

‘Democracy and Terrorism’

Dr. A. Lever

**Dept of Philosophy
London School of Economics
Annabelle@alever.net**

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We have been asked to keep our presentations short, in order to maximise time for discussion, so I am going to concentrate on three related points about democracy and terrorism that I hope will be helpful.

1) Terrorism and Exceptionalism

It is increasingly common to claim that terrorism is different from other bad things, such as crime, because it is essential to *prevent* terrorism, rather than simply to hunt down and punish its perpetrators. For example, Jacqui Smith, the Home Secretary, maintains that

‘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’.¹

I think we should treat such claims about the exceptionalism of terrorism with care, not because terrorism isn’t sui-generis in important ways, but because the ways in which it is exceptional are likely to depend on how one understands other bad things, such as war, crime or illness. Hence, the exceptional features of terrorism may turn out to be matters of degree, rather than kind.

For all great evils, including crime, prevention is preferable to redress. We should therefore prioritise the prevention of murder, rape, corruption, fraud, the spread of Aids or cancer over post-hoc efforts at redress, important though these are, because such things ruin people’s lives and destroy societies, whether or not they are *also* meant to terrorise.

So, it is hard to discern a categorical difference between terrorism, crime and other evils, if we consider the nature of the phenomena, or the types of harms we are seeking to prevent or punish. Nor, of course, are the *causes* and *remedies* for terrorism invariably exceptional, either. Although most crime is spontaneous, and this can make it hard to prevent, not all crime is of this type. Some of it is very complex, requiring significant international organisation and cooperation - as with the trafficking of drugs, weapons and people - or, of course, with some forms of corruption, tax-evasion and fraud.

Likewise, the social causes and preconditions of crime are hard to disentangle, although there are clearly differences between the levels and the types of crime committed in different societies. However, it is fairly well-established that heavy-handed efforts to prevent crime or terrorism can *increase* the incidence and severity

¹ The Home Secretary was addressing the Smith Institute and the Centre for the Study of Terrorism, at St. Andrews University, in June 3, 2008 (available at <http://press.homeoffice.gov.uk/Speeches/countering-terrorism-democracy>). The quotation comes from the section called ‘Our Objectives’.

of both. This is partly because one might as well be hanged for a sheep as a lamb; and partly because the resulting disruption to ordinary life, activities, relationships, hopes and expectations undermines the inhibitions that prevent most people, most of the time, from becoming violent.²

A democratic approach to terrorism, therefore, may need to consider the ways in which our social and economic policies, as well as our approaches to crime and terrorism foster, rather than inhibit, violence. William Julius Wilson and Robert Sampson have strikingly highlighted the role of urban renewal, family breakdown and ordinary market forces in explaining black and white homicide rates in the United States.³ The late Brian Barry, amongst others, drew our attention to the ways crime prevention and imprisonment can exacerbate already intractable social problems, thereby fostering precisely the alienation, marginalisation, bitterness and anger that lead people to seek violent solutions to their problems.⁴

Finally, and strikingly, in the previous discussion on terrorism and democracy, which Baroness Nicholson hosted, Steve Tsang referred to the work of Mike Aaronson on economic development and terrorism.⁵ This showed, he explained, that 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 such aid is not altruistic but self-interested, and that its benefits may fail to offset any impoverishment, exploitation and insecurity resulting from trade with the West.

So, the first thing I want to highlight is the difficulties of reconciling a democratic approach to terrorism with the insistence that terrorism is exceptional, rather than something embedded in complex everyday networks of power, opportunity and justification.

² John Sidel's fascinating 'The Islamist Threat in South East Asia: Much Ado About Nothing?' *Asian Affairs*, vol. XXXIX, no. III (Nov. 2008) 339 - 351, provides some evidence of that - and of the importance of distinguishing terrorist violence as a 'last gasp' response to waning power as compared to the confident move of a powerful group.

³ Robert J. Sampson and William Julius Wilson, 'Toward a Theory of Race, Crime and Urban Inequality' in *Crime and Inequality*, ed. J. Hagan and R. D. Peterson (Stanford University Press, 1995), 37 - 54. See also Robert J. Sampson, Jeffrey D. Morenoff and Stephen Raudenbush, 'Social Anatomy of Racial and Ethnic Disparities in Violence' *American Journal of Public Health* 95, No. 2 (Feb. 2005). For the bearing of these figures on arguments for and against racial profiling see Annabelle Lever, 'What's Wrong With Racial Profiling? Another Look at the Problem', *Criminal Justice Ethics*, (Vol. 26. No. 1, Winter/Spring 2007), 20-28.

⁴ Brian Barry, *Why Social Justice Matters*, (Polity Press, London, 2005).

⁵ See Steve Tsang's pre-publication chapter in *Combating Transnational Terrorism: Searching for a New Paradigm* (Praeger Security International, 2009). The gist of this chapter was presented at the House of Lords debate on Terrorism, organised by Baroness Nicholson of Winterbourne, MEP, on 23 February, 2009. I was not at that meeting and am relying on the copy of the chapter that he supplied.

2) Privacy and Security

My second point is that protections for privacy are essential to democratic governments and societies, and are, consequently, an essential part of State duties for security. Nonetheless, people's claims to privacy are not reducible to their claims to security, or inherently of lesser importance than the latter. That is why democracies enable citizens, but not legislators, to vote anonymously although universal suffrage means that it is usually easier and more efficient to bribe or coerce the latter.⁶

Protections for privacy sometimes promote security - freedom from violence, exploitation, intimidation and the like. But even where they don't - indeed, even when they come at a cost to self-protection and the protection of others - they can still be justified by the powers, liberties and opportunities they help to create, and by the ways they prevent us from sacrificing other people's hopes, aspirations and well-being for our own ends. We can harm people by making them public objects of ridicule, contempt, entertainment and instruction, as happened to Max Mosley, and not only when we make them objects of fear or hatred.⁷ So, our interests in anonymity, seclusion and confidentiality cannot be reduced to interests in security.

If these points are right, I think we must modify Sir David Omand's well-publicised claim that people must be willing to limit privacy for security against terrorism.⁸ Such claims mislead us about the nature and relationship between core democratic rights and values and, I fear, will hinder rather than help democratic responses to terrorism.

Of course, we sometimes have to sacrifice privacy in order to secure our own rights and those of other people - although we must still consider the different consequences for privacy, equality and security of racial profiling, policemen on the beat, CCTV, or

⁶ A. Lever, 'Mill and the Secret Ballot: Beyond Coercion and Corruption', *Utilitas* 19.3 (2007) 354-378. Compare the arguments for open voting in G. Brennan and P. Pettit, 'Unveiling the Vote', *British Journal of Political Science* 20.32 (1990).

⁷ Compare Max Mosley's case as described in *Mosley v. News Group Newspapers Ltd.* (2008) EWHC 687 (QB) with the fate of poor Oliver Sipple, who deflected a bullet aimed at U.S. President Gerald Ford in September, 1975. Encouraged by Harvey Milk, the gay mayor of San Francisco and a friend of Sipple's, Herb Caen published an article, revealing that Sipple was gay. Sipple unsuccessfully tried to sue for invasion of privacy but, by 1984 when his appeal reached the State Court of Appeals, in California, the Court held that Sipple had, indeed, become news and that his sexuality was part of the story. To my mind Sipple's privacy was invaded by Milk and Caen (and subsequent newspapers) in order to instruct the public, or to show that a gay man can be a hero. I think the invasion was unjustified, and the revelation clearly blighted Sipple's life, even though much of his life in San Francisco was openly gay. Others, like Richard Mohr, however, would disagree.

⁸ See, 'Privacy Must Be Sacrificed, Says Ex-Security Chief' and the resulting controversy at <http://www.guardian.co.uk/world/blog/audio/2009/feb/25/guardian-daily-podcast>. 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 program prevented the effective use and dissemination of any information that it provided.

even conductors on buses and attendants in lavatories.⁹ Still, what is worrying about Omand's pronouncement is its one-sided and unqualified character: as though our only interests in privacy are security-based, and so obviously secondary to the latter.

Why do such mistakes matter to the ways we think about terrorism? The reasons are partly normative and partly practical. The normative concern is that a problem in *jointly protecting* two values is wrongly presented as a reason to *sacrifice one* to the other. The practical concern is that confusion over the relationship between our values and rights leads to inadequate protections for them all.

Compare, for instance, the idea that we must trade privacy for security with the US Supreme Court's decision in *NAACP v. Alabama*.¹⁰ The NAACP is the National Association for the Advancement of Coloured People and, 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 organised groups and associations can be held responsible for the damage to life, liberty or property that they cause.

Clearly, the purpose of requiring the NAACP's to disclose its membership list was not motivated by fears about the protection of 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', which, so his 'ethical guidelines' suggest, is a prerequisite for legitimate state access to private information.¹¹ Nonetheless, the Court held, the State of Alabama had a legitimate interest in holding members of the NAACP to account for their actions, as with the members of other groups. However, it concluded, the State's interests in security could be met quite adequately so long as the leaders of the NAACP were known. There was therefore no

⁹ Compare A. Lever, 'Why Racial Profiling is Hard to Justify' in *Philosophy and Public Affairs* 33.1. (2005) with M. Risse and R. Zeckhauser, 'Racial Profiling' in *Philosophy and Public Affairs* 32.2. (2004). And compare A. Lever, 'Mrs. Aremac and the Camera' and B. Goold, 'The Difference Between Lonely Old Ladies and CCTV Cameras' in *Res Publica* 14.1. (March 2008) 35-42 and 43-47 with J. Ryberg, 'Privacy Rights, Crime Prevention, CCTV and the Life of Mrs. Aremac' in *Res Publica* 13.2. (June 2007) 127-143. I worry that we use CCTV too indiscriminately as a tool of surveillance, even when surveillance is justified, and thereby sacrifice privacy without improving security. See, for example, recent efforts by the police to make the use of CCTV a condition for the licensing of pubs. Such indiscriminate requirements fail to distinguish the security needs and threats posed by the large city pub-cum-nightclub with those of a village or suburban pub. They will therefore fail adequately to protect people's security, while arbitrarily invading their privacy. <http://www.guardian.co.uk/uk/2009/mar/12/cctv-pubs-privacy-ico> .

¹⁰ *NAACP v. Alabama*, 357 U.S. 449 (1958)

¹¹ See Sir David Omond, GCB, 'The National Security Strategy: Implications for the UK Intelligence Community' (IPPR, February 2009), 9-10. Omand's 'ethical guidelines' include 'sufficient sustainable cause; integrity of motive; proportionate methods; proper authority; reasonable prospect of success; no reasonable alternative'. As we will see, this list provides no information on the limits to people's moral or legal rights to privacy, and so provides no guidance on when other rights justify state action to constrain privacy. The guidelines merely provide advice on when, once the state is entitled to act, action would in fact be appropriate.

justification for the names and addresses of ordinary members to be accessible to the State.

There are, clearly, limits to the ways we can generalise the reasoning and conclusions from this case, especially where we are concerned with groups that are amorphous, informal or actually clandestine. However, it helps to demonstrate why purity of motive is a poor guide to the legitimacy of our interests in privacy or security.

The road to hell is paved with good intentions, but the converse is also true. Hence judgements of *motive* are no substitute for the careful description and evaluation of people's *interests* in privacy and security - or in freedom of movement, expression and association. Our motives may show that we are justified in exercising our rights in a particular way or on a particular occasion, but they do not tell us what moral or legal rights we have.

Sir Omand's ethical guidelines, then, may help to determine *which* constraints on privacy are justified, once we know *that* constraints on privacy are permitted or required. But they cannot tell us *when* the state is permitted or required to constrain people's privacy, anymore than they tell us when it is permitted or required to constrain people's property rights or their rights to religious freedom.¹²

The state has a duty to secure our liberties and equality, not just our lives, bodily integrity and property. Hence, claims to security are not self-interpreting, nor their implications for privacy self-evident. It is therefore too simple to suggest that terrorism - anymore than crime, public health or public wealth - means that the state must be able to mine personal data, or limit people's privacy. As the Supreme Court saw, State duties to ensure the security of its members may sometimes require it to *enhance, rather than constrain* legal protections for privacy.

3) Democratic Education and Deliberation

Finally, I think we need to discuss and educate ourselves about the moral and political tradeoffs, as well as the sorts of empirical details which form the stuff of counter-terrorism. The government, and every think tank stresses the importance of education in fighting extremism, but proposals in this area are astonishingly vague and bland. Above all, they seem utterly disconnected from the thought that, as citizens, we *need*

¹² It may be that Omand is basing his guidelines on analogy to just war theory, where justice in war requires that the state exercise its right to wage war in ways that are proportional, reflect a just cause, reasonable prospects of success and the lack of peaceful alternatives and so on. However, these principles assume the existence of state rights of self-defence, and state duties to defend others from unjust aggression. They then seek to illuminate when and how a state can justifiably act on these rights and duties. But they do not tell us whether the state is entitled to claim self-defence under circumstances x rather than y; or whether the state has a duty to aid other states in conditions p rather than q. They come into operation once these things have been established, and are meant to help us decide whether *war* is a legitimate consequence of those rights and duties.

and are entitled intelligently to discuss counter-terrorism policy, just as we would employment policy, education, welfare or policy on crime and punishment.

Naturally, we will all differ in our desire and ability to master many of the relevant details or controversies - though this is unlikely to be any truer of counter-terrorism than of employment or education policy, let alone pensions or the EU constitution. And, of course, some things have to stay secret. So we will 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 counter-terrorism.

Thus, ordinary citizens ought to be able to consider whether the UK should continue to exclude wiretapped evidence in court, and the grounds on which people are subjected to wire-tapping. They should be free to decide whether, or how far, the state should protect the credibility of spies even at the cost of their involvement in serious crimes like murder or racketeering.¹³ Such questions are as central to the prevention of financial, as violent crime; and as important to preventing sexual enslavement and coercion as terrorism.

In short, until we accept that citizens are *entitled to* understand the principles and main practices of counter-terrorism, and to debate these openly, we will lack an essential element in a democratic response to terrorism, and to crime more generally. This will inevitably lead well-meaning, brave and patriotic officers to feel betrayed when deals that they thought had been officially justified and accepted prove unjustifiable and unacceptable to many members of the public (whether rightly or wrongly). Likewise, until we can have public discussions about both terrorism and crime, we can expect young men and women, as well as middle-aged politicians, policemen and journalists to be vulnerable to manipulation by the fanatical, ambitious and crooked.

I therefore conclude that it is essential to a democratic approach to terrorism that we learn to talk more honestly about our laws, institutions and practices - their history, justification, their strengths, weaknesses and the alternatives to them. This applies as much to our laws, institutions and policies concerning terrorism as it does to our other collective problems, because there is no bright line that separates the one from the other.

¹³ Omand specifically raises this issue in 'The National Security Strategy', p. 10. The problem of controlling and/or justifying the actions of agents embedded in gangs or terrorist organisations underpins controversies over 'collusion' in Northern Ireland, and over racketeering and murder by police agents in Massachusetts.