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Deliverable 25. Moral Risks of Preventive Policing in Counter-Terrorism

Executive Summary

1. Preventive policing is any action carried out by police with the intention of identifying and preventing a specific crime or a type of crime. Preventive policing can include "special investigation techniques", including secret surveillance. These carry obvious moral risks.

2. Recommendaton Rec (2005) 10 of the Committee of Ministers of the Council of Europe outlines possible restrictions on the use of special investigation techniques. It suggests that the least intrusive special investigation measures should be used, if at all, only when the prevention or prosecution of *serious* crime requires it, and not in a way that conflicts with the right of anyone arrested to a fair trial. The principles reflect legal privacy protections under European Convention on Human Rights, Article 8, and Convention 108.

3. Liberal theory supports the approach of Rec (2005) 10. It permits the use of special investigative techniques in preventive policing if the crime that these techniques are intended to prevent is very serious, e.g. a terrorist attack. In particular, liberal theory permits the use of secret surveillance, if the choice of targets for the surveillance is evidence-based.

4. The form of liberal theory that best reconciles the demands of privacy and counter-terrorism with those of liberty is a modified Kantian theory, which is less utopian in its assumptions about human beings than a Lockean theory, but which excludes the total concentration of power, as in a Hobbesian theory.

5. Liberal theory condemns terrorist acts not just because of the injury and death they cause, but because of the contempt for impartiality that terrorist groups display. Impartiality is central to the liberal design of government institutions.

6. Privacy in Kantian theory is primarily the scope agents have for deliberating and choosing life plans free from other people's interference. In liberal theory generally, privacy is also the scope people have for forming intimate relationships without scrutiny and adopting harmless life plans (harmless means of pursuing happiness) without being subject to outside criticism.

7. Kantian theory does not justify restrictions on thought or expression of thought about terrorism or in favour of terrorism, but it does justify restrictions on actions that contribute to terrorist acts.

8. Expression of thought about terrorism, even expression of thought sympathetic to terrorism, should not be criminalized from the point of view of liberal theory. This counts against e.g. the "glorification" of terrorism provisions in the UK Terrorism Act (2006).

9. Kantian theory implies that preventive policing can fairly employ "profiling" techniques for identifying suspects in counter-terrorism, so long as these are evidence-based.

10. "Profiling techniques" cannot justifiably be used alongside detention and trial procedures that are revised *ad hoc* for counter-terrorism purposes.

Moral Risks of Preventive Policing in Counter-Terrorism

A European Union Counter-Terrorism strategy was devised in 2005.[1] Of its four strands –prevent, pursue, protect and respond – only two have a direct connection with policing. Perhaps surprisingly, the "prevent" strand is not primarily a police responsibility. It is concerned with addressing the causes of radicalization among citizens or residents of Member State jurisdictions, and those concerned with its implementation are likely to be NGOs, including relevant community groups. The "respond" strand is to do with the aftermath of disasters, and would naturally be implemented by authorities concerned with repairing infrastructure, or distributing food, medical services and shelter. It is the "pursue" and "protect" strands that concern policing. "Protect" is mainly to do with securing borders against the entry of terrorists, and infrastructure facilities from physical and cyber-attack. "Pursue" is the strand that comes closest to concerning itself with the arrest and prosecution of those responsible for terrorist attacks. The official explanation of this strand, however, does not explicitly distinguish between investigations that target terrorist suspects *before* a crime has been committed, and investigations aimed at identifying, arresting and convicting those responsible for terrorist acts *post facto*. Both in counter-terrorism and in the investigation of organized crime, there is a use for police operations that identify and test the intentions of suspects. These operations sometimes involve the police in secret surveillance, and sometimes in secret infiltration of criminal groups with a view to discovering conspiracies to import drugs or traffic in immigrants. Operations along these lines often culminate in arrests before an attack, or in interventions that disrupt the commission of a crime. This paper considers the permissibility of pro-active or preventive policing

[1] http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/87257.pdf

within the context of counter-terrorism, emphasising the use in that context of detection technologies.

Two Council of Europe documents published in the same year as the Counter Terrorism Strategy are particularly relevant to our discussion. The first, *Terrorism: Special Investigation Techniques*,[2] surveys some of the policing techniques that are associated with preventive policing, and identifies legal and other issues to do with its permissibility. The second is a published Recommendation–Rec (2005) 10 of the Committee of Ministers of the Council of Europe.[3] It sets out a kind of legal framework for the use, when necessary, of special investigation techniques, including secret wiretapping, email monitoring, and, differently, undercover infiltration operations. Special investigation techniques define the area in which the most acute moral risks associated with counter-terrorism are to be found. Indeed, it may be that, whenever they are used, there is more than a *risk* of immorality or injustice, since some kind of intrusion or deception is always involved. Even when the targets of these techniques turn out to justify police suspicions, the suspicions themselves can be vague enough, or can be so weakly justified when they are first acted upon, that the danger of disturbing the lives of the entirely innocent is very great.

In what follows, some relatively unproblematic uses of preventive policing will first be set aside, and the discussion will turn to preventive policing in counter-terrorism that relies on special investigation techniques. The permissibility of these techniques will be considered –not from a narrowly legal point of view, but from the standpoint of what will be called "liberal theory", which will be derived from some classic texts of European liberal philosophers. The version of "liberal theory" to be formulated is non-utilitarian, but, like utilitarianism, it justifies a properly constrained preventive policing policy that violates some kinds of privacy. It is broadly in line with Recommendation Rec (2005) 10. The discussion will focus on apparent violations of privacy: it is a separate question whether the *deception* involved in some preventive policing is permissible according to liberal theory.

1. Preventive policing

"Preventive policing" can be defined as any action carried out by police with the intention of identifying and preventing a specific crime or a type of crime.[4] Broadly construed, preventive policing need not carry special moral risks. For example, public police liaison with community organizations and NGOs responsible for countering radicalization has a clear role in preventing terrorism in communities known to contain militants. Co-operation with the community in order to build trust may be the basis for police receiving reliable information about specific threats. It may also provide opportunities for community organizations to sensitize police to heavy-handedness in their operations or discriminatory behaviour. Another example of unproblematic preventive policing is a policy of tackling minor crime aggressively within a community also identified as containing radicals. Such a policy shows that the police are interested in crimes against members of a co-operating community, and not just in the identification of suspects within it. It can also help with the

[2] P De Koster, *Terrorism: special Investigation Techniques* (Strasbourg: COE, 2005)

[3] http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/2_adopted_texts/rec_2005_10E.pdf

[4] For a definition of the related concept of pro-active policing, see J Pradel, *De l'enquete penale proactive: suggestions pour un statut legal* (Paris: Dalloz, 1998), p. 57.

prevention of more serious crime. Neither policy need involve intrusion, disrespect for community practices, or deception. Of course, it carries what may be called diplomatic risks. Police may not be the representatives of the state who are most likely to win the confidence of communities containing radicals, and they may say and do things that cause offence. But these are risks that face any interaction between groups in tension with one another, when they attempt to co-operate. The moral risks of *not* going in for community liaison may be considerably worse.

The moral risks of preventive policing increase the more intrusive it is likely to be, the more deception it is likely to involve, and the more the ground for targeting people for investigation seems to be based on prejudice, or, differently, on stereotypes that might make too great a cross-section of a population a possible suspect for relatively exotic crime. "Special investigation techniques" are among the carriers of risk here, but another and different source of risk is the use of insufficiently evidence-based forensic techniques, notably profiling. The discussion will return to profiling much later on; but it begins with special investigation techniques.

1.1 Special investigation techniques

Special investigation techniques used in European jurisdictions include secret bugging, wire-tapping, email interception, human and camera surveillance of suspects in public places; and surveillance in hotel rooms and private residences. What ties them together is that they are done without the knowledge of the people being investigated, and sometimes involve deception. The use of these techniques typically requires authorization by a high police official, a judge or a chamber of judges, or even a government minister. [5] The more intrusive the technique, the greater the legal obstacles typically stand in the way of the police using it, and the more independent officials have to be who give the authorization. Sometimes the collection of biometric information, whether openly or in secret, is regarded as particularly intrusive, because it is uniquely identifying. In the UK, investigations employ data from a very large store of DNA data information, some of it collected from people who have had no charges brought against them. Elsewhere in the EU, further biometric data is used for passport identification. This is used by individual jurisdictions and shared between them in counter-terrorism and illegal immigration operations. Information from the UK data base is also shared with other jurisdictions.

1.2 A legal framework for special investigation measures

Rec (2005) 10 of the Committee of Ministers of the Council of Europe effectively outlines a legal framework for the use of special investigation techniques . The same recommendation calls on Member States to build capacity in this area, and to introduce procedures for making available information to one another, in keeping with the Prum agreement.[6] The "general principles" of this framework presuppose, but do not articulate, the liberal approach to the design of government that is enshrined in the EU constitution as well as in the institutions of member states. After quoting the general principles and the restrictions on preventive policing derived from them, the discussion will make explicit the thinking underlying the liberal approach. This is articulated in classic texts of European political philosophy, and gets at the deep basis for judgements about the justice or injustice of special investigation techniques.

[5] For a survey of requirements in different jurisdictions, see De Koster, op. cit., Part II.
[6] http://register.consilium.europa.eu/pdf/en/05/st10/st10900.en05.pdf

The General Principles of Rec (2005) 10, then, run as follows:

> **a. General principles**
> 1. Member states should, in accordance with the requirements of the European Convention on Human Rights (ETS No. 5), define in their national legislation the circumstances in which, and the conditions under which, the competent authorities are empowered to resort to the use of special investigation techniques.
> 2. Member states should take appropriate legislative measures to allow, in accordance with paragraph 1 ,the use of special investigation techniques with a view to making them available to their competent authorities to the extent that this is necessary in a democratic society and is considered appropriate for efficient criminal investigation and prosecution.
> 3. Member states should take appropriate legislative measures to ensure adequate control of the implementation of special investigation techniques by judicial authorities or other independent bodies through prior authorisation, supervision during the investigation or ex post facto review.

The main thrust of these principles is that there is a presumption *against* the use of special investigation techniques in a *democracy* constrained by human rights standards, that their use, even when they are efficient means of detecting and prosecuting crime, should be *limited*; and that they need to be subject to *independent* oversight and retrospective review.

The text goes on to make explicit some of the limits:

> **b. Conditions of use**
> 4. Special investigation techniques should only be used where there is sufficient reason to believe that a serious crime has been committed or prepared, or is being prepared, by one or more particular persons or an as yet-unidentified individual or group of individuals.
> 5. Proportionality between the effects of the use of special investigation techniques and the objective that has been identified should be ensured. In this respect, when deciding on their use, an evaluation in the light of the seriousness of the offence and taking account of the intrusive nature of the specific special investigation
> technique used should be made.
> 6. Member states should ensure that competent authorities apply less intrusive investigation methods than special investigation techniques if such methods enable the offence to be detected, prevented or prosecuted with adequate effectiveness.
> 7. Member states should, in principle, take appropriate legislative measures to permit the production of evidence gained from the use of special investigation techniques before courts. Procedural rules governing the production and admissibility of such evidence shall safeguard the rights of the accused to a fair trial.

It summarizes these principles to say that the least intrusive special investigation measures should be used, if at all, only when the prevention or prosecution of *serious* crime requires it, and not in a way that conflicts with the right of anyone arrested to a fair trial. The principles reflect legal privacy protections under European Convention on Human Rights, Article 8, and Convention 108.[7]

The recommended conditions of use make sense only on a liberal understanding of the citizens against whom special investigative techniques are to be used. Citizens are supposed to be free to lead their lives without government interference or scrutiny, so long as they do not break laws, and they are not supposed to be subject to the highest degree of intrusion, even for the sake of law-enforcement, unless the crime is serious. Again, they are supposed collectively to be able to consent

[7] For a full discussion, see the Legal Evaluation Report of the EU Preparatory Action in Security Research, PRISE. See http://www.prise.oeaw.ac.at/docs/PRISE_D3.2_Legal_Evaluation_Report.pdf, p. 10. For an ageing, but still useful, general survey of theunderstanding of privacy in Anglo-American jurisprudence, see R Gavison, 'Privacy and the Limits of the Law' *Yale Law Journal* 89 (1980), pp. 421-70.

to the laws and special investigation techniques they are subject to, which means that the laws have to pass through a democratic legislative process and that they be interpreted by a judiciary at one remove from both the government and the police.

1.3 The contrast with a deeply undemocratic, illiberal regime

It is useful to contrast the liberal picture of citizens with a picture of life under a diametrically opposed kind of government. Until the end of the 1980s, the secret police or *Stasi* in the former German Democratic Republic succeeded in infiltrating the general population and recruiting more than 100,000 informants.[8] These informants watched for signs of supposedly dissident behaviour on the part of their neighbours or acquaintances, and their reports contributed to a vast store of files on ordinary citizens held by the authorities. Writers, artists, actors and others involved in state-supported cultural life were subject to particularly systematic official surveillance. These were people who had unusual opportunities for contacts with cultural figures from the West during the Cold War, and who were watched by the authorities for that reason. The well-known recent film by von Donnersbruck, *Das Leben der Anderen* (*The Lives of Others*) *(*2006)*,* depicts the fictional but true-to-life case of a playwright and actress who were watched and eavesdropped upon at the whim of high-ranking East German officials. The film tracks the growing disaffection of the Stasi watcher who is assigned to spy on the actress and the playwright. Eventually, the watcher helps the playwright and the actress avoid arrest on serious charges, and is himself demoted, ending up as an isolated and despised ex-Stasi official and postman in post-Communist Germany. The reason the watcher is revolted by his assignment is not that he holds liberal beliefs and is outraged at the way the civil liberties of the playwright and the actress are undermined. On the contrary, the watcher is a supporter of the highly illiberal East German state and its extreme precautions against subversion. What revolts him is the way that high officials use their power and the anti-subversion apparatus for the pursuit of personal vendettas and as a resource for personal blackmail.

Liberalism condemns the Stasi-state twice over. Like the watcher, it insists on the rule of law, and on impartiality in the conduct of public officials. But it also comes with a view very different from the watcher's about what the rule of law is *for*, which is to enable every independent adult in a population simultaneously to pursue personal life-plans with as little official interference as is permitted by the avoidance of harm, civil equality and representative democracy. Privacy contributes in two ways to the pursuit of lawful personal life plans. First, typical components of life-plans include intimate adult relationships and family life: privacy, in the sense of a sphere of activity organized solely by the agents and closed off from the observation and comment of others– is a plausible condition of intimacy. Second, liberalism tends to treat as ideal those life-plans that proceed from the informed and reasonable and autonomous choices of the people to whom the life-plans belong; such choices arguably require a space for reflection and deliberation that is free of unsolicited external influences.[9] For an agent to decide *for himself* what short-and long-term goals to pursue is for his choices to proceed from private reflection and deliberation –private not in the sense of being incommunicable or inaccessible, but in the sense of being self-determined.

[8] For an account of the Stasi in the context of the collapse of the German Democratic Republic, see E Peterson, *The Secret Police and the Revolution* (Westport, CT: Greenwood, 2001).
[9] See Gavison, op.cit., pp. 448-50.

Thought and reflection along these lines cannot be a mechanical rehearsal of propaganda for a public orthodoxy, even if the conclusion it reaches autonomously turns out to agree with a public orthodoxy. Instead, the reasoning leading to the conclusion must in some sense be the reasoner's own, and when it is, the conclusion is made the reasoner's own as well.

One way of approaching counter-terrorism legislation that permits intrusion on a large scale is by asking how the aim of counter-terrorism in a liberal state differs from the aim of a regime of intrusion in a Stasi-state. In East Germany, intrusion was for the sake of monitoring dissent from a ruling and repressive ideology, or, differently, and more grubbily, for the sake of maintaining the personal power and privileges of a certain set of high officials who purported to be custodians of that ideology. The Stasi state was the same state that forcibly prevented its citizens from moving to or visiting West Germany and even West Berlin, let alone the rest of the world. It was the same state that tried to counteract the free flow of information from the West. It was the same state that supported the economic survival of the rest of the Soviet bloc, entirely independently of whether the population of East Germany or of that bloc freely consented to rule by the Communist Party or East Germany's place in its policies of economic co-operation. This wider context itself draws heavy criticism from a liberal point of view.

In the West, on the other hand, at least officially, the wider context is benign. Representative democracy and a free press, as well as active dissent, are just what liberals call for, and in the West all of these things are in operation. The rigours of Western counter-terrorism are striking because they *depart*, or at least appear to depart, from liberal conventions and laws –such as a Constitutional prohibition on warrantless searches in the US, or on indefinite detention in the UK. They do not reinforce a pre-existing coercive, undemocratic style of politics. Again, the appearance of departure from liberal conventions does not pass in liberal jurisdictions without comment or challenge. Newspapers and broadcasters; NGOs and legislators; the courts; individuals in demonstrations and letter-writing campaigns: all are routinely involved in criticizing the counter-terrorism policies of Western governments. In the case of the courts in the UK and US, there have recently been a number of instances of decisions which reverse or limit government policies, especially in regard to detention, deportation and the right to a fair trial.[10] When governments of liberal states have won their battles with their liberal antagonists at all, it has generally been on the strength of persuading them that terrorists are plotting local mass murder.[11]

This brings us to the heart of the current *liberal* debate over counter-terrorism: the tension between, on the one hand, liberty and liberty-promoting values like privacy, and, on the other, the value of preventing harm and of punishing those who have inflicted harm, including life-taking harm.[12] The warrant for preventing harm, including the loss of life, is written into liberalism no less

[10] Relevant cases include, in the US, *Hamdan v. Rumsfeld, 126 S. Ct. 2749*, and, in the UK, *A and others v. Secretary of State for the Home Dept*. United Kingdom House of Lords, 16 December 2006 [2004] UKHL 56.

[11] The question of whether Western governments have been persuasive because they have *exaggerated t*he threat posed by governments will be left open.

[12] There is a big, recent literature on this topic. Many papers deny that security and liberty are in tension. Waldron, 'Security and Liberty: The Image of Balance', *Journal of Political Philosophy*, Vol. 11(2), 2003, pp. 191-210; and 'Safety and Security', *Nebraska Law Review*, Vol. 85, 2006, pp. 454-507. For a recent variation on this theme, see Neocleous, Mark , 'Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics' *Contemporary Political Theory* (2007) 6, 131–149. Very often the requirements of liberal political life are discussed in the form in which they are stated in human rights law.A good collection on the whole topic is Richard Ashby Wilson, ed. *Human Rights in the*

than the warrant for limiting intrusion. But that does not mean that that there are no hard cases for a liberal security regime. Hard cases *can* reasonably be claimed to confront policies of e.g. policing in a liberal jurisdiction. The police can be aware of people who seem to be conspiring to commit violence but who communicate in code, like the 9/11 terrorists, who gave the Pentagon and the World Trade Centre the names of university facilities. Building a prosecutable case in time to prevent an atrocity can be genuinely difficult, even if the police have targeted the right people in time. Then there are cases where someone who is perfectly innocent is wrongly arrested, though the police or intelligence services are acting on information from sources who in the past have proved reliable. Finally, indiscriminate and secret monitoring of private communications and intimate life can temporarily penetrate blameless private lives and then be dropped, without any questioning or arrest.

Now, it is arguable that in the great scheme of ways in which counter-terrorism can go wrong and can do wrong, the penetration by officials of a blameless private life without further consequences is relatively minor wrong, perhaps comparable to being stopped for questioning and a bag search while passing through a railway station, because one looks nervous and is wearing a backpack. The invasion of privacy can be a relatively minor wrong in another way, namely when it takes place in a society in which there is quite a lot of willing exposure of private life on the internet, verging on exhibitionism, and quite a lot of public voyeurism in the form of consumption of reality TV. In such a society there may not be much in life that many people are very unwilling to lay bare. In what follows, however, these points will not be developed. Instead there will be a discussion in general terms of the relation between privacy and security of life in the systematically articulated liberalism of liberal political philosophy. Liberal justifications for preventive and reactive policing will then be distinguished, and different kinds of intrusion considered as examples of preventive policing . Profiling both with and without intrusion will be discussed as a kind of preventive policing, and the following dilemma will be developed: either preventive policing is non-intrusive, in which case it runs a great risk of being discriminatory and arbitrary, or else it is intrusive but evidence-based. The argument of this paper is that intrusive but evidence-based preventive policing, including profiling, is the lesser of the two evils, and that it is justified when what is in the balance is serious injury or loss of life on a large scale. In other words, some kinds of privacy-sacrificing counter-terrorism are permissible. Whether the threats from terrorism that we are facing or are likely to face *actually* rise to the threshold of serious harm postulated is another matter: *if* they do, then intrusion is justified. Whether intrusion on a very large population in a liberal jurisdiction is an effective preventive strategy is again another matter. The argument assumes that in principle it can be effective, and seeks to establish grounds in liberalism on which it can be justified.

'War on Terror' (Cambridge: Cambridge University Press, 2005). More recent is B. Goold and L Lazarus, eds. *Security and Human Rights* (Oxford: Hart, 2007) A focus of some literature is Michael Ignatieff's *The Lesser Evil* (Princeton: Princeton University Press, 2004). Ignatieff argues for meeting terrorism with force subject to certain constraints. The position has met with much hostility. For recent discussion of Ignatieff, see e.g. Kenneth Baynes, 'Toward a Political Conception of Human Rights' *Philosophy & Social Criticism*, Vol. 35, No. 4, 371-390 (2009)

2. Liberalism

2.1 Liberalism: Hobbes, Locke and Kant

If liberalism is a set of principles for, among other things, enabling the common, free pursuit of autonomously chosen personal life-plans, then liberalism must take account of personal security. It must consider means of protecting people from death or injury through violence; for life is a condition of a life-plan, and injury can undermine the chances of success of many life-plans. Again, the pursuit of a life-plan under liberalism is plausibly claimed to be the pursuit of a life-plan relative to an ideal of living happily as interpreted by agents. Freedom from the justified fear of death or injury or coercion at the hands of those one lives with is plausibly a condition of being able to seek happiness. So freedom from justified fear can also be considered to be part of the security liberalism provides for. Since the time of Hobbes, the political order has been understood in political philosophy as the antithesis of the state of nature –in Hobbes, violent , amoral chaos, a condition in which each is the best judge of their own interest and everything is permitted if an agent sincerely thinks it will make him prosper or live longer. The state of nature is the supremely fearful condition that life under government is supposed to exclude.

In Hobbes, the political order is necessarily illiberal, but some of his successors in political thought believed that Hobbes had either overdrawn the violence of the state of nature (Locke) or not understood the possibilities of individual and collective self-rule in human beings (Kant). For these liberal successors of Hobbes, political life did not have to be unquestioning submission to the commands of an all-powerful sovereign who was simultaneously judge, legislator and commander in chief. Political life could consist instead in the membership of a community that could oppose tyranny as much as arbitrary dispossession or killing among individuals.

Kant, Locke and Hobbes all agree that political life depends on the accessibility to governing agents of an impartial practical judgement that can be accepted by most or all who are subject to it. All three writers also agree that, in the state of nature, impartiality is either absent altogether or operates imperfectly. But Hobbes thinks the impartiality is achieved by the many delegating judgement on all matters of collective security and well-being to someone who is not affected by their individual passions, and who is committed to public safety. This delegation, accomplished through a mutual promise among the many to leave the relevant judgements to a designated third party, is the beginning of government, according to Hobbes. The many are supposed to have reason to renew the social contract eternally out of fear of the consequences of the all-out war that is the alternative to life under government. This war arises from the simple right of each passionate human being to judge the means to their own security and prosperity. When different individuals exercise this right, the result is bound to be conflict and eventually slaughter. Although the person to whom the power of judgement is delegated in a monarchy may himself be an individual who is affected by passions, his reasonable fear of the many if he rules too selfishly and fails to protect the many from one another or from conquest will keep him from ruling in his own interest. Or it will if he is prudent, says Hobbes. In any case, the key to the survival of the many, for Hobbes, is for each of the many to abstain from judgements about the requirements of safety and prosperity. They are not supposed to second guess the judgements of the sovereign, particularly in public, and their

freedom of action is whatever happens not to be prohibited by the sovereign's laws. As for the private sphere in Hobbes, private in the sense of being out of the public sphere controlled by the sovereign, that seems to be the sphere of unexpressed thought. As soon as thought issues in action it is open to the legal regulation of the sovereign.[13] Government surveillance is legitimate if the sovereign thinks it promotes security, for any public policy is legitimate if the sovereign thinks it promotes security.[14] So is the take-over of domestic premises and the appropriation of private wealth. Hobbes supported the decision of the English king Charles I to order billeting of soldiers in private houses, and to levy taxes *ad hoc*.

Things stand differently in Locke. Locke does not think that human beings characteristically disagree with one another, or naturally maintain their own side in a disagreement just because it is theirs. Although he certainly claims that arbitration is important and morally necessary, that is not because he thinks that people naturally lack any intersubjective standard of judgement. He thinks that people natively have a capacity for reason, and that this can be exercised even in the state of nature. He denies that in the state of nature people need be strongly disposed to fight, and he keeps apart the state of nature from the state of war. He does not think that the conditions for moral judgement and action in accordance with it arise only after the formation of commonwealths; and he nowhere implies that life in the state and life in the state of nature that one enters by rebelling are as different as 17th century Europe was from the back woods of Virginia during the same period. Locke's state of nature is not necessarily fearful. And his commonwealth institutionalizes the division of executive, judicial and legislative powers that Hobbes thought was fatal for effective sovereignty. The commonwealth also acknowledges that "property" in the sense of things necessary for each to lead a chosen life is *not* open to appropriation *ad lib* by government. In short, Locke departs entirely from what is in effect the authorized dictatorship proposed by Hobbes.

Kant agrees with Locke that life in the state ought not to be submission to concentrated public power no questions asked. For him political life has to be appropriate to the beings who live together. These beings are not conceived as the good-natured, rational denizens of Locke's state of nature,[15] still less the self-seeking competitive human beings caught up in Hobbes's war of all

[13] A piece of wrongdoing is a not a *crime* according to Hobbes 'till it appear by some thing done, or said, by which the intention may be argued by a humane [human] judge" R Tuck, ed. *Leviathan* (Cambridge: CUP, 1991) , ch. 27, second paragraph (p, 201). He is distinguishing crime from sin: 'To intend to steal, or kill, is a sinne, though it never appear in Word, of Fact; for God that seeth the thoughts of man, can lay it to his charge' (Ibid.)

[14] 'It belongeth of Right, to whatsoever Man, or Assembly that hath the Soveraignty, to be Judge both of meanes of Peace and Defence; and also of the hindrances, and disturbances of the same; and to do whatsoever he shall think necessary to be done, both before hand, for the Preserving of Peace and Security, by prevention of Discord at home, and Hostility from Abroad...". *Leviathan*, ch. 18 (Tuck ed. p. 124).

[15] Locke (all page references are to the Laslett edition of *Two Treatises on* Government (Cambridge: CUP, 1988) seems to outline a politics for people who, by being naturally rational and internalizing natural law, are naturally sociable (*Two Treatises* II §§ 77ff). This may be an acceptable account of what people must be like if a benevolent God made them (presumably, in his image), but it is hardly a modest foundation for politics. Hobbes starts with much less, makes much more room for conflict, and, as a result, thinks that the ingredients of violence are far more prevalent than they seem to be. Locke thinks that private judgements in the state of nature are subjective enough to require 'umpiring', but unlikely to be subjective enough to lead either to war or unjustified rebellion under arbitrary power.

In the state of nature, according to Locke, everyone is free to protect his life and property as he thinks fit, and to respond as he sees fit to transgressors of natural law, both where he and where someone else is the victim of transgression (cf. II § 10). Although the transgression is only supposed to be punished severely enough to deter the offender, and although a

against all. And though these beings are not fully rational and are assumed by Kant's politics to be actuated by their pursuit of happiness rather than the thought of duty, they are, for all that, capable of being law-abiding. They can in principle subject themselves to the self-imposed laws of duty recognized by pure practical reason, and they can even more readily agree to membership in a liberal civil republic with a division of powers and powers of law-enforcement involving threats of painful and even capital punishment. What is more, they can *rationally* agree to the just laws passed in this republic: this agreement is what makes those laws legitimate. Submission to coercive law on the basis of rational agreement is what constitutes political freedom. The other side of the coin is that no laws or punishments agreed to can justly deny or disrespect the rationality of citizens. Indeed, laws must go further. They must be consistent with the fact that citizens of a Kantian republic are defined as free, equal, and independent. Laws must be consistent with civic personality along these lines in order to be just. And they rise to this standard if they are in principle able to be agreed to unanimously by those subject to them.

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natural law that distinguishes appropriate punishments exists, and is more accessible to individuals than a man-made law (II § 12), there is no general assurance of impartiality in this or other matters in the state of nature without a delegation of the right to judge to the community (II § 13). In particular, it is not to be expected that offenders will acknowledge the wrong they do or submit to even a proportionate punishment (ibid.). Only when people join together and submit to a judgement of a legislative power in matters of dispute resolution and punishment do they introduce impartial, proportionate, and reliably enforceable punishment. Jointly submitting to a legislative power, people in a state of nature are turned into a civil or political society (II §§ 87-89).

Such submission makes sense if people are naturally keen on seeing the law of nature upheld, rarely violate it themselves, but do not always see eye to eye about what the law of nature requires in a particular case. It makes less sense if people are mostly irrational and not inclined to uphold the law of nature when others break it, and are quite willing to violate it themselves. There must be some irrational people along these lines for punishment in the state of nature to have a point; but if they are in a majority, then it is unclear why the state of nature is *not* a state of war. Even if the irrational are in a minority, on the other hand, their irrationality needs an explanation on Locke's assumptions. How *can* there be human wrongdoers, if human beings are made by God as reasonable beings, and have the law of nature engraved on their hearts? How can some be more rational, better disciplined and public-spirited than others if all are endowed with 'like Faculties'(II §6)? The only room Locke appears to make for inequality is in upbringing. Since human beings after Adam have to attain the use of reason and are not born rational (II §57), there is scope for failure ever to achieve it –through bad parenting, say. This gives a natural history for a willing wrongdoer. But there is some tension between, on the one hand, failure to achieve rationality –failure to grow up to govern oneself by the law of nature– and, on the other hand, being free (ibid.). Yet the state of nature is the state of perfect freedom (II §4). This yields a trilemma for Locke: either the state of nature is not the state of perfect freedom, or else it is. If it is, either some people never attain freedom and therefore cannot be parties to the state of nature, or else people are parties to the state of nature and rational. But if they are parties to the law of nature and rational, how can they violate the law of nature?

When a community organizes itself under legislative, and law-enforcement institutions, according to Locke, the pooled executive power of a community to enforce the law of nature –specifically, the executive power to protect 'property' – stands the best chance of being impartially and efficiently deployed against wrongdoers. But it is the executive power that is entrusted –and only conditionally–to a government when a community becomes a state. No-one transfers the right of judgement, as in Hobbes, and the right of judgement may be exercised by the irrational in ways that lead people to think their trust has been betrayed by government. When the routine burdens of life in the state –taxation, military service– seem too great, the impression of a betrayed trust may not be slow to form. As for the extraordinary burdens of life in the state–submitting to incessant security searches and intrusive questioning, even detention, in times of terrorist threat–these can even more clearly and quickly register as oppression, at least in a minority.

Hobbes and Kant are in some ways closer to one another than to Locke on the place of personal security in a liberal regime. This comes out in the severe view both take of violence directed at government. Both take rebellion to be a sort of crime to end all crimes –either because it threatens the sovereign's power to keep the many from one another's throats, and vastly increases the personal danger everyone is in (Hobbes), or because it undermines the rule of law itself, substituting for it the operation of personal inclination in each (Kant). The seriousness of the crime of rebellion for Kant and Hobbes is reflected in the severity of the punishment they think it deserves. Kant makes both rebellion and murder capital crimes, on the ground that no lesser penalty is "equal" to the offence.[16] Hobbes gives the sovereign complete discretion to make any crime capital, but the sovereign can be expected to make violent rebellion a capital crime if any crime is capital, because it is the most direct repudiation of the duty to submit that government and a reasonable life for each depends on. In short, both Kant and Hobbes take civil life to exclude to the greatest degree possible the threat of violent death from individual and massed co-contractors.

Locke is more relaxed about the threat of violent disorder. When a community organizes itself under legislative and law-enforcement institutions, according to Locke, the pooled executive power of a community stands the best chance of being impartially and efficiently deployed against wrongdoers. But it is *executive* power that is entrusted –and only conditionally–to a government when a community becomes a state. No-one transfers the right of *judgement*, as in Hobbes. And if in the judgement of the community the executive power is used *poorly* in defence of the public or turned against the public, it can be taken back.

Granted that Locke's theory does well to make room for government betrayal of the trust of the public, how does it control for the *illusion* of betrayed trust, or for cases where, extraordinarily, protections of life, liberty, and property are weakened or suspended justifiably? Locke does not deny that the right of judgement may be exercised by the irrational in ways that lead people to think falsely that their trust has been betrayed by government. When the routine burdens of life in the state –taxation, military service–seem too great, the impression of a betrayed trust may not be slow to form. As for the extraordinary burdens of life in the 21st century state–submitting to incessant security searches and intrusive questioning, even sweeping powers of detention –these can even more clearly and quickly register as oppression. They can register as oppression of the general public in liberal jurisdictions with a strong background suspicion of big government, as in the US, or, differently, they can register as oppression when the burdens of life seem overconcentrated on religious or ethnic minorities, to such an extent that these minorities feel ostracized by a majority population. Although these impressions can sometimes be reasonable, pre-existing ethnic or political divisions, including de facto ghetto-ization can produce exaggerated grievances on both sides.

Locke's *theory* does not control for this exaggeration. Instead, human nature or custom is relied upon to put a brake on the violent impulses of the discontented. Thus, against the objection that no state will last for long if people are able to withdraw their trust on seeing their 'property' invaded, Locke insists in the chapter in the *Two Treatises* entitled 'The Dissolution of Government' that

[16] For rebellion, see M.J.Gregor and R Sullivan eds. *The Metaphysics of Morals* (Cambridge: CUP, 1998), p. 96: Ak. Ed. Vol. 6, p. 320).

> People are not so easily got out of their old Forms, as some are apt to suggest. They are hardly to be prevailed with to amend the acknowledg'd Faults, in the Frame they have been accustom'd to (II, §223)

It even goes against the grain, Locke immediately adds, for people to go in for reform when everyone agrees that an opportunity for reform has arrived. Human inertia overcomes the appetite for changing how countries are ruled, even when the appetite is widely shared.

Locke replies in the same vein when he entertains the objection that his own theory of the dissolution of the state will add to pretexts for rebellion. According to Locke's theory, as soon as a government passes laws which have the effect of endangering people's property, the government introduces a state of war –shows that it is willing to use force without authority–and therefore loses legitimacy of office. So, might people seize on the theory at every opportunity to claim that a government has overstepped the mark? Locke's answer is, 'Not if actual rebellions are anything to go by':

> *Revolutions happen* not upon every little mismanagement in publick affairs. *Great mistakes* in the ruling part, many wrong and inconvenient Laws, and all the *slips* of humane frailty will be *born by the People*, without mutiny or murmur (II §225).

This sounds like sheer assertion, and seems no more or less compelling than Hobbes's remark about the multiplying glasses applied to every little cost of government by the typical citizen.

Far from adding to the pretexts for rebellion, Locke says, his theory of the dissolution of states points the people not in the direction of *no* government, but in the direction of *new* government. In any case, Locke's theory implies that the rebels in cases of dissolution of government are not the people who withdraw trust, but the government that betrays trust, since it is the government that by turning laws against the people introduces a state of war. If anyone is cautioned by the theory against rebellion, it is governments, for they are told that they have the people to answer to. On this highly revisionary account of rebellion, Locke may be right, but he does not meet the objection that in the ordinary sense of 'rebellion' his theory might provide a pretext for rebellion.

Locke is also in difficulty when it comes to the question of who should judge that the betrayal of trust has taken place. What if the claim that this trust has been broken is spread by 'ill affected and factious Men' in cases where 'the Prince only makes use of his due Prerogative'?

> To this I reply, *The People shall be Judge*; for who shall be *Judge* whether his Trustee or Deputy acts well, and according to the Trust reposed in him, but he who deputes him, and must, by having deputed him, have still a Power to discard him when he fails in his Trust. If this be reasonable in particular Cases of private Men, why should it be otherwise in that of the greatest moment; where the Welfare of Millions is concerned, and also where the evil, if not prevented, is greater, and the Redress very difficult, dear and dangerous? (II §240).

This reply suggests that the analogy between the private judger and the People is unproblematic. But it is not. To the extent that the People –the community without formal government – can produce a judgement, it is that of a majority, which, if it is a small majority, may not be decisive enough to justify anything as momentous as the dissolution of a government. It is because what is

being decided in the case at issue is unlike that of the typical private withdrawal of trust, and because the judger in the form of a community has less unity than a private judger, that Locke's answer is unsatisfactory.

It is possible, of course, that in Locke's favoured case of deciding about the withdrawal of trust –the case where flagrant arbitrariness and brazen invasion of property have tried the patience of a people over such a long period that its wrongness is unmistakeable– the people would have no trouble forming an undivided judgement. The question is whether the favoured case is too easy a case. The current situation in the Western world –where trade-offs between security and liberty are increasingly being settled in favour of security–may look to some sections of a community like movement toward a "police state"–not a Lockean tyranny, perhaps, but perhaps something unsatisfactory enough to some to justify violent reaction. Again, the connection between fundamentalist religious beliefs and the repudiation of liberal beliefs may make liberal governments' liberal policies seem to fundamentalists to be intolerably disrespectful of their scheme of values. This may pit not only local fundamentalists, but their co-religionists around the world, against a given state or against all liberal states. And their opposition may take a violent form, as when authors are subjected to death threats, or when the forceful imposition of sharia law globally is advocated by jihadists. The "people" may or may not speak clearly or liberally in response to this threat, and may withdraw trust from a state that does not assert its values against those of the fundamentalists.

It is true, and tells in favour of Locke's claims, that, the more impressive and recent the evidence of the threat to security has been in a given population, the more incursions on liberty genuinely for the sake of safety tend to be borne willingly by the public. It may also be true that the more fundamentalists try to enforce their orthodoxies in liberal jurisdictions, the more fundamentalism is challenged non-violently at grass roots level rather than through a state supposedly at war with a certain religion, or extremist parties that claim a betrayal of trust if a host population's values are not asserted. But things change, and the spectre of the tyrannical or unjust state seems to materialize for some people quite readily. Is the intrusive liberal state that lengthens detention of suspects and lowers the threshold for arrest or surveillance a police state in the making? I have already pointed to some differences between the Stasi state and the liberal Western state even in its unappealing, increasingly authoritarian, counter-terrorist mode. Even if the authoritarianism is detestable, it is a great distance from tyranny, a great distance from the Stasi state.

2.2 A Kantian framework elaborated

The truth seems to lie somewhere between Locke and Hobbes. Might it lie in Kant? Kant appreciates the dangers of political instability and violence from internal and external force, but his politics is clearly liberal, and, as we shall see, it is well-placed to acknowledge the value of privacy.

Kant's politics does not proceed from a Lockean optimism about human nature. On the contrary, according to Kant, human beings are evil –in the sense that they are strongly disposed to subordinate duty to the gratification of inclination or the pursuit of happiness.[17] Morality involves

[17] A. Wood, G. Di Giovanni, R.M. Adams, eds. *Religion within the Limits of Reason Alone* (Cambridge: CUP, 1998),I, ii, p.54; Ak. Ed. Vi, 29-30.

the cultivation of *detachment* from inclination and the goal of happiness, directing people to the adoption of policies of action that could be acceptable to anyone and that are co-realizable. These organizing policies are the ones that pass Kant's famous tests of universalizability. But one does not have to confine one's policies to universalizable ones to belong to a *political* community, according to Kant. On the contrary, politics is all about the co-ordination of the pursuit of happiness by people in large numbers.[18]

This may sound like a utilitarian politics, but it is not. Kant nowhere connects the purpose of the state with the maximization of collective happiness, and indeed deeply distrusts happiness as an organizing goal of personal life. Although the organization of one's ends and actions by happiness has much to be said against it morally,[19] according to Kant, and though the importance people give happiness is in a certain sense the key to why human nature is bad, politics is not about perfecting citizens. Politics is about the systematic and just organization of the life of people in groups. Since politics does not demand the independence of one's choices from considerations of happiness , and since it regulates public behaviour rather than the adoption of policies of the will, politics is possible even for devils,[20] individuals who will what is wrong whenever it suits them. That is, even people who always subordinate duty to inclination in their practical deliberations, can, if coerced in the right way, *act* in accordance with laws that maximize the realization of compossible life-plans in a liberal republic.

A minimal way of acting in accordance with laws that facilitate the pursuit of happiness by everyone is to omit to kill or injure others. Many central and undisputed cases of terrorism are outlawed by this general, enforced prohibition on killing or injury. The Kantian warrant for such a prohibition is at the same time a warrant for counter-terrorism law prohibiting terrorist acts of killing and injury. A Kantian set up can also acknowledge the value of privacy. Privacy –in the sense of a space for uncoerced , rational practical deliberation–is not hard to explicate as a condition of the existence of free, independent, and equal co-citizens. At the very least, privacy in this sense is a condition of reasoning in one's own right: it is the space in which the reasoning is conducted.[21] So Kant's

[18] E.B. Ashton, trans. *On the Old Saw*: *That May Be Right in Theory But it Won't Work in Practice* (Philadelphia: University of Pennsylvania Press, 1974). Pt. 2: '...[E]verybody may pursue his happiness in the manner that seems best to him, provided he does not infringe on other people's freedom to pursue similar ends, i.e. on another's right to do whatever can coexist with every man's freedom under a possible universal law.' (p. 58; Ak. Ed.vol VIII, 290).

[19] See Section II of the *Groundwork,* Ak. Ed. vol. IV, 417ff

[20] See Kant's 'Perpetual Peace' in L.W. Beck, ed. *On History* (Indianapolis: Bobbs Merrill, 1963), p. 112 (Ak. Ed. vol. VIII, 366).

[21] Now ironically, this private space can be *subversive* of politics as Kant understands it. That is, it can be subversive of co-ordinated communal life organized around the pursuit of happiness. The reason is that privacy makes possible *detachment* from inclination and the pursuit of happiness itself. The more one reasons in one's own right, the more one can be expected to regulate one's life by universalizable maxims and not the requirements of a life plan one thinks will make one happy. From this *moral* rather than political perspective, it can seem questionable for happiness to be given the importance that politics assumes it has. The beginning of moral wisdom and self-improvement may be for each person to revalue happiness downward and revalue upwards acting from duty. But since from the same moral point of view that leads to this insight it would be immoral to force people individually and collectively to value happiness less –since valuing happiness less has to be the result of one's one choice in order to lead to moral improvement– the private space of reasoning does not entirely destabilize politics.

principles can easily accommodate the value of a private sphere within the context of politics, while also connecting politics with laws that prohibit killing, including, presumably, terrorist killing.

Does Kant's theory capture the *tension* between counter-terrorism and the preservation of privacy? For reasons internal to Kant's general philosophy, the answer may appear to be 'No'. For if the private is the sphere in which pure practical reason operates, it may seem to be a sort of noumenal sphere. This is not a sphere penetrable by CCTV cameras. The answer to this point is that privacy in the context of politics is not a sphere that only a noumenal self inhabits. If that were so, politics would not place so much value on happiness. For the purposes of politics people are assumed to reason under the influence of their appetites and aversions, including those that are created by the apparatus of government. If they deliberate in a climate of fear, their capacity for detaching themselves and conducting reasoning from a detached perspective can be compromised. In this sense, Kantian privacy is threatened in the Stasi-state.

2.21 Kantian privacy, counter-terrorism and the unguarded expression of thought

Can Kantian privacy be threatened in a *liberal* state with counter-terrorism laws? If the laws in question were merely laws against killing, it might be possible to argue fairly directly for the answer 'No'. But since some counter-terrorism laws seek to prevent terrorist crime, and since prevention can begin with the official search for evidence of an intention to commit such crimes, and since such evidence is arguably obtained by secret monitoring of the unguarded expression of thought, things are more complicated. Either there is a ground in a liberal theory for protecting the unguarded expression of thought from untoward official inference, or such a ground is outweighed by the need to protect life. Either way, there is a presumption against the decision to monitor unguarded expression of thought.

Unguarded expressions of thought can be exploratory, and can be discarded in the process of reaching a considered opinion. Working out what one thinks may also involve trying out various positions in *conversation*. If a counter-terrorism policy makes people in general fearful of writing or saying things about violence or about jihadism, then the state can disrupt or discourage processes of thought that cannot themselves be criminal, and that never come close to reaching the threshold of action. This is self-defeating for a programme of surveillance that seeks to work from the unguarded expression of thought. It is also redundant if, left undisturbed, a process of thought would have led to a decision *against* violence or *against* support of violent people. A climate of fear is also out of keeping with institutionalizing autonomous thinking, when this is a key desideratum of liberal society. Here is where the Kantian set up engages current debate over the justice of counter-terrorism. In general it tells against obstacles to autonomous thinking, including obstacles thrown up by counter-terrorism legislation. And so it acknowledges reasons against surveillance while acknowledging reasons for preventing killing.

A Kantian argument against a state's creating intellectually debilitating fear is not an argument against any creation of fear by the state, and nor is it an argument against every preventive counter-terrorism policy . After all, in the Kantian set up, fear is a legitimate means of motivating citizens to omit illegality, and whether fear is debilitating depends partly on the strength of customs of thought and speech in the jurisdiction to which the counter terrorism policy applies: people may be more

used to thinking and talking about controversial issues than holding their tongues, even during a supposed war on terror, or they may direct their thoughts to things other than jihadism or violence that still have a bearing on counter-terrorism –civil liberties, for instance. In such a society, counter-terrorism measures that sought to identify expressions of sympathy for terrorism might not cause debilitating fear in the relevant sense.

Fear may legitimately be created by the promise in penal laws of hard treatment to which citizens may be subjected if they break them. And because citizens in theory endorse the legislation that threatens this punishment, they cannot withdraw that endorsement when the law takes its course in the case of their own law-breaking. That would be to make oneself arbitrarily into an exception to a reasonable rule. One aspect of the law taking its course is *reactive* policing, the detection by the police of law-breakers and the collection of evidence for a prosecution. This is a relatively easy form of policing for liberal theory to accommodate.

2.22 Surveillance in the face of evidence of ability and willingness to carry out violence

What about preventive policing? Among the non-debilitating preventive counter-terrorism policies that are permitted by a Kantian set up are policies of surveillance geared to what enables people to *carry out* violence, as opposed to think and talk about violence. Virtually no-one argues that private conversations apparently directed to obtaining weapons or purchases of ingredients for home-made bombs are of no legitimate interest to the police, especially when interspersed with expressions of sympathy for jihadism. But what about expressions of sympathy for jihadism by themselves? Although counter-terrorism law in England and Wales criminalizes some public declarations of such sympathy,[22] it is hard to get a clear endorsement for this provision from the Kantian framework developed here. There are too many fine lines between expression of support and experimental explorations in thought and talk of the implications of the jihadist position. There are too many fine lines as well between support for jihadism and a supportive posture unallied to any intention to become a jihadist oneself.

This does not mean that there are no criteria for identifying suspects who do deserve surveillance, only that the criteria have to go beyond publicly expressed support for jihadism. To illustrate, it seems to be sufficient in late 2009 to justify preventive counter-terrorist surveillance of someone when this person satisfies all of the following conditions:

- Travels frequently to Pakistan/Afghanistan border (as revealed by travel records; mobile telephone location-tracking)
- Visits and posts expressions of support for jihadism on jihadist websites
- Has a bank account with big deposits from abroad
- Visits websites related to components of explosives .

For example, someone who was questioned at random at an airport and, after further checks, turned out to satisfy these conditions, or someone who was discovered to satisfy these conditions through checks on money laundering, might properly be put under surveillance.

[22] *Terrorism Act* (2006), c. 11, Pt. 1, 1 subsection 3.

The Kantian idea that citizenship is citizenship among *equals* constrains counter-terrorism policy. Policies of searching every passenger at airports, or of genuinely random questioning of members of the public, satisfy this constraint; policies of searching only South Asians or only men with beards do not.[23] That way of narrowing down a population of suspects is too open to the charge of depending on facile stereotypes. It is true that arriving and acting on these stereotypes may involve no intrusion on any individuals, but this is consistent with sheer prejudice. If stereotypes are to be used at all, one expects them to be based on evidence and tested by further enquiries at the level of the suspects they throw up. The more evidence-based, and the more they are supported by enquiries, the more they are likely to depend on intrusion. But the less-evidence-based, the more they are likely to violate the liberal constraint of equality before the law, as well as making too *many* people suspects.[24]

As with policing in general, the *targeting* of suspicion can be justified if it is based on evidence relevant to the preparation of a future crime, and, to be relevant, evidence has to rise above facile stereotyping. It has to be more specific, for example. The reason why travelling to the Pakistan / Afghanistan border might justifiably trigger surveillance, while travel to Hong Kong might not, is that the Pakistan/Afghanistan border is a known location of Al Qaeda training camps, and, in any case, a jihadist war-zone, while Hong Kong is not. So it is legitimate to ask why ordinary citizens are travelling there, and whether there are facts about them and their contacts that might make it probable that their business is sinister. Asking these questions does not mean that the answers will incriminate anyone. By contrast, it is doubtful that a policy of targeting all travel to all parts of Pakistan could even in principle be based on evidence, and in any case a target that big would not be a practical object of preventive policing.

Justifiable surveillance for the purpose of preventive counter- terrorism is a far cry from the surveillance of the Stasi state. First, it is surveillance for the prevention of a crime, and in a liberal jurisdiction there is a presumption against the criminalization of activity in the first place. In the Stasi state, on the other hand, information was paid for, received and collected in the pursuit of no clear legal objective, and in a setting where adopting certain political views might be criminal, and prosecutable without the protections of due process. Second, justifiable surveillance can be conducted by the state without a huge infiltration of civil society by the state apparatus. Third, as it

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[23] Or, in other words, stereotypes associated with islamophobia, would violate the requirement that equal citizens be treated the same. See C. Allen and J.S. Nielsen, *Summary Report on Islamophobia in the EU after 11 September 2001*. See also European Monitoring Centre on Racism and Xenophobia ("EUMC"), Vienna, May 2001 <http://eumc.europa.eu/eumc/material/pub/anti-islam/Synthesis-report_en.pdf>; European Monitoring Centre on Racism and Xenophobia *The fight against Anti-Semitism and Islamophobia - Bringing Communities together*, Vienna/Brussels, Fall 2003, at http://eumc.europa.eu/eumc/material/pub/RT3/Report-RT3-en.pdf>. I owe these references to Katerina Hadjimatheou's Essex University PhD dissertation, *Ethnic Profiling in Counter-Terrorism* (2009). Chapter 3 of that thesis is highly relevant to the present paper.

[24] In the German Rasterfahndung, data-mining was used after 2001 to identify individuals satisfying a very crude stereotype of a terrorist "sleeper". Quite apart from trading on prejudice, the stereotype was satisfied by tens of thousands of citizens, making it perfectly useless for narrowing down people requiring investigation in Germany. Developments since then, including the troubling BKA law, are discussed in the 2008 Statewatch analysis paper, 'Germany-a permanent state of pre-emption' http://www.statewatch.org/analyses/no-79-germany-permanent-state-of-preemption.pdf

is being discussed here, surveillance is for the prevention of killing and serious injury from a terrorist attack:[25] in east Germany it was for limiting the influence of Western liberal ideas and conventions. Fourth, as we are considering it here, surveillance is as much a resource for the elimination of the innocent from enquiries as for mounting a prosecution against those who turn out really to be plotting to plant bombs. Then there are facts of life that limit the operation of surveillance. In jurisdictions in the West, and very likely in any real-world liberal jurisdiction, surveillance is expensive in both money and man hours, and it is unlikely to be sustained if it does not produce material for a prosecution with good chances of success. This is so quite apart from any legal time-limit imposed on its use, or any high-minded scruples about intrusion. In East Germany surveillance could last indefinitely, and huge resources were put toward it without any evidence that the saving of life or the prevention of injury depended on it. Nor were legal standards for resulting prosecutions protective of suspects. Nor was there any obstacle to passing laws that would make it easier to spy on people for longer, that is, if the authorities bothered to apply the legal fig-leaf in the first place.

2.3 What makes terrorism a serious crime for liberals?

So far the prevention of terrorism has been treated as the prevention of killing and serious injury. But this underdescribes what is wrong with terrorism from a liberal point of view. After dwelling in this section on some features of terrorism that are particularly objectionable to philosophical liberals, discussion turns in the next section to the question of whether the means adopted in preventive counter terrorism are acceptable from a liberal point of view. In this latter connection, acceptable profiling is distinguished from unacceptable by reference to the plausible requirements of evidence-based policing.

Let us begin, however, with an attempt to characterise terrorism more fully than as a kind of conspiracy to kill or injure. At least nine points seem relevant in this connection. First, by contrast with a typical murder or assassination, terrorism often has no specific target: it is often indiscriminate, and therefore likely to kill or injure the harmless and defenceless. Second, it is often *ambitiously* indiscriminate: often the more people who get killed, the greater the success an operation is judged to be. A bomb that is placed in a crowded market just because it is crowded, is unlikely to have served its purpose if, by chance, only one person is killed. Its target is a *crowd* of people who are within range of the shrapnel when the bomb goes off. The more powerful the bomb, the greater the ambition of the indiscriminateness. Third, a terrorist attack is more successful, the more fear it creates. If a bomb is placed near a military installation and kills many soldiers who *expect* to be the targets of bombs, and who are *trained* to react militarily to those who placed them, the new fear created may be slight. But the fear created in a civilian population by bombs with huge killing potential is likely to be huge as well, especially if the bombs are detonated with no warning. Fourth, terrorist attacks are often hate crimes. They are directed not only at an adversary group of civilians, but at a *vilified* adversary group of civilians –an adversary group often perceived as monsters. There is reason to regard mass murder with this added dimension as

[25] Recommendation REC(2005)10 of the EU Committee of Ministers to member states on "special investigation techniques" in relation to serious crimes including acts of terrorism permits surveillance for prevention of serious crime. See http://www.coe.int/t/e/legal_affairs/legal_co%2Doperation/fight_against_terrorism/2_adopted_texts/rec_2005_10E.pdf.

aggravated mass murder, much as a homophobic murder or a racist murder is worse than killing that results from an armed robbery gone wrong. Fifth, though the ends of terrorists are often officially political ends that are declared to be carried out on behalf of a people, neither the ends nor the acts are tested in a political process where the endorsement of the people supposedly represented is measured in votes.[26] Not only does terrorism invariably bypass a democratic political process, but sixth, it is often contemptuous of this process, and contemptuous of the laws that result from this process. Seventh, terrorism is often contemptuous of human rights and international standards. Eighth, terrorism –particularly in its Islamist form–is often contemptuous of liberal regimes and liberal freedoms, which it associates with a weak, decadent and Godless political order. Ninth, while disdaining liberalism, many people convicted of terrorism take advantage of its legal protections, often arguing against deportation to illiberal regimes.

It ties up some of what is wrong with terrorism from a liberal point of view to say that it repudiates any ideal of non-violence, and any political order sustained by impartial oversight or the rule of law. Terrorists appoint themselves the judge of what is in the interests of a people, and of what retaliation is appropriately meted out to their supposed enemies. They submit to no-one and nothing, except perhaps a religious text as interpreted by themselves, or some favoured reading of history. Since the acts of violence they initiate are indiscriminate, and often carried out in places where the people they are supposed to be acting for might be killed or injured as well as their enemies, they also appoint themselves judges of whether and when some of their own side may be sacrificed. It assists the ends of terrorists for hate towards enemies to be spread and intensified rather than reduced. Criticism of violence from some of the people the terrorists say they represent is treated as betrayal, rather than as a legitimate point of view. And the use of terror as a medium of politics discourages responses that are based on reasoning –from enemies *or* friends. Even if terrorist acts are not widespread enough or widely enough supported to make an all-out war of all against all likely, they can reasonably be viewed by governments as an attack not only on lives but on any order that a whole population can freely endorse. To sum up, terrorism militarizes politics in defence of ends that a few hand down to the many. This is not intelligible as politics from a liberal point of view.

It is true that there are degrees of militarization and partiality among groups guilty of terrorist acts. Sometimes a movement with a "military wing" is also represented in liberal party politics by politicians who appear to take part in parliamentary institutions, but when this happens, the legality and tolerability of the military wing is always in doubt. War is sometimes said to be politics by other means, but it cannot be *liberal* politics. Liberal politics excludes war, and war excludes liberal politics. That is why the attempt to enlist mass violence or bombings for politics can be regarded by liberals not only as criminal but as a crime to end all crimes, as an attack on liberal political order itself. This is different from regarding bombings as an attack on a *people* with liberal traditions. Terrorism can seem from a liberal point of view to be friendly to chaos and inimical to legal order quite apart from the groups or peoples it is directed against. This is why a campaign of terrorist bombings cannot be conceptualized as a campaign of mass-murder simply, even if laws against mass murder in liberal jurisdictions outlaw a campaign of terrorist bombings.

2.4 Terrorism and the use of profiling in preventive counter-terrorism

[26] For a complementary line of thought, see Walzer 'Terrorism: A Critique of Excuses' in *Arguing About War* (New Haven, CT: Yale University Press, 2004), p. 54f.

Terrorism, then, is an extremely serious crime from a liberal point of view. Its seriousness, however, does not justify a sweeping counter-terrorism policy unless the probability of terrorist attacks in a relevant jurisdiction is high, and the measures taken against them are likely to prevent them or punish those who have carried them out. There is a respectable body of opinion in the US, according to which the size and imminence of the threat from Islamist terrorism since 2001 has been vastly exaggerated by those who have something to gain politically or financially from the existence of a formidable Islamist enemy.[27] That body of opinion is not confronted here. Instead, we can ask whether, assuming the threat *is* significant, highly intrusive preventive measures are justified. Since these preventive measures are likely to involve profiling –that is, the specification of a type of person who might be a terrorist– in the absence of evidence against anyone in particular and in the absence of any information concerning plans for a specific crime, any general argument against profiling may also be an argument against preventive counter-terrorism.

General arguments against profiling exist. A profile is a stereotype of a possible offender, and this stereotype can inherit content from stereotypes of groups against which there is popular prejudice . In the last section I distinguished an evidence-based profile from a profile that might be derived from hostile stereotyping of South Asians in general. If men with long beards in South Asian dress are automatically stopped in the UK or France for questioning about bombs, or are chosen for surveillance, that may reinforce a pre-existing prejudice against British or French Asians. This is not only a violation of a moral requirement of equality among citizens, but counter-productive from a policing point of view, discouraging co-operation from a non-violent local Asian population, while also making it easier for the guilty to avoid attention by adopting western dress and shaving. Differently, if travellers to all parts of Pakistan are terrorist suspects, profiling will throw up too many suspects. Profiling, then, can be unacceptable for roughly two kinds of reasons: that it is too undiscriminating to be useful, and that it is too discriminatory to be consistent with equality under the law and the presumption of innocence. Profiling is not *necessarily* discriminatory in this way– reasons were given why a specific profile sketched in the last section is not– but it can be.

The solution to some of the problems being discussed is to base profiling in a jurisdiction on social scientific evidence from studies of the extent and causes of radicalization –a relatively sudden willingness to engage in violence– in the local population. This is in line with the EU Counter-Terrorism Strategy. It is also a way of avoiding facile stereotyping. Another solution is to *obviate* profiling by encouraging communities likely to contain radicals to provide information about past or future crimes, this information to be tested by further investigation meeting the usual rules for evidence admissible for a prosecution in a liberal jurisdiction. Information of this kind is a staple of ordinary policing in the West, and so its use for counter-terrorism is no more objectionable than its use elsewhere.[28]

Even when a profile used by the authorities is acceptable because it is evidence-based and specific , it is still being used *before* a crime has been committed, and it is being directed at a *type* of suspect rather than identified individuals. Is satisfying a profile really a sufficient reason for being arrested

[27] J. Meuller, *Overblown:* How Politicians and the Terrorism Industry Inflate National Security Threats, and Why we Believe Them (New York: Free Press, 2006).

[28] In some liberal jurisdictions, however, new procedures for collecting evidence, detaining suspects and prosecuting those charged have been adopted *ad hoc*, justifying the impression that the usual procedures with their usual protections are being circumvented for no very clear reason, or for the convenience of the authorities. These *ad hoc* departures are no part of what is being argued for in this paper.

and questioned? In the investigation of serial murder, where profiling has been used longest, the influence of profilers has sometimes been blamed for sending an enquiry off course.[29] Not only have profiles been accepted as authoritative in the absence of corroborating evidence against people arrested for fitting them, but evidence against individuals *not* fitting a profile has sometimes been taken to be outweighed by the authority of the profile.[30] In general, the evidence base for profiling, its methodology and its success even in solving serial murders is questionable.[31] In Europe, profiling has often involved illegal discrimination, quite apart from intrusion.[32]

Nevertheless, it is possible reasonably to maintain that *evidence-based* profiling is defensible if preventive counter-terrorism is. So long as such profiling is used to identify suspects who are presumed innocent until evidence connecting them with a specific crime turns up, and so long as anyone detained for fitting a profile is given the normal legal protections –representation by a lawyer and time-limited detention–arrest based on profiling is prima facie permissible. In the case of suspects fitting profiles geared to the acquisition of skills useful to terrorist attacks (see previous section),evidence-based profiling may even permissibly trigger police surveillance, albeit independently authorized and time-limited police surveillance subject to normal liberal safeguards. Much depends, of course, on the quality of the evidence on which the profiling is based. The intuitions of forensic psychologists are perhaps to be relied on less than systematic sociology of radicalization, if the latter but not the former works by a widely recognized methodology of social science. But there is no reason why methodologically acceptable sociology should not in principle guide the identification of suspects, with ordinary questioning and information-gathering by the police in relation to specific suspects serving to eliminate the innocent. The fact that people are interviewed or even watched or overheard before they have committed any crime does not seem to be a decisive moral objection if there is evidence that they may be planning a crime, and the crime is serious. Especially where the effect of the crime, once carried out, is irreversible, as in the case of death or some kinds of injury, the case for preventive action is normally very strong, at any rate in liberal jurisdictions, where there are constraints on what can be criminalized and on what is regarded as a serious crime.

A profile that fits everyone is not a possible candidate for a profile that permissibly leads to questioning or surveillance. Neither is a profile that is arrived at with no recognized social scientific or natural scientific methodology. Much police profiling of ordinary crime, and much counter-terrorist profiling, fails to reach the threshold for evidence-based profiling in the sense of this paper. So the argument, if accepted, is not a vindication of preventive counter-terrorism as it actually exists in real liberal jurisdictions. Neither is the argument a vindication of the line of thought of all those who campaign on behalf of privacy in counter-terrorism. Normal protections of correspondence and family life against intrusion can exceptionally be waived permissibly, but they should not be

[29] The notorious Rachel Nickell murder enquiry in the UK is an illustration. See http://www.independent.co.uk/news/uk/the-rachel-nickell-case-severe-blow-to-future-of-profiling-stephen-ward-assesses-the-role-of-the-psychologist-after-mr-justice-ognalls-ruling-1449044.html

[30] Ibid.

[31] C. Dowden, C Bennell and S Bloomfield, Advances in Offender Profiling: A Systematic Review of the Profiling Literature Published Over the Past Three Decades *Journal of Police and Criminal Psychology* vol. 22 (1) 2007 pp. 44-56.

[32] O. De Schutter and J. Ringelheim, 'Ethnic Profiling: A rising challenge for European Human Rights Law' *Modern Law Review vol. 71 (* 2008) pp.358-384.

waived lightly, or simply on the say-so of a few people in authority. And the burden of proof is on those who wish to depart from the normality of liberalism, not on those whose emails are being intercepted and whose movements are being recorded. This paper has aimed to show that the burden of proof can be discharged consistently with liberal principles if the threat is big enough. It has not tried to show that the threat *is* big enough. If it is not, the normal norms of liberalism must prevail.