

**Democracy, Privacy and Security**

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This article is concerned with the role of democracy in preventing terrorism, identifying and apprehending terrorists, and in minimising and alleviating the damage created by terrorism. Specifically, it considers the role of democracy as a resource, not simply a limitation, on counter-terrorism.<sup>1</sup>

I am mainly concerned with the ways in which counter-terrorism is similar to more familiar forms of public policy, such as the prevention of crime or the promotion of economic prosperity, and so nothing that I say turns on being able sharply to distinguish terrorism from other bad things that democracies have to face. I will not, then, address the extensive debate on the best way to define terrorism.<sup>i</sup> However, I assume that terrorists characteristically seek to terrorise people in order to secure their particular ends. What forms that terror takes, what people terrorists seek to terrorise, and what ends terrorists seek to promote I assume to be indeterminate, open to change, and a matter for empirical investigation. However, I take it that the IRA, Baader Meinhoff, the Red Brigade, as well as certain animal rights' groups in the UK, and certain anti-abortion groups in the US, are examples of terrorist groups, and individuals. In short, I will be assuming that terrorism is principally characterised by the choice of means to given ends, rather than by the ends themselves, and that it is the choice of means, rather than the favoured ends, that makes terrorism so problematic from a democratic perspective.

However good the goal, terrorising a population – whether or not this involves killing the innocent – is morally wrong and, from a democratic perspective, an abuse of power over the lives of others. While the use of terror may indicate that the ends sought by terrorists are such that people cannot be expected to support them voluntarily, there is no justification for supposing that the ends of terrorism must be morally or politically unacceptable, simply because the means are both. It is a staple

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<sup>1</sup> Unfortunately, this paper was written before David Anderson's review of British terrorism legislation (especially RIPA the Regulation of Investigatory Powers Act), was made public. However, it can be accessed online at <https://terrorismlegislationreviewer.independent.gov.uk>. And for those who wish to follow some of the debate which it has occasioned, see ‘“Undemocratic, unnecessary, intolerable”... The Official verdict on Britain's state snoopers by John Naughton in 13, June, 2015, available at [www.theguardian.com/commentisfree/2015/jun13/david-anderson-qc-investigatory-powers-report](http://www.theguardian.com/commentisfree/2015/jun13/david-anderson-qc-investigatory-powers-report)

of ordinary life – not merely of philosophical examples- that people are sometimes unjustified in the means they use in order to accomplish perfectly acceptable ends. So, the ends terrorists seek are, or might become, morally or politically acceptable without in any way altering our objections to the use of terror as a tool for promoting them.

Before turning to the goals of counter-terrorism, and the role of democracy in achieving those goals, it may be helpful briefly to distinguish specifically democratic objections to terrorism from more familiar ethical objections to it. Most obviously, terrorism is generally wrong because it involves unjust killing, maiming and terrorising. Utilitarians, for instance, will likely focus on the pain it creates in sentient beings (animal, as well as human); Kantians will likely object to the ways that terrorism treats people simply as means to other people's ends, as though people are not also ends in themselves, however useful they may be to others. These both strike me as persuasive objections to terrorism. However, they are not intrinsically democratic – that is, they are the sorts of objections to terrorism you might make whatever your views of legitimate government. By contrast, the democratic objections to terrorism importantly turn on the unjust ascription of power over others implicit in terrorism. Arrogation of such power is at odds with the core democratic idea that people are entitled to govern themselves freely and as equals. No government is entitled to terrorise its citizens, whatever one thinks about the legitimacy of capital punishment. Nor is government entitled to exercise its powers arbitrarily, or in ways and for ends, that have not been approved by citizens or their representatives. There are, therefore, distinctive ethical objections to terrorism from a democratic perspective which are not reducible to, although consistent with, more familiar objections. <sup>ii</sup>

A comparison may be helpful. "Outing" involves the dissemination and publication, without consent, of sensitive personal information in order to achieve some particular moral or political purpose.<sup>iii</sup> The typical case involves revealing that some well-known or influential figure is gay or HIV positive – but the fact that

someone has cancer, that they had an abortion, were a victim of rape, that they were once communists, or worked for the secret service are also examples of the phenomenon. Classic objections to “outing” involve claims that the relevant information is private or personal, and so should not be made public without consent; or that revealing this information is unlikely to achieve the desired ends, and may even prove counter-productive. A natural Kantian objection would be that outing treats someone simply as a tool for other people’s purposes, and that this is morally wrong.

These strike me as good objections to “outing” as a general matter, although they are not always persuasive. However, these objections are rather different from the specifically democratic objection, which is to the arbitrary ascription of power over others involved in the practice. Who decides to do the outing, who is chosen as victim, how the costs and benefits of outing are determined are all decided in ways that deny victims the ability to influence a matter that may have serious implications for their lives, liberty, social standing, their prospects of employment, their marriage and the custody of their children. Nor of course, is there any scope for appeal, oversight or compensation implicit in outing, as usually practiced.<sup>iv</sup> The power involved, therefore, is fundamentally undemocratic, even if it is not absolute – or the power of life and death. <sup>v</sup>So, while outing, like terrorism, may be successful in achieving ends that are morally good, and potential objects of democratic consent, the means used are unacceptable and at odds with the reasons to value democratic government.

### **The Goals of Counter-Terrorism**

I take the goals of counter-terrorism centrally to involve the prevention of terrorism, the identification and capture of terrorists, and the minimisation and alleviation of damage from terrorism. These are scarcely the only goals of counter-terrorism, but I imagine that these must have a central place in democratic responses to terrorism, whatever the case with other political regimes.

If these are the central goals of counter-terrorism, then the origin of terrorism (whether it is home-grown, imported or some combination of the two) is irrelevant to the legitimacy of the goals, though it may matter to the means used in realising them. Moreover, the goals of counter-terrorism are importantly similar to those characteristic of other forms of public policy, which typically seek to minimise or prevent the occurrence of bad things –whether or not the causes are human or intentional.<sup>vi</sup>

The goals of fighting terrorism are importantly similar to the goals involved in fighting crime and, more generally, to the goal of preventing non-criminal sources of harm. So, many of the resources and constraints typical of these other cases will be useful and important in the case of terrorism – in part because the differences between terrorism and organised crime may be hard to determine (especially because terrorists are likely to fund themselves through various criminal activities)<sup>2</sup> and because the terror created by some diseases when first discovered (cancer/AIDS) or by certain events (floods, famines, eclipses, economic depressions) are all susceptible to manipulation by the unscrupulous for their own purposes. The *source* and particular *character* of the terror, therefore, does not matter to the legitimacy of trying to prevent it, to minimise the harms created by it, and to identify and apprehend those who seek to promote and to benefit from it. Finally, *rehabilitation and not just punishment*, may be a legitimate goal of counter-terrorism and, in some cases, may be obligatory, because the moral horror of an act does not automatically transfer to the person who committed it, as is clear from the case of child killers.

These theoretical points have practical relevance to counter-terrorism. It is likely that fairly long-running terrorist organisations will have members who ‘want out’ or

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<sup>2</sup> The fact that terrorist organisations are often engaged in racketeering, for example, underpins controversies about ‘collusion’ in Northern Ireland and Massachusetts, where police and security agents often engaged in illegal activities that were hard to control. Sir David Omand raises this issue clearly at p. 10 in ‘The National Security Strategy: Implications for the UK Intelligence Community’, a discussion paper commissioned and published by the Institute for public Policy Research, in the UK, in February, 2009. Sadly, this paper is no longer available from the IPPR website, but I have a copy on file.

who, with a little persuasion, can be brought to envisage and desire an alternative way of life. Handling such people involves complex moral, as well as practical, judgements about the appropriate punishment for their acts; the appropriateness of promising immunity from that punishment; and the appropriateness of demanding their active participation in the fight against their former comrades. Fear of public hostility to anything that looks like being 'soft on crime' – let alone 'soft on terrorism' – may well hamper efforts to be *open* about the bargains/promises made to former terrorists and to use the promise of rehabilitation and/or immunity from punishment as an inducement to desist from terrorism. Security forces therefore become vulnerable to the charge of acting illegitimately (undemocratically) and immorally if and when their bargains come to light.<sup>vii</sup> These are real practical handicaps in counter-terrorism, as in efforts to diminish crime more generally. They arise from mistaken views about the nature of moral responsibility, desert and punishment; and it is as important to counter-terrorism, as it is to other public-policy objectives, to counter these. As we will see, debate and deliberation are, therefore, democratic resources for achieving security.

### **Democracy**

Democracy has many forms, but its key feature is that citizens are entitled to participate in government – in formulating, executing and judging matters of public policy – and have intrinsically equal claims to do so. This claim to participate is different from the idea that citizens are entitled to be consulted by those who have responsibility for government – an ideal that characterised the medieval conception of kingship, for example. It is also different from the idea that governments should consider people's interests equally, or 'govern in the interests of all'. Attractive and important though these political ideals may be, they do not imply that ordinary people are entitled themselves to hold positions of public power and responsibility and, therefore, to do the consulting, considering and governing themselves, or through agents who they have authorised.

Of course, there are different ways of ensuring democratic participation, and different ways of interpreting the ideal itself. However, a common feature of these is that people have moral and legal rights, liberties, opportunities and resources to *enable* them to participate in politics freely and as equals. These rights, liberties, opportunities and resources structure the *competitive* aspects of politics so that winners and losers are capable of, and motivated to seek, cooperation in future. In short, in (modern) democracies winners do not 'take all'; losers 'live to fight another day'; and words, arguments and dialogue, rather than force, intimidation and exclusion are the main tools of competition, as of government itself.<sup>viii</sup> This helps to explain why religious, civil and personal liberties are so critical to democratic government, even when they seem to be apolitical or, even anti-political, and why their content and justification from a democratic perspective may be rather different from those characteristic of liberalism, even in its egalitarian forms.<sup>ix</sup>

For example, the point of protecting privacy, from a democratic perspective, is not that privacy is some pre-eminent individual good because of its connection to human dignity, intimate and familial relationships or to property ownership – as it would be from liberal perspectives. Privacy may, or may not be justified on these grounds. The point, rather, is that protection for anonymity, confidentiality, seclusion, and intimacy – to name a few characteristics of privacy – helps to foster the freedom and equality necessary for democratic politics, by structuring and limiting competition for power in ways that enable people to see and treat each other as equal despite incompatible beliefs, interests and identities. Although there is likely to be considerable overlap between democratic and liberal accounts of people's rights to privacy – especially when we consider the more egalitarian forms of liberalism associated with John Rawls, Ronald Dworkin or Thomas Nagel – these are not going to be identical and there is no reason, off hand, why democratic ideas of privacy should be closer to liberal ones than to utilitarian, Marxist, communitarian or feminist ones – which typically accord less importance to individual self-expression, sexual and romantic fulfilment, or to private ownership than liberals. <sup>x</sup>



*The relevance of these points to counter-terrorism* is that democratic government is not the same as liberal government or, even, constitutional government, although many forms of democracy are liberal, (in the sense that they place a premium on individual rather than collective goods and rights) and are constitutional, (in that deciding upon, judging and carrying out formal laws is the preeminent way in which collectively binding decisions are made – by contrast to the more informal and ad-hoc ways in which people often govern themselves).

It is only comparatively recently that philosophers have really started to probe the differences between democratic and allied moral and political ideals – in particular, the differences between democratic and liberal egalitarian ideas about people’s rights, values and claims on scarce resources. It is therefore difficult to provide simple and concrete examples of the significance of these differences for counter-terrorism. The point, rather, is to be aware that liberal objections to wire-tapping, for example, may be rather different from democratic ones- so what would be unjustified from one perspective is not necessarily unjustified from the other. This is partly because the considerations determining what is and is not justified can differ – as we have seen – but partly that what counts as an invasion of privacy (whether justified or not) may be rather different in the two cases.

For example, liberals tend to think that there is something especially bad about constraining sexual and religious expression, compared to scientific or military expression.<sup>xi</sup> This shapes their understanding of people’s claims to secrecy in sexual and religious matters, compared to economic and scientific ones – where companies, for example, are typically accorded considerable freedom to determine what is secret and to deny their employees privacy, and in military matters, where the government is given a fairly free hand. <sup>xii</sup>

It is unclear that we should accept these sorts of priorities – however familiar they may be – if what we are concerned with is the distribution of power amongst

individuals. Hence, the importance we should attach to differences between various techniques for surveillance – CCTV cameras compared to policemen, say- and to their location in pubs and shops, not just train stations and airports. These differences may not be particularly significant from a liberal perspective, in so far as surveillance here can be described as occurring in public places, accessible to all, rather than in domestic or intimate settings. However, they may matter a great deal from a democratic perspective. These different tactics and locations of surveillance suggest rather different ways of distributing security and liberty amongst individuals and of conceptualising the good of security itself. So, the differences between democratic and liberal approaches to privacy can affect the ethics of counter-terrorism, and of security more generally.<sup>xiii</sup> For instance, the differences between racial profiling, random searches and universal searches shows that there are very considerable moral and political differences in the way we can scrutinise and monitor each other. Racial profiling places the burdens of collective security primarily upon a disadvantaged social group, and is likely, as well, to exacerbate unjustified prejudices and hostility. As this is not true either for random searches or for universal ones, racial profiling is much harder to justify than these other forms of security.<sup>xiv</sup>

Likewise, the differences between a uniformed police presence, CCTV and a bus conductor or bathroom attendant are important to the justification of security in public places, and the justification of the one does not automatically mean that we should accept the others. The disadvantage of CCTV relative to a visible, uniformed police presence, for example, is that it provides no one who can come to our aid and, depending on how likely we are to forget that it is there, and how impetuous we are, it may do little to prevent crime. The prime uses of CCTV, therefore, are likely to be in the post-hoc identification of criminals, whereas deterrence as well as solidarity may be better fostered by the presence of identifiable people who are able to provide some oversight of public areas, even if they are also engaged in other tasks.<sup>xv</sup>

People have privacy interests in public, then, which we can provisionally define as interests in anonymity, seclusion, confidentiality and solitude. These are morally and politically important, even though it is unreasonable to demand the same degree of protection for our privacy in public places, to which all have access, as in areas where we are entitled to exclude others.<sup>xvi</sup> Privacy in public places, such as parks, streets, museums, cinemas, pubs matters because many of us live in such crowded conditions that public space provides some of our best chances for peace and quiet, for a heart-to-heart with friends, or for relaxation and fun.

It is a mistake, therefore, to suppose that people lack legitimate interests in privacy once they leave their houses, or to suppose that privacy on public transport, the park or, even, at work, is a contradiction in terms simply because these are all areas in which others may see us, overhear what we say, or bump into us without violating our moral or legal claims to privacy. After all, being snooped on and overheard by a passer-by are not the same, nor does groping on the subway seem any more morally acceptable than at a cocktail party. It is therefore important, when thinking about security, to consider the differences between our privacy interests in public – our interests in anonymity, seclusion, confidentiality and intimacy, for example – and their implications for the different forms of surveillance, if any, which may be justified.

A few years ago, for instance, some police forces in the UK attempted to force pubs to install CCTV on their premises, as a condition for getting or retaining their entitlement to serve alcohol.<sup>xvii</sup> Now alcohol clearly exacerbates tendencies to violence and aggression, and may make it easier for people to steal other people's property, and to deceive or coerce them. But to insist on treating all pubs as though they are the same is to ignore the differences for both privacy and security of small pubs, where people regularly meet and know each other, and the large, anonymous drinking places increasingly found in bigger cities. The threats to security posed by the former are very much smaller than the latter, and the intrusion on privacy created by CCTV may well be much greater, because of the greater degree of

intimacy and informality characteristic of such settings. In short, the costs to privacy of surveillance are likely to vary even within spaces that are characteristically thought of as public.

We should therefore be wary of ignoring people's interests in privacy on the internet, including in areas of the web which are open to all, rather than 'closed' or part of recognisably private conversations. Clearly the web, like the street, the park or the cinema, cannot be exempt from police scrutiny, nor can it be off-limits to social researchers. However, just as our privacy interests in parks, cinemas, streets and pubs are more complex and diverse than is often assumed, so our privacy interests in public communications, including on the internet, cannot be simply divided into a public area – where police scrutiny or social research is assumed to pose no problems – and a private area where complex legal safeguards are supposed to be required before we are subject to such scrutiny. If we would be troubled by the routine presence of unidentified police officers in health-clinics or public libraries, we should be uncomfortable with the suggestion that no special justification or supervision is required for police scrutiny of, and participation in, debates on public websites.

A uniformed police presence, for example, might inhibit us from picking up the information pamphlets on sexually transmitted diseases discretely available in the health clinic or seeking information about cancer or drug addiction in the library. But official surveillance that we do not know about leaves us vulnerable to misinterpretation of our thoughts and actions as well as to the misuse of state power. Once widespread, it creates a climate in which we are encouraged to see others as threatening, and ourselves as powerless and defenceless individuals. Surveillance can adversely affect the quality of our social relations and our subjective sense of ourselves, then, as well as our objective capacities to shape our own lives, whether we are concerned with places that are open to all, or those in which we are able to seclude ourselves.

### **Democracy As a Constraint in Counter-Terrorism**

Democratic principles are a constraint on the ways we can respond to terrorism, just as they are to the ways we can fight crime, promote economic growth, or secure peace, love and happiness at home and abroad. These constraints are partly institutional and partly created by the moral and political considerations which justify democratic institutions. There are two main ones I want to highlight here, in part because they tend to be short-changed in the more familiar discussion of the ways liberty conflicts with security, or with efficiency. The first concerns the relationship amongst different liberties, rights and opportunities; and the second concerns the way we conceptualise and distribute the costs and benefits of security.

#### *Privacy v. Security?*

As we have seen, it is not possible sharply to differentiate political and non-political rights, liberties and opportunities – or constraints on religious freedom, sexual equality or freedom from arbitrary arrest and imprisonment and rights to vote, stand for election to government, or to dissent from the political choices, associations and actions of others. We cannot sharply differentiate political and non-political liberties and rights partly because the political consequences of curtailing any particular liberty are hard to predict and because democratic politics cannot be neatly cabined in Parliament, or its regional equivalents, and limited to the choice of legislators every few years.

Constraints on privacy are necessary to protect ‘the rule of law’, because we cannot form, pass, judge and execute laws democratically without devices such as the secret ballot, or legal rights of confidential judgement, information and association, which enable people carefully to explore alone, and with others they know and trust, what they should do as citizens.<sup>xviii</sup> Our legitimate interests in privacy are not negligible, or inherently of lesser importance than our interests in security. Nor are they always selfish or self-regarding. The latter assumption, I suspect, often underpins ideas about the lesser importance of privacy relative to other things. But a moment’s reflection reminds us of the importance of confidentiality to our ability to

keep *other people's* secrets, even when it might be in our personal interests to disclose them; and of the importance of anonymity, solitude and confidentiality to our abilities to act with tact, discretion and consideration for others, even when we do not share their particular sensibilities, interests and commitments. Just as our willingness to grant privacy to others can reflect respect and trust - and be valued and desired for that reason - so our willingness to act anonymously, confidentially or discreetly can reflect a mature and considered decision to avoid burdening others with our problems, or to avoid forcing them to confront features of the world with which they may be unwilling or unable to cope.

Our interests in privacy, then, can be varied and inescapably tied to our sense of ourselves as moral agents. They are not, therefore of obviously lesser importance than our interests in self-preservation - individual, or collective.<sup>3</sup> This is partly because our interests in privacy are not purely instrumental but seem sometimes to be ways of affirming, even constituting, ourselves as people to be trusted, respected, deserving of liberty, equality and happiness.<sup>4</sup> Indeed, while privacy can be necessary to our security and be desired for that reason, people are sometimes willing to risk their lives and health in order to maintain anonymity, seclusion and confidentiality. This would be unreasonable were privacy less important than security but if, as I have suggested, it is inseparable from relationships and ideals that have ultimate value, then a willingness to risk physical security for privacy can be comprehensible, and even admirable.

Not all arguments for limiting privacy in the interests of security are consistent with democratic principles, or with the ways in which privacy can express our collective, as well as individual, interests in freedom, equality and solidarity. We should therefore be wary of 'ethical guidelines', such as those propounded by Sir David

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<sup>3</sup> Hence I disagree fundamentally with Kenneth Himma, in this volume.

<sup>4</sup> Benjamin Goold makes a similar point in his excellent 'Privacy, Identity and Security', in B.J. Goold and L. Lazarus, *Security and Human Rights*, (Hart Publishing Company, Oxford 2007), ch. 3, where he shows how the effects of automated surveillance in the wake of 9/11, have exacerbated the threats to 'narrative' forms of identity, and their replacement by 'categorical identities'.

Omand, which assume that whenever it is impossible to protect both privacy and security, the former should bow before the latter.<sup>xix</sup> . Omand's 'ethical guidelines', which appear to be drawn from just war theory,<sup>xx</sup> are meant to tell us when the state is entitled to limit people's privacy in the interests of security. They include 'sufficient sustainable cause; integrity of motive; proportionate methods; proper authority; reasonable prospect of success; no reasonable alternative'. Such guidelines ignore the ways in which privacy can be *necessary* to the security of at least some people, given prejudice, discrimination and unfounded fear and hostility. In addition, they overlook the ways in which democratic government and principles depend on our willingness to constrain the quest for security in the interests of the privacy of members. In short, one worry about Sir Omand's pronouncements are their one-sided and unqualified character, which turn a problem in *jointly protecting* two values into a reason to *sacrifice one* to the other. This is unjustified, and has the predictable consequence that some people's security will be threatened because we are contemptuous of their privacy.

The US Supreme Court decision in *NAACP v. Alabama* (357 US. 1958) is interesting in this context. The NAACP is the National Association for the Advancement of Coloured People, and was originally founded as a non-profit membership association. By 1957 the state government of Alabama was seriously concerned with its growing membership and use of civil disobedience against racial segregation. The state government therefore sought access to the membership list of the NAACP under an existing state statute aimed at ensuring that business associations be held responsible for any damage to life, liberty or property that their activities cause. But while the Court accepted that the government of Alabama had a legitimate interest in ensuring that associations, like individuals, can be held accountable for harm to others, it denied that this required them to have access to the full membership list of the NAACP, rather than to the names and contact information of its leaders. Freedom of association, the Court argued, is a fundamental democratic right, and protections for anonymity can be essential to its exercise. So while the state has a duty to provide security for its citizens, the Court

maintained that people's interests in privacy and associative freedom legitimately constrain the ways that the state may fulfil that duty.

According to Sir David's guidelines, 'integrity of motive' is essential to determine when our interests in security justify curtailing people's privacy by spying on them. But this appears to confuse the conditions necessary for the state to be justified in *exercising* its rights of surveillance with the question of *what rights* – whether moral or legal – the state is entitled to claim. At best, integrity of motive is relevant to the former, however as the US Supreme Court realised, in *NAACP v. Alabama*, it is irrelevant to the latter. For example, the purpose of requiring the NAACP's to disclose its membership list was not fear for people's lives, liberty or property, so much as the desire to thwart the movement for Civil Rights. The motives for requiring the membership list in 1957, then, were not particularly reputable. They would surely have failed Omand's test of 'integrity of motive'. Nonetheless, as the Court thought, democracy requires governments to be able to hold associations to account for their actions, and therefore to have some means of identifying their legal representatives, even if these do not require governments to record the names, addresses (or the license plates and photos) of ordinary people, even if they are engaged in social protest, or campaigning for radical change.<sup>xxi</sup> In short, Omand's six criteria – 'sufficient sustainable cause; integrity of motive; proportionate methods; proper authority; reasonable prospect of success; no reasonable alternative' – provide guidance on the morally appropriate *claiming* and *exercise* of rights of surveillance. What they do not tell us is tell us *which* moral or legal rights of surveillance follow from the state's duty to keep us all safe.

### *Equality*

Of course, we cannot always protect – let alone promote – the liberties and opportunities to which people are entitled. But if and when we can't, it matters *how the costs and benefits of any sacrifice are made* in counter-terrorism, as in other aspects of public policy. In fact, I would suggest, it is necessary publicly to show that sacrifice x by group y is, indeed, necessary to prevent greater harms to some other



group. Hence, it is necessary to discuss alternative ways of preventing harm, and how their respective costs and benefits are to be described and assessed.

An example may be helpful, and can illustrate why talk of ‘proportionate’ sacrifices is often so empty and misleading. In 2009 the part of London in which I lived – Streatham -faced the loss of its local police station, in the interests of efficiency and cost effectiveness, to some ‘central’ location somewhere else within the borough.<sup>xxiii</sup> The move might have been justified, although given the appalling traffic in London it is hard to be confident that shop-keepers, victims of domestic violence or young people would get the timely help that they need if they need to depend on help from outside the area. But putting problems of response times aside, if we consider that it can take an ordinary person anywhere from half an hour to an hour or more to travel 5-7 miles in that part of London, the consequences of such a move for democratic forms of policing and security become apparent. After all, the point of police stations, from a democratic perspective, is not simply that they enable police quickly to get to the scene of a crime/potential crime, but that they represent the local community, and are a focus for local hopes, complaints, knowledge, pride and initiative. This is scarcely possible if people have to find anywhere from an hour to three hours, in already busy lives, for a round-trip visit to ‘their’ police station.

Thus, whether we are concerned with powers to stop and search, wiretap, detain without trial, to limit choice of religious dress, expression, travel and employment, it matters how we describe and assess the costs and benefits of our actions. It matters, in order to avoid stigmatising minorities and unpopular social groups for what is, typically, the behaviour of a very small percentage of their population. It is necessary to avoid cementing injustices and social problems – racial and sexual inequality, poverty, alienation, ignorance and hopelessness – that we already find it hard enough to deal with. And it is necessary to avoid confusing democratic rights and liberties with alternatives, however efficient, familiar and seemingly attractive.

*Suicide Bombers*

Before turning to democracy as a resource in the fight against terrorism, I would like briefly to suggest how the idea of democracy as a constraint on counter-terrorism, and public policy more generally, may help us to handle the real and potential problems of *suicide bombers*.

I assume that an important goal of counter-terrorism is to move suicide bombers away from suicide, even when we cannot yet stop them planting/setting off bombs. The parallel here is to the IRA – and the importance of getting advance warning *that* a bomb is about to go off, even when it is impossible to prevent the bomb from being planted and/or triggered. In each case, what is at stake is saving lives but also – and importantly, from a long-term perspective - the ability to establish a relationship with bombers, however tenuous and difficult, in order to discuss alternative ways to achieve their ends, and different ways to think about those ends themselves.

To do this it is essential that we can persuasively convey the message that the lives of suicide bombers are more valuable than they think; that they are valuable for reasons other than, or in addition to, those they believe; and that we recognise and care about their lives for reasons related to the reasons why we value our own, and that of our compatriots. Put simply, we need to convey the message that we want them to desist from *suicide*, not merely from *bombing*; and that our objections to the latter – that this is a dreadful way to die; that nobody deserves such a death; that nobody is entitled to inflict such a death on others – are connected to our objections to their suicide and to those who have encouraged/persuaded/ordered them to die in this way.

Of course, we are unlikely to be able to convey this message successfully in many cases; just as it is difficult to persuade some would-be bombers of the advantages of calling the police in order to avoid or, at any rate, to minimise death and injury. But there are some people who can be persuaded or are, at least, credible targets of persuasion. An important goal of counter-terrorism is to work out how to reach and influence these people. However, the credibility and practical effectiveness of our

claims of concern and care – or of the effort to turn potential suicide bombers into negotiating partners – is the way that our society treats its own members, as well as foreigners.<sup>xxiii</sup> While it is clear that foreign policy has made Britain a target of Muslim ire, I think we also need to consider the ways in which our *domestic* politics prevent an adequate response to suicide bombers at home and abroad, and may even foster the belief that killing oneself, along with others, is necessary to manifest the sincerity and strength of one's convictions, the urgency of one's cause, and one's claims to public attention.

### **Democracy As a Resource in Counter-Terrorism.**

It is important to the motivation and justification of democratic government that people have some hope of influencing the political agenda on things that they care about. Where people have this sort of influence, democracies can accommodate the classic 'single issue voter' described by political scientists, whose views are organised around one particular issue, or set of issues – be they abortion, animal rights, global warming, self-rule for Ireland, Kashmir, Palestine. It is typically these people who are most readily alienated from democratic government, even though only a very small minority of those who are alienated will act out that alienation through politically motivated violence.

Democracy offers the promise that losing on the swings (for example, on economic policy) is compatible with gaining on the roundabouts (for example, civil liberties or foreign policy). So, while many people are not particularly enamoured of democratic government, let alone of their political leaders, they are unlikely to reject democracy as a means of handling political conflict. This is less likely to be true for those with single-issue, non-negotiable causes, and this makes it a matter of some importance that people have multiple ways of competing for political power and positions of public responsibility, so that failure in any one of these is less likely to determine failure on all.

Making politics accessible to people in a variety of ways and through a variety of means encourages us to seek cooperative solutions to the realisation of our cherished ends, even when these are eccentric or unpopular. Political participation can help us to see why compromise is a legitimate response to the demands of others, and how to structure compromises that respect the sincerity and importance of people's fundamental convictions, even when we cannot endorse them. Engagement with democratic politics is not guaranteed to produce satisfaction and can, sometimes, be alienating and dispiriting. But we are much less likely to be bitter and cynical about politicians as a class when we have tried our hand at politics; and we are more likely to accept the need to compromise in order to accommodate the interests of others when we have, ourselves, experienced the efforts of other people to accommodate our interests and concerns.

If these points are right, the centralised, hierarchical and hide-bound character of British democracy – as of other well-established democracies – is a real obstacle to counter-terrorism. Democratic entitlements to welfare, education, employment and security imply rights to participate in determining what forms of these are desirable, how best to achieve these, and at what costs in terms not just of taxes raised and spent, but of opportunities foregone, and claims postponed or ignored. The real democratic agenda, therefore, is to improve people's abilities and opportunities to debate their rights and duties, their liberties and opportunities, and the proper distribution of resources in matters of security, as well as of education, employment and health, rather than to demand acceptance of a supposed code of 'British values' or of their equivalents, such as 'laïcité'<sup>xxiv</sup>.

There are many ways in which we might try to do this, and there is research on democratic budget-setting, prioritising of health-care needs, and jury deliberation – as well as on democratic deliberation more generally – which can be examined and

built upon.<sup>5</sup> How democratic deliberation obviously depends on the way it is structured – what veto rights people have over discussion; what the terms of entry and exit are; what information is available to all, and what is secret; what sorts of coalitions are allowed and disallowed; who, if anyone, monitors or facilitates discussion. All these are important, because deliberation is not always free and equal, let alone capable of generating more light than heat.

Nor can all aspects of counter-terrorism be openly debated – though this, it should be said, is as likely to be true of economic and foreign policy as of counter-terrorism. Discussions may need to be confidential in order to facilitate the free and frank exchange of ideas – hence, in part, the ideal of cabinet secrecy. They may need to be limited in subject matter in order to avoid needless offence, or to enable people actually to sit down together. And, of course, public debate sometimes has to be limited to protect people, institutions and facts of national interest.

But discussions of security can be useful even when they are based on historical cases, or on hypothetical ones. They can be comparative and quite general in focus – as when we compare attitudes to CCTV, ID cards, the storage and use of DNA samples, in Britain and other countries. They can be useful when we consider how Britain differs from other democracies in its fairly extensive use of wiretapping for security and police purposes, but its unwillingness to allow that evidence in court<sup>6</sup>. We can compare the treatment of gang members and the incidence of gang crime amongst children in Boston and Chicago, compared to London or Liverpool and its significance for racial profiling, for stop and search laws, and for the relationship

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<sup>5</sup> See for example, Archon Fung, *Empowered Participation: Reinventing Urban Democracy*, (Princeton University Press, 2004); Albert Weale, 'Democratic Values, Public Consultation and Health Priorities' in ed. A. Oliver, *Equity in Health and Health Care*, (The Nuffield Trust, London, 2004), and Annabelle Lever, 'Democracy, Deliberation and Public Service Reform: The Case of NICE', in eds. Henry Kippin, Gerry Stoker and Simon Griffiths, *Public Services: The New Reform Agenda*, (Bloomsbury Academic Press, London 2013), 91 -106

<sup>6</sup> For American scepticism about the benefits of their use of warrantless wiretapping, see the *New York Times*, (July 10, 2009), <http://www.nytimes.com/2009/07/11/us/11nsa.html?th&emc=th>. Apparently, the very secrecy of the covert-wiretapping programme prevented the effective sue and dissemination of any information that it provided.

between crime and terrorism.<sup>77</sup> Above all, it is possible to help people to think about, and confront, difficult questions of identity, value and experience that are important to current efforts against terrorism, and that may be useful in considering what Donald Rumsfeld so memorably referred to as ‘unknown unknowns’.

Take, for example, the role of Islam in Africa – in the conflicts in Sudan, Ethiopia and Kenya. Why not encourage Muslims in Britain and elsewhere to discuss the role of race in Islam, just as it is appropriate to ask Christians or Jews to consider the way it has shaped, and continues to shape, their theology, culture and politics? Why not have television programmes, newspaper and radio discussions on religion in contemporary Britain in which Asian Muslims and Christians from Africa and the Caribbean – two of the livelier religious groups in our country – discuss shared experiences of faith, racism, immigration and international concerns, as well as their mutual suspicions?

These are merely examples – perhaps not good ones. But they illustrate how narrow in structure and subject matter most contemporary debates on religion and security really are; how much we have to learn about people’s experiences of identity, religion and security; and how little we actually know about the sources of conflict and cooperation in our society.

In short, democratic debate and choice are important weapons in the fight against terrorism. Democratic education and deliberation are necessary to the justification of any public policy on surveillance, although they do not figure in Omand’s ‘guidelines’ for legitimate surveillance. Moreover, while governments and think-tanks stress the importance of education in fighting extremism, and in justifying surveillance, most proposals in this area are astonishingly bland and vague.<sup>xxv</sup>

Above all, they seem utterly disconnected from the thought that, as citizens, we *need and are entitled* intelligently to discuss government policy on surveillance, just as we

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<sup>77</sup> See for example David A. Harris, *Good Cop: The Case for Preventive Policing*, (The New Press, New York, 2005) and his earlier *Profiles in Injustice: Why Racial Profiling Cannot Work*, (The New Press, New York, 2003).

would employment policy, education, welfare or policy on crime and punishment. We may differ in our desire and ability to master many of the relevant details or controversies - though this is unlikely to be any truer of surveillance than of employment or education policy, let alone pensions or the EU constitution. And some things have to stay secret. We will therefore need to combine historical cases, the experience of other countries, and hypothetical examples, in lay as well as expert discussions. But this is perfectly compatible with the assumption that ordinary citizens might be interested in, and should be able to discuss, the principles and basic practices of surveillance, as of counter-terrorism more generally.

### **Conclusion**

I have argued that democracy is a resource, as well as a constraint, in the goals of counter-terrorism and suggested that the two are intimately related. They are related in some of the same ways, and for the same reasons, that democratic government helps to prevent famine. As Amartya Sen showed, in some of the work for which he won the Nobel prize in economics, democracies facilitate the effective use and sharing of information, as of other goods, because of the freedoms they secure.

Those freedoms come at a price and that price is not purely financial. It includes the death of people who would not have died, and might have had happier, more successful, lives under other forms of government. In some cases, this is no cause for regret, because people are not entitled to secure their lives, liberty and happiness by enslaving others. But matters are often more complicated, because people do not deserve to die or to be maimed because we may not inflict worse harms on others. To say that democracy is a resource, not merely a constraint, then, is not to underestimate the latter. Instead it is to recognise that the dilemmas of counter-terrorism, as of public policy more generally, arise because the constraints of democracy are our resources for securing voluntary cooperation, even in the face of involuntary conflict.

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<sup>i</sup> See, for example, Verena Erlenbusch, “How (Not) to Study Terrorism,” *Critical Review of Social and Political Philosophy* 17, no. 4 (2014). and on p. 99 of *Securing the State*, David Omand refers to over 109 definitions of terrorism. Sir David Omand, *Securing the State* (London: Hurst and Company, n.d.).

<sup>ii</sup> Robert Goodin also focuses on the distinctively *political* aspects of the harms of terrorism in Robert E. Goodin, *What’s Wrong With Terrorism?* (Cambridge, UK: Polity Press, 2006). and believes that the use of terror for political advantage is the ‘*distinctive* wrong that terrorists commit, making them terrorists and not mere murderers’. P. 49, although he repeatedly reiterates his point that the moral *badness* of terrorism comes from the violence used to create the terror, (murder, mass-murder, kidnapping etc), as distinct from the bare fact of trying to get one’s political way through fear (though this, too, is presumptively bad). See for example, pp., 184-5.

<sup>iii</sup> I discuss ‘outing’ at more length in Annabelle Lever, *On Privacy* (Routledge, 2012). ch. 2. See also Patricia Boling, *Privacy and the Politics of Intimate Life* (Cornell, NY: Cornell University Press, 1996). pp. 29 -30.

<sup>iv</sup> Max Mosley, for example, was very clear that his effort to bring the *News of the World* to justice for invasions of privacy was something that few other people would be able to manage for financial, as well as personal, reasons. See *Moseley v. News Group Newspapers Ltd.* (2008) EWHC 687 (QB)

<sup>v</sup> I develop this argument in more detail in Annabelle Lever, “Privacy, Democracy, and Freedom of Expression,” in *Social Dimensions of Privacy*, eds. Beate Roessler and Dorota Mokrosinska (Cambridge, UK: Cambridge University Press, 2015).

<sup>vi</sup> I therefore disagree with the view of Jacqui Smith, then Home Secretary for the United Kingdom, who appears to suppose that the importance of prevention, rather than after-the fact responsiveness, is more urgent in the case of terrorism than of murder, rape, domestic violence, robbery and corruption. The fact that most police investigations of the latter typically occur after the fact, does not tell us about the relative urgency of prevention in these cases, so much as the difficulty of prevention and, probably, the difficulty of using *law enforcement* rather than social policy, education and the rest, to influence people’s behaviour. See Jacqui Smith, ‘In many respects, counter-terrorism work is distinctive in nature and not like other areas of law enforcement. The work of our security and intelligence agencies is, of necessity, covert.....We depend on the police and Security Service to identify these individuals before their plans come to fruition, to stop an attack from happening. This contrasts with the majority of police investigations, which happen after the crime has taken place’. The Home Secretary was addressing the Smith Institute and the Centre for the Study of Terrorism, at St. Andrews University, in June 3, 2008 (<http://press.homeoffice.gov.uk/Speeches/countering-terrorism-democracy> ). The quotation comes from the section called ‘Our Objectives’.

<sup>vii</sup> David Omand refers to this as the ‘moral hazard’ that comes with principle-agent actions. Pp. 285-6 and his discussion of the problem of shared intelligence and diplomatic collaboration with countries who use torture pp. 271-77. However, as Omand notes, the shift in Britain in the 1980s from a situation where the existence of a



secret organisations was neither confirmed nor denied, to one in which it was openly acknowledged and given a legislative framework, has been generally welcomed because of its capacities to alleviate – though not remove – some of these problems. He quotes Sir Stephen Lander, a former DG of the Security Service: ‘We now had the assurance of statute law as opposed to the insecurity of royal prerogative, under which much agency activity hitherto notionally took place. That change played a key part in the 1990s and beyond in making the agencies more self-confident and thus more effective’.

<sup>viii</sup> An interesting contrast comes from the practice of ostracism in Ancient Greece. On this see Sara Forsdyke, *Exile, Ostracism and Democracy: The Politics of Expulsion in Ancient Greece* (Princeton University Press, 2005). and Judith N. Shklar, “Obligation, Loyalty and Exile,” in *Political Thought and Political Thinkers*, ed. Stanley Hoffman (Chicago: Chicago University Press, 1998).

<sup>ix</sup> My conception of democracy has been shaped by Joshua Cohen’s brilliant, if difficult, essay, Joshua Cohen, “Procedure and Substance in Deliberative Democracy,” in *Philosophy and Democracy*, ed. T. Christiano (Oxford: Oxford University Press, 2003), 1–17. And by his work on democracy more generally. See Joshua Cohen, *Philosophy, Politics, Democracy: Selected Essays* (Cambridge MA.: Harvard University Press, 2009).

<sup>x</sup> I have developed these ideas at length in Annabelle Lever, *A Democratic Conception of Privacy* (Authorhouse, 2014).and Annabelle Lever, “Privacy and Democracy: What the Secret Ballot Reveals,” *Law, Culture and Humanities*, 2012.

<sup>xi</sup> See, for example, Charles Fried, “‘Privacy,’” in *Philosophical Dimensions of Privacy: An Anthology*, ed. Ferdinand D. Schoeman (Camb: Cambridge University Press, 1984), 203–22.or Julie C. Inness, *Privacy, Intimacy and Isolation* (Oxford: Oxford University Press, 1992).

<sup>xii</sup> For a helpful discussion of the differences in legal notions of employee privacy in the USA and Europe see Matthew W. Finkin, “Employee Privacy, American Values and the Law,” *The Chicago-Kent Law Review* 72 (July 1996): 221–69.

<sup>xiii</sup> Anita Allen has an interesting discussion of ‘catcalling’ as an invasion of privacy and a marker of male space and dominance in Anita L. Allen, *Uneasy Access: Privacy for Women in a Free Society* (New Jersey: Rowman and Littlefield, 1988). Ch. 5, on ‘Privacy for Women in Public’, especially pp. 128-140

<sup>xiv</sup> See Annabelle Lever, “Why Racial Profiling Is Hard to Justify,” *Philosophy and Public Affairs* 33, no. 1 (2005). and Annabelle Lever, “What’s Wrong With Racial Profiling? Another Look at the Problem,” *Criminal Justice Ethics* 26, no. 1 (winter/spring 2007): 20–28..For an excellent short book on the subject, see Naomi Zack, *White Privilege and Black Rights: The Injustice of U.S. Police Racial Profiling and Homicide* (Maryland: Rowman and Littlefield, 2015).

<sup>xv</sup> Compare the views on CCTV of Ryberg J., “Privacy Rights, Crime Prevention, CCTV and the Life of Mrs. Aremac,” *Res Publica* 13, no. 2 (June 2007): 127–43.in .with those of Annabelle Lever, “Mrs. Aremac and the Camera,” *Res Publica* 14, no. 1 (March 2008).

and Benjamin Goold, “The Difference between Lonely Old Ladies and CCTV Cameras: A Response to Ryberg,” *Res Publica* 14, no. 1 (2008): 43–47.

<sup>xvi</sup> This is a point well made by Helen Nissenbaum, although her ways of understanding the context-dependent aspects of privacy strike me as too uncritical of actual practices, and of élite theories about those practices, whereas I believe the starting point should be the weight and variety of the legitimate interests in doing various things, or in being in various places, rather than a theoretically pre-given definition of ‘context’. Helen Nissenbaum, “Protecting Privacy in an Information Age: The Problem of Privacy in Public,” *Law and Philosophy* 17, no. 5 (1998): 559–96. ...As Jeremy Waldron persuasively argues, ‘The subway is a place where those who have some other place to sleep may do things besides sleeping’. For those who lack anywhere of their own, public space provides their only chances of meeting their basic needs legally and with some modicum of privacy. Jeremy Waldron, “Homelessness and the Issue of Freedom,” in *Liberal Rights: Collected Papers 1981–1991* (Cambridge: Cambridge University Press, 1993), 309–38.

<sup>xvii</sup> <http://www.theguardian.com/uk/2009/mar/12/cctv-pubs-privacy-ico>;  
<http://www.theguardian.com/uk/2009/mar/16/pubs-police-cctv-in-bars>

<sup>xviii</sup> Annabelle Lever, “Privacy Rights and Democracy: A Contradiction in Terms?,” *Contemporary Political Theory* 5, no. 2 (2005): 142–62. And *A Democratic Conception of Privacy*, ch. 3 and on our political interests in privacy. See also Joshua Cohen, ‘Pluralism and Proceduralism’.

<sup>xix</sup> <http://www.theguardian.com/uk/2009/feb/25/personal-data-terrorism-surveillance>;  
<http://www.theguardian.com/commentisfree/2013/jun/11/make-surveillance-ethical-and-effective> ; <http://www.ippr.org/publication/55/1675/the-national-security-strategy-implications-for-the-uk-intelligence-community>.

See also Omand’s *Securing the State*, pp. 285-7 and 324-5 for repetitions of these guidelines. However, in his discussion of privacy (pp. 110 -111) he notes that ‘the total impact of individually justified measures may add up to an unwelcome capability of the state to access information on its citizens for undefined purposes’. It is not clear how his statement at p. 111 that trade-offs between personal privacy and security have ‘to be weighed for each technique’, responds to that concern, even granted that ‘intrusions into personal privacy can and should be limited to the most serious challenges to security, from terrorism and serious crime and not from the multitude of minor misdemeanours that authority must therefore find less intrusive ways to prevent’. Perhaps Omand’s view is that we must just live with the collectively undesirable, even irrational, results of individually rational decisions – rather than straining to find ways to factor the risks of collectively irrational outcomes into our analysis of what it is rational to do in individual cases.

<sup>xx</sup> For reasons that will become apparent, I am sceptical about the appropriateness of using Just War theories for thinking about the ethics of counter-terrorism, or of security more generally, including the ethics of war. This is partly because JWR is a tradition of ethical thought that still uses an ethical framework originally developed to determine when divinely ordained absolute monarchs might be justified in waging war on each

other. It therefore treats the differences between democratic and undemocratic governments as irrelevant to what we are entitled to do. Its prescriptions and ways of thought therefore sit very uneasily with the perspectives on security which come out of democratic approaches to civil and criminal law, where the protection of civil liberties are of fundamental concern, irrespective of the intentions of our governments. Robert Goodin is similarly sceptical of the extension of just war theory to the analysis of terrorism and of security more generally – and implicitly, if not explicitly, sceptical about its use in thinking about the ethics of war. However, while his reasons are compatible with mine, they are more concerned with the implications of just war theory for our judgements about individual terrorist acts and people than are mine. See in particular Robert E. Goodin, *What's Wrong With Terrorism?*. Ch. 2.

<sup>xxi</sup> See for example, “Police Forces Challenged over Files Held on Law-Abiding Protesters | World News | The Guardian,” accessed May 16, 2015, <http://www.theguardian.com/uk/2009/oct/26/police-challenged-protest-files>. and “Kingsnorth: How Climate Protesters Were Treated as Threat to the Country | Environment | The Guardian,” accessed May 16, 2015, <http://www.theguardian.com/environment/2009/oct/26/kingsnorth-protests-climate-change-campaign>.

<sup>xxii</sup> The saga seems to have continued through 2014, with a new police station finally opening within Streatham. Streatham, at the time, had problems with gangs and drugs and contained a significant immigrant and refugee population with distinctive linguistic needs.

<sup>xxiii</sup> I am not thinking only of the treatment of interpreters in Afghanistan and Iraq, who have found it hard to obtain citizenship in Britain, but also of the treatment of the poor, disabled and of religious, racial and ethnic minorities in Britain. In a discussion on terrorism and democracy in the House of Lords in 2009, Steve Tsang referred to the work of Mike Aaronson on economic development and terrorism. While Western governments think of development as a sensible way to combat terrorism, the way in which such development is offered often serves to *discredit development*, not to inhibit terrorism. The reason is simple: recipients of aid are well-aware that aid is self-interested, not altruistic and that its benefits may fail to offset the risks of impoverishment, exploitation and insecurity resulting from trade with the West. See Tang, Steve, *Combating Transnational Terrorism: Searching for a New Paradigm* (Praeger Security International, 2009). The gist of this argument was presented at the House of Lords debate on Terrorism, organised by Baroness Nicholson of Winterbourne, MEP, on 23 February, 2009, apparently. I was not there.

<sup>xxiv</sup> On Laïcité see Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy: The Hijab Controversy and Political Philosophy* (Oxford University Press, 2008). Cécile Laborde, *Français, Encore Un Effort Pour Être Républicains!* (Seuil, 2013).

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<sup>xxv</sup> See Sir David Omand 'National Security Strategy' and Jacqui Smith's speech at St Andrews, *supra*.

- Allen, Anita L. *Uneasy Access: Privacy for Women in a Free Society*. New Jersey: Rowman and Littlefield, 1988.
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