004).

4. *See* United States v. Bin Laden, 397 F. Supp. 2d 465 (S.D.N.Y. 2005).

A description of the mutation of terrorism and the rise of neighbor terrorism is explored in Part I, which suggests that, in the contemporary phase of terrorism, our neighbors – fellow citizens or at least long-term foreign residents – have become the most threatening actors. Their terrorist activities, which are often autonomous in direction and financed by local sources, are supplanting the plots of foreign visitors or foreign masterminds. Yet, the threats posed by our neighbors are more insidious – how do we tell friend from foe, and how do we respond without harming community solidarity or without blatant discrimination?

A serious threat of terrorism from any source will always entail significant shifts in law enforcement. Part II details these law enforcement consequences, including "all-risks" policing powers. There is likely to be an enhanced emphasis on anticipatory risk – the need to deal with terrorism before it happens through prevention, protection, and preparation – as well as on the more traditional forms of pursuit after the event through prosecution.[5] Intelligence rather than evidence will loom large as a trigger for responses, and the responses will also reflect an expanded array, including not only policing operations but also executive actions. Because intelligence often lacks the probative power of evidence, ever more pervasive tactics must be adopted to deal with anticipatory risk. The focus of this article is on the policing consequences rather than on executive actions.[6] One aspect will be the inception of all-risks policing powers, by which the police will treat anyone and everyone as a risk and will take action on the basis of a risk calculation that shifts from the personal to the positional. Thus, "all-risks" policing of terrorism is that based on the recognition that risks may come from any source, and are not exclusively raised by the non-citizens or other obvious "outsiders" traditionally considered most in need of scrutiny.

The primary focus of this article, Part III, will then present an example of all-risks policing powers. The illustration will be drawn from the experience of the United Kingdom with blanket stop-and-search policing powers under section 44 of the Terrorism Act 2000, selected because there are full data on their impact and also case law and executive guidance that have sought to react to some of the problems created by the exercise of

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5. *See* HOME OFFICE, COUNTERING INTERNATIONAL TERRORISM: THE UNITED KINGDOM'S STRATEGY (2006), Cm. 6888, at 2–3 ; ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS 2–3 (2006).

6. For the prime example of executive action within the United Kingdom, see the Prevention of Terrorism Act 2005, as described in Clive Walker, *Keeping Control of Terrorists Without Losing Control of Constitutionalism,* 59 STAN. L. REV. 395 (2007). For the United States, executive action includes detention without trial, *see* Presidential Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001), and surveillance. *See* Elizabeth B. Bazan & Jennifer K. Elsea, Presidential Authority To Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information (Congressional Research Service, 2006); Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552.

these powers. Part III will explain not only the nature and use of these powers but also the consequences for those among our neighbors who are most affected by their application. The absence of the normal policing powers, such as the standard of reasonable suspicion, allows other factors to come into play in the choice of police targets.[7] These points are elaborated in a case study in Part IV, which analyzes litigation brought against the Metropolitan Police (in London) and arising from the use of stop-and-search powers in 2003. The raw issue of racial profiling in the context of all-risks policing is aired further in Part V in the light of this litigation and other policy considerations.

Having gleaned a clearer sense of the law and practice of all-risks policing through stop-and-search powers, Part VI further considers the models of containment that seek to preserve constitutional values, even in the extreme circumstances of neighbor terrorism.

I. NEIGHBOR TERRORISM

Traditional military strategy conceived of the typical "enemy" as someone other than our "neighbor" – an alien whose unfamiliarity in thought and intention increased the potential risk to our well-being.[8] Historically, anyone not fitting a narrow stereotype – be it national, racial, or cultural – could become an object of suspicion and easily marked as a potential foe. Yet this approach was adopted before the days of porous borders, of diaspora, and of massive immigration.[9] In these contexts, who is my neighbor and who is my enemy?

Applying these considerations to contemporary terrorism, there may have been some solace in the convenient figure of Osama bin Laden, who could be presented as an archetypal foe – definitely not a neighbor who shares our ideologies and cultures, but a primitive, uncivilized cave dweller.[10] But bin Laden as a convenient scapegoat has ceased to be the center-stage villain, now driven so far into the shadows by the invasion of Afghanistan in 2001 that even the Central Intelligence Agency (CIA) has

7. ROBERT REINER, THE POLITICS OF THE POLICE (3d ed. 2000).

8. *See* SUN TZU, THE ART OF WAR pt.III, ¶18 (Samuel B. Griffith trans., 1963) (515-512 B.C.), *reprinted in* MARK MCNEILLY, SUN TZU AND THE ART OF MODERN WARFARE (2003) ("If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.").

9. *See* JIHADI TERRORISM AND THE RADICALISATION CHALLENGE IN EUROPE (Rik Coolsaet ed., 2008).

10. Late in 2001, President Bush referred to bin Laden as "a guy who, 3 months ago, was in control of a country. Now he's maybe in control of a cave." Remarks Welcoming General Tommy R. Franks and an Exchange with Reporters in Crawford, Texas, 2 PUB. PAPERS 1546, 1547 (Dec. 28, 2001). *See also* ROHAN GUNARATNA, INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR ch.1 (2002) (detailing bin Laden's life).

reportedly closed Alec Station, its specialized search unit.[11] More ominously, in the contemporary phase of terrorism, the most threatening figures are our neighbors "from within." This phrase became obvious in the United Kingdom on July 7, 2005, when the London bombings were carried out by three second-generation British citizens whose parents were of Pakistani origin, and a Jamaican-born British national who had been a U.K. resident since the first year of his life.[12] These were men from Yorkshire whose mundane backgrounds contradicted many of the expectations of the security forces on the hunt for crazed foreigners. The attempted bombings in London on July 21, 2005, were likewise perpetrated by a mixture of citizens and long-term residents.[13] Although these attacks brought home the concept of neighbor terrorism, there had been prior incidents involving British citizens who had engaged in terrorism since September 11, albeit not against their neighbors. Examples include Richard Reid (convicted of the attempted shoe bombing on a trans-Atlantic flight in 2001),[14] Ahmad Omar Saeed Sheikh (sentenced to death in Hyderabad in 2002 for journalist Daniel Pearl's murder),[15] and the suicide bombings in Tel Aviv in 2003 by Asif Mohammed Hanif and Omar Khan Sharif.[16]

The same switch towards neighbor terrorism can be detected in the United States, perhaps in part as a consequence of the wide-scale detention and deportation of noncitizens after September 11[17] and the tighter checks

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11. Suzanne Goldenberg, *CIA Disbands Bin Laden Unit*, GUARDIAN, July 5, 2006, at 15.

12. *See* INTELLIGENCE AND SECURITY COMMITTEE, REPORT INTO THE LONDON TERRORIST ATTACKS ON 7 JULY 2005 (2006), Cm. 6785, at 11; REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON 7TH JULY 2005 (2006), H.C. 1087 (Session 2005-06), at ¶¶8, 31.

13. Those accused of involvement in the bombings (several others are charged with withholding information or facilitating escape) include: Muktar Said Ibrahim (Eritrean-born but arrived in the United Kingdom as a child dependent of asylum seekers in 1990 and was granted residency in 1992); Ramzi Mohamed (a Somalian with indefinite leave to remain); Yassin Hassan Omar, (originally from Somalia and arrived in the United Kingdom in 1992 as a child dependent of asylum seekers, with indefinite leave to remain); Hussain Osman (Ethiopian-born but a naturalized British citizen); Manfo Kwaku Asiedu (a Ghanian who arrived in the United Kingdom in 2003); Adel Yahya (born in Ethiopia but a naturalised British citizen who arrived in 1991). *See* R v. Ibrahim, [2008] EWCA Crim 880; R v. Asiedu, [2008] EWCA Crim 1725 (detailing the appeals).

14. Pamela Ferdinand, *Would-Be Shoe Bomber Gets Life Term*; *Al Qaeda Member Shouts at Judge*, WASH. POST, Jan. 31, 2003, at A1.

15. Rory McCarthy, *Case Closed?: Murky Underworld Where Terror and Security Meet: Pearl Trial Ends but Doubts Exist on Military's Role*, GUARDIAN, July 16, 2002, at 10.

16. Ohad Gozani et al., *British Bomber's Body Identified*, DAILY TELEGRAPH, May 20, 2003, at 2.

17. *See* Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1197 (2002); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 316 (2002); Teresa Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 85 (2005); Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV.

on visitors thereafter.[18] As in the United Kingdom, the early cases involved U.S. citizens captured through activities abroad. Prominent examples included Yaser Hamdi, who was seized in Afghanistan during hostilities in 2001. Following the Supreme Court decision that, as a U.S. citizen, he must be given broader due process rights than the government had recognized,[19] the U.S. Department of Justice agreed to allow him to return to Saudi Arabia on the condition that he give up his U.S. citizenship.[20] Likewise, José Padilla, a U.S. citizen who was arrested in Chicago in 2002 on his return from a visit to the Middle East, was at first treated as an "enemy combatant"[21] but later was transferred into the criminal justice system and convicted of conspiracy to commit murder abroad.[22] Several other U.S. citizens have been charged in connection with attempts to enter Afghanistan.[23]

More recent cases have been instances of truly neighbor terrorism – plots by citizens against fellow citizens at home. An early instance was the Lackawanna case, in which six U.S. citizens of Yemeni origin pleaded guilty in Buffalo, New York, to providing material support and resources to a terrorist group by training at a camp associated with al Qaeda in Afghanistan.[24] Arrests were made in March 2006 in Atlanta of a U.S. citizen and a U.S. resident for providing material support to a terrorist group by obtaining information on targets.[25] In June 2006, arrests were made in Liberty City, near Miami, of alleged al Qaeda activists who were

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1173, 1177 (2004); Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counter-productive in the "War on Terrorism"?*, 16 PACE INT'L L. REV. 19, 21 (2004); Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573, 573-574 (2005); Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 645 (2005).

18. *See* Kareem Shora, *National Security Entry Exit Registration System (NSEERS)*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 73, 73-74 (2003); Susan Ginsburg, *National Security Efforts to Disrupt the Mobility of Terrorists*, 2 LOY. U. CHI. INT'L L. REV. 169, 171-172 (2005); A. James Vazquez-Azpiri & Daniel C. Horne, *The Doorkeeper of Homeland Security: Proposals for the Visa Waiver Program*, 16 STAN. L. & POL'Y REV. 513, 515 (2005).

19. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).

20. Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y.TIMES, Oct. 12, 2004, at A15.

21. *See* Rumsfeld v. Padilla, 542 U.S. 426, 451 (2004).

22. Peter Whoriskey & Dan Eggen, *Judge Sentences Padilla to 17 Years, Cites His Detention*, WASH. POST, Jan. 23, 2008, at A3.

23. Ahmed and Muhammed Bilal and four others (part of the Portland Seven) were convicted in 2003. Blaine Harden & Dan Eggen, *Duo Pleads Guilty to Conspiracy Against U.S.; Last of the "Portland 7" Face 18 Years in Prison*, WASH. POST, Oct. 17, 2003, at A3.

24. *See* United States v. Goba, 220 F. Supp. 2d 182, 187 (W.D.N.Y. 2002).

25. Those who have been charged are Ehsanul Islam Sadequee, a U.S. citizen of Bangladeshi descent, and Syed Haris Ahmed, a naturalized U.S. citizen born in Pakistan. Anthony M. DeStefano, *2 U.S. Citizens Met Extremists To Talk About Attacks, FBI Says*, WASH. POST, Apr. 22, 2006, at A4.

said to be plotting attacks on FBI buildings in Miami and on the Sears Tower in Chicago.[26] Described as members of "a homegrown terrorist cell," five of the seven suspects were United States citizens.[27] Another case was alleged to involve a plot against Fort Dix, New Jersey, in 2007 by a group including a U.S. citizen and several long-term residents.[28] Nor do all of these neighbor terrorists even fit the description of "Arab" or Middle Easterner. A prime example is John Walker Lindh, convicted of joining the Taliban in Afghanistan.[29] Timothy McVeigh's crime also demonstrates that making the distinction between friend and foe on the basis of racial or ethnic stereotypes can prove fatally flawed.[30]

In the light of all these cases, no longer can it be claimed that the enemy in war is "in a particularly intense way, existentially something different and alien" and "the negation of our existence, the destruction of our way of life."[31] Rather, we are less and less sure as to how to typecast our enemies, let alone fully comprehend their murderous or suicidal tendencies.[32] So which mechanisms or strategies might assist in allowing us to live tolerable lives that are in line with cherished constitutional values[33] – tolerably free from the fear of terrorism risk, from the paranoia that our neighbor may turn out to be a terrorist, and from being unjustly labeled as a terrorist because of racial or ethnic origins?

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26. Peter Whoriskey & Dan Eggen, *Terror Suspects Had No Explosives and Few Contacts; Sears Tower Plan Never Finished, Authorities Say*, WASH. POST, June 24, 2006, at A3.

27. *Id.* Following two hung juries, five of the defendants were found guilty after a third trial in 2009. Damien Cave & Carmen Gentile, *Five Convicted in Plot To Blow Up Sears Tower as Part of Islamic Jihad*, N.Y. TIMES, May 13, 2009, at A19.

28. *See* Dale Russakoff & Dan Eggen, *Six Charged in Plot To Attack Fort Dix; "Jihadists" Said to Have No Ties to Al-Qaeda*, WASH. POST, May 9, 2007, at A1.

29. *See* United States v. Lindh, 212 F. Supp. 2d 541, 574-577 (E.D. Va. 2002); Leonard M. Baynes, *Racial Profiling, September 11th and the Media: A Critical Race Theory Analysis*, 2 VA. SPORTS & ENT. L.J. 1, 34 (2002); Suzanne Kelly Babb, *Fear and Loathing in America: Applications of Treason Law in Times of Crisis: The Case of John Walker Lindh*, 54 HASTINGS L.J. 1721, 1722 (2003); Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terrorism*, 75 U. COLO. L. REV. 59, 97-98 (2004).

30. *See* LOU MICHEL & DAN HERBECK, AMERICAN TERRORIST: TIMOTHY MCVEIGH AND THE OKLAHOMA CITY BOMBING (2001); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1584 (2002).

31. CARL SCHMITT, THE CONCEPT OF THE POLITICAL 26 (George Schwab trans., 1976).

32. *See* ROBERT A. PAPE, DYING TO WIN: THE STRATEGIC LOGIC OF SUICIDE TERRORISM (2005); Ami Pedahzur, *Toward an Analytical Model of Suicide Terrorism – A Comment*, 16 TERRORISM & POL. VIOLENCE 841 (2004); Dipak K. Gupta & Kusum Mundra, *Suicide Bombing as a Strategic Weapon: An Empirical Investigation of Hamas and Islamic Jihad*, 17 TERRORISM & POL. VIOLENCE 573, 574-575 (2005); Andrew Silke, *The Role of Suicide in Politics, Conflict, and Terrorism*, 18 TERRORISM & POL. VIOLENCE 35, 36 (2006).

33. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 394–395 (2004).

II. ALL-RISKS POLICING POWERS

A. Tactical Setting

To deal with a more insidious and pervasive threat – namely neighbor terrorism – countermeasures must also become pervasive. Counterterrorism laws have proliferated in both the United Kingdom[34] and the United States,[35] and, through the influence of U.N. Security Council Resolution 1373,[36] there have been reverberations in almost every other country in the world.[37] Counterterrorism laws often give prominence to criminal justice outcomes – extra policing powers to gather evidence, special procedures to assist in trials, and enhanced penalties. However, the anticipatory risk of mass terrorism casualties or even the nightmare of the use of weapons of mass destruction have also triggered executive-based alternatives to criminal justice resolutions, such as detention without trial[38] and control orders in the United Kingdom.[39]

As well as applying the traditional mechanisms of security laws, governments have begun to conceive of responses to terrorism in more holistic terms that address contingency planning and resilience. These grander designs are exemplified by sweeping antiterrorism strategy statements, such as the United Kingdom's CONTEST program,[40] which

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34. For the United Kingdom, see Terrorism Act 2000 and Anti-terrorism, Crime and Security Act 2001, as described in CLIVE WALKER, BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION (2d ed. 2009).

35. For the United States, see USA PATRIOT Act 2001, Pub. L. No. 107-56, 115 Stat. 272, as described in Lawyers' Committee for Human Rights, *Imbalance of Powers*: *How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties* (2003), *available at* http://www.humanrightsfirst.org/us_law/loss/imbalance/powers.pdf; AMITI ETZIONI, HOW PATRIOTIC IS THE PATRIOT ACT? FREEDOM VERSUS SECURITY IN THE AGE OF TERRORISM (2004); John A.E. Vervaele, *The Anti-Terrorist Legislation in the U.S.: Inter Arma Silent Leges?*, 13 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 201, 201-203 (2005).

36. The Resolution obliges all States to criminalize assistance for terrorist activities, deny financial support and safe haven to terrorists, and share information about groups planning terrorist attacks "through all lawful means." S.C. Res. 1376, U.N. Doc. S/RES/1373 (Sept. 28, 2001). A Counter-Terrorism Committee (CTC) was also established to monitor implementation of the resolution through investigations and the review of state reports. *See* Malvina Halberstam, *The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements To Criminalizing Terrorism Wherever and by Whomever Committed*, 41 COLUM. J. TRANSNAT'L L. 573, 578 n.37 (2003); Curtis A. Ward, *Building Capacity To Combat International Terrorism: The Role of the United Nations Security Council*, 8 J. CONFLICT & SEC. L. 289, 289 (2003).

37. *See* GLOBAL ANTI-TERRORISM LAW AND POLICY (Victor V. Ramraj et al. eds., 2005).

38. *See* Clive Walker, *Prisoners of "War All the Time,"* EUR. HUM. RTS. L. REV. 50, 53-61 (2005) (describing the Anti-terrorism, Crime and Security Act 2001, Pt. IV).

39. *See* Clive Walker, *Keeping Control of Terrorists Without Losing Control of Constitutionalism*, 59 STAN. L. REV. 1395, 1403-1407 (2007) (describing the Prevention of Terrorism Act 2005).

40. *See* COUNTERING INTERNATIONAL TERRORISM, *supra* note 5, at 1-2.

involves four aspects – prevention, protection, preparation, and pursuit. The Civil Contingencies Act 2004 and related legislation seek to apply the wider tactics beyond direct pursuit, demanding that some of the responsibilities should be shouldered by private sector responders.[41] Likewise, the Department of Homeland Security developed the (federal) "National Response Plan" (NRP)[42] as a comprehensive approach to managing domestic hazards and incidents. The NRP incorporated fifteen "Emergency Support Functions" (ESF), each with an ESF coordinator and comprising draft regulations, guidelines, and protocols. The NRP was rebranded in 2008 as the National Response Framework (NRF) to signal that it requires the continued development of detailed operations plans.[43]

The security of society is being promoted not just through the activities of governments and professional agencies, but also by becoming embedded in everyday transactions and in the architecture of social space, such as through the technology of closed-circuit television (CCTV).[44] A significant step in the development of this approach occurred in the City of London, where CCTV was installed on a pervasive scale to create a "Ring of Steel" following bombings by the Irish Republican Army (IRA) in 1992 and 1993.[45] Other hardware includes concrete barriers to thwart suicide bombers, such as have appeared outside the Houses of Parliament in London.[46] There is also the continuing infusion of explosives and metal detectors, *de rigueur* at airports[47] and now proliferating at rail stations[48] and

41. *See* CLIVE WALKER & JAMES BRODERICK, THE CIVIL CONTINGENCIES ACT 2004: RISK, RESILIENCE, AND THE LAW IN THE UNITED KINGDOM (2006).

42. Department of Homeland Security, National Response Plan, *available at* http:// www.dhs.gov/dhspublic/interapp/editorial/editorial_0566.xml.

43. *See* Emergency Support Functions, *available at* http://www.fema.gov/ emergency/nrf/.

44. *See* CLIVE NORRIS & GARY ARMSTRONG, THE MAXIMUM SURVEILLANCE SOCIETY: THE RISE OF CCTV (1999); CLIVE NORRIS ET AL., SURVEILLANCE, CLOSED CIRCUIT TELEVISION AND SOCIAL CONTROL (1999); BENJAMIN J. GOOLD, CCTV AND POLICING: PUBLIC AREA SURVEILLANCE AND POLICE PRACTICES IN BRITAIN (2004).

45. Clive Walker, *Political Violence and Commercial Risk*, 56 CURRENT LEGAL PROBS. 531 (2004); Jon Coaffee, *Recasting the "Ring of Steel": Designing Out Terrorism in the City of London, in* CITIES, WAR, AND TERRORISM: TOWARDS AN URBAN GEOPOLITICS 276 (Stephen Graham ed., 2004).

46. *See Security: What Measures Are Being Taken To Protect British Targets?*, INDEPENDENT, Nov. 4, 2001, at 3.

47. *See* Convention on Civil Aviation, Safeguarding International Civil Aviation Against Acts of Unlawful Interference, Annex 17, ¶4.1.1, Dec. 7, 1944, 15 U.N.T.S. 295 (passenger and baggage screening); R. Spencer MacDonald, *Rational Profiling in America's Airports*, 17 BYU J. PUB. L. 113, 132 (2002); Paul S. Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT'L L. 649, 701-702 (2003) (tracing the development of international and U.S. domestic law to prevent the presence of explosives and other dangerous devices aboard aircraft); Jens Hainmüller & Jan M. Lemnitzer, *Why Do Europeans Fly Safer? The Politics of Airport Security in Europe and the U.S.*, 15 TERRORISM & POL. VIOLENCE 1 (2003).

48. *See* HOUSE OF COMMONS TRANSPORT COMMITTEE, UK TRANSPORT SECURITY – PRELIMINARY REPORT (2005), H.C. 637 (Session 2005-06).

"postcard" targets such as the Statue of Liberty in New York[49] and the CN Tower in Toronto.[50] There is also growing interest in the use of biometrics in identity documents such as passports.[51] This facet of security has again been applied to the logical conclusion of an all-risks approach through the introduction in the United Kingdom of identity cards.[52] Their utility in response to terrorism is highly contested,[53] while other scattershot approaches toward making everyday life more secure may be of equally debatable impact.[54] The very existence of such apparatus as a constant reminder of the threats from terrorism can amplify rather than allay our insecurities. The pictures of the 7/7 bombers as they boarded a train at Luton for their journey to attack London commuters is a poignant historical record not only of their threat but also of the ineffectiveness of the technology to be any more than a dumb witness powerless to interdict their attack,[55] though the CCTV footage of the 21/7 London bombers did undoubtedly assist in their arrest.[56] There are not only doubts about

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49. The Statue was closed altogether after 9/11 until August 2004. Mike McIntire, *Visitors Can Go Underfoot, But Not to Liberty's Crown*, N.Y. TIMES, Aug. 3, 2004, at B4.

50. Philip Lee-Shanok, *Tower of Strength; $1m Anti-terror Security Slated for CN Tower*, TORONTO SUN, Feb. 8, 2002, at 3; Rob Granatstein, *CN Tower Stands up to Terrorism; Top Tourist Draw Acts To Keep Its Visitors Safe*, TORONTO SUN, Mar. 9, 2003, at 37.

51. *See* Council Regulation on Standards for Security Features and Biometrics in Passports and Travel Documents Issued by Member States, (EC) No. 2252/2004 (Dec. 13, 2004).

52. The United Kingdom system is "locational" in that it comes into play in set places or processes, such as claims for social security, *see* Identity Cards Act 2006, c. 15, §13 (Eng.), as opposed to a demand to verify identity on, say, a stop and search in the street. *See id.* §16(2). For the details of their introduction, see HOME OFFICE, IDENTITY CARDS: A SUMMARY OF FINDINGS FROM THE CONSULTATION EXERCISE ON ENTITLEMENT CARDS AND IDENTITY FRAUD (2003), Cm. 6019.

53. Their utility was questioned in LORD LLOYD OF BERWICK, 1 INQUIRY INTO LEGISLATION AGAINST TERRORISM (1996), Cm. 3420, at ¶16.31. For other views, see ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 201 (2002); ETZIONI, *supra* note 35, at ch. 5; MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 79 (2004); Daniel J. Stein, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697 (2004).

54. *See* General Accounting Office, *Aviation Security: Efforts To Measure Effectiveness and Strengthen Security Programs: Testimony Before the Committee on Government Reform, House of Representatives*, GAO-04-285T, at 2 (2003) (statement of Cathleen A. Berrick, Director, Homeland Security and Justice) (recommending increased supervision and screener training); Government Accountability Office, *Aviation Security: Enhancements Made in Passenger and Checked Baggage Screening, but Challenges Remain: Testimony Before the Committee on Commerce, Science, and Transportation, U.S. Senate*, GAO-06-371T, at 1 (2006) (statement of Cathleen A. Berrick, Director, Homeland Security and Justice Issues) (describing staffing and training challenges). Several of the nineteen hijackers of September 11 were subject to extra scrutiny; THE 9/11 COMMISSION REPORT, *supra* note 33, at ch. 1.

55. The picture can be seen at *Timeline of the 7 July Attacks*, BBC NEWS, July 11, 2006, http://news.bbc.co.uk/1/hi/uk/5032756.stm?ls.

56. The pictures can be seen at *Police Hold Four 21 July Suspects*, BBC NEWS, July

efficacy, but the panoply of cameras, scanners, sensors, and sniffers sparks unease that we shall "sleepwalk into a surveillance society."[57]

Because of the difficulties of distinguishing friend and foe, security and insecurity, or even war and peace, terrorism appears to be an endemic and endless risk. The embedded nature of the terrorist risk seems to demand the application of all-risks security and policing measures, such as stop-and-search powers. Their application will owe more to an intelligence-led approach than to the collection of evidence, and will reflect "a new and urgent emphasis on the need for security, the containment of danger, and the identification and management of any kind of risk."[58] Intelligence will trigger action in an array of policing operations and in executive action. But where intelligence is not sufficiently precise to pick out foe from friend, then ever more pervasive tactics must be adopted. Here, the operation of all-risks policing powers involves the police treating anyone and everyone as a risk and taking action on the basis of leads even more vague and haphazard than intelligence or suspicion. The reason for their attention is not so much the suspicion falling on any given individual but the nature of a particular site or some other perceived vulnerability. Thus, a risk calculation is still present, but it shifts from the personal to the positional.

B. An Example: All-Risks Policing at Ports

A familiar example of this all-risks approach is the universal screening of passengers at airports. Airline hijacking by political extremists[59] has long prompted international action at both legal and administrative levels.[60] The legal instruments comprise the (Hague) Convention for the Suppression of

30, 2005, http://news.bbc.co.uk/1/hi/uk/4727975.stm.

57. Richard Ford, *Beware Rise of Big Brother State, Warns Data Watchdog*, TIMES (London), Aug. 16, 2004, at 1; *see* Surveillance Studies Network, A Report on the Surveillance Society (2006), *available at* http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/surveillance_society_full_report_2006.pdf.

58. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME & SOCIAL ORDER IN CONTEMPORARY SOCIETY 12 (2001).

59. *See* PAUL M. WILKINSON & BRIAN M. JENKINS, AVIATION SECURITY AND TERRORISM (1999).

60. Implementation in the United Kingdom is achieved through the Aviation Security Act 1982 and the Aviation and Maritime Security Act 1990. *See generally* SIR JOHN WHEELER, AIRPORT SECURITY (2002), *available at* http://www.dft.gov.uk/pgr/security/aviation/airport/airportsecurityreport.pdf. For the legitimacy of such "administrative" searches in the United States, see United States v. Hartwell, 436 F.3d 174 (3d Cir. 2006) (holding that a warrantless search, initiated without individualized suspicion, of an airline passenger's pockets was reasonable under the "administrative search doctrine"); United States v. Marquez, 410 F.3d 612, 616 (9th Cir. 2005) (holding that random, handheld magnetometer wand scan searches of airline passengers do not violate the Fourth Amendment); People v. Heimel, 812 P.2d 1177, 1182 (Colo. 1991) (holding that once a person consents to inspection by walking into an airport security screening area, he could not thereafter withdraw until the screening process was complete).

Unlawful Seizure of Aircraft,[61] the (Montreal) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,[62] and the (Montreal) Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.[63] Following the attack on the *Achille Lauro* cruise ship in 1985,[64] corresponding measures began to emerge for maritime traffic, including the (Rome) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation[65] and the (Rome) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.[66] As for administrative standards, the International Civil Aviation Organization has developed Annex 17 to its Standards and Recommended Practices.[67] The International Maritime Organization has likewise promulgated standards. The International Convention for the Safety of Life at Sea (SOLAS) requires security levels for ships and ports, crew information, a Ship Security Plan sufficient to obtain a Ship Security Certificate, and an Automatic Identification System.[68]

These international measures may be supplemented by additional national provisions. Within the United Kingdom, port controls, under Part V of the Terrorism Act 2000, involve the further scrutiny of travelers.[69] The purpose is to disrupt possible terrorist planning and logistics and also to gather low-level intelligence about movements. These measures also deter attacks on the travel facilities themselves. The system began in 1974 within the Common Travel Area between Britain, Northern Ireland, and the Republic of Ireland, where passport controls have never applied for historical reasons related to the close common history of those territories

61. Hague Convention on the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105.

62. Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23 1971, 974 U.N.T.S. 178.

63. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474.

64. *See* ANTONIO CASSESE, TERRORISM, POLITICS, AND LAW: THE ACHILLE LAURO AFFAIR (1989).

65. Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221.

66. Rome Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 3, 1988, 1678 U.N.T.S 304.

67. Alan Khee-Jin Tan, *Recent Developments Relating to Terrorism and Aviation Security*, *in* GLOBAL ANTI-TERRORISM LAW AND POLICY 225, 227-228 (Victor V. Ramraj et al. eds., 2005).

68. Robert C. Beckman, *International Responses To Combat Maritime Terrorism*, *in* GLOBAL ANTI-TERRORISM LAW AND POLICY, *supra* note 67, at 248, 249-252. These requirements are implemented in the United Kingdom through the Ship and Port Facility (Security) Regulations. 2004 S.I. 1495.

69. *See* WALKER, *supra* note 34, at ch. 5; *see also* the extension of the power to search vehicles as well as persons under the Terrorism Act 2006, c.11, §29 (Eng.).

and their populations.[70] The details are mainly set out in Schedule 7 of the Terrorism Act. However, further changes were brought about by section 118 of the Anti-terrorism, Crime and Security Act 2001,[71] which allows an examining officer to exercise the port controls in relation not just to traffic entering the United Kingdom or between Ireland and Britain but also to persons whose presence at a port is believed to be connected with their traveling on a flight within Great Britain or within Northern Ireland or to a person on a ship or aircraft that has arrived at any place in Great Britain or Northern Ireland, whether from within or outside Great Britain or Northern Ireland.

The control procedures language begins under Schedule 7's paragraph 2, whereby an "examining officer" (meaning a constable, an immigration officer, or a designated customs officer) may question a person for the purpose of determining whether he appears to be a "terrorist." Reflecting the all-risks nature of these powers, the procedures make clear that examining officers may exercise their powers under this paragraph whether or not they have grounds for suspicion against any individual. For the purpose of satisfying himself whether there are any persons whom he may wish to question under paragraph 2, an examining officer may under paragraph 7 search a ship or aircraft, search anything on a ship or aircraft, or search anything that he reasonably believes has been, or is about to be, on a ship or aircraft. In order to carry out an examination, an examining officer may under paragraph 6 stop a person or vehicle, authorize the person's removal from a ship, aircraft, or vehicle, or detain a person. The conditions of detention are broadly covered by Schedule 8. The length of detention must not exceed nine hours.

Under paragraph 5, a person who is questioned under the Act must (a) give the examining officer any information in his possession that the officer requests; (b) give the examining officer on request either a valid passport that includes a photograph or another document that establishes his identity (the alternative is necessary because travel between Ireland and Britain does not require the production of a passport); (c) declare whether he has with him documents of a kind specified by the examining officer; or (d) give the examining officer on request any document that he has with him and that is of a kind specified by the officer. The person, and any ship or aircraft carrying him (or vehicle in Northern Ireland), may also be searched under paragraph 8 by an examining officer (or a person authorized by an officer under paragraph 10). There is also a wide power to search unaccompanied baggage and goods under paragraph 9.

Schedule 14, paragraph 6, envisages the issuance of a code of practice for authorized officers. Paragraph 6 has been issued pursuant to the

70. But note the proposals for ending this special zone of document-free travel. U.K. BORDER AGENCY, STRENGTHENING THE COMMON TRAVEL AREA: CONSULTATION PAPER 7 (2008).

71. Anti-terrorism, Crime and Security Act 2001, c. 24, §118 (Eng.).

Terrorism Act 2000 (Code of Practice for Examining Officers) Order 2001.[72] Whether it is perceived as achieving one of its aims – the avoidance of racial or national stereotyping – remains to be seen. The exercise of powers is dealt with under paragraph 10 as follows:

> Examining officers should therefore make every reasonable effort to exercise the power in such a way as to minimize causing embarrassment or offence to a person who has no terrorist connections. The powers to stop and question a person should not be exercised in a way which unfairly discriminates against a person on the grounds of race, color, religion, creed, gender or sexual orientation. When deciding whether to question a person the examining officer should bear in mind that the primary reason for doing so is to maximize disruption of terrorist movements into and out of the United Kingdom.
>
> *Note for guidance on paragraph 10: The selection of people stopped and examined under the port and border area powers should, as far as is practicable given the circumstances at the port or in the area, reflect an objective assessment of the threat posed by various terrorist groups active in and outside the United Kingdom. Examining officers should take particular care not to discriminate unfairly against minority ethnic groups in the exercise of these powers. When exercising the powers examining officers should consider such factors as*
>
> - *known and suspected sources of terrorism*
> - *any information on the origins and/or possible location of terrorist groups*
> - *the possible nature of any current or future terrorist activity*
> - *the means of travel (and documentation) which a group of individuals could use*
> - *local circumstances, such as movements, trends at individual ports or parts of the border area.*

Though the powers of examination can be applied randomly, police strategy demands some targeting, otherwise either police resources will be overwhelmed or potential suspects will pass by unnoticed among the millions of travelers. At the same time, the possibility remains that the "copper's nose"[73] for wrongdoing, based on intuition rather than rational

72. S.I. 2001/427. A revised draft code has been issued by the Home Office, but paragraph 10 is unaltered.

73. LORD CARLILE OF BERRIEW Q.C., REPORT ON THE OPERATION IN 2006 OF THE TERRORISM ACT 2000 (2007), at ¶121 .

indicators, must be allowed the occasional unprompted sniff. The fear is that such unstructured discretion will become patterned by prejudice, as was alleged by Irish citizens who were in practice most subjected to port controls in the past[74] and as is now the perceived experience of dark-skinned Muslims.

An example of the latter who has drawn headlines has included Shahid Malik, Member of the U.K. Parliament and International Development Minister, who was stopped at Dulles Airport, Washington D.C., as he attempted to return to the United Kingdom after official meetings on tackling terrorism.[75] A comparison might be made with the case of Dr. Sawsaan Tabbaa, a U.S. citizen from Syria, who attended a conference, "Reviving the Islamic Spirit," in Toronto and was detained for examination on her return to Buffalo as part of a "random" search along with dozens of other Muslim-Americans who had likewise attended the conference. The U.S. Court of Appeals rejected her pleas of breach of constitutional rights and accepted the Department of Homeland Security argument that there was intelligence providing reasons to believe that persons with known terrorist ties would be attending that conference and that Department's procedures were sufficiently narrowly tailored toward achieving a compelling interest.[76]

III. 'ALL-RISKS' POLICING OF TERRORISM THROUGH STOP-AND-SEARCH POWERS

The all-risks policing of terrorism is applied away from borders by stop-and-search powers under section 44 of the United Kingdom's Terrorism Act 2000. These powers even more clearly exemplify how action can be taken against neighbors in the light of terrorist risks, since individuals not at ports and airports are much less likely to be foreigners. The question then arises that if neither intelligence nor reasonable suspicion is available, what patterns of application will emerge? Policing resources are not so plentiful as to be able to apply the powers evenly to everyone, not even those who happen to be in a vulnerable location. Therefore, since choices must be made, will they simply reflect an array of police prejudices in the absence of more rational motivations? This part explores the details of the statutory provisions and administrative guidance about them, and their applications as evidenced by statistics. Part IV then discusses the important case law that has sought to analyze and set parameters of their use, including parameters governing the use of ethnic profiling. These issues are key to an understanding of how neighbor terrorism is now being

74. *See* PADDY HILLYARD, SUSPECT COMMUNITY: PEOPLE'S EXPERIENCE OF THE PREVENTION OF TERRORISM ACTS IN BRITAIN (1993).

75. Rajeev Syal & Francis Elliott, *U.S. Officials Dispute Muslim MP's Allegation of Wrongful Detention*, TIMES (London), Nov. 3, 2007, at 10.

76. Tabbaa v. Chertoff, 509 F.3d 89 (2d Cir. 2007).

addressed within the United Kingdom and perhaps how it might be dealt with in the future in comparable jurisdictions such as the United States.

A. Statutory Provisions and Guidance Documents

Section 44 is the descendant of a number of additions to the Prevention of Terrorism (Temporary Provisions) Act 1989 (sections 13A and B) inserted by the Criminal Justice and Public Order Act 1994, section 62, and the Prevention of Terrorism (Additional Powers) Act 1996. Those pieces of legislation responded to large IRA truck bombs in the City of London (the heart of the financial district) in 1992 and 1993 and then in the London Docklands area in 1996. It was contended that the new measures would deal with vehicle bombs and smaller devices carried by individuals by allowing the uniformed police opportunities for chance interceptions or systematic disruption of plans.[77] The Terrorism Act 2000 replaced the 1989 Act, and section 44 has been amended in turn by the Anti-terrorism, Crime and Security Act 2001[78] to allow the specialist British Transport Police, Civil Nuclear Constabulary, and Ministry of Defence Police to invoke these powers alongside the regular police forces.[79]

The powers of search in section 44 allow any police constable in uniform to stop a vehicle or a pedestrian located within an area or at a place specified in an authorization as follows:

> (1) An authorisation under this subsection authorises any constable in uniform to stop a vehicle in an area or at a place specified in the authorisation and to search
> (a) the vehicle;
> (b) the driver of the vehicle;
> (c) a passenger in the vehicle;
> (d) anything in or on the vehicle or carried by the driver or a passenger.
>
> (2) An authorisation under this subsection authorises any constable in uniform to stop a pedestrian in an area or at a place specified in the authorisation and to search
> (a) the pedestrian;
> (b) anything carried by him.

77. 1 INQUIRY INTO LEGISLATION AGAINST TERRORISM, *supra* note 53, at ¶¶10.14, 10.21.

78. Sched. 7, ¶31.

79. "Regular" police forces are established under the Police Act 1996, c. 16 (Eng.). The more specialist forces are provided for by the Transport Acts 1962-92; Energy Act 2004, §57 (Eng.); Ministry of Defence Police Act 1987, c. 4 (Eng.).

> (3) An authorisation under subsection (1) or (2) may be given only if the person giving it considers it expedient for the prevention of acts of terrorism.[80]

Authorizations are granted under section 44(4) by senior police officers (of the rank of assistant chief constable or, in London, of commander). The legal pre-condition for exercise of the stop-and-search powers,[81] the requirement of an authorization, may be given only if the senior police officer giving it considers it "expedient" for the prevention of acts of terrorism. An authorization, which can endure for up to twenty-eight days under section 46 and can then be renewed, may be given by a police officer for the area who is of at least the rank of assistant chief constable or commander of a London force. According to Home Office guidance,[82] each authorization under section 44 should specify whether it applies across the entire force area, across a particular part of the force area, or only at a particular place; forces are asked to consider providing supporting intelligence on potential targets where the powers are restricted to a particular place. It must also specify the period for which the authorization has effect, up to a maximum of twenty-eight days. Where the Secretary of State confirms an authorization, he may substitute an earlier date or time; alternatively he may cancel an authorization with effect from a specified time.

Section 46 requires the police to inform the Secretary of State (in other words, a United Kingdom government minister, the function usually being performed by the Secretary of State for the Home Department) as soon as is reasonably practicable. If the power is to continue in force, the authorization must be confirmed by the Secretary of State within 48 hours. This ministerial form of oversight follows a recommendation in the *Inquiry into Legislation Against Terrorism*[83] and first appeared in the 2000 Act.

Though it is good in principle that there is review of the police decision, it is odd that the review in this instance is executive in nature rather than judicial. Elsewhere in the Terrorism Act 2000, the policy was to move toward judicial review, a prime example being secured in the review of the continued need for extended detention after arrest on reasonable suspicion of involvement in terrorism under section 41, which contrasted

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80. As amended by Police (Northern Ireland) Act 2000, §78(2) (Eng.); Anti-terrorism, Crime and Security Act 2001, §§101, 127(2)(f), sched. 7, ¶¶29, 31 (Eng.); Energy Act 2004, §§57, 197(9), sched. 23, pt. 1 (Eng.); Terrorism Act 2006, §30 (Eng.).

81. There have been at least five occasions where stops have been undertaken without prior authorization, with impact on 12 persons. LORD CARLILE OF BERRIEW Q.C., REPORT ON THE OPERATION IN 2007 OF THE TERRORISM ACT 2000 AND PART I OF THE TERRORISM ACT 2006 (2008), at ¶126.

82. Circular 03/01: Terrorism Act 2000 (2001), at ¶5.6.2.

83. 1 INQUIRY INTO LEGISLATION AGAINST TERRORISM, *supra* note 53, at ¶10.25; HOME OFFICE & NORTHERN IRELAND OFFICE, LEGISLATION AGAINST TERRORISM: A CONSULTATION PAPER (1998), Cm. 4178, at ¶9.13 (1998).

with the purely executive review of continued detention following arrest under the previous legislation, the Prevention of Terrorism (Temporary Provisions) Act 1989, section 14.[84] Furthermore, there are doubts about how effective searching ministerial scrutiny is, since there is no record of any refusal.[85]

Turning from authorization to implementation, it is made clear in section 45(1)(b) that there can be a random or blanket search – the power "may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind." When exercising stop-and-search powers, police officers are under a duty to address the provisions of Code A of the Codes of Practice to the Police and Criminal Evidence Act 1984 (commonly known as PACE).[86]

There are two general principles of relevance. First, based on paragraph 1.1, powers to stop and search must be used "fairly, responsibly, with respect for people being searched and without unlawful discrimination." It is further noted that the Race Relations (Amendment) Act 2000 makes it unlawful for police officers to discriminate on the grounds of race, color, ethnic origin, nationality, or national origins when using their powers. Paragraph 1.2 of the Code provides that the intrusion on the liberty of the person stopped or searched has to be brief, and detention for the purposes of a search has to take place at or near the location of the stop. Paragraphs 2.24 to 2.26 state that where an authorization is given under section 44, a constable might only exercise the powers for the purposes of searching for articles of a kind that could be used in connection with terrorism, whether or not there are any grounds for suspecting the presence of such articles.

On the other hand, because the power is not applied on the basis of reasonable suspicion, there may be some doubts as to whether this warning given in paragraph 2.2 is applicable at all or in part to section 44 powers:

> Reasonable suspicion can never be supported on the basis of personal factors. It must rely on intelligence or information about, or some specific behaviour by, the person concerned. For example, other than in a witness description of a suspect, a person's race, age, appearance,

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84. A failure to provide any form of judicial review of the necessity for detention fell foul of Article 5(3) of the the European Convention on Human Rights. Brogan v. United Kingdom, 11 Eur. H.R. Rep. 117 (1988). The same complaint may be more difficult to entertain against section 44 because of doubts as to whether it impacts on Article 5 rights at all, as discussed below.

85. *See* REPORT ON THE OPERATION IN 2007 OF THE TERRORISM ACT 2000, *supra* note 81, at ¶¶125-131.

86. Police and Criminal Evidence Act 1984, c. 60 (Eng.). The current version of Code A became effective January 1, 2009. Police and Criminal Evidence Act 1984, Code A, *available at* http://police.homeoffice.gov.uk/publications/operational-policing/pace-code-a-amended-jan-2009?view=Binary. Under section 67(9) of PACE, codes of practice also apply to persons other than police officers who are charged with the duty of investigating offenses or charging offenders.

> or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other as the reason for searching that person. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity. A person's religion cannot be considered as reasonable grounds for suspicion and should never be considered as a reason to stop or stop and search an individual.[87]

Indeed, paragraph 2.25 of the Code goes on to suggest that group identity can come into play in the exercise of the power:

> The selection of persons stopped under section 44 of Terrorism Act 2000 should reflect an objective assessment of the threat posed by the various terrorist groups active in Great Britain. The powers must not be used to stop and search for reasons unconnected with terrorism. Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers. There may be circumstances, however, where it is appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic identities).

As for the impact of the powers, the search is limited in extent by section 45. Searches may be exercised only for the purpose of searching for articles of a kind that could be used in connection with terrorism and may not involve a person being required to remove any clothing in public except for headgear, footwear, an outer coat, a jacket, or gloves. A further safeguard is that where a driver or pedestrian applies within twelve months for a written statement as to the legal basis for a stop, it shall be provided.

A person may commit an offense under section 47(1) in one of three ways. One is where the person fails to stop a vehicle when required to do so by a constable in the exercise of the power conferred by an authorization under section 44(1). Next, it is an offense to fail to stop when required to do so by a constable in the exercise of the power conferred by an authorization under section 44(2). Third, it is an offense willfully to obstruct a constable in the exercise of the power conferred by an authorization under section 44(1) or (2). The penalties upon summary conviction are imprisonment for a term not exceeding six months, a fine not exceeding level 5 on the standard scale, or both.

87. Compare the power in section 43 of the Terrorism Act 2000.

B. Statistics as to Application

Published statistics relating the application of section 44 are far from complete. But one of the Macpherson inquiry's recommendations was that the police should record, monitor, and analyze stops and searches, including by reference to ethnicity (but not religion).[88] The statistics reveal that, throughout the period since 2000, there have occurred two evident trends – a sustained increase in the use of this power and a disproportionate impact on Asian and other ethnic minorities. The powers of stop and search under the Terrorism Act 2000 have been used against tens of thousands of people per year, which means that, aside from port controls, section 44 is the most frequent form of public encounter with terrorism laws. The precise statistics as to use in England and Wales are as follows:

88. *See* SIR WILLIAM MACPHERSON OF CLUNY, THE STEPHEN LAWRENCE INQUIRY (1999), Cm. 4262-I, at recommendations 61-62; *see also* PACE, Code A, *supra* note 86, at ¶4.3.

TABLE 1: STATISTICS ON §44 BY EHNICITY AND LOCATION[89]

89. MINISTRY OF JUSTICE, STATISTICS ON RACE AND THE CRIMINAL JUSTICE SYSTEM – 2006, at Tables 4.6-4.8 (and prior editions of this annual publication).

The incidence of application has increased substantially over the period, more so in relation to pedestrians than vehicles. Resultant arrests of relevance to terrorism are secured at a very low rate (around 0.2% in recent years). This figure discounts the greater number of non-terrorist arrests on the ground that these impacts cannot possibly justify the existence and invocation of section 44 powers and, in any case, could have been achieved in many cases under other legislation.[90] But the arrest rate may not provide the sole basis for the assessment of "successful" outcomes. Thus, Assistant Chief Constable Beckley defended on behalf of ACPO (Association of Chief Police Officers) the lack of arrests resulting from stops and searches by stressing that "this is a power to be used to put people off their plans, hence it is used in a pretty random way."[91] The National Centre for Policing Excellence also advises that the number of arrests should not be used as the measure of success.[92] In this way, the disruptive potential of the power is more important than its interdictory potential. Of course, claims along these lines are more difficult to test in empirical terms than harder-edged outcomes, such as arrests or even convictions. In addition to these "positive" outcomes, one must also consider measurement of the wasted resources arising from the many fruitless searches or searches that take place unobserved or unpublicized and which therefore cannot have any deterrent effect.

Analysis in terms of ethnicity reveals a strong overrepresentation of ethnic minorities. The foregoing figures should be understood in the context of returns from the 2001 Census, which stated the United Kingdom's population composition as follows:

90. *See, e.g.*, Police and Criminal Evidence Act 1984, c. 60 (Eng.).

91. HOUSE OF COMMONS HOME AFFAIRS COMMITTEE, 1 TERRORISM AND COMMUNITY RELATIONS (2005), H.C. 165-I (Session 2004-05), at ¶54.

92. NATIONAL CENTRE FOR POLICING EXCELLENCE (ON BEHALF OF THE ASSOCIATION OF CHIEF POLICE OFFICERS), PRACTICE ADVICE ON STOP AND SEARCH (ON BEHALF OF THE ASSOCIATION OF CHIEF POLICE OFFICERS) (2006), at ¶4.5.2 [hereinafter 2006 PRACTICE ADVICE], *available at* http://www.met.police.uk/stopandsearch/files/Practice_Advice_on_Stop_and_Search.pdf; *see* NATIONAL POLICING IMPROVEMENT AGENCY (ON BEHALF OF THE ASSOCIATION OF CHIEF POLICE OFFICERS), PRACTICE ADVICE ON STOP AND SEARCH IN RELATION TO TERRORISM (2008), at ¶2.3 (making the same point).

TABLE 2: ENGLAND AND WALES POPULATION PROFILE BY RACE[93]

	(n)	Total Population (%)	Minority Ethnic Population (%)
White	54,153,898	92.1	n/a
Mixed	677,117	1.2	14.6
Asian or Asian British			
Indian	1,053,411	1.8	22.7
Pakistani	747,285	1.3	16.1
Bangladeshi	283,063	0.5	6.1
Other Asian	247,664	0.4	5.3
Black or Black British			
Black Caribbean	565,876	1.0	12.2
Black African	485,277	0.8	10.5
Black Other	97,585	0.2	2.1
Chinese	247,403	0.4	5.3
Other	230,615	0.4	5.0
All Minority Ethnic Population	*4,635,296*	*7.9*	*100*
All Populations	58,789,194	100	n/a

The extent of these racial inequalities in terms of the impact of section 44, which is reflected also in non-terrorism stop-and-search powers, is disputed to some extent because of the inaccuracy of police recording practices and the possible disparity between the users of public spaces and the total population.[94] Of course, these explanations hardly allay negative reactions by the unduly affected ethnic minority communities.[95] It should be noted that "Asian" should certainly not be translated as "Muslim," because only half of those belonging to the Asian group are in fact

93. OFFICE FOR NATIONAL STATISTICS, CENSUS 2001: NATIONAL REPORT FOR ENGLAND AND WALES (2003), *available at* http://www.statistics.gov.uk/StatBase/Expodata/Spreadsheets/D6588.xls .

94. *See* NICK BLAND, JOEL MILLER & PAUL QUINTON, UPPING THE PACE? AN EVALUATION OF THE RECOMMENDATIONS OF THE STEPHEN LAWRENCE INQUIRY ON STOPS AND SEARCHES (Home Office Police Research Series Paper No. 128) (2000); MVA & JOEL MILLER, PROFILING POPULATIONS AVAILABLE FOR STOPS AND SEARCHES (Home Office Police Research Series Paper No. 131) (2000); P.A.J. Waddington, Kevin Stenson & David Don, *In Proportion: Race, and Police Stop and Search*, 44 BRIT. J. OF CRIMINOLOGY 889 (2004).

95. *See* MACPHERSON, *supra* note 88; JOEL MILLER, NICK BLAND & PAUL QUINTON, THE IMPACT OF STOPS AND SEARCHES ON CRIME AND THE COMMUNITY (Home Office, Police Research Series Paper No. 127) (2000); MARIAN FITZGERALD ET AL., POLICING FOR LONDON (2002).

Muslims, though this proportion rises to 92 percent for those of Pakistani or Bangladeshi origins.[96]

The power is exercised very selectively in terms of location. Overwhelmingly, its use has been concentrated in London, where it has been in force on a rolling basis since 2001.[97] In earlier years, less than half of the police forces in England and Wales invoked the powers at all, though this portion has increased to just over a half by 2005.[98] Remarkably, up to the end of 2004, the power had not been authorized for application anywhere in Scotland.[99]

IV. CASE STUDY: CHALLENGING THE METROPOLITAN POLICE

A. Factual Background

The exercise of these powers has been considered at length by the Court of Appeal[100] and House of Lords[101] in *R. (on the Application of Gillan and Another) v. Commissioner of Police for the Metropolis and Another*. The facts were that an assistant commissioner of the Metropolitan Police gave an authorization under section 44(4) covering the whole of the Metropolitan Police District. That authorization was confirmed by the Secretary of State and was then renewed and confirmed a number of times on a continuing basis (ever since February 2001 and still persisting today). Each authorization had been given and confirmed without publicity.

The first appellant, Kevin Gillan, was a postgraduate student who visited London in September 2003 to protest against an arms fair being held at the ExCel Centre, Docklands, in east London. He was stopped and searched near the Centre. Nothing incriminating was found, and the episode lasted for around 20 minutes. The second appellant, Pennie Quinton, was an accredited freelance journalist who also attended at the Centre on September 9, 2003, to film the protests taking place. She was stopped and searched. Nothing incriminating was found. The length of the encounter was five minutes according to the police records, but about thirty minutes in Quinton's estimation.

Both appellants challenged the police action on various grounds, and each ground was given a handy title by the Court Appeal: that section 44, as an incursion into liberties, should be construed restrictively – the

96. 1 TERRORISM AND COMMUNITY RELATIONS, *supra* note 91, at ¶63; OFFICE FOR NATIONAL STATISTICS, ETHNIC GROUP BY RELIGION: APRIL 2001 Census Update (2001).

97. LORD CARLILE OF BERRIEW Q.C., REPORT ON THE OPERATION IN 2004 OF THE TERRORISM ACT 2000 (2005), at ¶92.

98. *Id.* at ¶99

99. *Id.* at ¶98.

100. R. (Gillan) v. Commissioner of Police of the Metropolis, [2004] EWCA Civ 1067.

101. R. (Gillan) v. Commissioner of Police of the Metropolis, [2006] UKHL 12.

"Interpretation Question"; that the exercise of discretion to issue the authorization on behalf of the Commissioner was unlawful – the "Authorization Question"; that the Secretary of State had exceeded his powers in confirming the authorization – the "Confirmation Question"; that the officer in charge of the police operation wrongly invoked the powers in that place and time – the "Command Question"; and that there was excessive action by the operational officers who respectively stopped and searched the appellants – the "Operational Question."

B. The Court of Appeal Judgment

These challenges were rejected by the Court of Appeal. In its view, the "Interpretation Question" was answered by the clear grant of powers in the wording of section 44. Even if a restrictive interpretation were to be adopted, an expansive power was evidently intended both in respect of the area so affected and the triggering reasons – the word "expedient" being selected to allow wide discretion.[102] At the same time, this approach did not mean, according to Lord Chief Justice Woolf, that the courts should adopt a "deferential" attitude toward executive decisions about security.[103] The statutory interpretation thus adopted by the Court is defensible, and it is primarily up to the legislature to insert more effective controls.[104] For example, section 44 authorizations should be subjected to confirmation by a judge *ab initio*, rather than by a Minister. A Privy Counsellor Review Committee likewise commented in December 2003 that, "Had Parliament envisaged such extensive and routine use of these powers, it might well have provided for different safeguards over their use."[105] The Home Office paper prepared in response made no response to this point.[106]

Another preliminary issue of interpretation resulted in a further finding against the appellants, who had suggested that the action against them was "not in accordance with the law" for the purposes of the European Convention on Human Rights[107] because the authorization was not published and was arbitrary. This contention must be appreciated in the context of the European Convention on Human Rights becoming adopted as

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102. [2004] EWCA Civ 1067 at ¶30 ("Parliament, unusually, has permitted random stopping and searching"), ¶31 ("expedient" given "its ordinary meaning of advantageous").

103. [2004] EWCA Civ 1067 at ¶35. The same point was made more forcefully by the House of Lords in *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56, ¶¶42, 44.

104. Compare the performance of the U.S. Congress in the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552.

105. PRIVY COUNSELLOR REVIEW COMMITTEE, ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 REVIEW: REPORT (2003), H.C. 100, at ¶86.

106. HOME OFFICE, COUNTER-TERRORISM POWERS: RECONCILING SECURITY AND LIBERTY IN AN OPEN SOCIETY: A DISCUSSION PAPER (2004), Cm. 6147.

107. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

the United Kingdom's Bill of Rights by virtue of the Human Rights Act 1998.[108] For its part, the Court of Appeal refused to consider the "law" as meaning anything wider than the parent statute, which clearly had been published in sufficiently clear and accessible terms. In addition, the Court of Appeal noted that any individual who is stopped has the right to a written statement under section 45(5). Yet, the Court of Appeal's reasoning at both steps may be questioned. The European Court of Human Rights has recognized that the "need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are initially couched in terms which, to a greater or lesser extent, are vague."[109] The "law" includes unwritten law in addition to written law, but a government must show more than that it has complied with domestic law:

> Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[110]

It is difficult to comprehend how a retrospective notice given to a citizen who has fallen into the clutches of police officers, informing the individual that a specified law has been applied to that location, can easily satisfy the requirement of foreseeability demanded by the Strasbourg court. Nor is it readily comprehensible, contrary to the assertion of the Court of Appeal,[111] exactly how the publication of a blanket authorization covering hundreds of square miles could compromise its effectiveness.

Taking together the "Authorization Question" and the "Confirmation Question," the evidence adduced by the Secretary of State pointed toward global and national incidents (connected with Northern Ireland) that had already occurred as the foundation for the authorization in question, plus an extensive blanket or "rolling" program of authorizations up to that point.[112]

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108. For the legislative background and impact of the Human Rights Act 1998, see generally RICHARD CLAYTON & HUGH TOMLINSON, THE LAW OF HUMAN RIGHTS (2000); DAVID FELDMAN, CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES (2d ed. 2002); ANTHONY LESTER & DAVID PANNICK, HUMAN RIGHTS LAW AND PRACTICE (2d ed. 2004); Clive Walker & Russell L. Weaver, *The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World*, 33 U. MICH. J.L. REFORM 497 (2000).

109. Kuijper v. Netherlands, App. No. 64848/01 (Eur. Ct. H.R., Mar. 3, 2005, unreported).

110. Malone v. United Kingdom, 7 E.H.R.R. 14 (1984), at ¶66 (quoting the Court's 1979 judgment in *Sunday Times v. United Kingdom*).

111. [2004] EWCA Civ 1067 at ¶49.

112. [2004] EWCA Civ 1067 at ¶¶50, 51.

That the court did not object to this all-purpose evidence opens the way to the continuation of a proactive invocation of authorizations to an extent that seemingly nullifies the point of having specific and periodic authorizations.

C. The Command Question

In those circumstances, the "Command Question" added little. Provided the police commander could imagine a possible reason for terrorists targeting the arms fair, then administrative law rests content. More disturbingly, the Lord Chief Justice cited as acceptable reasons "the nature of the fair, its location near an airport and a previous site of a terrorist incident (connected with the Northern Ireland problems), and the fact that a protest was taking place."[113] Given that the U.K. arms industry is immense and that the IRA has perpetrated attacks in many locations in England since its foundation in 1918, it would seem once again that these draconian powers can effortlessly be invoked. The concatenation of protest with terrorism is most disturbing of all and should be rejected as either loose language or loose thinking.

A further aspect of the "Command Question" was the requirement that that operational officers should receive carefully designed instructions. Here at least, the Court of Appeal was critical: "The evidence as to what happened is lamentable."[114] These remarks echoed those of the Divisional Court,[115] which had been even more robust in warning that the guidance in the Police and Criminal Evidence Act Code of Practice A[116] was wanting. Lord Justice Brooke had found "just enough evidence" to satisfy the court that sufficient care and attention had been applied, but "it was a fairly close call," which he underscored with a demand for a review of police training and briefings and revisions to Code A advice so that it is more pertinent to section 44 and does not just emphasize discrimination against particular ethnic groups.[117] The issue was followed up by the official reviewer of the Terrorism Act 2000, Lord Carlile, who sensibly suggested written guidance to be issued to operational officers that rehearsed the possibilities of powers within and without the antiterrorism legislation and the possibility of switching between them.[118] Home Office guidance has since been issued, although it is more relevant to the Command Question itself. Officers are required to review fully the intelligence on each authorisation and clearly show the link between that intelligence and the geographic extent of the

113. [2004] EWCA Civ 1067 at ¶52.

114. [2004] EWCA Civ 1067 at ¶53.

115. [2003] EWHC 2545 (Admin).

116. *See* PACE, Code A, *supra* note 86, at ¶2.25 (as amended in 2003).

117. [2004] EWCA Civ 1067 at ¶58.

118. LORD CARLILE OF BERRIEW Q.C., REPORT ON THE OPERATION IN 2002 AND 2003 OF THE TERRORISM ACT 2000 (2004), at ¶86.

location in which the powers will be used, though a force-wide authorization is still permitted.[119]

Later guidance from the National Centre for Policing Excellence[120] on behalf of ACPO mentions merely that "Forces should review sites and locations in their policing area which could present a target to terrorists and consider this information along with national and local intelligence."[121] More pertinently, officers are to be briefed about the availability of alternative powers under PACE,[122] but there is no elaboration of the factors guiding the choice of "special" or "normal" powers to stop and search or as between the choice between stops and arrests or as between stops and searches and other tactics such as a high visibility presence.[123] The work of the National Centre for Policing Excellence has now been taken up by the National Policing Improvement Agency.[124] Its *Practice Advice on Stop and Search in Relation to Terrorism* is described as replacing the earlier APCO documents on the subject,[125] but it gives no further examples or directions as to the proper applications of section 44 compared to other powers or tactics.

D. The Operational Question

At the "operational" level, the Court of Appeal was likewise critical but ultimately more forgiving. To the court's annoyance,[126] the frontline officers had provided notes but not statements to the lower court. Given the number of stops per authorization, it may be unrealistic to expect recollection of any detail. At the same time, the appellants were not able to demonstrate any breach of the powers.

Recent years have witnessed a proliferation of police powers of detention short of arrest, whether in the form of stops and searches under the Police and

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119. *See, e.g.*, HOME OFFICE, HOME OFFICE CIRCULAR 038/2004: AUTHORISATIONS OF STOP AND SEARCH POWERS UNDER SECTION 44 OF THE TERRORISM ACT (2004); HOME OFFICE, HOME OFFICE CIRCULAR 22/2006: AUTHORISATIONS OF STOP AND SEARCH POWERS UNDER SECTION 44 OF THE TERRORISM ACT (2006) (replacing the 2004 version).

120. This body, set up in 2002, was part of the Central Police Training and Development Authority (CENTREX), established under the Criminal Justice and Police Act 2001, Pt. IV.

121. 2006 PRACTICE ADVICE, *supra* note 92, at ¶4.4.1.

122. *Id.* ¶4.5.

123. *See id.* ¶4.4.1.

124. This agency became operational in 2007 in pursuance of the proposals in the Home Office paper *Building Communities, Beating Crime*, and the Police and Justice Act of 2006. HOME OFFICE, BUILDING COMMUNITIES, BEATING CRIME: A BETTER POLICE SERVICE FOR THE 21ST CENTURY (2004), Cm. 6360, at ¶5.42; Police and Justice Act 2006, c. 48 (Eng.).

125. NATIONAL POLICING IMPROVEMENT AGENCY (ON BEHALF OF THE ASSOCIATION OF CHIEF POLICE OFFICERS), PRACTICE ADVICE ON STOP AND SEARCH IN RELATION TO TERRORISM 3 (2008), *available at* http://www.npia.police.uk/en/docs/Stop_and_Search_in_Relation_to_Terrorism_-_2008.pdf.

126. [2004] EWCA Civ 1067 at ¶55.

Criminal Evidence Act 1984, section 1,[127] the Terrorism Act 2000, or of antisocial behavior provisions (such as in the Criminal Justice and Police Act 2001 and the Anti-Social Behaviour Act 2003). There was further encouragement to this trend in *Gillan* by the Court of Appeal, which considered that "a short detainment pursuant to a stop and search power will normally fall outside Article 5 [of the European Convention]"[128] or would otherwise fall within Article 5(1)(b).[129] Yet, as was true of their forerunners, such as the notorious "sus" laws,[130] the product is low-visibility policing, which is difficult to monitor or restrain. If there are few practical fetters on when and where police powers are used, we should not be too surprised if the "usual suspects," such as demonstrators, are mistaken for terrorists. In this way, all-risks policing is shaped by custom and practice, especially by the impact of police cultures that depict certain cohorts as more suspect than others.[131] These cultures can come to the fore when legal guidance is absent and when supervision, as occurs to some extent on arrest, is not triggered.

One might suppose that the absence of reasonable suspicion would per se put into question its compatibility with liberty and privacy[132] rights under Articles 5 and 8 of the European Convention, but the preconditions for exercise, the limited nature of the search, and the nexus to combating terrorism may save the day. The European Commission so concluded in *McVeigh, O'Neill, and Evans v. United Kingdom* in the context of detention periods far exceeding those under section 44 in the furtherance of the checks of travelers at ports.[133]

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127. Note also the powers allowing stops and searches for "dangerous instruments or offensive weapons" under the Criminal Justice and Public Order Act 1994, §60 (Eng.). *See* Faiza Qureshi, *The Impact of Extended Stop and Search Powers Under the U.K. Criminal Justice Act 2003*, 30 POLICING 466 (2007).

128. [2004] EWCA Civ 1067 at ¶46; *see* R (Laporte) v. Chief Constable of Gloucestershire Constabulary, [2004] EWCA Civ 1639.

129. [2004] EWCA Civ 1067 at ¶44.

130. Vagrancy Act 1824, §4 (Eng.); HOUSE OF COMMONS HOME AFFAIRS COMMITTEE, RACE RELATIONS AND THE "SUS" LAW (1980), H.C. 559 (Session 1979-80).

131. *See* JANET B.L. CHAN, CHANGING POLICE CULTURE: POLICING IN A MULTICULTURAL SOCIETY (1997); REINER, *supra* note 7; Mike Rowe, *Rendering Visible the Invisible: Police Discretion, Professionalism and Decision-making*, 17 POLICING & SOCIETY 279 (2007).

132. It should be noted that there is no power under "normal" powers under PACE §1 to require a person to remove any clothing in public other than an outer coat, jacket or gloves. But §45(3) of the Terrorism Act 2000 empowers a constable conducting a search under §44(1) or §44(2) of that Act to require a person to remove headgear and footwear in public. It may also be noted that under §60AA of the Criminal Justice and Public Order Act 1994 a constable can require a person to remove any item worn to conceal identity.

133. App. Nos. 8022, 8025, 8027/77, 18 Eur. Comm'n H.R. Dec. & Rep. 66 (1979) (admissibility); 25 Eur. Comm'n H.R. Dec. & Rep. 15, 5 Eur. H.R. Rep. 71 (1981) (final report). This decision may be viewed as vulnerable in the light of later Court case law. Murray v. United Kingdom, App. No. 14310/88, 19 Eur. H.R. Rep. 193 (1994); Fox, Campbell and Hartley v. United Kingdom, App. Nos. 12244, 12245, 12383/86, 13 Eur. H.R. Rep. 157 (1990). Detention without reasonable suspicion at a port is now limited to nine hours. Terrorism Act 2000, sched. 5, ¶6 (Eng.).

E. Appeal to the House of Lords

1. The Interpretation, Authorization, and Confirmation Questions

Gillan was appealed to the House of Lords. Many issues dissected before the Court of Appeal were duly resurrected. Thus, there was an "Interpretation Issue." This broke down first into a dispute as to the construction of the word "expedient" in section 44(3) and whether it should be interpreted as permitting an authorization to be made only if there were reasonable grounds for considering that the powers were necessary and suitable for the prevention of terrorism. The House of Lords determined that it was significant that Parliament had chosen the word "expedient," not the word "necessary."[134] It was also deemed significant that section 44 dispensed with the condition of reasonable suspicion and that sections 44 and 45 are set in a series of constraints. Taking these contexts together, section 44(3) was taken to mean that an authorization might be "expedient" if, and only if, the person giving it considered it likely that the stop-and-search powers would be of significant practical value and utility in seeking to achieve the prevention of acts of terrorism. That result is seemingly close to an administrative law standard. Objectivity is required to the extent that the authorization must not be irrational – it is hard to see how it could be proven that an officer might suppose that there is significant practical value and utility if no reasonable onlooker could concur with such a view.

In this respect, the House of Lords thankfully did not sustain a wholly unreviewable subjective basis for decisionmaking of a kind that bedevils security measures and which demands only that the executive authority expresses genuine suspicion or fear. Conversely, it is arguably less demanding than the Home Office Circular 038/2004, *Authorisations of Stop and Search Powers Under Section 44 of the Terrorism Act*, addressed to Chief Officers of Police, which emphasizes that "Powers should only be authorised where they are absolutely necessary to support a [force's] anti-terrorism operations." That standard may require the ruling out of alternative strategies, though it may be notable that the wording adopted in the next version of the circular, issued in 2006, stated more circumspectly that "Powers should only be authorised where they can be justified on the grounds of preventing acts of terrorism."[135]

Next, several points concerning the authorization and confirmation of the invocation of section 44 were examined. Lord Bingham was persuaded as to the need for wide geographical spread and the possibility of early,

134. [2006] UKHL 12 at ¶14 (per Lord Bingham). Lord Scott adopted a different argument by reference to section 48(3). *Id.* at ¶60.

135. *Compare* HOME OFFICE CIRCULAR 22, *supra* note 119, *with* HOME OFFICE CIRCULAR 038, *supra* note 119.

disruptive police action that may be divorced from the actual point of attack.[136] Lord Bingham was also satisfied that the authorization and confirmation procedures had not become a "routine bureaucratic exercise"[137] despite the rolling enforcement of these powers over several years. The specific threats at any one time to specific targets do not seem to have been revealed, though there was an offer to explore the evidence more fully before the Divisional Court, subject to yet another deployment of a special advocate, an offer that was not taken up[138] but that might answer any complaints under Article 5(4) of the European Convention as to the availability of effective review of the merits.[139] Even in the absence of this inquiry, one might argue that their Lordships here too easily accepted evidence of vulnerabilities (which are indeed diffuse and permanent and so can be used to justify diffuse and de facto permanent powers) as equivalent to evidence of threats.

2. The Command and Operational Questions

As for the "command and implementation questions," Lord Bingham emphasized that the implementing constable is not free to act arbitrarily and must not stop and search people who are "obviously not terrorist suspects."[140] So the absence of a requirement of reasonable suspicion is not tantamount to carte blanche. Albeit that the applicants were not from an ethnic minority so the issue did not pertain to them, some of their Lordships were troubled by the lingering dangers of discrimination – how can discrimination be detected in the first place, and how in practice is discriminatory use of the power to be prevented?

Insofar as rationality is to govern discretion, the answer is often given in terms of racial, ethnic, or national profiling, which might be described as:

> . . . when race or nationality is used as a factor in determining whom to stop, search, question, or arrest – whether in an investigative stop and frisk, a motor vehicle pretext search, or a security search – unless there is a suspect-specific or crime-specific exception to this general rule.[141]

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136. [2006] UKHL 12 at ¶17.

137. [2006] UKHL 12 at ¶18.

138. [2006] UKHL 12 at ¶64.

139. *See generally* R. v. Bournewood Community and Mental Health NHS Trust, *ex parte* L, [1999] AC 458; HL v. United Kingdom (App. No. 45508/99) (Oct. 5, 2004).

140. [2006] UKHL 12 at ¶35.

141. Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1206 (2003). Gross and Livingston argue that racial profiling "occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating." Samuel R. Gross & Debra Livingston, *Racial Profiling Under*

The U.S. Department of Justice has offered the following more pejorative comment:

> "Racial profiling" at its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.[142]

These considerations lead to a damning assessment of the role of profiling:

> At its most productive, counterterror and law enforcement activities proceed from 'actionable' intelligence. In its absence, profiling is necessary. At their most useful, profiles are based on behavior, like the purchase of a one-way ticket, travel to certain countries, or participation in flight training. When based exclusively on racial, ethnic, or religious characteristics, profiles offend the targeted groups and do not constitute useful counterterror tools. Profiles need to evolve based on new intelligence.[143]

As suggested above, profiling should not to be divorced from intelligence, but in practice the two do diverge, as shall now be illustrated.

Attack, 102 COLUM. L. REV. 1413, 1415 (2002). An alternative definition is offered in John Dwight Ingram, *Racial and Ethnic Profiling*, 29 T. MARSHALL L. REV. 55, 55-56 (2003): "Racial and ethnic profiling is the reliance by a law enforcement official, to any degree, on race, ethnicity, or national origin in selecting which individuals to subject to routine investigatory activities, or determining the degree and scope required under the circumstances following the initial routine investigatory activity."

142. U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (2003), *available at* http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm. The guidance allows the use of race as a factor in specific anti-terrorist and national security investigations where "there is trustworthy information, relevant to the locality or time frame, that links personas of a particular race or ethnicity to an identified criminal incident, scheme, or organization." *Id.; see* Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67 (2004); *see also* U.S. DEP'T OF TRANSPORTATION, FACT SHEET: ANSWERS TO FREQUENTLY ASKED QUESTIONS CONCERNING THE AIR TRAVEL OF PEOPLE WHO ARE OR MAY APPEAR TO BE OF ARAB, MIDDLE EASTERN OR SOUTH ASIAN DESCENT AND/OR MUSLIM OR SIKH (2001), *available at* http://airconsumer.ost.dot.gov/rules/20011119.htm ("The Department is committed to ensuring that all persons are provided equal protection of the laws and that no person is subject to unlawful discrimination when traveling in the Nation. Various Federal statutes prohibit unlawful discrimination against air travelers because of their race, color, religion, ethnicity, or national origin.").

143. Donald Kerwin, *The Use and Misuse of 'National Security' Rationale in Crafting U.S. Refugee and Immigration Policies*, 17 INT'L J. REFUGEE L. 749, 754-755 (2005). For definitions of profiling, see Sujit Choudhry, *Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the Charter*, *in* THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL 367, 368-370 (Ronald J. Daniels et al. eds., 2001).

Returning to *Gillan*, in Lord Hope's view, "the mere fact that the person appears to be of Asian origin is not a legitimate reason for [profiling's] exercise."[144] While an appearance that suggests that the person is of Asian origin may attract the constable's attention in the first place, a further factor must be in the mind of the constable even if on the spur of the moment and subjectively felt; otherwise the selection may be inherently discriminatory.[145] This important guidance was certainly felt to be more pertinent and practicable than appellants' submission that the power should be applied "by stopping and searching literally everyone (as, of course, occurs at airports and on entry to certain other specific buildings) or by stopping and searching on a strictly numerical basis, say every tenth person."[146] To put this in police terms, Ian Johnston, Chief Constable of the British Transport Police, stated in 2005 that

> We should not waste time searching old white ladies. It is going to be disproportionate. It is going to be young men, not exclusively, but it may be disproportionate when it comes to ethnic groups.[147]

Likewise, Home Office Minister Hazel Blears concurs that sources of the terrorist threat "inevitably means that some of our counter-terrorist powers will be disproportionately experienced by people in the Muslim community."[148] Thus, intuitive stops must remain, but there must be more to them than the racial origins of the subject – there must be a connection to reasons connected with the perceived terrorist threat.

This resolution too easily accepts that race is by its very nature sufficiently connected to terrorist suspect description and that it does not unduly divert attention from more pertinent criteria such as behavioral and antecedent information.[149] It also remains troublesome to reconcile this partial reliance on racial origins as a basis for official action with the decision in *R. (European Roma Rights Centre) v. Immigration Officer at Prague Airport*.[150] In that case, the House of Lords found unlawful the targeting at Prague Airport of Roma passengers, who because of their ethnicity were routinely treated with more suspicion and subjected to more intense and intrusive questioning than other potential asylum-seekers. Lord Brown concluded that the case must be interpreted as contending that there

144. [2006] UKHL 12 at ¶45.

145. [2006] UKHL 12 at ¶46.

146. [2006] UKHL 12 at ¶76 (Lord Brown).

147. Vikram Dodd, *Asian Men Targeted in Stop and Search*, GUARDIAN, Aug. 17, 2005, at 6.

148. 3 TERRORISM AND COMMUNITY RELATIONS, *supra* note 91, HC 165-III, at Ev 97 (Q 474).

149. *See* Ramirez et al., *supra* note 141; Mariano-Florentino Cuellar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9, 34 (2003).

150. [2005] 2 AC 1.

was no other operative factor in the minds of those immigration officers,[151] whereas the police implementing the Terrorism Act do ultimately focus on terrorism, not on ethnic origins. A more forthright answer was given by Lord Scott, who suggested a reconciliation by reference to sections 41(1)(a) and 42 of the Race Relations Act 1976, as amended,[152] though one doubts that the Terrorism Act gives sufficiently explicit permission to discriminate to come within section 41(1)(a) or that discrimination is inherently necessary for the purpose of safeguarding national security under section 42. The legislation directs the police toward terrorists, not young Asian males.

3. Respect for Individuals and Communities

Together with the dissection of construction and implementation based on administrative law, the House of Lords concentrated heavily on human rights issues, which questioned again the levels of respect shown to individuals and their communities.

The first issue was that the very design of the powers appeared to contravene the right to liberty in Article 5(1) of the European Convention on Human Rights by infringing on liberty without legitimate and stated grounds for doing so. In response, Lord Bingham sustained a continuing trend in English case law, which is to deny its applicability to detentions that occur during police operations where detention is not the primary aim,[153] such as in searches[154] and operations to keep the peace.[155] It is regrettable that no reference was made to the decision in *Murray v. Ministry of Defence*,[156] where there was no doubt that holding an occupant for thirty minutes pending a house search by soldiers in Northern Ireland was a detention. Lord Bingham claimed that no European decision was closely analogous on the facts with *Gillan*,[157] though there is surely a clear enough principle (and cases more recent than 1981) that Article 5(1) may apply in principle to deprivation of liberty of a very short duration.[158] It is true that a

151. [2006] UKHL 12 at ¶90.

152. [2006] UKHL 12 at ¶68.

153. [2006] UKHL 12 at ¶25.

154. R. (Laporte) v. Chief Constable of Gloucestershire Constabulary, [2004] EWCA Civ. 1639. The decision was reversed in part by the House of Lords but for reasons relating to the interpretation of the concept of breach of the peace rather than the interpretation of liberty. [2006] UKHL 55.

155. Austin v. Commissioner of Police of the Metropolis, [2005] EWHC 480 (QB).

156. [1988] 2 All ER 521 (HL); *see* Clive Walker, *Army Special Powers on Parade*, 39 N. IRELAND LEGAL Q. 1 (l989).

157. [2006] UKHL 12 at ¶23.

158. See not only X. v. Austria, App. No. 8278/78, 18 Eur. Comm'n H.R. Dec. & Rep. 154 (1978) and X. v. Germany, App. No. 8819/79, 24 Eur. Comm'n H.R. Dec. & Rep. 158 (1981) (which were cited), but also B. v France, App. No. 10179/82, 52 Eur. Comm'n H.R. Dec. & Rep. 111 (1987), Reyntjens v Belgium, App. No. 16810/90, 73 Eur. Comm'n H.R.

stop and search under section 45 would ordinarily be relatively brief and not intrusive – the person would not be handcuffed or removed from the scene. But to depict the process as akin to being kept from proceeding or kept waiting through official direction,[159] as would apply if waiting to board a bus or waiting until the light turns green at a pedestrian crossing, is wholly unconvincing for two important reasons. Section 45 involves first the exercise of an official coercive power, not a directive power – the person waiting for the bus or for the green light can give up and try another route. Persons subject to section 45 must comply; they do not have the choice to turn around and take a detour. Nor is the time of "non-detention detention" as fleeting as suggested. In Gillan's case, it lasted for 20 minutes,[160] admittedly still less than the seven hours of "non-detention detention" to prevent a breach of the peace by demonstrators in the case of *Austin*.[161] Aside from the inconsistency of this approach with the principles behind Article 5, it is also inconsistent with cases regarding false imprisonment whereby unauthorized detentions for an hour or more in the context of otherwise lawful police operations have been readily found to be tortious.[162]

As for Article 8 rights, the stop and search were proportionate and readily justified as necessary in a democratic society. Their lawful exercise would readily be found to be proportionate in relation to the clear and present danger of terrorism. The assumption that Article 8 was infringed in the first place raised the observation from Lord Bingham, parallel to his treatment of Article 5, that it was "doubtful whether an ordinary superficial search of the person can be said to show a lack of respect for private life."[163] Similar arguments assuaged concerns about Article 10 and Article 11 rights.

For both Article 5 and Article 8, the police power had to be "lawful" – "prescribed by law" under Article 5(1) and "in accordance with the law" under Article 8(2) – which in Convention terms meant that the power must be governed by clear and publicly accessible rules of law. A sharp attack was made on the basis that the authorization and confirmation under section 44 were not accessible to the public, who would thereby be rendered ignorant of the applicability of the law at any given time or place.

The attack was rebuffed. Their Lordships viewed section 44 as conveying the definition and limits of the powers with considerable precision. It was bolstered by Police and Criminal Evidence Act Code A,

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Dec. & Rep. 136, Järvinen v Finland, App. No.30408/96 (Jan. 15, 1998), and Vasileva v. Denmark, App. No. 52792/99 (Sept. 25, 2003).

159. [2006] UKHL 12 at ¶25.

160. [2006] UKHL 12 at ¶2.

161. Austin v. Comm'r of Police of the Metropolis, [2005] EWHC 480 (QB).

162. Roberts v. Chief Constable of Cheshire Constabulary, [1999] 2 Cr App R 243; Davey v. Chief Constable, R.U.C., [1988] NI 139; Petticrew v. Chief Constable, R.U.C., [1988] NI 192.

163. [2006] UKHL 12 at ¶28.

though the House of Lords rightly doubted whether that Code could count as "law" rather than as procedure for bringing the law into potential effect. It was deemed by Lord Bingham not to be a necessary requirement of "lawfulness" that further information or warnings had to be given about the authorization or confirmation process because that process was about implementation rather than about "law" itself.[164] Lord Bingham was further seduced into this stance by arguments of security – that "publishing the details of authorisations . . . would by implication reveal those places where such measures had not been put in place, thereby identifying vulnerable targets," and that the scheme would be "gravely weakened" as a result.[165]

These latter views, it is submitted, confuse legal availability with strategies or tactics of operational implementation across an area as large as London. Contrary to the further assertion of Lord Hope, publication would not at all reveal "when and where the use of the procedure is to be authorised and whom they should stop on the spur of the moment";[166] the police still have full discretion throughout London to apply or not apply at any given time or place. Furthermore, given that court cases have now revealed that the sections have been in continuous force throughout London since 2001, only a dim-witted terrorist would be unaware of these powers. If the public deserves, as contended by Lord Bingham, "clear and publicly accessible rules of law,"[167] then sections 44 and 45 cannot realistically be said to be sufficiently accessible or sufficiently precise to enable the individual to foresee the consequences of walking down a public thoroughfare without reference to the section 44 authorizations and confirmations.

The view that the local community deserves more concern and respect and thus ought to know the state of play on section 44 is shared by the ACPO. In their *Interim Practice Advice on Stop and Search in Relation to the Terrorism Act 2000* (issued in 2005 and thus existing at the time of the relevant judgments),[168] the value of community consultation, if possible in advance of a section 44 authorization, is reiterated at several points and includes discussions with relevant groups and in the media: "Community consultation is essential when seeking to exercise these powers, excluding exceptional and urgent cases when consultation will have to occur as soon as possible after the authorisation has been granted."[169]

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164. [2006] UKHL 12 at ¶¶33-35.

165. [2006] UKHL 12 at ¶¶33, 35.

166. [2006] UKHL 12 at ¶51.

167. [2006] UKHL 12 at ¶34.

168. NATIONAL CENTRE FOR POLICING EXCELLENCE (ON BEHALF OF THE ASSOCIATION OF CHIEF POLICE OFFICERS), INTERIM PRACTICE ADVICE ON STOP AND SEARCH IN RELATION TO THE TERRORISM ACT 2000 (2005), *available at* http://www.met.police.uk/stopandsearch/files/practice_advice_on_stop_and_search_in_relation_to_terrorism_act_2000.pdf.

169. *Id.* ¶2.1.1.

How can there be such consultation without revealing that an authorization will apply to that area? Admittedly, there follows the somewhat opaque statement in paragraph 3.1 that "Care should be taken when informing communities as to the location and extent of a section 44 authorisation, as public safety is paramount." Does this mean care should be taken to convey this information so that the public knows and can feel safe, or care should be taken not to convey this information so that the potential terrorists are not forewarned? Even if the latter interpretation were to be adopted, how can there be consultation with a community without revealing that section 44 is in force in its area, or do the police organize "foil" consultations to put people off the scent? In short, whether by accident or design, it would appear that what the police chiefs consider to be good practice is closer to the concept of the rule of law than the story spun to the House of Lords that distracted Lords Bingham and Hope.

That their Lordships' apprehensions are unfounded is again highlighted by guidance that has superseded the ACPO Interim Practice document. The Interim Practice Advice was replaced first by a finalized *Practice Advice on Stop and Search*, issued on behalf of ACPO in 2006 by the National Centre for Policing Excellence.[170] While adopting the previous general advice about the value of community consultation,[171] it is given greater emphasis because it will increase confidence, reassure the public, and encourage the flow of intelligence.[172] Consultation is especially important under section 44 in the absence of proof of reasonable suspicion, which is recognized as having "the potential to increase tensions within communities."[173] But this general rule is subject to some reflection on whether it is safe to pass on information about the location and extent of section 44 activity; operational reasons might also rule out prior consultation, but the *Practice Advice* does firm up the previous version and demands information by way of posters and signs as well as consultation as soon as possible so that communities are made to feel "valued and respected."[174] In the exercise of these powers, the police are further instructed that ethnicity alone should not be used as the basis for their use, on the grounds that "Terrorists come from all ethnic groups and all walks of life. Actions define a terrorist not ethnicity, race or religion."[175] The National Police Improvement Agency's 2007 publication, *Practice Advice on Stop and Search in Relation to the Terrorism Act*, simply repeats most of these

170. *See supra* text accompanying notes 120-125. The 2006 *Practice Advice*, *supra* note 92, covers all common statutory powers and not just the Terrorism Act, and the author thanks Charlie Hedges for the supply of a copy. *See also* Liberty, Response to Consultation (2006), http://www.liberty-human-rights.org.uk/pdfs/policy06/ncpe-stop-and-search-practice. pdf. The most recent version of the document is cited in note 125, *supra*.

171. 2006 PRACTICE ADVICE, *supra* note 92, at ¶4.4.1.

172. *Id.* ¶2.1.

173. *Id.* ¶2.3

174. *Id.* ¶2.3

175. *Id.* ¶4.5.1.

points,[176] but it does usefully indicate some of the local bodies that might be consulted. It also suggests contact with ACPO's National Community Tension Team, which can assist with Community Impact Assessments, which should take place when section 44 is utilized.[177] There is also a reminder[178] that local police authorities have a duty under the Race Relations Act 1976, section 71, to eliminate unlawful racial discrimination and promote equality of opportunity and good relations between persons of different racial groups.[179] This duty is viewed as entitling the local police authorities to oversee police policies and training arrangements, access stop and search data, and provide feedback on community views.

These messages are in the main reinforced by two further sources. First, there is the report from Her Majesty's Inspectorate of Constabulary, *A Need To Know*, which emphasizes ". . . the vital importance of extending the reach of the national security agencies by further utilising the close links between local police and the communities in which they work."[180] Second, the *Stop and Search Manual* was published in 2005 by the Stop and Search Action Team in the Home Office,[181] though its statements on community involvement primarily relate to other powers.[182] But it is made equally clear, in answer to the question raised earlier about the applicability of Police and Criminal Evidence Act Code A, that its requirements based on the premise of reasonable suspicion do not apply here:

> The selection of persons stopped under section 44 of Terrorism Act 2000 should reflect an objective assessment of the threat posed by the various terrorist groups active in Great Britain. The powers must not be used to stop and search for reasons unconnected with terrorism. Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers. There may be circumstances, however, where it is appropriate for officers to take account of a person's ethnic origin

176. NATIONAL CENTRE FOR POLICING EXCELLENCE (ON BEHALF OF THE ASSOCIATION OF CHIEF POLICE OFFICERS), PRACTICE ADVICE ON STOP AND SEARCH IN RELATION TO THE TERRORISM ACT (2007), *available at* http:// police.homeoffice.gov.uk/publications/operational-policing/advice-stop-search-terrorism-act? view=Binary. For example, the latter quotation is at paragraph 2.2.1, while the concerns about community consultation are set out in paragraph 3.1.

177. *Id.*

178. *Id.* ¶3.3.

179. *See* MACPHERSON, *supra* note 88, at recommendation 63 ("That Police Authorities be given the duty to undertake publicity campaigns to ensure that the public is aware of 'stop and search' provisions and the right to receive a record in all circumstances.").

180. DAVID BLAKEY, A NEED TO KNOW: HMIC INSPECTION OF SPECIAL BRANCH AND PORTS POLICING (2003), at ¶2.3.

181. HOME OFFICE, STOP & SEARCH MANUAL (2005), *available at* http://police.home office.gov.uk/news-and-publications/publication/operational-policing/stopandsearch-inter manual1.pdf?view=Binary.

182. *Compare id.* ¶1.20 *with id.* ¶1.24.

> in selecting persons to be stopped in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic identities).[183]

V. RACIAL PROFILING AND ALL-RISKS POLICING

Do the dicta of the House of Lords, plus the unenforceable guidelines of the Home Office and various policing agencies, amount to a final or even a sufficient word on the subject of racial profiling? While the rise of all-risks policing in the face of a pervasive terrorism threat is unsurprising, the history of section 44 suggests that "all-risks" will rarely be applied evenly. It might be distinguished in very specific locales, such as screening in airports, where it is conceivable that the same level of scrutiny could be applied uniformly to all. However, even in that situation, the weight of numbers of passengers in reality means that choices are made, and profiling, blacklists, and watchlists have been developed. The ensuing problems of perceptions or realities of discrimination and also the inefficiency of applying inappropriate considerations may be dismissed by some commentators as hot air on the basis that

> Racial profiling is "the most misunderstood and emotionally laden term in the modern vocabulary of law enforcement and politics."[184]

But the reality for the United Kingdom is that the powers of stop and search in section 44 remain highly contentious. Not only are they exercisable without the usual protection of reasonable suspicion;[185] but also the quest for terrorists impacts most heavily on ethnic minorities. The House of Commons Home Affairs Committee found "a clear perception among all our Muslim witnesses that Muslims are being stigmatised by the operation of the Terrorism Act: this is extremely harmful to community relations."[186] As a result, Lord Carlile, the independent reviewer of terrorism legislation, has recognized its dangers[187] and has called for much

183. PACE, Code A, *supra* note 86, at ¶2.25.

184. DERSHOWITZ, *supra* note 53, at 207. It is further argued that identity cards would "eliminate much of the justification now offered for racial or ethnic profiling." *Id.* at 203. But why is that so? Those asked to produce cards are not being targeted on different grounds. If racial "misplacement" was an operative factor beforehand, then it will continue to be so under an all-risks provision such as identity cards. Thus, it will be minorities who are stopped and asked to show their cards.

185. This feature distinguishes them from the already controversial power to stop and search in the Police and Criminal Evidence Act 1984, §1 (Eng.), under which black males are six times more likely to be stopped than white males. HOME OFFICE, STATISTICS ON RACE AND THE CRIMINAL JUSTICE SYSTEM (1999), at 7; *see* Waddington et al., *supra* note 94, at 892-893.

186. 1 TERRORISM AND COMMUNITY RELATIONS, *supra* note 91, at ¶153.

187. REPORT ON THE OPERATION IN 2004 OF THE TERRORISM ACT 2000, *supra* note 97, at ¶106 ("section 44 . . . involves a substantial encroachment into the reasonable expectation of

more restrained application.[188] Even the police, represented by Peter Clarke, Deputy Assistant Commissioner of the Metropolitan Police, have publicly recognized that these provisions need to be much more tightly focused.[189] Not only does this create social tensions; it also will hamper the flow of assistance from the community.[190] The practice also bolsters the accusation made by the Macpherson Inquiry into the police handling of the racist murder of Stephen Lawrence in 1999.[191] Based on the investigation of that murder, the inquiry concluded that "institutional racism" was "a corrosive disease" in all British police forces, and one of the symptoms was the racial difference in the impacts of stop-and-search powers.[192] As the U.S. Department of Justice has stated:

> Racial profiling in law enforcement is not merely wrong, but also ineffective. Race-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society. The use of race as the basis for law enforcement decision-making clearly has a terrible cost, both to the individuals who suffer invidious discrimination and to the Nation, whose goal of "liberty and justice for all" recedes with every act of such discrimination.[193]

To that clear statement of policy must be added the statements of nondiscrimination in international law, including Article 26 of the International Covenant on Civil and Political Rights and Article 14 of the European Convention on Human Rights. There are also important "soft" law guidelines, such as the U.N. Code of Conduct for Law Enforcement Officials[194] and the European Code of Police Ethics of the Council of Europe.[195] The U.N. Committee on the Elimination of Racial

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the public at large that they will only face police intervention in their lives (even when protesters) if there is reasonable suspicion that they will commit a crime").

188. *See* REPORT ON THE OPERATION IN 2006 OF THE TERRORISM ACT 2000, *supra* note 73, at ¶114.

189. Alan Travis, *Use of "Stop and Search" Terror Law Alienating Muslims, Warns Yard*, GUARDIAN, Feb. 17, 2006, at 4.

190. *See* McDonnell, *supra* note 17, at 35-37.

191. MACPHERSON, *supra* note 88; *see* MICHAEL ROWE, POLICING, RACE AND RACISM (2004); POLICING BEYOND MACPHERSON (Michael Rowe ed., 2006).

192. MACPHERSON, *supra* note 88, at ¶¶6.34, 6.39, 6.45.

193. U.S. DEPT. OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (2003), *available at* http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm.

194. G.A. Res. 34/169, U.N. Doc. A/RES/34/169 (Dec. 17, 1979), at Art. 2 and Commentary 2(a) (Code of Conduct for Law Enforcement Officials).

195. Recommendation (2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics, Sept. 19, 2001, Appendix, Article 40.

Discrimination[196] has warned against discriminatory measures in pursuance of combating terrorism. The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, has expressed serious concerns about discriminatory profiling based on "stereotypical assumptions that persons of a certain 'race,' national or ethnic origin or religion are particularly likely to commit crime."[197]

A comparison might be made with criminal profiling, which is commonplace. But descriptive criminal profiles[198] point to specific individual characteristics relating to a perpetrator and/or a completed crime. It would be quite wrong to believe that such profiling is not also affected by cultural considerations (including racism), but at least the starting point is more empirical and specific than in the case of stops and searches. Accordingly, the courts have treated this approach as impermissible, such as in *Brown v. City of Oneonta*.[199] Law enforcement officials possessed a witness description of a criminal suspect; the description consisted primarily of the suspect's race, gender, and age, though it also contained a specific detail about a cut hand. The court held that, provided there was no other evidence of discriminatory intention, they could act on the basis of that description without violating the Equal Protection Clause:

> Defendants' policy was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description. This description contained not only race, but also gender and age, as well as the possibility of a cut on the hand. In acting on the description provided by the victim of the assault – a description that included race as one of several elements – defendants did not engage in a suspect racial classification that would draw strict scrutiny. The description, which originated not with the state but with the victim, was a legitimate classification within which potential suspects might be found.[200]

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196. U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation No. 30, *Discrimination Against Non-citizens*, 64th Sess., ¶10, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

197. Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, 4th Sess., ¶34, U.N. Doc. A/HRC/4/26, (Jan. 29, 2007); *see also id.* at ¶¶38-42.

198. Less common are predictive criminal profiles – characteristics which fit a modus operandi but are not based on witness evidence. *See* DAVID HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 87 (2002).

199. 221 F.3d 329 (2d Cir. 1999).

200. *Id.* at 337-338.

Though the case does not support a criminal profile in terms of race alone, even if not motivated by racism[201] as a proper basis to found reasonable suspicion for a police stop power,[202] Professor Dershowitz seeks to the maintain the legitimacy of race as a primary trigger for police action in the following example:

> . . . in looking for Klansmen who may have lynched an African-American, it would be foolish to look beyond the white community, since we know that all such racially motivated lynchings were committed by whites (although we also know that the vast majority of whites never committed lynchings).[203]

Yet, if there are thousands or millions of people within the particular "suspect" population, does reliance on this factor really advance the criminal profile and, given the difficulty of discerning by appearance alone who really is a "Klansman," a "white" (or, comparably, an "Arab" or a "Muslim"),[204] does it not then become a race-based ground for harassment?

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201. *Compare* Ellen Baker, *Flying While Arab*, 67 J. AIR L. & COM. 1375, 1404 (2002). Even if motivated by racism, the stop and search can still be lawful if there is probable cause. In *Whren v. United States*, 517 U.S. 806, 819 (1996), the Supreme Court weakened the Fourth Amendment as a basis for challenging race profiling in traffic stops by indicating that claims of discriminatory law enforcement had to be based on equal protection under the Fifth Amendment and would then prevail only upon a showing of discriminatory intent. Under equal protection jurisprudence, racial classification is constitutional under "strict scrutiny" if the government (federal, state or local) can prove that it is a narrowly tailored way to meet a compelling interest (such as national security). For criticism, see Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); David Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271; Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257 (2002).

202. For further confirmation of the presence of race along with other factors establishing reasonable suspicion (but not probable cause), see United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Collins, 532 F.2d 79, 82 (8th Cir. 1976); Whren v. U.S., 517 U.S. 806 (1996); United States v. Rias, 524 F.2d 118, 121 (5th Cir. 1975); United States v. Travis, 62 F.3d 170 (6th Cir. 1995); United States v. Roberson, 90 F.3d 75 (3d Cir. 1996); United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000); Farm Labor Organizing Committee v. Ohio State Highway Patrol, 308 F.3d 523 (2002); United States v. Swindle, 407 F.3d 562 (2005). As applied to terrorism, see Liam Braber, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451, 463-65 (2002); Seth M. Haines, *Rounding Up the Usual Suspects: The Rights of Arab Detainees in a Post-September 11 World*, 57 ARK. L. REV. 105, 122 (2004); Andrew E. Taslitz, *Racial Profiling, Terrorism, and Time*, 109 PENN ST. L. REV. 1181 (2005).

203. DERSHOWITZ, *supra* note 53, at 208.

204. *See* Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 198 (quoting United States v. Montero-Camargo, 208 F.3d 1122, 1134 (9th Cir. 2000) (en banc), for the proposition that reasonable suspicion requires particularized suspicion, and that where a large number of people share a racial or ethnic characteristic, use of that characteristics "casts too wide a net to play any part in a particularized reasonable

In the United Kingdom, there is an assumed association of the Muslim religion with "Asian" appearance, but only half of those belonging to this ethnic group are in fact Muslims,[205] and this fact alone does not begin to challenge the misplaced assumption that terrorists form a significant portion of the Muslim population.[206] Nevertheless, Professor Dershowitz seeks to extrapolate from this example to what is really another situation – the claim that a certain type of crime will be committed in the future by people with a given racial or ethnic or religious profile. In his words:

> . . . we know that all al-Qaeda members, and certainly all al-Qaeda suicide bombers are Muslims. It is foolish, therefore to misallocate our resources in the fight against suicide bombers by devoting equal attention to searching an eighty-year-old Christian woman from Maine and a twenty-two-year-old Muslim man from Saudi Arabia.[207]

There are several factual elisions here.[208] First, it is not possible to be sure about religion from skin color. Muslims males come from many ethnic groups, as the example of John Walker Lindh starkly demonstrates. Surely the reliance on race or ethnic origins at the beginning of the stop-and-search procedure is consistent with Dershowitz's edict against foolishness. Better by far to concentrate on more relevant behavioral criteria, such as signs of stress (hesitancy or nervousness), the absence of baggage, whether the ticket was purchased on the day of travel or with cash or is a one-way ticket, or undue interest in security installations or procedures, just as a cut hand might have been a better starting point than race in the *Oneonta* case.[209] Given these other possible indicia of behavior (and experts can no doubt devise many and more subtle descriptions than these), where a characteristic based on racial profiling becomes the only reason for a stop, does this not amount to "inexcusable racism" akin to the internment of Japanese-Americans during World War II?[210] The main difficulty with this conclusion is in practice, not principle. The boundary between racial profiling and crime- or subject-specific profiling is indeterminate, given that opposites (such as that the passenger is too nervous or too calm, makes eye contact or does not) can both be justifying

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suspicion determination").

205. 1 TERRORISM AND COMMUNITY RELATIONS, *supra* note 91, at ¶63.

206. *See* Haroon Siddiqui, *Muslim-bashing Dilutes Our Democratic Values*, TORONTO STAR, June 11, 2006, at A17.

207. DERSHOWITZ, *supra* note 53, at 208.

208. *See* Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215, 222 (2005).

209. Ramirez et al., *supra* note 141, at 1220.

210. DERSHOWITZ, *supra* note 53, at 209. *Compare* MacDonald, *supra* note 47, at 125-129; Tracey Maclin, "*Voluntary" Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror*, 73 MISS. L.J. 471, 484-487 (2003).

factors for intervention,[211] and given that race is often mentioned in crime or subject-specific descriptions. In addition, the principle of avoiding racial profiling must be carried out in the context of societies where racism is culturally endemic[212] or institutionally enshrined,[213] with the result that ethnic and religious minorities tend to pay a disproportionately high share of the costs attendant on responses to terrorism.[214]

By contrast, in the case of stop and search under section 44, there is no specific crime and no factual evidence as to perpetrator, so attention tends to wander toward personal characteristics. But if terrorists can be either insiders or outsiders, those characteristics must be drawn in very broad terms. One is left with widely drawn criteria that rely on factors such as age, gender, and race. In other words, in the case of terrorism, young men with ethnic backgrounds based in predominantly Islamic states such as in North Africa, the Middle East or south or southeast Asia become the targets. As a result, profiling brings clear dangers: "the current war on terrorism is fraught with anti-Islamic and anti-Arab prejudices that could turn very ugly under emergency conditions."[215] It also has the danger of creating many false positives and false negatives and thereby creating miscarriages of justice that damage the legitimacy of the legal system as well as misleading or diverting attention from more promising investigative leads.[216] These problems become all the more vivid because of the (false) "assumption . . . that the focus of the government's policies in the 'war on terror' is noncitizens, even if principally Arabs and Muslims."[217] Applied to U.S. citizens, the policies have the potential to become much more deeply divisive in society.

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211. *See* Sean P. Trende, *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling*, 50 DUKE L.J. 331, 363 (2000); Stephen J. Ellman, *Racial Profiling and Terrorism*, 22 N.Y.L. SCH. J. INT'L & COMP. L. 305, 320 (2003); R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201, 1211-1215 (2005).

212. *See* Girardeau A. Spann, *Terror and Race*, 45 WASHBURN L.J. 89, 90 (2005). For evidence of the disjunction between the national origins of the perpetrators of attacks and those subsequently targeted by immigration measures, see Akram & Karmely, *supra* note 17, at 660.

213. *See* MACPHERSON, *supra* note 88, at ¶6.6.

214. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 1-14 (2003); *see also* Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 WASHBURN L.J. 1, 1 (2005).

215. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1075 (2004).

216. *See* HARRIS, *supra* note 198, at ch. 4; David A. Harris, *Racial Profiling Redux*, 22 ST. LOUIS U. PUB. L. REV. 73, 79-87 (2003); Nelson Lund, *The Conservative Case Against Racial Profiling in the War on Terrorism*, 66 ALB. L. REV. 329, 339 (2003); Reem Bahdi, *No Exit: Racial Profiling and Canada's War Against Terrorism*, 41 OSGOODE HALL L.J. 293, 310, 313 (2003); David A. Harris, *An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001*, UTAH L. REV. 913 (2004). *See generally* Chet K.W. Pager, *Lies, Damned Lies, Statistics and Racial Profiling*, 13 KAN. J.L. & PUB. POL'Y 515, 518-523 (2004).

217. Akram & Karmely, *supra* note 17, at 610.

VI. THE CONTAINMENT OF ALL-RISKS POLICING

After a thorough understanding of the intricate legal and practical problems, it is time to step back and consider in broader perspective the modes by which all-risks anticipatory policing can be contained not just by the judicial system but by all constitutional mechanisms.

The example of section 44 offers an example of the proliferation of all-risks policing, including the growth of racial profiling, which has increased in acceptability since September 11, at least in the United States.[218] Because of the exigencies of the situation (especially limited policing resources), we must expect that "all-risks" will not be taken literally and that some people will be viewed as greater risks than others. We must also expect, unless there is structuring by law, that choice will be based on professional or sectarian cultures as much as on rational choices and may well reflect unpalatable or unlawful considerations. To the ironic American imaginary crimes brought about by racial profiling or racial prejudice, of "driving while black"[219] or "flying while Arab,"[220] section 44 may have created the British equivalent of "perambulating while Muslim."

The general approach of this paper advocates that the response should be containment. It is suggested that the more radical step of eradication is neither politically feasible nor rationally warranted. As for political exigencies, one must expect that "democracies respond when there is blood in the streets,"[221] and there is noble justification for them to do so based on the international law duties to combat terrorism[222] and the duty in national and international law to protect individual life.[223] The challenge posed by

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218. Milton Heumann & Lance Cassak, *Afterward: September 11th and Racial Profiling*, 54 RUTGERS L. REV. 283 (2001); Lund, *supra* note 216, at 330; Gross & Livingston, *supra* note 141, at 1413-1414; Joanne V. Gonzales, *Flying While Arab*, INT'L TRAV. L.J. 76 (2002); Maclin, *supra* note 201; Ramirez et al., *supra* note 141.

219. *See* Angela Anita Allen-Bell, Comment, *The Birth of The Crime: Driving While Black (DWB)*, 25 S.U. L. REV. 195 (1997); DAVID A. HARRIS, RACIAL PROFILING ON OUR NATION'S HIGHWAYS (1999); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999); Matthew Zingraff et al., *North Carolina Highway Traffic and Patrol Study: "Driving While Black"*, 25-3 CRIMINOLOGIST 1 (2000); KENNETH MEEKS, DRIVING WHILE BLACK (2000); Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717 (1999); Katheryn K. Russell, *Racial Profiling: A Status Report of the Legal, Legislative, and Empirical Literature*, 3 RUTGERS RACE & L. REV. 61, 63-64 (2001).

220. *See* Baker, *supra* note 201; Charu A. Chandrasekhar, *Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians*, 10 ASIAN L.J. 215 (2003).

221. Jennifer M. Collins, *And the Walls Came Tumbling Down: Sharing Grand Jury Information with the Intelligence Community Under the USA PATRIOT Act*, 39 AM. CRIM. L. REV. 1261, 1261 (2002).

222. *See* G.A. Res. 40/61 (Dec. 9, 1985); G.A. Res. 49/60 (Dec. 9, 1994); S.C. Res. 1373, (Sept. 28, 2001).

223. Examination of the legal duty (which is not absolute) to protect against terrorism is provided in cases such as X. v United Kingdom, 8 Eur. H.R. Rep. 49 (1985).

terrorism can be the subject of rational and effective legislative response, just as there have been rational and effective responses to other forms of specialized criminality, such as organized crime, or even to broader threats to democracy and rights, such as Fascism.[224] Based then on the objective of containment, what steps should be taken to contain all-risks policing within constitutional bounds?[225]

The first is to suggest that all-risks policing best applies when the protection of a vulnerable target is clearly established. At that point, there may be a more specific idea, based on intelligence (which should be given greater weight than profiling), as to what attack is possible and from whom. If not, the powers should not be applied. This consideration casts doubt on whether a powerful law such as section 44 should be in force on a continuing basis and should apply to an acreage as wide as the metropolis of London. Conversely, it may suggest that for a much more select list of endemic targets (such as airports and primary government and legislative buildings), a policy of blanket stops and searches is a more sensible and sustainable way forward – one that avoids any exercise of discretion tainted by racial considerations.[226]

The second consideration is to seek statutory structuring to the power as far as possible. To some extent, this is already attempted under Code A and in the related guidance, but, as already discussed, more could be said, for example, about the relationship between racial profiling and the professional use of the power or about the choice of "special" or "normal" powers to stop and search or as between stops and arrests. The possibility of profiling should itself be expressly mentioned in the statute so that it is "in accordance with the law" for European Convention purposes:

> If governments wish to discriminate on the basis of race and ethnicity, they should be prepared to justify that practice to the . . . public, even before they are required to do so to the courts.[227]

In structuring profiling, there should be guidance as to whether it is alone sufficient,[228] what priority should be given to a profile,[229] and what kinds of profiles are legitimate. It has been suggested that these guidelines might be

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224. *See* Karl Lowenstein, *Militant Democracy and Fundamental Rights*, 31 AM. POL. SCI. REV. 417, 638 (1937).

225. *See* HARRIS, *supra* note 198, at ch. 7; DERSHOWITZ, *supra* note 5, at ch. 7.

226. *See* Jaime L. Rhee, *Rational and Constitutional Approaches to Airline Safety in the Face of Terrorist Threats*, 49 DEPAUL L. REV. 847, 870 (2000).

227. *See* Sujit Choudhry & Kent Roach, *Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability*, 41 OSGOODE HALL L.J. 1, 7 (2003).

228. It is suggested that it should be just "one factor in a suspect-specific or crime-specific description." Ramirez et al., *supra* note 141, at 1233.

229. It is suggested that there should be a strong presumption against it. Lund, *supra* note 216, at 342.

bolstered by a statement of "symbolic reassurance"[230] – a sweeping reminder of the right against discrimination as specified in Article 14 of the European Convention.[231] A precedent for the type of provision in mind is the British Nationality Act 1981, section 44: "(1) Any discretion vested by or under this Act in the Secretary of State, a Governor or a Lieutenant-Governor shall be exercised without regard to the race, color or religion of any person who may be affected by its exercise." Yet, section 44(1) has not been cited in any reported judgment. It may, of course, still have value as an administrative *aide memoire*,[232] but evidence for its influence as such is not strong. Rather more prominence has been accorded to section 75(1) of the Northern Ireland Act 1998, whereby "A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity." However, it is again difficult to cite a judicial decision where section 75 has provided the sole or decisive argument,[233] though its primary objective is the administrative mainstreaming of equality rather than legal coercion. In conclusion, statements of symbolic reassurance are not worthless, but they should not be relied on as the primary means for ensuring that terrorism provisions do not overstep their bounds. The track record of such devices is uninspiring, even in contexts much less fraught than counterterrorism legislation.

A third consideration is accountability. Statistics should be kept not only on the application of powers such as section 44 (as happens now), but there should be a statutory obligation to explain the results, including in local meetings,[234] and to require action plans for the use of such powers. There is a tendency in society to delegate the management of risk to "experts,"[235] and the suppression of information is an easy way of ensuring that expertise is confined to a small circle. This trend should be resisted by local communities and even more so by the courts, which should be more ready than was the practice in *Gillan* to gainsay claims to expertise in security, especially when its impact is both felt by the general public and happens in public places. Just as there is no certain correlation between a loss of liberty and a gain in security, so there is no certain relationship between secrecy and standards in public administration, including in

230. Kent Roach, *Canada's Response to Terrorism*, *in*, GLOBAL ANTI-TERRORISM LAW AND POLICY 520 (Victor V. Ramraj et al. eds., 2006).

231. Article 14 proved decisive in *A v. Secretary of State for the Home Department*, [2004] UKHL 56. *See also* Walker, *supra* note 38, at 66-68.

232. Section 44 is not mentioned in the Immigration and Nationality Directorate issue to caseworkers the Nationality Guidelines, *available at* http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/nationalityinstructions.

233. *But see* Family Planning Association of Northern Ireland v. Minister for Health, Social Services and Public Safety *(SPUC NI and others intervening)*, [2004] NICA 37.

234. *See* Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 45-48 (2001).

235. ULRICH BECK, RISK SOCIETY: TOWARDS A NEW MODERNITY 57-58 (1992).

policing.[236] Indeed, one might argue that the police objective of deterrence and disruption would be better achieved by greater publicity.

A fourth consideration, and perhaps most radical of all, would be to encourage greater community involvement in the exercise of these powers. Consultation about the invocation of the powers is raised in the guidance papers discussed in connection with the *Gillan* case. Why not encourage the police also to invite community representatives to shadow them in the exercise of these powers? The guidelines are important pointers in this direction but too easily allow claims to exceptional operational contingencies, which, without firmer explication, will set at naught the principle of effective consultation in most cases.

A final consideration is for the legislature to keep under review the need for the existence of section 44. The independent review by Lord Carlile does that to some extent, but his detailed reports have not stimulated detailed responses by the government or detailed scrutiny by Parliament. The danger of the continued existence of powers of this kind is that the powers may be applied in situations that are not terrorist-related, such as political demonstrations. For example, Walter Wolfgang, an 82-year-old party activist, was ejected from the Labour Party's 2005 annual conference after he heckled Foreign Secretary Jack Straw and then was stopped under section 44 when he tried to re-enter the venue.[237] Even more outrageous was the stopping of a woman in Dundee for walking along a cycle path.[238]

There is also the risk of "contamination" of the "normal" law through seepage from the exceptional powers under the Terrorism Act.[239] The example of section 44 illustrates the general lessons[240] both that the authorities will act as if the emergency is without end and will invoke the powers in ever-widening circles. They will be applied against friend as well as foe.

CONCLUSION

At this point, the reader may feel disappointed that no absolute solution has been offered to the pitfalls and unpleasantness of the all-risks approach.

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236. *See generally* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2180 (2002).

237. Matthew Tempest & James Sturcke, *Heckler Returns to Hero's Welcome*, GUARDIAN, Sept. 29, 2005, at 1, 2; Paul Lewis, *Assault Inquiry into Labour Activist's Ejection*, GUARDIAN, Oct. 6, 2005, at 8.

238. David Lister, *Two Wheels: Good. Two Legs: Terrorist Suspect*, TIMES (London), Oct. 17, 2005, at 8.

239. *See* Stephen J. Ellmann, *Changes in the Law Since 9/11: Racial Profiling and Terrorism*, 46 N.Y.U. SCH. L. REV. 657, 709 (2003).

240. *See* Jonathan H. Marks, *9/11 + 3/11 + 7/7 = ?: What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559, 571 (2006); Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091, 1119-1121 (2006).

But no such invention is offered here. The perception that there is an altered state of vulnerability, which adds to the growing strength of the discourse of risk, means that the all-risks policing approach will have cogency to policy-makers and policing bodies.[241] And its attractiveness may have increased since September 11 with the clear emergence of neighbor terrorism, which gives added impetus to the trend within the criminal justice system toward anticipatory risk. But with the assessment of risk comes uncertainty,[242] giving rise to the acceptance of an all-risks fallback in which there is recognition of the fallibility of preemption and the inevitability of some catastrophes along the way.

With the advent of neighbor terrorism, measures such as stopping and searching cannot easily be confined to exceptional situations bounded by temporal, spatial, or communal divisions.[243] Nevertheless, despite all of the difficulties, or even because of the endless vista of them, societies such as the United Kingdom and the United States would be well advised both to impose more effective limits on special anti-terrorism measures and also to emphasize a normal criminal justice approach as the core response to terrorism rather than accentuating the exceptional or extraordinary, such as interventions based on discriminatory profiling or groundless suspicion.[244] The dictum of former U.K. Prime Minister Tony Blair in response to the July 7 London bombing was that "Let no one be in any doubt, the rules of the game are changing."[245] He is correct in the fact that many jurisdictions are attempting to install new regimes against terrorism, but it should be realized that the pursuit of this new game will often entail damage to the legitimacy and fairness of criminal justice systems.[246] It also has the increasingly unpalatable and counterproductive consequence of making no distinction between friend and foe.

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241. There has been some consideration given to a power to stop and question. HOME OFFICE, GOVERNMENT DISCUSSION DOCUMENT AHEAD OF PROPOSED COUNTER TERROR BILL 2007 (2007), *available at* http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/CT-Bill-2007-discussion-do.pdf?view=Binary. However, it has not been currently adopted.

242. PAT O'MALLEY, RISK, UNCERTAINTY AND GOVERNMENT (2004).

243. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 YALE L.J. 1011, 1073-1089 (2003) .

244. *See* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

245. Rosemary Bennett & Richard Ford, *Row over Tougher Rules on Preachers of Hate*, TIMES (London), Aug. 6, 2005, at 1.

246. *See* DAVID BEETHAM, THE LEGITIMATION OF POWER (1991); Lucia Zedner, *Securing Liberty in the Face of Terror*, 32 J. OF LAW & SOC. 507 (2005); Clive Walker , *Clamping Down on Terrorism in the United Kingdom*, 4 J. OF INT'L CRIM. JUSTICE 1137 (2006) .