'KNOW THINE ENEMY AS THYSELF': DISCERNING FRIEND FROM FOE UNDER ANTI-TERRORISM LAWS

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[The embedded nature of the terrorist risk appears to demand the treatment of one's neighbour as potentially both friend and foe. One of the consequences is the application of 'all-risks' policing measures, such as stop and search powers. But can this wide casting of the intelligence web or the application of policing powers both enhance security and keep the faith with constitutional values? In this article, all-risks policing of terrorism will be considered by reference to the stop and search powers under s 44 of the Terrorism Act 2000 *(UK) c 11. Since reasonable suspicion does not found policing action, it is important to examine the consequent patterns of usage and the forms of governance over them. This article will explore the nature and usage of the special stop and search powers since they are key to an understanding of how 'neighbour' terrorism is now being addressed.]*

CONTENTS

I 'NEIGHBOUR' TERRORISM

According to Sun Tzu's *The Art of War*:

> If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.[1]

The old sage, Sun Tzu, had in mind that one's enemy would be an outsider — schooled in other cultures and ways of thinking. Overcoming the cognitive gaps would be advantageous to refining one's own strategies and tactics. Notably,

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1 Sun Tzu, *The Art of War* (Samuel B Griffith trans, 1963 ed) pt III [18] [trans of: *Sūnzǐ Bīngfǎ*] reprinted in Mark McNeilly, *Sun Tzu and the Art of Modern Warfare* (2003) 213, 232.

these arts of war were propounded before globalisation. In olden times, anyone not fitting a stereotype — be it national, ethnic, racial or cultural — could be marked out as a potential foe. But with porous borders, it is much more difficult to answer the question: who is my neighbour and who is my enemy?

Applying these considerations to contemporary terrorism, an archetypal outsider is embodied by the convenient figure of Osama bin Laden — depicted as an alien, uncivilised cave-dweller.[2] Yet, whilst foreigners remain a threat, the menacing figures in the contemporary stage of terrorism are often our neighbours from within. For example, the London bombings of 7 July 2005 were carried out by three second-generation British citizens whose parents were of Pakistani origin and an individual who had been residing in Britain almost since birth.[3] The attempted bombings in London on 21 July 2005 were likewise perpetrated by long-term residents.[4] The 'neighbour' bombers of the 2005 London bombings and 2006 transatlantic aircraft plot[5] were not isolated aberrations, since it is known that British citizens have engaged in terrorism not only on their own soil but also on foreign soil, disregarding whether they killed neighbours or aliens. Examples include Richard Reid, who attempted to explode a shoe bomb on a transatlantic flight in 2001.[6]

In light of these precedents, it can no longer be claimed that the enemy in war is 'in a specially intense way, existentially something different and alien' and the negation of our existence, the destruction of our 'way of life'.[7] Rather, we are increasingly unsure of how to typecast our enemies, and the embedded nature of the terrorism risk seems to demand the treatment of one's neighbour as potentially friend and foe. One of the consequences is the application of 'all-risks' policing measures, which treat almost anyone and everyone as a risk. Nevertheless, how can the casting of the intelligence web or the application of policing powers be used to enhance security while, at the same time, avoid social division or the wholesale repression of constitutional values?[8] Which mechanisms or strategies might assist in allowing us to live our lives tolerably free from the fear of terrorism risk and from the paranoia that our neighbour may turn out to be a terrorist?

[2] President George W Bush referred to Osama bin Laden as 'a guy who, three months ago, was in control of a county. Now he's maybe in control of a cave': Office of the Press Secretary, The White House, 'President, General Franks Discuss War Effort' (Press Release, 28 December 2001) <http://www.whitehouse.gov/news/releases/2001/12/20011228-1.html>.

[3] See Intelligence and Security Committee, *Report into the London Terrorist Attacks on 7 July 2005*, Cm 6785 (2005); Home Office, *Report of the Official Account of the Bombings in London on 7th July 2005*, House of Commons Paper No 1087, Session 2005–06 (2006).

[4] See Sean O'Neill, 'Refugees Who Tried to Wage War on London', *The Times* (London), 10 July 2007, 1.

[5] Stewart Tendler, Jenny Booth and Adam Fresco, *Foiled Transatlantic Bomb Plot 'Was Ready to Go in Days'* (10 August 2006) *Times Online* <http://www.timesonline.co.uk/tol/news/uk/crime/article605120.ece>.

[6] Pamela Ferdinand, 'Would-Be Shoe Bomber Gets Life Term; Al-Qaeda Member Shouts at Judge', *The Washington Post* (Washington DC), 31 January 2003, A01.

[7] Carl Schmitt, *The Concept of the Political* (George Schwab trans, 1976 ed) 27 [trans of: *Der Begriff des Politischen*].

[8] National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* (2004) 394–5.

This article will first explain in Part II what is meant by 'all-risks' policing in general and will explore, as one prominent example, the application of stop and search powers against the risk of terrorism. The statistical impacts of the powers, both in terms of the enhancement of security and the differential treatment of ethnic minorities, will be described and explained. Part III of the article will consider the constitutional and normative aspects of the powers, the police's practices around them and how those practices might be contained within a suitable normative framework. By reference first to case law, it will be seen how the courts have struggled to allow police demands for the widest possible discretion in the interests of public protection, while at the same time ensuring that communities are not discriminated against and that individuals are treated with respect. Finally, the article will consider in Part IV aspects of containment beyond case law, bringing in wider aspects of regulation and accountability.

II 'ALL-RISKS' POLICING POWERS

An intelligence-led approach provides a strong basis for action against terrorism.[9] Intelligence will trigger an array of policing operations and will also found executive action such as detention and control. However, when intelligence is not sufficiently precise to pick out foe from friend, then evermore pervasive tactics must be adopted. One approach will be the application of 'all-risks' policing powers, by which the police will treat anyone and everyone as a risk. The reason for their attention is not so much the suspicion falling upon any given individual, but the nature of the threat and the vulnerability or importance of a particular target. Thus, the risk calculation shifts from persons to actions and objects.

A familiar example of this all-risks approach is the universal screening of passengers at airports.[10] The legal instruments comprise the Hague *Convention for the Suppression of Unlawful Seizure of Aircraft*,[11] the Montreal *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*[12] and the Montreal *Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*.[13] As for administrative standards, the International Civil Aviation Organisation has developed annex 17 to its *Standards and Recommended Practices*,[14] which have been applied assiduously in jurisdictions such as Australia and the United Kingdom.[15] There are corresponding measures in place relating to maritime security.[16]

9 See Clive Walker, 'Intelligence and Anti-Terrorism Legislation in the United Kingdom' (2006) 44 *Crime, Law and Social Change* 387.

10 See Paul M Wilkinson and Brian M Jenkins, *Aviation Terrorism and Security* (1999).

11 Opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971).

12 Opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973).

13 Opened for signature 26 October 1988, [1990] ATS 39 (entered into force 6 August 1989).

14 See Alan Khee-Jin Tan, 'Recent Developments Relating to Terrorism and Aviation Security' in Victor V Ramraj, Michael Hor and Kent Roach (eds), *Global Anti-Terrorism Law and Policing* (2005) 225.

15 See Sir John Wheeler, *Airport Security* (27 March 2002) Department for Transport <http://www.dft.gov.uk/pgr/security/aviation/airport/airportsecurityreport.pdf>; Sir John Wheeler, *An Independent Review of Airport Security and Policing for the Government of Australia* (2005) <http://www.premiers.qld.gov.au/policy/intergovt/coagmincncl/Communiques/

These international measures may be supplemented by additional national provisions. Within the UK, port controls under pt V and sch 7 of the *Terrorism Act 2000* (UK) c 11 involve the further scrutiny of travellers.[17] Their purpose is to disrupt possible terrorist planning and logistics, and also to gather low-level intelligence about movements. The controls also deter attacks on the travel facilities themselves.

The system began in 1974 within the 'Common Travel Area' between Britain, Northern Ireland and the Republic of Ireland, where passport controls have never applied for reasons relating to the close common history of those territories. However, further changes were implemented by s 118 of the *Anti-Terrorism, Crime and Security Act 2001* (UK) c 24, which allows an examining officer to exercise the port controls not only in relation to traffic entering the UK or between Ireland and Britain, but also in relation to persons travelling on a ship or aircraft within the UK.

The series of controls begins under para 2 of sch 7 of the *Terrorism Act 2000* (UK) c 11, whereby an 'examining officer' (meaning a constable, an immigration officer or a designated customs officer) may question a person for the purpose of determining whether they appear to be a 'terrorist'. Reflecting the 'all-risks' nature of these powers, it is made clear that examining officers may exercise their powers under this paragraph whether or not they have grounds for suspicion against any individual. In this way, the possibility remains that the 'copper's nose'[18] for wrongdoing, based on intuition rather than rational indicators, must be allowed the occasional unprompted 'sniff'. Detention may be imposed during questioning, but the length of detention must not exceed nine hours.[19] A person who is questioned must, under para 5:

> (a) give the examining officer any information in his possession which the officer requests;
>
> (b) give the examining officer on request either a valid passport which includes a photograph or another document which establishes his identity [the alternative is necessary because travel between Ireland and Britain does not require the production of a passport];
>
> (c) declare whether he has with him documents of a kind specified by the examining officer; [or]

COAG/27_September_2005/Wheeler_Airport_Security_and_Policing_Review_report_and_other_information>.

16 See Robert C Beckman, 'International Responses to Combat Maritime Terrorism' in Victor V Ramraj, Michael Hor and Kent Roach (eds), *Global Anti-Terrorism Law and Policing* (2005) 248.

17 See Clive Walker, *The Anti-Terrorism Legislation* (2002) ch 5. See also the extension of the power to search vehicles as well as persons under the *Terrorism Act 2006* (UK) c 11, s 29.

18 Lord Carlile of Berriew, *Report on the Operation in 2006 of the* Terrorism Act 2000 (2007) 33 <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/TA2000-review061.pdf>.

19 *Terrorism Act 2000* (UK) c 11, sch 7 para 6(4).

(d) give the examining officer on request any document which he has with him and which is of a kind specified by the officer.[20]

The person, and any ship or aircraft carrying them, may also be searched under para 8 of sch 7 and there is also a wide power to search unaccompanied baggage and goods under para 9.

Though the statutory powers cover 'all risks', some attempt to structure the wide discretion is tackled by para 10 of the Code of Practice for Examining Officers under the *Terrorism Act 2000*:

> Examining officers should therefore make every reasonable effort to exercise the power in such a way as to minimise causing embarrassment or offence to a person who has no terrorist connections. The powers to stop and question a person should not be exercised in a way which unfairly discriminates against a person on the grounds of race, colour, religion, creed, gender or sexual orientation. When deciding whether to question a person the examining officer should bear in mind that the primary reason for doing so is to maximise disruption of terrorist movements into and out of the United Kingdom.
>
> *Note for guidance on paragraph 10*
>
> The selection of people stopped and examined under the port and border area powers should, as far as is practicable given the circumstances at the port or in the area, reflect an objective assessment of the threat posed by various terrorist groups active in and outside the United kingdom [sic]. Examining officers should take particular care not to discriminate unfairly against minority ethnic groups in the exercise of these powers. When exercising the powers examining officers should consider such factors as
>
> - known and suspected sources of terrorism
> - any information on the origins and/or possible location of terrorist groups
> - the possible nature of any current or future terrorist activity
> - the means of travel (and documentation) which a group of individuals could use
> - [l]ocal circumstances, such as movements, trends at individual ports or parts of the border area.[21]

All-risks policing of terrorism is applied at places other than borders by stop and search powers under s 44 of the *Terrorism Act 2000* (UK) c 11. These powers even more clearly exemplify how action can be taken against 'neighbours' in the light of terrorist threats, since the clientele away from ports and airports is much less likely to comprise foreigners. The question then arises that if neither intelligence nor reasonable suspicion is available, what patterns of usage will emerge? This article next explores the nature and usage of these

20 *Terrorism Act 2000* (UK) c 11, sch 7 para 5.

21 *Terrorism Act 2000 (Code of Practice for Examining Officers) Order 2001* (UK). A revised draft Code has been issued by the Home Office, but para 10 is unaltered. The Code is issued under the *Terrorism Act 2000* (UK) c 11, sch 14 para 6.

internal stop and search powers as such an examination is key to an understanding of how neighbour terrorism is now being addressed within the UK, and perhaps how it might be dealt with in the future in comparable jurisdictions such as Australia.

III 'ALL-RISKS' POLICING THROUGH STOP AND SEARCH POWERS

A *Statutory Provisions*

The powers in s 44 of the *Terrorism Act 2000* (UK) c 11 allow any police constable in uniform to stop a vehicle or a pedestrian located within an area or at a place specified in an authorisation. Section 44 is the descendant of a number of additions to the *Prevention of Terrorism (Temporary Provisions) Act 1989* (UK) c 4 (ss 13A and 13B) inserted by the *Criminal Justice and Public Order Act 1994* (UK) c 33, s 62 and the *Prevention of Terrorism (Additional Powers) Act 1996* (UK) c 7. Those measures were in response to large Irish Republican Army truck bombs in the City of London in 1992 and 1993 and then in Docklands in 1996. It was argued that the new powers afforded a chance to intercept munitions or to disrupt plans.[22] Section 44 of the Act now states:

> (1) An authorisation under this subsection authorises any constable in uniform to stop a vehicle in an area or at a place specified in the authorisation and to search —
>
> (a) the vehicle;
> (b) the driver of the vehicle;
> (c) a passenger in the vehicle;
> (d) anything in or on the vehicle or carried by the driver or a passenger.
>
> (2) An authorisation under this subsection authorises any constable in uniform to stop a pedestrian in an area or at a place specified in the authorisation and to search —
>
> (a) the pedestrian;
> (b) anything carried by him.
>
> (3) An authorisation under subsection (1) or (2) may be given only if the person giving it considers it expedient for the prevention of acts of terrorism.
>
> (4) An authorisation may be given —
>
> (a) … by a police officer for the area who is of at least the rank of assistant chief constable …[23]
>
> (5) If an authorisation is given orally, the person giving it shall confirm it in writing as soon as is reasonably practicable.[24]

[22] Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism*, Cm 3420 (1996) [10.14], [10.21].

[23] Corresponding ranks apply in the City of London and in Northern Ireland: *Terrorism Act 2000* (UK) c 11, s 44(4).

[24] *Terrorism Act 2000* (UK) c 11, s 44 amended by: *Police (Northern Ireland) Act 2000* (UK) c 32, s 78(2)(c); *Anti-Terrorism, Crime and Security Act 2001* (UK) c 24, ss 101, 127(2)(f), sch 7

It is made clear in s 45(1)(b) of the Act that there can be a random or blanket search — the power 'may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind.'[25]

At the same time, there are some limits to the exercise of the powers. The search has limited impact on individuals due to s 45. Searches may be exercised only for the purpose of 'searching for articles of a kind which could be used in connection with terrorism'.[26] They may not involve a person being required 'to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves.'[27] A further safeguard is that a driver or pedestrian may apply within 12 months for a written statement as to the legal basis for the stop.[28] Next, when exercising stop and search powers, police officers must have regard to the provisions of Code A of the *Codes of Practice*[29] accompanying the *Police and Criminal Evidence Act 1984* (UK) c 60.[30] First, according to para 1.1 of Code A, powers to stop and search must be used 'fairly, responsibly, with respect for people being searched and without unlawful discrimination.'[31] It is further noted in para 1.1 that the *Race Relations (Amendment) Act 2000* (UK) c 34 'makes it unlawful for police officers to discriminate on the grounds of race, colour, ethnic origin, nationality or national origins'.[32] Secondly, para 1.2 of Code A provides that the 'intrusion on the liberty of the person stopped or searched' has to be brief and that any detention 'must take place at or near the location of the stop.'[33] Thirdly, paras 2.24 to 2.26 state that where an authorisation is given under s 44 of the Act, a constable might only exercise the powers for the purposes of 'searching for articles of a kind which could be used in connection with terrorism'.[34] On the other hand, since the power is not applied on the basis of reasonable suspicion, there may be some doubts as to whether the following warning in para 2.2 is applicable to s 44 powers as compared with 'normal' police stop and search powers which are predicated upon reasonable suspicion:

> Reasonable suspicion can never be supported on the basis of personal factors alone without reliable supporting intelligence or information or some specific behaviour by the person concerned. For example, a person's race, age, appearance, or the fact that the person is known to have a previous conviction, cannot

paras 29, 31; *Energy Act 2004* (UK) c 20, ss 57, 197(9), sch 23 pt 1; *Terrorism Act 2006* (UK) c 11, s 30. The changes mainly relate to the extension of the powers to the British Transport Police Force, the Civil Nuclear Constabulary and the Ministry of Defence Police.

25 *Terrorism Act 2000* (UK) c 11, s 45(1)(b).

26 *Terrorism Act 2000* (UK) c 11, s 45(1)(a).

27 *Terrorism Act 2000* (UK) c 11, s 45(3).

28 *Terrorism Act 2000* (UK) c 11, s 45(5).

29 See *Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2008* (UK).

30 *Police and Criminal Evidence Act 1984* (UK) c 60, s 67(9): 'Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of … a code.' The current version was adopted in 2005.

31 Code A of the *Codes of Practice* accompanying the *Police and Criminal Evidence Act 1984* (UK) c 60, para 1.1.

32 *Race Relations (Amendment) Act 2000* (UK) c 34, para 1.1.

33 Code A of the *Codes of Practice* accompanying the *Police and Criminal Evidence Act 1984* (UK) c 60, para 1.2.

34 Code A of the *Codes of Practice* accompanying the *Police and Criminal Evidence Act 1984* (UK) c 60, para 2.24.

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

The precondition for exercise, an authorisation, may be granted only if the senior police officer giving it considers it 'expedient' for the prevention of acts of terrorism.'[35] An authorisation, which may be valid for up to 28 days under s 46 and can be renewed, may be given by a police officer for the area if that officer is at least the rank of Assistant Chief Constable or a Commander of a London force. Section 46 requires the police to inform the Secretary of State (in other words, a UK government Minister as the function is usually performed by the Secretary of State for the Home Department) as soon as is reasonably practicable. For the authorisation to continue its validity, the authorisation must be confirmed (or amended or rejected) within 48 hours.[36] According to Home Office guidance, each authorisation under s 44

> should specify whether it applies across the entire force area, across a particular part of the force area, or only at a particular place (forces are asked to consider providing supporting intelligence on potential targets where the powers are restricted to a particular place).[37]

It must also specify the period for which the authorisation has effect, up to the maximum of 28 days.[38] Though it is desirable in principle that there is review of police decisions,[39] it is anomalous that the review is executive rather than judicial.

There are three different offences under s 47(1) for noncompliance with stops and searches. Failing to stop a vehicle when required to do so under s 44(1) is an offence.[40] Likewise, pedestrians who fail to comply with a direction under s 44(2) commit an offence.[41] Finally, it is an offence to wilfully obstruct a constable in the exercise of these powers.[42] The penalties on summary conviction are imprisonment for a term not exceeding six months, a fine not exceeding level 5 on the standard scale, or both.[43]

35 *Terrorism Act 2000* (UK) c 11, s 44(3).
36 *Terrorism Act 2000* (UK) c 11, s 46(4).
37 Home Office, Terrorism Act 2000 (Circular 03/01, 2001) 14–15.
38 *Terrorism Act 2000* (UK) c 11, s 46(2).
39 For the background, see Lord Lloyd of Berwick, above n 22, [10.25]; Home Office and Northern Ireland Office, *Legislation against Terrorism*, Cm 4178 (1998) [9.13].
40 *Terrorism Act 2000* (UK) c 11, s 47(1)(a).
41 *Terrorism Act 2000* (UK) c 11, s 47(1)(b).
42 *Terrorism Act 2000* (UK) c 11, s 47(1)(c).
43 *Terrorism Act 2000* (UK) c 11, s 47(2).

B *Statistics as to Usage*

Published statistics relating to the usage of s 44 are far from complete,[44] but they do reveal that, since 2000, five manifest patterns have occurred: a sustained increase in the use of this power, a low rate of consequent terrorist arrests, a higher rate of non-terrorist arrests, a disproportionate impact on Asian ethnic minorities and an uneven geographical delivery.

Table 1: Usage of s 44[45]

Year		**2001/02**	**2002/03**	**2003/04**	**2004/05**	**2005/06**
Stops (n)	s 44(1)	7604	16 761	21 287	21 121	25 479
	s 44(2)	946	4774	8120	10 941	19 064
	Total	8550	21 577	29 407	32 062	44 543
Terrorism/ Other Arrests (n)	s 44(1)	20/149	11/280	14/358	35/240	46/246
	s 44(2)	0/20	7/79	5/112	24/153	59/212
	Totals	20/169	18/359	19/470	59/393	105/458
Ethnicity (n)[46]	White	6629	14 429	20 637	23 389	30 837
	Black	529	1745	2704	2511	4155
	Asian	744	2989	3668	3485	6805
Location (%)	Metro-politan Police	49	61	53	40	51
	City (London)	32	21	25	20	15
	Other	19	18	23	40	35

The incidence of usage has increased substantially over the five year period, more so in relation to pedestrians (s 44(2)) than vehicles (s 44(1)). The figures therefore reveal that, alongside port controls, powers of stop and search under the *Terrorism Act 2000* (UK) c 11 constitute the most frequent form of public encounter with terrorism laws.

Resultant arrests of relevance to terrorism are secured at a very low rate (well under one per cent). Concentration upon this figure alone discounts the greater number of non-terrorist arrests, on the ground that these extraneous impacts

[44] See Sir William Macpherson, *The Stephen Lawrence Inquiry*, Cm 4262-I (1999) ch 47 (recommendations 61–2). See also Code A of the *Codes of Practice* accompanying the *Police and Criminal Evidence Act 1984* (2008) para 4.3.

[45] Alex Jones and Lawrence Singer, Ministry of Justice, UK, *Statistics on Race and the Criminal Justice System — 2006* (2007).

[46] Some are not recorded.

cannot possibly justify the existence and invocation of s 44 powers. However, the arrest rate does not provide the sole basis for the evaluation of 'successful' outcomes. Thus, Assistant Chief Constable Robert Beckley defended (on behalf of the Association of Chief Police Officers) the lack of consequent arrests by stressing that 'this is a power to be used to put people off their plans, hence it is used in a pretty random way'.[47] In this way, the disruptive potential of the power is depicted as more important than its interdictory potential, a claim which is even more difficult to test in empirical terms than harder edged outcomes such as arrests or convictions. Against these 'positive' outcomes, however, one must set first, the wasted resources arising from fruitless searches or searches which take place unobserved or unpublicised and which therefore cannot achieve any deterrent effect; and, secondly, the indirect negative impacts on individuals or communities through perceived unfair treatment.

Arrests relating to non-terrorist offences are consistently at a higher rate. One can appreciate that the genuinely unexpected detection of drugs or offensive weapons will account for some of these arrests. However, there may be a more insidious practice, which involves the use of terrorism powers to avoid the restraints (in terms of the establishment of reasonable suspicion of specific offences) in more 'normal' search powers. In this way, there is a danger that special powers will be applied in inappropriate contexts. It is impossible to discern from the statistics how often this happens, but some instances have been reported. First, Walter Wolfgang, an 82-year old party activist, was ejected from the Labour Party's 2005 annual conference after he heckled Foreign Secretary Jack Straw and then was stopped under s 44 when he tried to re-enter the venue.[48] Even more outrageous was the stopping of a woman in Dundee for walking along a cycle path.[49] The authorities seem to be tempted to invoke the powers in ever widening circles beyond terrorism.

Analysis in terms of ethnicity reveals a strong over-representation of minorities given the overall composition of the UK's population.

[47] Home Affairs Committee, *Terrorism and Community Relations*, House of Commons Paper No 165–I, Session 2004–05 (2005) 18. This point is endorsed by the National Centre for Policing Excellence, *Practice Advice on Stop and Search 2006* (2006) 27–8.

[48] Sam Jones, 'Heckler, 82, Wins Apology from Labour', *The Guardian* (London), 29 September 2005, 1.

[49] David Lister, 'Two Wheels: Good. Two Legs: Terrorist Suspect', *The Times* (London), 17 October 2005, 8.

Table 2: UK ethnicity[50]

	(n)	Total Population (%)	Minority Ethnic Population (%)
White	54 153 898	92.1	n/a
Asian or Asian British			
Indian	1 053 411	1.8	22.7
Pakistani	747 285	1.3	16.1
Bangladeshi	283 063	0.5	6.1
Other Asian	247 664	0.4	5.3
Black or Black British			
Black Caribbean	565 876	1.0	12.2
Black African	485 277	0.8	10.5
Black Other	97 585	0.2	2.1
Other	1 155 135	2.0	24.9
All Minority Ethnic Population	***4 635 296***	***7.9***	***100***
All Population	58 789 194	100	n/a

The extent of these racial inequalities, which is reflected also in non-terrorism stop and search powers, is disputed to some extent because of the inaccuracy of police recording practices and the possible disparity between the users of public spaces and the total population.[51] Of course, these explanations hardly allay negative concerns of the unduly affected ethnic minority communities.[52] It should be noted that the term 'Asian' should certainly not be translated as 'Muslim' since only half of those belonging to this ethnic group are in fact

[50] See Office for National Statistics, *National Statistics: Ethnicity* (13 February 2003) <http://www.statistics.gov.uk/cci/nugget.asp?id=273>.

[51] See, eg, Joel Miller, Nick Bland and Paul Quinton, *Upping the PACE? An Evaluation of the Recommendations of the Stephen Lawrence Inquiry on Stops and Searches* (Police Research Series Paper No 128, Policing and Reducing Crime Unit, Home Office, 2000); M V A and Joel Miller, *Profiling Populations Available for Stops and Searches* (Police Research Series Paper No 131, Policing and Reducing Crime Unit, Home Office, 2000); P A J Waddington, Kevin Stenson and David Don, 'In Proportion: Race, and Police Stop and Search' (2004) 44 *British Journal of Criminology* 889.

[52] See Macpherson, above n 44; Joel Miller, Nick Bland and Paul Quinton, *The Impact of Stops and Searches on Crime and the Community* (Police Research Series Paper No 127, Policing and Reducing Crime Unit, Home Office, 2000); Marian Fitzgerald et al, *Policing for London: Report of an Independent Study Funded by the Nuffield Foundation, The Esmée Fairburn Foundation and the Paul Hamlyn Foundation* (2002).

Muslims, though this proportion rises to 92 per cent for those of Pakistani or Bangladeshi origins.[53]

The power is also exercised selectively in terms of location. Overwhelmingly, its usage has been concentrated in London, where it has been in force on a rolling basis since 2001.[54] Aside from London, Table 1 demonstrates that the use of s 44 has been increasing elsewhere but, at any one time, only a minority of force areas have issued authorisations during a given year.[55] Section 44 powers had not been authorised for use anywhere in Scotland up to the end of 2004.[56]

IV THE CONTAINMENT OF 'ALL-RISKS' POLICING

The threats to individuals and communities from all-risks policing were explained in the previous Part. This Part of the article will address the possible modes of containment starting with court review, which tackles inter alia the role of profiling, before moving towards wider forms of regulation and accountability.

A *Case Law*

The exercise of s 44 of the *Terrorism Act 2000* (UK) c 11 has been considered at length by the Court of Appeal of England and Wales[57] and the House of Lords[58] in *R (Gillan) v Metropolitan Police Commissioner*. The facts were that an Assistant Commissioner of the Metropolitan Police gave an authorisation under s 44(4) covering the whole of the Metropolitan Police District. That authorisation was confirmed (without any publicity) by the Secretary of State and was then renewed and confirmed a number of times on a continuous basis since February 2001 and is still persisting today.

The first appellant, Kevin Gillan, was a postgraduate student who visited London in September 2003 to protest against an arms fair being held at the ExCel Centre, Docklands. He was stopped near the Centre for around 20 minutes and searched. Nothing incriminating was found.[59] The second appellant, Pennie Quinton, was an accredited freelance journalist who also attended at the Centre to film the protests taking place. She was stopped and searched. Nothing incriminating was found; the length of the transaction was five minutes in the police records but about 30 minutes in her estimation.[60]

Both appellants challenged the police action on various grounds:

- that s 44, as an incursion into liberties, should be construed restrictively (the 'interpretation question');

[53] Home Affairs Committee, *Terrorism and Community Relations*, above n 47, 21; Office for National Statistics, *Ethnic Group by Religion: April 2001 Census Update* (April 2001) <http://www.statistics.gov.uk/statbase/ssdataset.asp?vlnk=6892&More=Y>.

[54] Lord Carlile of Berriew, *Report on the Operation in 2004 of the* Terrorism Act 2000 (2005) 24.

[55] Ibid 27.

[56] Ibid 26–7.

[57] *R (Gillan) v Metropolitan Police Commissioner* [2005] 1 QB 388 ('*Gillan* (CA)').

[58] *R (Gillan) v Metropolitan Police Commissioner* [2006] 2 AC 307 ('*Gillan* (HL)').

[59] Ibid 332 (Lord Bingham).

[60] Ibid.

- that the exercise of discretion to issue the authorisation on behalf of the Commissioner was unlawful (the 'authorisation question');
- that the Secretary of State had exceeded his powers in confirming the authorisation (the 'confirmation question');
- that the officer in charge of the police operation wrongly invoked the powers in that place and time (the 'command question'); and
- that there was excess action by the operational officers who respectively stopped and searched the appellants (the 'operational question').[61]

These challenges were rejected by the Court of Appeal, whereupon there was an appeal to the House of Lords with the same outcome. The 'interpretation question' broke down first into a dispute as to the construction of the word 'expedient' in s 44(3) of the *Terrorism Act 2000* (UK) c 11. The House of Lords determined that it was significant that Parliament had chosen the word 'expedient' and not the word 'necessary'.[62] It was also held to be significant that s 44 dispensed with the condition of reasonable suspicion and that ss 44 and 45 are set in a series of constraints.[63] Taking these contexts together, s 44(3) was taken to mean that an authorisation might be expedient if, and only if, the person giving it considered it likely that the stop and search powers would be 'of significant practical value and utility in seeking to achieve … the prevention of acts of terrorism.'[64] That result is seemingly close to an administrative law standard. Objectivity is required to the extent that the authorisation must not be irrational — it is hard to see how it could be proven that an officer might suppose there is significant practical value and utility if no reasonable onlooker could concur with such a view. Conversely, it is arguably less demanding than the Home Office's circular *Authorisations of Stop and Search Powers under Section 44 of the* Terrorism Act 2000, addressed to Chief Officers of Police, which emphasises that: 'Powers should only be authorised where they are absolutely necessary to support a forces [sic] anti-terrorism operations.'[65] That standard may require the ruling out of alternative strategies.

Next, several points regarding the authorisation and confirmation of the invocation of s 44 were picked over. Lord Bingham was persuaded as to the need for wide geographical application and the possibility of early, disruptive police action which may be divorced from the actual point of attack.[66] Lord Bingham was also satisfied that the authorisation and confirmation processes had not become a 'routine bureaucratic exercise',[67] despite the rolling renewal over several years. The specific threats at any time to specific targets were not revealed, and the all-purpose evidence adduced pointed towards global and

61 *Gillan* (CA) [2005] 1 QB 388, 400–2 (Lord Woolf CJ).
62 *Gillan* (HL) [2006] 2 AC 307, 338 (Lord Bingham), 353 (Lord Scott).
63 Ibid 338 (Lord Bingham).
64 Ibid 339.
65 Home Office, *Authorisations of Stop and Search Powers under Section 44 of the Terrorism Act* (Circular 038/2004, 2004) 9.
66 *Gillan* (HL) [2006] 2 AC 307, 339–40.
67 Ibid 340.

national incidents of terrorism rather than the ExCel Centre.[68] The Home Secretary offered to explore the evidence more fully in closed session before the Divisional Court, but this offer was not taken up.[69] Even in the absence of this enquiry, one might argue that their Lordships too easily accepted evidence of vulnerabilities (which are indeed diffuse and permanent and so can be used to justify diffuse and de facto permanent powers) as equivalent to evidence of threats. The Court's indulgence seemingly nullifies the point of having specific and periodic authorisations.

As for the 'command question' and the 'operational question', Lord Bingham emphasised that the implementing constable is not free to act arbitrarily and must not stop and search people who are 'obviously not terrorist suspects'.[70] So, the absence of a requirement of reasonable suspicion is not tantamount to carte blanche. The lower courts were more pointedly critical of police practices on this score. There was concern that operational officers should receive carefully designed instructions as part of the command process.[71] However, the Court of Appeal found the police's practices to be 'lamentable.'[72] This remark echoed those of the Divisional Court, which had robustly warned that the guidance in para 2.25 of Code A of the *Codes of Practice* accompanying the *Police and Criminal Evidence Act 1984* (UK) c 60 was wanting.[73] Brooke LJ had found 'just enough evidence' to satisfy the Court that sufficient care and attention had been applied, but 'it was a fairly close call', which he underscored with a demand for a review of police training and briefings and revisions to Code A advice, so that it is more pertinent to s 44.[74] The issue was followed up by the official reviewer of the *Terrorism Act 2000* (UK) c 11, Lord Carlile of Berriew, who sensibly suggested that operational officers should be furnished with further guidance which emphasised the availability of more restrained powers outwith the anti-terrorism legislation.[75] Guidance has since been promulgated, albeit more relevant to the 'command question' than to implementation. Officers are required 'to review fully the intelligence on each authorisation and clearly show the link between that intelligence and the geographic extent of the location in which the powers will be used', though a force-wide authorisation is still permitted.[76]

68 Ibid.

69 Ibid 354 (Lord Scott). This offer might answer any complaints under the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221, art 5(4) (entered into force 3 September 1953) ('*European Convention*') as to the availability of effective review of merits.

70 *Gillan* (HL) [2006] 2 AC 307, 347.

71 *Gillan* (CA) [2005] 1 QB 388, 408 (Lord Hope).

72 Ibid.

73 Ibid.

74 Ibid 409.

75 Lord Carlile of Berriew, *Report on the Operation in 2002 and 2003 of the* Terrorism Act 2000 (2004) 16–17.

76 Letter from Charles Clarke, Home Secretary to Lord Carlile of Berriew, 20 July 2005 <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/response_terroract1.pdf?view=Standard&pubID=480254>. See further Home Office, *Review of the Operation of the* Terrorism Act 2000 (Circular 038/2004, 2004); Crime Reduction and Community Safety Group, Counter-Terrorism and Intelligence and Protection Unit, *Authorisations of Stop and Search Powers under Section 44 of the* Terrorism Act (Circular 22/2006, 2006).

Turning to implementation questions, though the applicants were not from an ethnic minority, some of their Lordships were troubled by the dangers of discrimination inherent in these powers. The preferred police practices were starkly described in 2005 by Ian Johnston, Chief Constable of the British Transport Police: 'We should not waste time searching old white ladies. It is going to be disproportionate. It is going to be young men, not exclusively, but it may be disproportionate when it comes to ethnic groups.'[77]

The Home Office Minister, Hazel Blears, concurred that sources of the terrorist threat 'inevitably means that some of our counter-terrorist powers will be disproportionately experienced by people in the Muslim community.'[78] Are these forms of racial profiling a sensible or unconscionable tactic within the application of all-risks policing?

Racial, ethnic or nationality profiling has been described as:

> when race or nationality is used as a factor in determining whom to stop, search, question, or arrest — whether in an investigative stop and frisk, a motor vehicle pretext search, or a security search — unless there is a suspect-specific or crime-specific exception to this general rule.[79]

The United States Department of Justice has offered the following more pejorative portrayal:

> 'Racial profiling' at its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.[80]

These considerations lead to an often damning assessment of the role of profiling:

> At its most productive, counterterror and law enforcement activities proceed from 'actionable' intelligence. In its absence, profiling is necessary. At their most useful, profiles are based on behaviour, like the purchase of a one-way ticket, travel to certain countries, or participation in flight training. When based exclusively on racial, ethnic, or religious characteristics, profiles offend the targeted groups and do not constitute useful counterterror tools. Profiles need to evolve based on new intelligence.[81]

Returning to *Gillan* (HL), in Lord Hope's view, 'the mere fact that the person appears to be of Asian origin is not a legitimate reason for [the] exercise [of the

[77] Vikram Dodd, 'Asian Men Targeted in Stop and Search: Huge Rise in Numbers Questioned', *The Guardian* (London), 17 August 2005, 6.

[78] Home Affairs Committee, *Terrorism and Community Relations*, above n 47, 46.

[79] Deborah A Ramirez, Jennifer Hoopes and Tara Lai Quinlan, 'Defining Racial Profiling in a Post-September 11 World' (2003) 40 *American Criminal Law Review* 1195, 1206.

[80] Civil Rights Division, United States Department of Justice, *Guidance regarding the Use of Race by Federal Law Enforcement Agencies* (2003) <http://www.usdoj.gov/crt/split/documents/guidance_on_race.pdf> 1. See also Kevin R Johnson, 'Racial Profiling after September 11: The Department of Justice's 2003 Guidelines' (2004) 50 *Loyola Law Review* 67.

[81] Donald Kerwin, 'The Use and Misuse of "National Security" Rationale in Crafting US Refugee and Immigration Policies' (2005) 17 *International Journal of Refugee Law* 749, 754–5.

s 44 power].'[82] While an appearance which suggests that the person is of Asian origin may attract the constable's initial attention, a further factor must be in the mind of the constable, even if on the spur of the moment and subjectively felt; otherwise the selection may be inherently discriminatory.[83] This important guidance was certainly felt to be more pertinent and practicable than the appellants' submission that the power should be applied 'by stopping and searching literally everyone (as, of course, occurs at airports and on entry to certain other specific buildings) or by stopping and searching on a strictly numerical basis, say every tenth person'.[84] Thus, intuitive stops may remain, but there must be more to them than the racial origins of the subject — there must be a connection to the perceived terrorist threat.

Yet even this resolution too easily accepts that race is by its nature sufficiently connected to terrorist suspect description and that it does not unduly divert attention from more pertinent criteria such as behavioural and antecedent information.[85] It also remains troublesome to reconcile even this partial reliance upon racial origins as a basis for official action with the decision in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees Intervening)* ('*Roma*').[86] In that case, the House of Lords found that it was unlawful to target Roma passengers at Prague Airport. These passengers were 'routinely treated with more suspicion and subjected to more intensive and intrusive questioning' than other potential asylum-seekers because of their ethnicity.[87] Lord Brown in *Gillan* (HL) concluded that *Roma* could be distinguished, since there was no other operative factor in the minds of those immigration officers, whereas the police implementing the *Terrorism Act 2000* (UK) c 11 do not solely focus on ethnic origins.[88]

Aside from issues of construction and implementation, the House of Lords concentrated heavily on human rights issues. The first was that the imposition of stop and search appeared to contravene the right to liberty in art 5(1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention*').[89] In response, Lord Bingham sustained a continuing trend in English case law, which is to deny its applicability to detentions which occur during police operations where detention is not the primary aim.[90] Adding

82 *Gillan* (HL) [2006] 2 AC 307, 349.
83 Ibid.
84 Ibid 357 (Lord Brown).
85 See Mariano-Florentino Cuéllar, 'Choosing Anti-Terror Targets by National Origin and Race' (2003) 6 *Harvard Latino Law Review* 9, 34.
86 [2005] 2 AC 1.
87 See, eg, ibid 64 (Baroness Hale).
88 [2006] 2 AC 307, 361–2. See also at 355 (Lord Scott), relying upon the *Race Relations Act 1976* (UK) c 74, ss 41(1)(a), 42.
89 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). The preconditions for exercise, the limited nature of the search, and the nexus to combating terrorism may excuse the absence of reasonable suspicion: see *McVeigh, O'Neill and Evans v United Kingdom* (1981) 18 Eur Comm HR 66 (admissibility); 25 Eur Comm HR 15 (final report). This decision may be viewed as vulnerable in the light of later Court case law: *Murray v United Kingdom* (1995) Eur Court HR (ser A) 300-A; *Fox, Campbell and Hartley* (1990) Eur Court HR (ser A) 182.
90 *Gillan* (HL) [2006] 2 AC 307, 343.

to ancient powers relating to keeping the peace,[91] recent years have witnessed a proliferation of such police powers of detention short of arrest, whether in the form of stop and search under s 1 of the *Police and Criminal Evidence Act 1984* (UK) c 60[92] or disorderly or anti-social behaviour provisions (as in the *Criminal Justice and Police Act 2001* (UK) c 16 or the *Anti-Social Behaviour Act 2003* (UK) c 38). Yet, as was true of their forerunners such as the notorious 'sus' laws under s 4 of the now repealed *Vagrancy Act 1824*, 5 Geo 4, c 83,[93] the product is low visibility policing which is difficult to monitor or restrain. If there are few practical fetters on when and where police powers are used, we should not be too surprised if the 'usual suspects', such as demonstrators, are mistaken for terrorists.[94] Furthermore, to depict the stop and search process as akin to waiting to board a bus or waiting until the light turns green at a pedestrian crossing[95] is wholly unconvincing for two important reasons. First, s 45 of the *Terrorism Act 2000* (UK) c 11 involves the exercise of an official coercive power not a directive power — the person waiting for the bus or for the green light can give up and try another route. Nor is the time of 'non-detention detention' as fleeting as suggested. In Gillan's case, it lasted for 20 minutes.[96]

As for the *European Convention* art 8 rights to privacy, the stop and search was readily justified as necessary in a democratic society and proportionate in response to the clear and present danger of terrorism.[97] Indeed, the assumption that art 8 was infringed in the first place raised the observation from Lord Bingham, in parallel to his treatment of art 5, that it was 'doubtful whether an ordinary superficial search of the person can be said to show a lack of respect for private life.'[98] Similar arguments assuaged concerns about arts 10 and 11, rights to expression and assembly.

For both arts 5 and 8, the police power had to be 'lawful' — 'prescribed by law' under art 5(1) and 'in accordance with the law' under art 8(2) — which in *European Convention* terms means that the power must be governed by clear and publicly accessible rules of law.[99] Their Lordships viewed s 44 as conveying the

91 *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 107; *Austin v Metropolitan Police Commissioner* [2008] 1 All ER 564.

92 See also the powers allowing stops and searches for 'dangerous instruments or offensive weapons' under the *Criminal Justice and Public Order Act 1994* (UK) c 33, s 60. See further Faiza Qureshi, 'The Impact of Extended Stop and Search Powers under the UK *Criminal Justice Act 2003*' (2007) 30 *Policing* 466.

93 See Home Affairs Committee, *Race Relations and the 'Sus' Law*, House of Commons Paper No 744, Session 1979–80 (1980).

94 See further Janet Chan, *Changing Police Culture: Policing in a Multicultural Society* (1997); Robert Reiner, *The Politics of the Police* (3rd ed, 2000); Mike Rowe, 'Rendering Visible the Invisible: Police Discretion, Professionalism and Decision-Making' (2007) 17 *Policing & Society* 279.

95 *Gillan* (HL) [2006] 2 AC 307, 343 (Lord Bingham).

96 Ibid 332.

97 There is no power under 'normal' powers in the *Police and Criminal Evidence Act 1984* (UK) c 60, s 1 to require a person to remove any clothing in public other than an outer coat, jacket or gloves. But the *Terrorism Act 2000* (UK) c 11, s 45(3) empowers a constable conducting a search under s 44(1) or s 44(2) of that Act to require a person to remove headgear and footwear in public.

98 *Gillan* (HL) [2006] 2 AC 307, 344.

99 See *Malone* (1984) 82 Eur Court HR (ser A) 39; *Kuijper v Netherlands*, Application No 64848/01 (Unreported, European Court of Human Rights, Third Section, 3 March 2005).

definition and limits of the powers with considerable precision. It was held by Lord Bingham not to be a necessary requirement of 'lawfulness' that further information or warnings had to be given about the authorisation or confirmation process since that process was about implementation rather than 'law' itself.[100] This interpretation neatly answered the complaint that the requirement of foreseeability may not be satisfied when a retrospective notice of a specified law has been applied to that location and given to a citizen who has fallen into the clutches of police officers. Lord Bingham was further seduced into this stance by arguments of security — that 'publishing the details of authorisations … would by implication reveal those places where such measures had not been put in place, thereby identifying vulnerable targets' and that the scheme would be 'gravely weakened' as a result'.[101] These latter views, it is submitted, confuse legal availability with strategies or tactics of operational implementation across an area as large as London. Contrary to the further assertion of Lord Hope, publication would not at all reveal 'when and where the use of the procedure is to be authorised and whom they should stop on the spur of the moment';[102] the police still have full discretion throughout London to apply or not apply the powers at any given time or place.[103] Given that court cases have now revealed that the sections have been in continuous force throughout London since 2001, only a dimwitted terrorist would be unaware of these powers in general terms.

The Association of Chief Police Officers proffer the view that the local community deserves concern and respect in the exercise of s 44. In their *Interim Practice Advice on Stop and Search in Relation to the* Terrorism Act 2000 (issued in 2005), the value of community consultation, if possible in advance of a s 44 authorisation, is emphasised: 'Community consultation is essential when seeking to exercise these powers, excluding exceptional and urgent cases when consultation will have to occur as soon as possible after the authorisation has been granted.'[104]

Admittedly, there follows a somewhat opaque statement in para 3.1 to the effect that: 'Care should be taken when informing communities as to the location and extent of a section 44 authorisation, as public safety is paramount.'[105] Does this mean care should be taken to convey this information so that the public knows and can feel safe, or rather care should be taken not to convey this information so that the potential terrorists are not forewarned? Even if the latter interpretation were to be adopted, how can there be consultation with a community without revealing to it that s 44 is in force in its area? Nevertheless, it would appear that what the police chiefs consider to be good practice is more transparent than the story spun to the House of Lords.

100 *Gillan* (HL) [2006] 2 AC 307, 345–6.
101 Ibid 346.
102 Ibid 351.
103 See ibid 340.
104 National Centre for Policing Excellence, Association of Chief Police Officers, *Interim Practice Advice on Stop and Search in Relation to the* Terrorism Act 2000 (2005) <http://www.acpo.police.uk/asp/policies/Data/mackey_Stop%20&%20Search_2005_22x12x05.pdf> 11.
105 Ibid 18.

The interim practice advice has now been replaced by a finalised *Practice Advice on Stop and Search Powers*, issued in 2006.[106] In the exercise of these powers, the police are instructed that ethnicity should not be used alone as the basis for exercise on the grounds that '[a]ctions define a terrorist not ethnicity, race or religion.'[107] It again emphasises community involvement under s 44, since it will increase confidence, reassure the public and encourage the flow of intelligence.[108] However, this general rule is subject to some reflection on whether it is safe to pass on information about the location and extent of s 44 activity. Operational reasons might also rule out prior consultation, but the Advice does firm up the previous version and demands such consultation as soon as possible so that communities are made to feel 'valued and respected'.[109] This advice should also be interpreted in light of the report from Her Majesty's Inspectorate of Constabulary, *A Need to Know: HMIC's Thematic Inspection of Special Branch and Ports Policing*, which emphasises 'the vital importance of extending the reach of the national security agencies by further utilising the close links between local police and the communities in which they work.'[110]

These messages are reinforced by the *Stop & Search Manual* which was published in 2005 by the Stop and Search Action Team in the Home Office,[111] though its statements on community involvement primarily relate to other powers.[112] The manual also makes clear, in answer to the question raised earlier about the applicability of Code A, that its requirements based on the premise of reasonable suspicion against an individual do not apply to s 44:

> The selection of persons stopped under section 44 of *Terrorism Act 2000* should reflect an objective assessment of the threat posed by the various terrorist groups active in Great Britain. The powers must not be used to stop and search for reasons unconnected with terrorism. Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers. There may be circumstances, however, where it is appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic identities).[113]

Do the dicta of the House of Lords, plus the unenforceable guidelines of the Association of Chief Police Officers and the Home Office amount to a final or even a sufficient word on the subject of racial profiling in the context of all-risks

106 The publisher is the former National Centre for Policing Excellence (now the National Policing Improvement Agency), and the document covers all common statutory powers, not just the *Terrorism Act* (see <http://www.npia.police.uk/en/6664.htm>). The author thanks Charlie Hedges for the supply of a copy. See also Liberty, *Response to Consultation* (2006) <http://www.liberty-human-rights.org.uk/pdfs/policy06/ncpe-stop-and-search-practice.pdf>.

107 National Centre for Policing Excellence, *Practice Advice on Stop and Search*, above n 47, 27.

108 Ibid 12.

109 Ibid 14.

110 David Blakeley, Her Majesty's Inspectorate of Constabulary, *A Need to Know: HMIC's Thematic Inspection of Special Branch and Ports Policing* (2003) 16.

111 Stop and Search Action Team, *Stop & Search Manual* (2005) Home Office Police <http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/stopandsearch-intermanual1.pdf?view=Binary>.

112 Cf ibid 18, 21.

113 Ibid 66.

policing? The near endemic problems relating to perceptions or realities of discrimination may be dismissed as hot air, on the basis that racial profiling is 'among the most misunderstood and emotionally laden terms in the modern vocabulary of law enforcement and politics.'[114] Nevertheless, the reality for the UK is that the powers of stop and search in s 44 of the *Terrorism Act 2000* (UK) c 11 remain highly contentious. Not only are they exercisable without the usual protection of reasonable suspicion,[115] but the quest for terrorists impacts most heavily upon ethnic minorities. The House of Commons Home Affairs Select Committee found 'a clear perception among all our Muslim witnesses that Muslims are being stigmatised by the operation of the *Terrorism Act*: this is extremely harmful to community relations.'[116] As a result, Lord Carlile, the independent reviewer of terrorism legislation, has recognised its dangers[117] and called for much more restrained usage.[118] Even the police, represented by Peter Clarke, Deputy Assistant Commissioner of the Metropolitan Police, has publicly recognised that these provisions need to be much more tightly focused.[119] Not only do the provisions create social tensions, but it will also hamper the flow of assistance to the police from minority communities.[120] The practice also bolsters the accusation made by the Macpherson Inquiry into the police handling of the murder of Stephen Lawrence in 1999.[121] Based on the investigation of that murder, the Inquiry concluded that 'institutional racism' was 'a corrosive disease' in British police forces and one of the symptoms was the racial differences in the impacts of stop and search powers.[122]

Added to that clear warning about national practice must be the statements of non-discrimination in international law.[123] The United Nations Committee on the Elimination of Racial Discrimination has warned against specifically discrimina-

114 Alan M Dershowitz, *Why Terrorism Works* (2002) 207. He further argued that identity cards would 'eliminate much of the justification now offered for racial or ethnic profiling': at 203. But if racial 'misplacement' was an operative factor beforehand, then it will continue to be so under an all-risks provision such as identity cards.

115 This feature distinguishes them from the already controversial power to stop and search in the *Police and Criminal Evidence Act 1984* (UK) c 60, s 1, under which black males are seven times more likely to be stopped than white males: Home Office, *Statistics on Race and the Criminal Justice System — 2006* (2007) 24.

116 Home Affairs Committee, *Terrorism and Community Relations*, above n 47, 43.

117 See Lord Carlile of Berriew, *Report on the Operation in 2005 of the* Terrorism Act 2000 (2006) 28.

118 See Lord Carlile of Berriew, *Report on the Operation in 2006 of the* Terrorism Act 2000, above n 18, 31.

119 Alan Travis, 'Use of "Stop and Search" Terror Law Alienating Muslims, Warns Yard', *The Guardian* (London), 17 February 2006, 4.

120 See Thomas M McDonnell, 'Targeting the Foreign Born by Race and Nationality: Counter-Productive in the "War on Terrorism"?' (2004) 16 *Pace International Law Review* 19.

121 Macpherson, above n 44.

122 Ibid [6.34], [6.39], [6.45].

123 See *European Convention*, opened for signature 4 November 1950, 213 UNTS 221, art 14 (entered into force 3 September 1953); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171, art 26 (entered into force 23 March 1976); *Code of Conduct for Law Enforcement Officials*, GA Res 34/169, UN GAOR, 3rd Comm, 34th sess, 106th plen mtg, Annex, 186, UN Doc A/Res/34/169 (1979); Committee of Ministers of the Council of Europe, *The European Code of Police Ethics* (2001) 29, 43.

tory measures in pursuance of combating terrorism.[124] The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, has also expressed serious concerns about the discriminatory profiling based on 'stereotypical assumptions that persons of a certain race, national or ethnic origin or religion are particularly likely to commit crime'.[125]

A comparison might be made with criminal profiling, which is commonplace in policing. Descriptive criminal profiles point to specific individual characteristics relating to a perpetrator and/or a completed crime.[126] Now, it would be quite wrong to believe that such profiling is not also affected by cultural considerations (including racism), but at least the starting point appears more empirical and specific than in the case of all-risks stops and searches. Accordingly, the courts have treated this approach as permissible. In *Brown v City of Oneonta*,[127] law enforcement officials possessed a witness description of a criminal suspect. The description consisted primarily of the suspect's race, gender and age, though it also contained a specific detail about a cut hand. The United States Court of Appeals held that, provided there was no other evidence of discriminatory intention, the law enforcement officers could constitutionally act on the basis of that description:

> Defendants' policy was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description. This description contained not only race, but also gender and age, as well as the possibility of a cut on the hand. In acting on the description provided by the victim of the assault — a description that included race as one of several elements — defendants did not engage in a suspect racial classification that would draw strict scrutiny. The description, which originated not with the state but with the victim, was a legitimate classification within which potential suspects might be found.[128]

The case does not support a criminal profile in terms of race alone, even if not motivated by racism,[129] as a proper basis to found reasonable suspicion for a

124 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 59th sess, Supp No 18, 95, UN Doc A/59/18 (20 August 2004) ('*General Recommendation XXX on Discrimination against Non-Citizens*').

125 Martin Scheinin, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council'*, 8, UN Doc A/HRC/4/26 (2007). See further at 9–11.

126 Also possible are predictive criminal profiles — characteristics which fit a modus operandi but are not based on witness evidence: see David Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (2002).

127 221 F 3d 329 (2nd Cir, 2000), cert denied 534 US 816 (2001).

128 Ibid 337–8 (Walker J).

129 Even if motivated by racism, the stop and search can still be lawful if there is probable cause as a result of *Whren v United States*, 517 US 806, 819 (1996) (Scalia J for the Court). For criticism, see David A Sklansky, 'Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment' [1997] *Supreme Court Review* 271; Anthony C Thompson, 'Stopping the Usual Suspects: Race and the Fourth Amendment' (1999) 74 *New York University Law Review* 956; Tracey Maclin, 'Race and the Fourth Amendment' (1998) 51 *Vanderbilt Law Review* 333; Andrew E Taslitz, 'Stories of Fourth Amendment Disrespect: From Elian to the Internment' (2002) 70 *Fordham Law Review* 2257.

police stop power.[130] However, Alan Dershowitz seeks to maintain the legitimacy of race as a prime trigger for police action in the following example:

> in looking for Klansmen who may have lynched an African-American, it would be foolish to look beyond the white community, since we know that all such racially motivated lynchings were committed by whites (although we also know that the vast majority of whites never committed a racial lynching).[131]

However, if there are thousands or millions of people within the particular 'suspect' population, does the reliance upon this factor effectively advance the criminal profile and, given the difficulty of discerning by appearance alone who really is a 'Klansman' or a 'white' (or equally, an 'Arab' or a 'Muslim'),[132] does it not then become a racially based ground for harassment? In the UK, there may be an assumed association of the Muslim religion with 'Asian' appearance but, as already mentioned, only half of those belonging to this ethnic group are in fact Muslims.[133] This fact alone does not begin to challenge the further misplaced assumption that terrorists form a significant proportion of the Muslim population.[134] Nevertheless, Dershowitz seeks to extrapolate from this example to what is really another situation — the claim that a certain type of crime will be committed in the future by people with a given racial or ethnic or religious profile. In his words:

> we know that all al-Qaeda members, and certainly all al-Qaeda suicide bombers, are Muslims. It is foolish, therefore, to misallocate our resources in the fight against suicide bombers by devoting equal attention to searching an eighty-year-old Christian woman from Maine and a twenty-two-year-old Muslim man from Saudi Arabia.[135]

Yet, there are several factual elisions here.[136] First, it is not possible to be sure about religion from skin colour. Muslim males derive from many ethnic groups, as the example of John Walker Lindh starkly demonstrates.[137] Surely the reliance

[130] As applied to terrorism situations: see Liam Braber, '*Korematsu*'s Ghost: A Post-September 11th Analysis of Race and National Security' (2002) 47 *Villanova Law Review* 451; Seth M Haines, 'Rounding Up the Usual Suspects: The Rights of Arab Detainees in a Post-September 11 World' (2004) 57 *Arkansas Law Review* 105; Floyd D Weatherspoon, 'Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection' (2004) 38 *The John Marshall Law Review* 439; Andrew E Taslitz, 'Racial Profiling, Terrorism, and Time' (2005) 109 *Penn State Law Review* 1181.

[131] Dershowitz, above n 114, 208.

[132] See Albert W Alschuler, 'Racial Profiling and the *Constitution*' [2002] *University of Chicago Legal Forum* 163.

[133] Home Affairs Committee, *Terrorism and Community Relations*, above n 47, 21.

[134] See Haroon Siddiqui, 'Muslim-Bashing Dilutes Our Democratic Values', *The Toronto Star* (Toronto), 11 June 2006, A17.

[135] Dershowitz, above n 114, 208.

[136] See further Margaret Chon and Donna E Arzt, 'Walking while Muslim' (2005) 68 *Law and Contemporary Problems* 215.

[137] See *United States v Lindh*, 212 F Supp 2d 541, 574–7 (Judge Ellis) (ED Va, 2002); Leonard M Baynes, 'Racial Profiling, September 11th and the Media: A Critical Race Theory Analysis' (2002) 2 *Virginia Sports and Entertainment Law Journal* 1; Suzanne Kelly Babb, 'Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh' (2003) 54 *Hastings Law Journal* 1721; Karen Engle, 'Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)' (2004) 75 *University of Colorado Law Review* 59.

upon racial or ethnic origins at the start of the stop process is consistent with Dershowitz's edict against foolishness. It is better by far to concentrate on more relevant behavioural criteria, such as: signs of stress, hesitancy or nervousness, the absence of baggage, whether the ticket was purchased on the day or with cash or is one-way, or undue interest in security installations or processes. Similarly, a cut hand might have been a better starting point than race in the *Brown v City of Oneonta* case.[138] Given these other possible indicia of behaviour (and experts can no doubt devise many and more subtle descriptions), where a characteristic based on racial profiling becomes the only reason for a stop, does this not amount to 'inexcusable racism', akin to the internment of Japanese-Americans during the Second World War?[139] The main difficulty with this conclusion is practice not principle. The boundary between racial profiling and subject- or crime- specific profiling is indeterminate, given that opposites (such as that the passenger is too nervous or too calm, makes eye contact or does not) can both be justifying factors for intervention,[140] and that race is often mentioned in crime- or subject- specific descriptions. In addition, the principle of avoiding racial profiling must be carried out in the context of societies where racism is culturally endemic[141] or institutionally enshrined,[142] with the result that ethnic and religious minorities tend to pay a disproportionately high share of the costs attendant upon responses to terrorism, no matter what guidance is published to discourage that trend.[143]

By contrast, in the case of stop and search under s 44, there is no specific crime and no factual evidence as to perpetrator, so attention tends to wander towards personal characteristics. However, if terrorists can be both neighbours and aliens, those characteristics must be drawn in very wide terms, including age, gender and race. Inevitably in the case of terrorism, young men with ethnic backgrounds based in predominantly Islamic states such as North Africa, the Middle East or South-East Asia become the targets. As a result, profiling brings clear dangers: 'the current war on terrorism is fraught with anti-Islamic and anti-Arab prejudices that could turn very ugly under emergency conditions.'[144] It also has the danger of creating many false positives and false negatives and thereby creating miscarriages of justice which damage the legitimacy of the legal

138 Ramirez, Hoopes and Quinlan, above n 79, 1220.

139 Dershowitz, above n 114, 209. Cf R Spencer MacDonald, 'Rational Profiling in America's Airports' (2002) 17 *Brigham Young University Journal of Public Law* 113; Tracey Maclin, '"Voluntary" Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror' (2003) 73 *Mississippi Law Journal* 471.

140 See Stephen J Ellman, 'Racial Profiling and Terrorism' (2003) 22 *New York Law School Journal of International & Comparative Law* 305, 320; R Richard Banks, 'Racial Profiling and Antiterrorism Efforts' (2004) 89 *Cornell Law Review* 1201.

141 See Girardeau A Spann, 'Terror and Race' (2005) 45 *Washburn Law Journal* 89; Susan M Akram and Maritza Karmely, 'Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?' (2005) 38 *University of California Davis Law Review* 609.

142 See Macpherson, above n 44.

143 David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (2003) 1–14. See also Erwin Chemerinsky, 'Civil Liberties and the War on Terrorism' (2005) 45 *Washburn Law Journal* 1, 1.

144 Bruce Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1075.

system as well as misleading or diverting attention from more promising investigative leads.[145] These problems become ever more vivid because of the false 'assumption … that the focus of the government's policies in the "war on terror" is [on] non-citizens, even if principally Arabs and Muslims.'[146] Applied to citizens, the policies have the potential to become even more divisive in society.

In conclusion, s 44 exemplifies the proliferation of all-risks policing, including the growth of racial profiling in its application, a technique which has increased in acceptability since 11 September 2001.[147] Yet, because of the exigencies of the situation (especially limited policing resources), all-risks cannot be applied literally. Thereupon, choice will be based on professional or sectarian cultures as much as rational choice and may well mask unpalatable or unlawful considerations. As a result, like the imaginary American crimes shaped by racial profiling or racial prejudice, such as 'driving while Black'[148] or 'flying while Arab',[149] s 44 may have created the British equivalent of 'perambulating while Muslim'.

B *Other Aspects of Containment*

The foregoing section of this article considered containment through judicial interpretation. This section will consider approaches to containment based on other forms of regulation or accountability. The most radical regulation would be the eradication of special powers, or at least those of the all-risks variety. However, this solution is neither politically feasible nor rationally warranted. As for political exigencies, one must expect that 'democracies respond when there is blood on the streets',[150] and there is noble justification for them to do so based on the international law duties to combat terrorism and the duty in national and international law to protect individual life.[151] The challenge of terrorism can be

145 See Harris, *Profiles in Injustice*, above n 126, ch 4; David A Harris, 'Racial Profiling Redux' (2003) 22 *Saint Louis University Public Law Review* 73; Nelson Lund, 'The Conservative Case against Racial Profiling in the War on Terrorism' (2003) 66 *Albany Law Review* 329; Reem Bahdi, 'No Exit: Racial Profiling and Canada's War against Terrorism' (2003) 41 *Osgoode Hall Law Journal* 293, 310, 313; David A Harris, 'New Risks, New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001' [2004] *Utah Law Review* 913. Cf Chet K W Pager, 'Lies, Damned Lies, Statistics and Racial Profiling' (2004) 13 *Kansas Journal of Law and Public Policy* 515.

146 Akram and Karmely, above n 141, 610.

147 Samuel R Gross and Debra Livingston, 'Racial Profiling under Attack' (2002) 102 *Columbia Law Review* 1413, 1413–14.

148 See Angela Anita Allen-Bell, 'The Birth of the Crime: Driving while Black (DWB)' (1997) 25 *Southern University Law Review* 195; David A Harris, *Racial Profiling on Our Nation's Highways* (1999); David A Harris, 'The Stories, the Statistics, and the Law: Why "Driving while Black" Matters' (1999) 84 *Minnesota Law Review* 265; Kenneth Meeks, *Driving while Black: Sideways, Shopping Malls, Taxicabs, Sidewalks: How to Fight Back if You Are a Victim of Racial Profiling* (2000).

149 See Ellen Baker, 'Flying while Arab — Racial Profiling and Air Travel Security' (2002) 67 *Journal of Air Law and Commerce* 1375; Joanne V Gonzales, '"Flying while Arab": Passenger Profiling in the Aftermath of the September 11th Terrorist Attacks' [2002] *International Travel Law Journal* 76; Charu A Chandrasekhar, 'Flying while Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians' (2003) 10 *Asian Law Journal* 215.

150 Jennifer M Collins, 'And the Walls Came Tumbling Down: Sharing Grand Jury Information with the Intelligence Community under the USA *Patriot Act*' (2002) 39 *American Criminal Law Review* 1261, 1261.

151 See Clive Walker, 'Clamping Down on Terrorism in the United Kingdom' (2006) 4 *Journal of International Criminal Justice* 1137.

the subject of rational and effective legislative response, just as there has been rational effective response to other forms of specialised criminality, such as organised crime, or even to broader threats to democracy and rights, such as fascism.[152] Based upon the objective of containment, what further steps should be taken to contain all-risks policing within constitutional bounds?[153]

The first step is to suggest that containment could apply by reference to limiting the all-risks powers to the protection of vulnerable targets. At that point, there may be a more specific suspicion, based on intelligence, as to what form of attack is possible. This consideration casts doubt on whether a power like s 44 should be in force on a continuous basis and should apply to an acreage as wide as the metropolis of London. Conversely, it may suggest that, for a much more select list of targets, a policy of blanket stops and searches is a more sensible and sustainable way forward and one which reduces any exercise of discretion tainted by racial considerations.[154] In addition, if a more specific remit for the power can be devised, then its invocation becomes more justiciable. Thus, s 44 authorisations could be subjected to confirmation by a judge *ab initio*, rather than by a Minister. A Privy Counsellor Review Committee report commented likewise in December 2003 that: 'Had Parliament envisaged such extensive and routine use of these powers, it might well have provided for different safeguards over their use.'[155]

The second step is to seek more statutory structuring to the all-risks power, as far as possible. Guidance from Code A and the Association of Chief Police Officers could be augmented, for example, by narrative about the relationship between racial profiling and the professional use of the power, about the choice of 'special' or 'normal' powers to stop and search,[156] and the choice of stops and arrests. In this way, '[if] governments wish to discriminate on the basis of race and ethnicity, they should be prepared to justify that practice to the … public, even before they are required to do so to the courts.'[157] In structuring profiling, there should be guidance as to whether it is alone sufficient,[158] what priority should be given to a profile[159] and what kinds of profiles are legitimate.

A third consideration is accountability. Statistics should not only be kept on the use of powers such as s 44 (as happens now), but there should be a statutory

[152] See Karl Loewenstein, 'Militant Democracy and Fundamental Rights' (Pt 1) (1937) 31 *American Political Science Review* 417; Karl Loewenstein, 'Militant Democracy and Fundamental Rights' (Pt 2) (1937) 31 *American Political Science Review* 638.

[153] See Harris, *Profiles in Injustice*, above n 126, ch 7.

[154] See Jaime L Rhee, 'Rational and Constitutional Approaches to Airline Safety in the Face of Terrorist Threats' (2000) 49 *DePaul Law Review* 847, 870.

[155] Privy Counsellor Review Committee, Anti-Terrorism, Crime and Security Act 2001 *Review: Report*, House of Commons Paper No 100, Session 2003–04 (2004) 25.

[156] National Centre for Policing Excellence, *Practice Advice on Stop and Search*, above n 47, 24–5 does remind police to consider other powers such as high visibility presence but does not list other possible legal provisions.

[157] Sujit Choudhry and Kent Roach, 'Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability' (2003) 41 *Osgoode Hall Law Journal* 1, 7.

[158] It is suggested that it should be just 'one factor in a suspect-specific or crime-specific description': Ramirez, Hoopes and Quinlan, above n 79, 1233.

[159] It is suggested that there should be a strong presumption against it: see Lund, above n 145, 342.

obligation to explain the results, including in local meetings,[160] and to require action plans for the use of such powers. There is a tendency in society to delegate the management of risk to 'experts'[161] and the suppression of information is an easy way of ensuring that expertise is confined to an exclusive circle. This trend should be resisted by local communities and even more so by the courts, who should be more ready than was the practice in *Gillan* (HL) to gainsay claims to expertise in security, especially when its impact is both felt by the general public and happens in public places. Just as there is no certain correlation between a loss of liberty and a gain in security, so there is no certain relationship between secrecy and standards of good public administration, including in policing.[162] Indeed, one might argue that the police objectives of deterrence and disruption under s 44 would be better achieved by greater publicity.

A fourth step would be to encourage greater community involvement in the exercise of these powers. Consultation about the invocation of the powers is raised in the Association of Chief Police Officers papers and discussed in connection with the *R (Gillan) v Metropolitan Police Commissioner* case above. Why not also encourage the police to invite community representatives to shadow them in the exercise of powers?

A final step is for Parliament to keep under review the need for the continued existence of s 44. The independent review by Lord Carlile does that to some extent, but his in-depth reports are not reflected by detailed responses by the government or careful scrutiny by Parliament. A present danger in the continued existence of powers of this kind is that they may be applied in situations which are not terrorist related, such as demonstrations, as already described.

V CONCLUSION

With the perception that there exists a heightened state of vulnerability because of terrorism, an all-risks policing approach will have mounting cogency to police and politicians. Therefore, further measures along these lines can be anticipated.[163] Its attractiveness may have increased recently with the clearer emergence of neighbour terrorism, which gives added impetus to the trend within criminal justice towards responses to the anticipatory risk of misdeed rather than perpetrated crime. However, with risk-based responses comes uncertainty,[164] giving rise to the inevitability that innocent persons and communities will be

160 See Brandon Garrett, 'Remedying Racial Profiling' (2001) 33 *Columbia Human Rights Law Review* 41.

161 Ulrich Beck, *Risk Society: Towards a New Modernity* (1992) 57–8.

162 Cf William J Stuntz, 'Local Policing after the Terror' (2002) 111 *Yale Law Journal* 2137.

163 There has been some consideration given to a power to stop and question: Home Office, *Government Discussion Document ahead of Proposed Counter-Terrorism Bill* (2007) 4 <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/CT-Bill-2007-discussion-do.pdf?view=Binary>. However, it has not been currently adopted: Home Office, *Possible Measures for Inclusion in a Future Counter Terrorism Bill* (2007) <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/ct-bill-consultation.pdf>.

164 Pat O'Malley, *Risk, Uncertainty and Government* (2004).

unfairly affected by the responses and, even then, not every catastrophe will be averted.

Given the advent of neighbour terrorism, measures such as stop and search cannot easily be confined to exceptional situations bounded by temporal, spatial or communal divisions.[165] Therefore, societies such as the UK and Australia would be well advised both to impose effective limits on special anti-terrorism measures and to emphasise a normal criminal justice approach as the core response to terrorism, rather than accentuating the exceptional or extraordinary.[166] The maxim of former UK Prime Minister, Tony Blair, in response to the 7 July 2005 London bombing was to '[l]et no one be in any doubt, the rules of the game are changing.'[167] He is correct in fact that many jurisdictions are attempting to install new regimes against terrorism which depart from the hallowed principles of criminal justice, but it should be realised that the pursuit of the new 'game' will inevitably entail damage to the legitimacy and fairness of criminal justice systems.

Furthermore, it also perpetrates the increasingly unpalatable and often negative consequence of making no distinction between friend and foe, which may prove counterproductive in trying to engage the support of the former against the latter, as noted already by the Home Affairs Committee of the House of Commons. Furthermore, all-risks policing may come to threaten the very goal of the government's stated counter-terrorism strategy ('CONTEST'), which is 'to reduce the risk from international terrorism, so that people can go about their daily lives freely and with confidence.'[168] Freedom cannot be delivered by legislation which substantially diminishes civil, political, economic or social life. Confidence cannot be secured if people are fearful of the arbitrary and ineffective impact of security measures.

165 Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 *Yale Law Journal* 1011, 1073–89.

166 See Ackerman, above n 144.

167 Rosemary Bennett and Richard Ford, 'Row over Tougher Rules on Preachers of Hate', *The Times* (London), 6 August 2005, 1.

168 Her Majesty's Government, *Countering International Terrorism: The United Kingdom's Strategy*, Cm 6888 (2006) [5]. See also *Counter-Terrorism Strategy* (2003) Home Office Security <http://security.homeoffice.gov.uk/counter-terrorism-strategy>.