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All-Risk Policing Powers

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INTRODUCTION

Since his early work, Clive Walker has recognised the key role of not only criminalisation but also 'control' in relation to countering terrorism.[1] Despite the oft-repeated mantra of the primacy of prosecution, it is control that dominates contemporary counter-terrorist strategies such as CONTEST.[2] A constant theme through Walker's writing has been the insistence that counter-terrorist laws, while sometimes justifiably exceptional, must adhere to constitutionalism.[3] He is one of the very few scholars who has comprehensively analysed every aspect of UK counter-terrorist law. This expansive range of inquiry has led him to analyse the workings and limitations of all UK counter-terrorist policing powers.[4] This chapter aims to draw together these three elements – policing, control and constitutionalism – by examining Walker's concept of all-risks policing powers.[5]

In counter-terrorist policing, intelligence based measures are the preeminent, and preferred, approach. But, as Walker notes, 'when intelligence is not sufficiently precise to pick

[1] C Walker *The Prevention of Terrorism in British Law* (Manchester University Press 1986) 8-9.

[2] Home Office, *CONTEST: the United Kingdom's Strategy for Countering Terrorism* (Cm 8123, 2011); C Walker 'Keeping control of terrorists without losing control of constitutionalism' (2007) 59 *Stanford Law Review* 1395, 1400-1401.

[3] See, Ch 18 (Walker) in this collection, and, eg, C Walker *Terrorism and the Law* (OUP, Oxford, 2011).

[4] Walker *Terrorism and the Law* (n 3); C Walker *Blackstone's Guide to the Anti-Terrorism Legislation* (3rd edn, OUP, Oxford 2014); Walker *The Prevention of Terrorism in British Law* (n 1).

[5] C Walker '"Know thine enemy as thyself": discerning friend from foe under anti-terrorism laws' (2008) *Melbourne Law Review* 275.

out foe from friend, then evermore pervasive tactics must be adopted'.[6] All-risks powers are an example of such tactics. The starting point for all-risks policing was the advent of 'neighbour terrorism': the threat is no longer from some exotic other who is clearly and easily distinguishable from ourselves.[7] It is not Bin Laden in a cave in Tora Bora. It is the local lads who you have seen around, chatting on the streets. It is your neighbour. Walker dates 'neighbour terrorism' to the mid-2000s, giving the 7/7 London bombings as an example, although he notes the earlier examples of Richard Reid, the 'shoe bomber', in 2001 and Ahmad Omar Saeed Sheikh, who murdered Daniel Pearl in 2002.[8]

Two important consequences flow from this designation. First, when faced with neighbour terrorism, everyone is deemed risky until proven otherwise. Indeed, '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.'[9] These powers clearly aim towards control rather than criminalisation. They are precautionary and aim to respond to anticipatory risks by means of disruption, deterrence and early detection.[10]

While it is possible to conceive of counter-terrorist measures that everyone, everywhere is subjected to – the mass data gathering that occurred under Tempora[11] comes close – it is impractical if not impossible for policing to occur in such an all-encompassing manner. This leads to the second consequence, whereby the response to this pervasive risk is refined by

[6] Walker 'Know thine enemy' (n 5) 277.

[7] Walker 'Know thine enemy' (n 5). See also Ch 5 (Hardy and Williams) in this collection.

[8] C Walker 'Neighbor Terrorism and the All-Risks Policing of Terrorism' (2009) *Journal of National Security Law and Policy* 121, 124.

[9] Walker 'Know thine enemy' (n 5) 276.

[10] Walker 'Keeping control of terrorists' (n 2).

[11] See, for example, E MacAskill et al, 'GCHQ taps fibre-optic cables for secret access to world's communications', *The Guardian*, June 21, 2013. Compare D. Bigo et al, *National Programmes for Mass Surveillance of Personal Data in EU Member States and their Compatibility with EU Law* (European Parliament, 2013).

turning the risk calculus on its head. Usually in criminal justice the risk attaches to the person who must, through their actions or exceptionally their inactions, have done something criminal or suspicious to trigger police action. In the context of stop and search, Lord Bingham noted that:

> It is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence. So jealously has this tradition been guarded that it has almost become a constitutional principle.[12]

With all-risks policing 'the risk calculation shifts from persons to actions and objects'.[13] If you carry out certain actions or are in a particular place you will be deemed risky – and potentially subject to police powers – until proven otherwise.

This chapter will first examine the costs associated with all-risks policing powers measures and Walker's proposals for containment. It then analyses current practice in the UK, US and France, concluding by considering the possible trajectory of counter-terrorist all-risks policing.

I. THE COSTS OF ALL-RISKS POLICING

There are two paradigms of all-risks policing: universal and refined. Universal all-risks measures are applied to everyone who is in the designated area or undertaking the designated actions. An example is airport security whereby anyone who wishes to get airside must submit to the same security procedures – having their hand luggage screened; removing one's belt and

[12] *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12 [1] (hereafter *Gillan (HL)*).

[13] Walker 'Know thine enemy' (n 5) 277.

sometimes shoes; taking liquids and large electronics out of hand luggage for separate screening etc. By contrast, the Terrorism Act 2000 (TA 2000), schedule 7 shows the refined approach. Schedule 7 permits an examining officer to stop, search, question and detain any person at ports or the border area in Northern Ireland to determine whether that person appears to be or have been involved in the commission, preparation or instigation of terrorism.[14] There is no requirement of suspicion, thus the powers may be used against anyone, but only a minute number – around 0.02% passengers at air and ferry ports and international rail terminals– are in fact subjected to the powers.[15]

A number of costs are common to both paradigms. First, an acceptance of increased false positives becomes embedded. This is an inevitable consequence of deploying powers without actionable intelligence or suspicion towards the subject. Second, there is an impact on human rights, notably the right to a private life as protected under the European Convention on Human Rights (ECHR), Article 8. Depending on the power and its deployment, the rights to liberty, a fair trial, freedom of expression, freedom of assembly and the prohibition on discrimination may also be engaged. Third, when applied in non-border situations, the areas chosen for these heightened security measures can lead to what Coafee terms 'splintered urbanism' whereby 'rings of security' or 'confidence' morph into 'rings of exclusions'.[16] There is an inevitable rural / urban divide as risk is translated into impact and numbers of potential casualties. There may also be financial consequences if non-designated events end up paying a premium for private security which, depending on the event, may be freely provided by the public police were it designated. Fourth, there is a societal cost through increased securitisation as a normal part of everyday life.

[14] The power is also applicable at St Pancras in respect of passengers travelling on the Eurostar.

[15] D Anderson 'The Operation of the Terrorism Acts in 2014' (Stationery Office, London 2015) 7.6.

[16] J Coafee 'Rings of Steel, Rings of Concrete and Rings of Confidence' (2014) (1) *International Journal of Urban and Regional Research* 201.

The degree and acceptability of these costs are integrally linked to the effectiveness of the measures. A limited infringement into the right to a private life would be justifiable if it is rationally linked to the object of reducing crime or disorder or addressing national security concerns (and, of course, is necessary and proportionate). The question of effectiveness, (discussed in more detail in relation to the specific powers outlined below) raises questions regarding the putative objectives of these powers. Do they aim to detect would-be terrorists? To deter them? To gather intelligence? Are they primarily methods of public reassurance? The objectives are important not only so that the effectiveness of the measures can be assessed but also because not all the objectives would satisfy the criteria of Article 8(2).

While the above costs are common to both universal and refined all-risks measures, there are additional costs specific to refined all-risks measures; these costs will vary depending on the implementation of the measure. While nominally neutral on its face, the application of all-risks suspicionless stop and search powers in the UK demonstrate the police relying on broad characteristics in an attempt to narrow the field, with 'Black' or 'Asian' persons between five and seven times more likely to be stopped than 'White' persons under the TA 2000, section 44.[17] It was notable that both the House of Lords and the European Court of Human Rights in *Gillan* commented on the potentially discriminatory application of the TA 2000, section 44 despite it not being raised on the facts.[18] This disproportionate application is a predictable consequence of measures applicable in the absence of reasonable suspicion against the subject. Having narrowed the field by reference to the designated location or action(s), the only criteria

[17] Liberty 'Section 44 Terrorism Act' Available at: https://www.liberty-human-rights.org.uk/human-rights/justice-and-fair-trials/stop-and-search/section-44-terrorism-act> (last accessed: February 28, 2018). See further: Ministry of Justice (MOJ) 'Statistics on Race and the Criminal Justice System-2006' (MOJ, London 2007); MOJ 'Statistics on Race and the Criminal Justice System-2006/07' (MOJ, London 2008); MOJ 'Statistics on Race and the Criminal Justice System-2007/08' (MOJ, London 2009).

[18] See *Gillan (HL)* (n 12) and *Gillan v United Kingdom* (2010) 50 EHRR 45 (App.No.22978/05) (hereafter *Gillan* (ECtHR)).

remaining to differentiate between the subjects are such generalised characteristics. As Walker warned, 'if terrorists can be both neighbours and aliens, those [refining] characteristics must be drawn in very wide terms, including age, gender and race'.[19] These carry obvious costs. Action triggered on the basis of such group characteristics risks infringing the prohibition on discrimination under the ECHR Article 14, as well as domestic legislation such as (in the UK) the Equality Act 2000. Of course, disproportionality does not necessarily equate to discrimination; as Anderson emphasised in relation to the TA 2000, schedule 7, if powers are exercised in relation to the terrorist threat then their deployment should be proportionate to the terrorist rather than the general population.[20] However, such parsing of the crowds, even if not exercised in a discriminatory manner, may lead to a perception of discrimination among the targeted communities, potentially reducing their willingness to cooperate with the police, thereby stemming vital intelligence, and even acting as a recruiting tool or appearing to justify terrorist propaganda.[21] Moreover, as Walker warns, 'choice will be based on professional or sectarian cultures as much as rational choice and may well mask unpalatable or unlawful considerations'.[22] If biases or cultures do inform individual officer's actions, there is a risk that they may overlook more pertinent factors.

Some police forces have attempted to address the tendency to rely upon such group characteristics by using behavioural assessment programmes, which aim to train officers to 'identify suspects through indicators such as behaviours, body language, expressions and signs of deception'.[23] For example, the British Transport Police developed the Behavioural

[19] Walker 'Know thine enemy' (n 5) 294.

[20] D Anderson 'The Operation of the Terrorism Acts in 2013' (Stationery Office, London 2014) 7.7-7.15.

[21] Ibid 7.15. See also L Donohue *The Cost of Counter-Terrorism* (CUP, Cambridge 2008) 117-122; B Harcourt *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (University of Chicago Press, London 2007); ACLU 'Sanctioned bias: racial profiling since 9/11' (ACLU, New York 2004).

[22] Walker 'Know thine enemy' (n 5) 298.

[23] Home Affairs Committee, *Seventh Report* (HL 364-II, 2008), Appendix 28 'Memorandum submitted by the British Transport Police'.

Assessment Screening System (BASS)[24] while in the US the Transportation Security Administration (TSA) has spent around $250M a year on its behavioural detection programme, Screening of Passengers by Observation Techniques (SPOT).[25] However, such programmes have been criticised. For example, SPOT has been excoriated by the American Civil Liberties Union for being unscientific, unreliable and for undermining civil liberties, in particular by encouraging racist and religious bias.[26]

II. THE CONTAINMENT OF ALL-RISKS POLICING

Having recognised the costs associated with all-risks policing and accepted that such measures have a place – albeit heavily curtailed – in the counter-terrorist toolkit, Walker proposed five ways to contain the measures.[27] First, link all-risks measures to vulnerable targets. Such geographical refinement should ease the costs that flow from the (almost inevitable) refinement in relation to the selection process itself, presuming these are refined and not universal measures. Second, put powers on a statutory footing. This should include details on profiling if that is a factor in the selection process, explaining how it operates and what weight is to be given to it. Third, there should be accountability, including public statistics of use and official explanation thereof, which should include local communities. Fourth, there should be greater community involvement in the deployment of such powers. Fifth, in keeping with Walker's consistent thread of democratic oversight of extraordinary powers, the measures should be kept under review by the legislature.

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[24] BTP *Embracing equality, Improving Confidence* (BTP, London 2007).

[25] Transit Cooperative Research Program 'Public Transportation Passenger Security Inspections: A Guide for Policy Decision Makers' (Transportation Research Board, Washington 2007).

[26] ACLU *Bad trip: Debunking the TSA's 'Behavior Detection' Program* (ACLU, New York 2017). See also A Ritchie and J Mogul 'In the shadows of the war on terror: persistent police brutality and abuse of people of color in the United States' (2008) 1 *De Paul Journal for Social Justice* 175; c.f. EU Agency for Fundamental Rights 'Towards More Effective Policing: Understanding and Prevention Discriminatory Ethnic Profiling: A Guide' (EU, Luxembourg 2010) 59 (discussing BASS).

[27] Walker 'Neighbor terrorism' (n 8) part VI.

There has been important judicial containment since Walker's initial writings on the subject, notably the ECtHR case of *Gillan v United Kingdom*, concerning the TA 2000, section 44.[28] The European Court of Human Rights (ECtHR) ruled that the routine use of section 44 did engage the right to a private life under the ECHR Article 8. While the judgment criticised the power roundly, the most interesting aspect in terms of all-risks policing related to whether it was prescribed by law. This requires that the measure have a basis in law, be adequately accessible and foreseeable, and be sufficiently bounded to ensure it cannot be exercised in an arbitrary manner. In holding that it was not, the Court focused on the vague statutory drafting and the fact that neither the authorisation nor deployment were sufficiently bounded to ensure the power would not be exercised in an arbitrary manner.[29] This strikes at the heart of all-risks policing as ambiguity in the statute is a necessary by-product of the absence of suspicion towards the subject. How can one precisely refine the selection process to guard against its arbitrary deployment when the objective is the flexibility to use it against anyone in a designated area? The authorisation process could be tightened up considerably – indeed, the ECtHR paid particular attention to the woefully low threshold of 'expediency' in triggering the power which it noted simply means 'advantageous'.[30] However, the logic of all-risks places a ceiling on how far the threshold can be raised. All-risks measures can be closely curtailed in geographical and temporal terms when triggered by intelligence and linked to a specific event or location. But it is less clear whether an authorisation in response to a generalised risk – for example in relation to an iconic site or transportation hub – would suffice. Certainly, the UK Government thought not, and such a deployment is explicitly excluded under the TA 2000, section 44's replacement, section 47A (which is discussed below). Indeed, much of the

[28] *Gillan (ECtHR)* (n 18).

[29] ibid [79] – [87].

[30] ibid [80].

deployment of all-risks powers address precisely such pervasive and non-specific threats. Thus *Gillan* appeared to place close constraints around all-risks as a counter-terrorist tool, seeming to relegate it to the position of 'break glass only in case of serious (and intelligence based) emergencies' rather than the UK's previous approach of 'break glass if advantageous'.[31]

In the domestic courts, the House of Lords held that only searches involving personal correspondence or similar, would engage Article 8.[32] However, the ECtHR criticised the basic structure of the power, and determined that any stop and search would engage Article 8 thereby appearing to set a strong precedent that would significantly limit the deployment of all-risks measures.[33] The UK Government responded by repealing section 44 and replacing it with section 47A. I have suggested elsewhere that, depending on the practice, the current power may still fall short of the ECtHR's requirements.[34] However, this long proved a moot point: the power was not authorised until late 2017 despite a number of high profile and high risk events (notably the Olympics in 2012 and Commonwealth Games in 2014), a threat level that has varied between SEVERE and CRITICAL,[35] and nine terrorist attacks.[36] (The use of section 47A is discussed in the next section).

Gillan thus appeared to herald the terminal decline of non-border all-risks policing, at least in the UK. However, in a number of subsequent cases the domestic courts have retreated from that high watermark and failed to closely scrutinise the putative safeguards both in

[31] See Ch 18 (Walker) in this collection.

[32] See *Gillan (HL)* (n 12) [28].

[33] *Gillan (ECtHR)* (n 18) [63]-[64] and passim.

[34] G Lennon 'Precautionary Tales: Suspicionless Counter-Terrorism Stop and Search' (2015) 15(1) *Criminology and Criminal Justice* 44.

[35] SEVERE means an attack is highly likely. CRITICAL means one is imminent. See also A Parker (DG MI5) 'Director General Andrew Parker - 2017 Speech' (17 Oct 2017) Available at: https://www.mi5.gov.uk/news/director-general-andrew-parker-2017-speech (last accessed: February 28, 2018).

[36] O Bowcott 'UK Terrorist Attacks since 11 September 2001' *The Guardian,* March 22, 2017; D Casciani 'Parsons Green: What do the police do next?' (BBC News, September 16, 2017).

relation to analogous all-risks powers and in relation to police powers more generally. For example, in *Beghal v DPP* the Supreme Court held that the TA 2000, schedule 7 was not incompatible with the ECHR Article 8.[37] The case concerned a French national who was detained, searched and questioned for an hour and 45 minutes and, having refused to answer most of the questions, charged with breaching her duty to comply with examining officers.[38] The defendant maintained the power breached her rights to liberty (Article 5), a fair trial – specifically the prohibition on self-incrimination (Article 6), and the right to a private life (Article 8). The majority (Lord Kerr dissenting) dismissed the appeal. While the outcome is disappointing, it is the approach of the court in relation to the principle of legality – in other words, whether the power was prescribed by law – which is most concerning in relation to the containment of all-risks policing measures.

In contrast to section 44, schedule 7 of the TA 2000 was seen as comparatively 'good' (or at least not hugely criticised) practice. This led the majority to overlook the fact that schedule 7 is far more broadly drawn than section 44 had been; the Court also failed to assess the adequacy of the safeguards.[39] Thus, the Court noted that: the use of schedule 7 was declining; there was no evidence of its discriminatory use against black and Asian persons; and the Independent Reviewer, generally, approved of the power and viewed it as effective.[40] Lord Hughes also noted the ineffectiveness of the authorisation regime in relation to section 44,[41]

[37] [2015] UKSC 49.

[38] As required by the Terrorism Act 2000, schedule 7, para 18(1).

[39] *Beghal* (n 37) [38] – [45] (Lord Hughes, with whom Lord Hodges agreed) and [79], [86]-[91] (Lord Neuberger and Lord Dyson).

[40] Although note that while the Reviewers acknowledged the utility of the power, each consistently criticised aspects of the powers, with Anderson calling for a number of changes to the law. See eg A Carlile *The Terrorism Acts in 2009* (Stationery Office, London 2010) ch 5; D Anderson *The Operation of the Terrorism Acts in 2013* (Stationery Office, London 2014) ch 7; M Hill *The Operation of the Terrorism Acts in 2016* (Stationery Office, London 2017) ch 5.

[41] *Beghal* (n 37) [41].

although the fact that there is no comparative safeguard (whether functioning or not) in relation to schedule 7 rather undermines this point. He then outlined the 'safeguards':

> 'the restriction to those passing into and out of the country; (ii) the restriction to the statutory purpose; (iii) the restriction to specially trained and accredited police officers; (iv) the restrictions on the duration of questioning; (v) the restrictions on the type of search; (vi) the requirement to give explanatory notice to those questioned, including procedure for complaint; (vii) the requirement to permit consultation with a solicitor and the notification of a third party; (viii) the requirement for records to be kept; (ix) the availability of judicial review…; (x) the supervision of the Independent Reviewer.'[42]

However, as Ip notes, several of these supposed safeguards 'are safeguards only in the most attenuated sense'.[43] Most applied equally – or indeed in a more restrictive context – to the TA 2000, section 44, all of which were rejected as insufficient by the ECtHR in *Gillan*.[44]

The only novel and substantive restriction discussed by the court was that the TA 2000, schedule 7 applies exclusively at ports and borders. It is undoubtedly true, as the majority argued, that people passing through such areas have always been subject to additional restrictions and there is an expectation of such controls. However, the majority's attempt to cast schedule 7 as a limited power on that basis is disingenuous.[45] As Ip notes, approximately 245 million people pass through ports and borders annually.[46] The majority also alleged that it is normal for travellers to be subject to such examinations.[47] This assertion cannot stand with

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[42] *Beghal* (n 37) [43].

[43] J Ip 'The Legality of 'suspicionless' stop and search powers under the European Convention on Human Rights' (2017) 17(3) *Human Rights LR* 523, 535.

[44] For a detailed discussion of the safeguards and their limitations see Ip (n 43).

[45] *Beghal* (n 37) [18] (Lord Hughes) and [88], [89] (Lord Neuberger and Lord Dyson).

[46] Ip (n 43) 536.

[47] *Beghal* (n 37) [38] – [40], [43] (Lord Hughes, with whom Lord Hodges agreed) and [88], [89] (Lord Neuberger and Lord Dyson).

the majority's other contention that the use of schedule 7 is statistically minute. The practice is either statistically minute or it is routine. It cannot be both. A final argument, articulated by Lord Neuberger and Lord Dyson, and based on the ECtHR's comments in *Gillan*, was that air travellers could be seen as consenting to 'the power of search exercised at airports'.[48] While true, the ECtHR was discussing Lord Bingham's comment about 'an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports'.[49] This refers to universal screening to get airside, not schedule 7 examinations, which include coercive questioning, searches which extend to personal data on electronic devices, and detention. These are not comparable measures except in the most superficial sense and the logic of implied consent is considerably more difficult to apply to schedule 7.

These putative 'safeguards' are not sufficient to prevent the arbitrary exercise of the power, but this inadequacy appears to have been subsumed by the fact that the practice did not reveal such treatment. The logic seems to be that an exceptionally broad discretion will adhere to the principle of legality in reliance on the examining officer's forbearance to use the power to the extent permitted by law. Lord Kerr (dissenting) is surely more convincing when he argues that '[a] power on which there are insufficient legal constraints does not become legal simply because those who may have resort to it, exercise self-restraint'.[50] Lord Kerr's dissent focused on how the TA 2000, schedule 7 was far more broadly drawn than the TA 2000, section 44, including its lack of any authorisation process, temporal or geographical limits, which led him to conclude that the power did not adhere to the principle of legality.[51]

[48] *Beghal* (n 37) [82] citing *Gillan* (n 18) [64].

[49] *Gillan (HL)* (n 12) [28] (Lord Bingham), cited at *Beghal* (n 37) [19].

[50] *Beghal* (n 37) [102].

[51] *Beghal* (n 37) [97].

A lack of intensive scrutiny regarding the exercise of police powers or discretion in non-counter-terrorist contexts is evident in other recent Supreme Court cases, for example in *Roberts v Commissioner of Police of the Metropolis*,[52] concerning non-counter-terrorism suspicionless stop and search, and *Gaughran v Chief Constable of the Police Service of Northern Ireland*,[53] which is being appealed to the ECtHR and concerned the indefinite retention of biometric data following a non-custodial sentence. The ECtHR case of *Colon v the Netherlands*[54] also seems to indicate some retreat from the intensive scrutiny evident in *Gillan*. For example, in *Colon*, which concerned a non-counter-terrorist suspicionless stop and search power similar to that in *Roberts*, we can see a lack of intensive scrutiny of safeguards. The case, however, was narrowly argued in relation to the necessity of judicial oversight.[55] As far as counter-terrorist all-risks measures are concerned, *Beghal* appears to lower the bar set by *Gillan*. The benchmark seems to have slipped from a requirement that the power be sufficiently circumscribed to ensure it cannot be applied in an arbitrary manner, to instead requiring that it is not in fact so exercised (notwithstanding that this relies on the officer's forbearance rather than legal safeguards). By focussing on the practice rather than the law, the Supreme Court has opened a back door to broadly drawn all-risks measures.

[52] [2015] UKSC 79.

[53] [2015] UKSC 29. Although note Lord Kerr's dissent. Cf *T v Chief Constable of Greater Manchester Police* [2014] UKSC 35 (concerning disclosure of criminal records) in which there was a more intensive scrutiny of safeguards.

[54] (2012) 55 EHRR SE5 app.no49458/06.

[55] See further G Lennon 'Stop and search powers in UK Terrorism Investigations – A Limited Judicial Oversight?' (2016) 20(5) *International Journal of Human Rights* 634.

III. THE PRACTICE OF ALL-RISKS POLICING

This section will examine the practice of all-risks policing in the UK (expanding upon the discussion in the previous sections), the US and France, specifically considering whether Walker's criteria for containment are adhered to in these jurisdictions.

A. The UK

Walker was primarily writing in response to the UK's increasing reliance on all risks counter-terrorist powers, both at ports and borders (TA 2000, Schedule 7) and in non-border situations (TA 2000, section 44). In 2007, when Walker first proposed the concept of all-risks policing, the use of section 44 had surged exponentially, with the total number of stops increasing from 42,834 in 2006/07 to 126,706 in 2007/08, peaking at 210,013 in 2008/09.[56] Both powers consistently featured among the major grievances of black and ethnic minority communities, in particular British Muslim and Asian communities, in relation to counter-terrorist powers.[57] Section 44 was aimed primarily at disruption and deterrence and intelligence gathering. Interestingly, the current power under the TA 2000, section 47A prohibits authorisation on the basis of deterrence, intelligence gathering or public reassurance.[58] Schedule 7 also aims at

[56] Hansard HC Deb 13 February 2013, vol 558 col762W (Brokenshire). These figures exclude the second and third heaviest users – the British Transport Police (BTP), who stopped approximately 215,735 persons between 2005/06 and 2010/11, and the Police Service of Northern Ireland (PSNI), who stopped approximately 36,914 between 2007/08 and 2009/10 (Lennon 'Precautionary tales' (n 34) 49, 54).

[57] See, eg, T Choudhury and H Fenwick 'The impact of counter-terrorism measures on Muslim communities' (2011) 25 *International Review of Law, Computers & Technology* 151, 166-167; Home Affairs Committee 'Terrorism and Community Relations' (HC 2004-05, 165-I) Ch 6; Liberty *The impact of anti-terrorism powers on the British Muslim population* (Liberty, London 2004); G Mythen, S Walklate and F Khan '"I'm a Muslim, but I'm not a terrorist": victimization, risky identities and the performance of safety' (2009) 49 *British Journal of Criminology* 736.

[58] Lennon 'Precautionary tales' (n **Error! Bookmark not defined.**). Home Office *Code of Practice (England, Wales and Scotland) for the authorisation and exercise of stop and search powers relating to section 47A of Schedule 6B to the Terrorism Act 2000* (Home Office, London 2012) 3.1.6.

disruption and deterrence and intelligence gathering, in addition to having utility in terms of evidence gathering and recruiting informants.[59]

Since this peak activity, many of Walker's proposed methods of containment have been taken on board, prompted in no small part by *Gillan*. First, the requirement of a linkage to vulnerable targets. TA 2000, schedule 7 satisfies this criterion (leaving aside arguments that there could be greater refinement in relation to some airports). TA 2000, section 44 had no such requirement in statute nor in practice, as exemplified by the Metropolitan Police Service (MPS) rolling, force wide-authorisation that lasted for over eight years, although there was some improvement from mid-2009.[60] The current power, TA 2000, section 47A, tightened the geographical linkage by requiring the area – and duration – of the authorisation be 'no greater than is necessary to prevent' an act of terrorism.[61] It also explicitly contemplates the vulnerability or 'high risk' nature of the location as a – although not the sole – factor in justifying an authorisation.[62] Thus, despite some improvement, section 47A does not satisfy Walker's first criterion.

The second criterion is that the powers have a statutory base, which requires more than merely having a basis in law. While the UK powers always had such a basis, the breadth and vagueness of the TA 2000, section 44 was a key reason for the ECtHR's conclusion that the power was not prescribed by law.[63] The TA 2000, section 47A and its accompanying Code of Practice include additional detail and impose a higher threshold for triggering the authorisation,

[59] D Anderson *The Operation of the Terrorism Acts in 2012* (Stationery Office, London 2013) 9.43-9.52.

[60] See Lennon 'Precautionary tales' (n **Error! Bookmark not defined.**) 49-50.

[61] Terrorism Act 2000, s 48(1)(b).

[62] Home Office 'Code of Practice (England, Wales and Scotland) for the Exercise of Stop and Search Powers Under Sections 43 And 43a of the Terrorism Act 2000, and the Authorisation and Exercise of Stop and Search Powers Relating to Section 47a of, and Schedule 6b to, the Terrorism Act 2000' (Home Office, London 2012) 4.1.5.

[63] *Gillan (ECtHR)* (n 18).

although the power remains, necessarily, broad. The TA 2000, schedule 7 has also undergone some legislative revision,[64] following criticism by the Independent Reviewer, David Anderson,[65] which prompted a public consultation.[66] This revision reduced the maximum duration of examinations and detention and improved some safeguards. The discussion of a profile or selection criteria largely occurs in the negative, with an explicit prohibition in both Codes of Practice on relying on any protected characteristic as the basis for stop and search and a reminder that 'a terrorist can come from any background; there is no profile for what a terrorist looks like'.[67] However, as Lord Kerr noted in *Beghal*, the prohibition is against relying solely on such criteria for selection, thus contemplating such 'that ethnic origin or religious adherence can be at least one of the reasons for exercising the power'.[68] Both Codes of Practice outline considerations that can be taken into account when selecting whom to stop. While the Code for the TA 2000, schedule 7 provides more detail, the considerations in both Codes remain very general (such as behaviour or information on current, emerging or future terrorist activity).[69]

Turning to Walker's remaining criteria, in relation to the requirement of accountability, there has been some improvement, certainly as far as statistical transparency goes, with the TA 2000, schedule 7 statistics being made publically available since 2009. The authorisation of the TA 2000, section 44 was highly opaque with, for example, a number of unlawful authorisations that overran the maximum 28 days only coming to light following a Freedom of Information

[64] Anti-Social Behaviour Crime and Policing Act 2014, section 148 and Schedule 9.

[65] See Anderson 'The Operation of the Terrorism Acts in 2013' (n 20).

[66] Home Office 'Review of the Operation of Schedule 7: A Public Consultation' (Home Office, London 2012).

[67] See Home Office 'Code of Practice' (n 62) [4.11.6], see generally [4.11]. For Schedule 7, see Home Office 'Examining Officers and Review Officers under Schedule 7 to the Terrorism Act 2000: Code of Practice' (Home Office 2015). Note this was updated following *Beghal*.

[68] *Beghal* (n 37) [104].

[69] See Home Office 'Code of Practice' (n 62); Home Office 'Examining Officers and Review Officers under Schedule 7' (n 67).

Request.[70] It is currently unclear whether there will be improved transparency in this respect under the TA 2000, section 47A. Community involvement – Walker's fourth requirement – is contemplated, although not required, under section 47A, but has not been incorporated into schedule 7.[71] Indeed, schedule 7 presents significant challenges in this regard. While some of the 'community' are evident – the staff and businesses that populate ports and airports, travellers are, by definition, transient and difficult to engage. Fifth, the powers are subject to consideration by the Independent Reviewers and the TA 2000, section 44 was also considered by Lord MacDonald in his review of terrorism legislation.[72] However, notwithstanding consideration by Parliamentary Committees, the powers are not subject to specific reviews by the legislature, thus failing to adhere to Walker's final criterion.

As already discussed, the deployment of all-risks counter-terrorist policing in the UK has dwindled from its highs of the late 2000s, with non-border suspicionless stop and search powers not used since 2011. Section 47A was used for the first time following the attack on Parsons Green Tube on the 15th September 2017.[73] Its use was authorised by four forces: the British Transport Police (BTP); City of London Police; North Yorkshire Police and West Yorkshire Police.[74] It is notable that the MPS, which is the largest UK police force and was by far the heaviest user of the TA 2000, section 44, did not authorise the use of section 47A even though the attack took place in its force area. There were 126 stops and searches conducted by the BTP, with 4 resultant arrests, and 1 stop and search by each of the Yorkshire forces. The

[70] Hansard HC Deb 10 June 2010, vol 511 cols 24WS-28WS (Herbert).

[71] Home Office 'Code of Practice' (n 62).

[72] Lord MacDonald, *Review of Counter-Terrorism and Security Powers* (Cm 8003, 2011).

[73] BBC News, Police forces use new terror stop and search powers (December 7, 2017).

[74] Home Office *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, quarterly update to September 2017* (Home Office, Statistical Bulletin 24/17, London 2017) 6.1.

City of London police did not deploy the power.[75] This use appears to be considerably more restrained than occurred under TA 2000, section 44 and seems likely to have been intelligence driven, however it remains to be seen whether this is a one off, or whether it heralds a return to the routine use of the power.[76]

The use of the TA 2000, schedule 7 has fallen consistently since 2012. In 2009, the first year for which there are records, there were 85,557 examinations. By 2016/17 this had fallen to 18,103, a reduction of some 80%. It is perhaps notable that the percentage of persons examined for more than an hour has increased over that period from just over 3% in 2012 to 9% in 2017, with detentions increasing from 0.8% to 10%.[77] The decreased numbers of schedule 7 examinations coupled with the increase in detentions of over an hour could perhaps point to a finessing of the powers' deployment.[78] Data is not published on the number of arrests or other outcomes.[79]

B. The US

In the US, practice has diverged from that of the UK since the late 2000's. Precise trends cannot be determined due to the lack of public accountability over the practices, none of which are subject to routine, public accounting. However, piecing together caselaw, reports and news articles presents at least a sketch of the environment of all-risks, focusing on non-border powers.

[75] Home Office 'Operation of police powers' (n **Error! Bookmark not defined.**)

[76] BTP *British Transport Police Annual Report: 2010/11* (BTP, London 2011).

[77] Home Office 'Operation of police powers' (n **Error! Bookmark not defined.**) Table s.04. Note figures are for the year to September.

[78] Hill (n 39) 5.10.

[79] Although see examples given in D Anderson *The Terrorism Acts in 2012* (Stationery Office, London 2013) 10.58-10.62.

The US counter-terrorist all-risks powers are fragmented. At the federal level, the Department of Homeland Security's Transportation Security Administration operates VIPR (Visible Intermodal Prevention and Response) teams, which are deployed across surface and air transportation systems and at special events, for example the Super Bowl and State of the Union. They are manged by the Federal Air Marshalls Service, often operating at the request of, and alongside, local law enforcement and transportation officers.[80] Certain ports are subject to federal statute which requires pre-boarding screening.[81] Amtrak and numerous transit authorities have deployed variants on the theme, including in: New York, New Jersey, Massachusetts Bay, Los Angeles, Washington DC, Marlyland and the Niagara Frontier.[82] While practice varies, these 'inspection programmes' are usually restricted to transit systems and are typically non-coercive: persons can leave the transit system rather than submit to a search. They are usually confined to bags that could contain bombs, thus excluding small handbags and wallets and personal pat-downs.[83] Their objectives are deterrence and detection, although the effectiveness of powers as a detection tool is highly questionable.[84]

The absence of mandatory reporting means that the use and impact of these powers is unclear. However, the DC Metro bag inspection programme had led to no arrests after 18

[80] R Allison (Director, Federal Air Marshal Service) 'The Federal Air Marshal Service and its Readiness to Meet the Evolving Threat' (Statement before the House Committee on Homeland Security, Transportation Security Subcommitttee, July 16, 2015).

[81] The Maritime Transportation Security Act 46 U.S.C. ss.70101–70119 (2006).

[82] American Public Transportation Association 'Random Inspections of Carry-On Items in Transit Systems' (SS-SRM-WP-002-10, APTA, Washington DC 2010).

[83] For further detail see G Lennon 'Security inspections: suspicionless stop and search in the USA and UK' in G Lennon and C Walker *Routledge Handbook of Law and Terrorism* (Routledge 2015).

[84] See, eg, *MacWade v. Kelly*, 460 F.3d 260, 271 (2d Cir. 2006); *Cassidy v. Chertoff*, 471 F.3d 67, 70 (2d Cir. 2006).

months, nor did the Massachusetts Bay Transit Authority after almost five years.[85] VIPR and at least some of the metro inspection programmes remain extant, although they have dropped down the priority list as far as commuter and rights' organisations are concerned.[86] This may be due to decreased numbers, or 'normalisation' after a decade of use in some areas, or simply the long list of other pressing civil rights issues. In the wake of the Port Authority attack there was, predictably, an upsurge in police activity, including bag inspections on the subway.[87]

There is little judicial containment, the courts having held that the bag inspection programmes are constitutional and come within the special needs exception of the 4th Amendment.[88] In *Sultan v. Kelly* the claimant, who was of Kashmiri descent, was stopped 21 times in three years under the NYPD's inspection programme. He contended that his 4th and 14th Amendment rights had been violated and sought an injunction requiring the NYPD to maintain demographic records to enable accountability around possible racial profiling and to implement improved training. The injunction was unsuccessful and the case was settled for $25,000.[89]

The US 'inspection programmes' hold up poorly against Walker's requirements for containment. Most have no statutory base, the notable exceptions being the VIPR programme

[85] A Tuff 'Metro's random bag searches net no arrests', Washington's Top News, June 12, 2012. Available at: wtop.com, https://wtop.com/news/2012/06/metros-random-bag-searches-net-no-arrests/ (last accessed February 28, 2012).

[86] Eg Boston's MBTA continues to have TSA coordinated inspections: Massachusetts Bay Transportation Authority 'If you See Something, Say Something' Available at: https://mbta.com/transit-police/see-something-say-something (last accessed: February 28, 2012).

[87] B Jansen 'Police pledge more patrols after NYC transit attack but say no broader threat is imminent' (USA Today, December 11, 2017) Available at: https://www.usatoday.com/story/news/2017/12/11/police-pledge-more-patrols-after-nyc-transit-atsubway-bombing-but-say-no-more-broader-threat-imminen/940309001/ (last accessed: February 28, 2018).

[88] *MacWade v. Kelly* (n 84); *Cassidy v. Chertoff* (n 84).

[89] *Sultan v Kelly*, 09 CV 00698 (RJD)(RER) (E.D.N.Y. June 30, 2009).

(although the statutory detail is exceptionally light-touch)[90] and the ferry inspections that were challenged unsuccessfully in *Cassidy v. Chertoff*.[91] There is little if any accountability, in terms of giving an account, with such information on deployment as exists haphazard and generally resulting from legal cases and/or information requests from news agencies. In terms of oversight, there is often none, with no authorisation required to deploy the powers, and no ad or post-hoc scrutiny. There is limited community involvement, although transit stakeholders are consulted under some regimes and the public is generally made aware that searches are being conducted. Apart from reviews of VIPR within the ambit of general reviews of the Department of Homeland Security (DHS) or TSA, there are no structured reviews by anybody, let alone the relevant legislature – who would rarely be involved in any case due to the lack of a statutory base. The one criterion they do adhere to is the requirement of a link to vulnerable targets, although this appears to be – at least some of the time – on the basis of a generalised threat towards mass transportation.

C. France

The French state of emergency that had been in force since the Paris attacks of November 13 2015 expired on November 1, 2017, being partially replaced by the Act to Reinforce Internal Security and the Fight Against Terrorism.[92] The law makes permanent a number of the emergency measures that had been in force. Of interest in relation to all-risks policing is the power under Article 1 which permits Prefects – the Interior Minister's local representatives – to designate 'protection perimeters' to ensure security at events or in particularly vulnerable places which are exposed 'to a risk of acts of terrorism'. The designation may last for up to a

[90] 6 USC 1112 sec. 1303.

[91] 471 F.3d 67, 70 (2d Cir. 2006). The relevant statute is: The Maritime Transportation Security Act 46 U.S.C. ss.70101–70119 (2006).

[92] Loi n° 2017-1510 du 30 Octobre 2017.

month and is renewable. The duration and extent must be proportionate although, given the trigger is so low, this adds little by way of safeguards. Human Rights Watch expressed concern that the broad discretion afforded by this power would simply exacerbate concerns regarding discrimination in relation to identity checks.[93] The UN Special Rapporteur, Fionnuala Ní Aoláin, noted the impact of the draft Bill on, *inter alia*, freedom of movement, as well as a general concern that such exceptional powers are being made permanent.[94] Given the power is so recent, there is no information on its deployment.

The 2017 law is based upon a measure from the state of emergency.[95] That power, under Article 8(1), permitted the Prefect to designate an area for up to 24 hours during which the police could conduct identity checks, visual and bag inspections and inspections of vehicles. There was no requirement of suspicion and the searches did not require consent. Any incidental criminality revealed could be relied on in subsequent proceedings.[96] There is no required trigger, the only pre-requisite being that the area was under a state of emergency. In the sixteen months that it was in force, approximately 5,000 designations were made.[97] There were no evaluations, nor published records regarding the number of dangerous items found, nor arrests made. It was deployed at events as diverse as the Saint-Hilaire-Saint-Mesmim cherry festival and the Parisian polling stations during the election.[98] While nominally limited to 24 hours, a

[93] Human Rights Watch 'France: Flawed Security Bill Would Violate Rights' (September 12, 2017). Available at: https://www.hrw.org/news/2017/09/12/france-flawed-security-bill-would-violate-rights (last accessed: February 28, 2017).

[94] F Ní Aoláin 'Letter to the French Government on 22 September 2017' (OL FRA6/2017). Available at: http://www.ohchr.org/Documents/Issues/Terrorism/OL_FRA22.09.17.pdf (last accessed: February 28, 2017).

[95] Article 8(1) of Loi n° 55-385 du 3 Avril 1955, in its drafting from Loi n° 55-385 du 21 Julliet 2016.

[96] Code of Criminal Procedure Article 78-2-2 sub paras 3-4.

[97] J Pascual 'Les contrôles d'identité et les fouilles de l'état d'urgence déclarés contraires à la Constitution' *Le Monde* (1 December 2017).

[98] ibid.

series of rolling designations covering the public transportation of passengers by rail in Paris lasted from April 4, 2016 to July 21, 2016.[99]

This law was challenged on the grounds that it infringed the constitutional rights of freedom of movement, respect for private life, the principle of equality and the right to a fair trial.[100] The Constitutional Council declared the law to be unconstitutional on the basis that the legislature failed to balance the objectives of safeguarding against attacks on public safety, which must be considered under the state of emergency, and the rights of freedom of movement and a private life. Specifically, it criticised the fact that the areas could be designated without any need to establish a risk of harm to public order.

The current law differs in two key respects. First, it is narrower in that there must be a risk of acts of terrorism in the designated areas. The link to acts of terrorism would appear to be the minimum required to address the concerns raised by the Constitutional Council. However, while this may have sufficed under the state of emergency, it is questionable whether it will go far enough outwith that. Second, it is broader in so far as a protection perimeter may be imposed for up to a month at a time. While fitting well with the logic of all-risks, permitting additional security around locations that are deemed to be vulnerable or particularly risky targets, it suggests the level of specificity is comparatively low and of a more generalised nature, such that it would endure for up to a month. This lengthy duration is unlikely to bolster the case for the power's constitutionality. One could argue that there is an element of consent required as persons who do not wish to be searched can leave the area rather than submitting to a search. However, this could be a rather ephemeral form of consent. If the perimeters apply around mass public transportation, it could be argued that entrance is a necessity rather than a choice for commuters who may have no reasonable alternative of getting to and from work.

[99] ibid.

[100] Decision no. 2017-677 QPC of 1 December 2017.

Equally, if the perimeters cover substantial public spaces, the potential infringement of the freedom of movement is substantial. Most concerning would be if the person lives or works within the perimeter: there can be no suggestion of freely given consent in such circumstances. The consent argument is only really persuasive if the perimeter is applied to specific events and/or iconic venues. Absent consent, it seems questionable whether the law is sufficiently narrowly drawn to satisfy the Constitutional Council.

Certainly *Gillan* would suggest that, should the issue be raised in Strasbourg, the ECtHR would be unimpressed. The trigger is slightly higher than the requirement of 'expediency' in the TA 2000, section 44, but not by much, and the absence of any additional safeguards, or even a specific object to the search indicates even broader discretion than evident in *Gillan*. Also, unlike the TA 2000, section 44, the powers permit identity checks. There seems to be a clear risk of the arbitrary exercise of the power. Current practice may show restraint, although the experience in relation to its predecessor power suggests otherwise. It therefore seems likely that the ECtHR would hold that the power was not in accordance with the law.

Under the relevant French provisions, there is weak compliance with Walker's containment principles. The power has a statutory base, but the provisions are exceptionally light-touch. The requirement that there be a risk of terrorism in the designated area could be seen as a linkage to a vulnerable location but some degree of imminence or narrowing of the trigger would be desirable. It is unclear what criteria, if any, there are around accountability. In terms of oversight, the designation process is undermined by the low trigger. It is unclear whether records must be kept or published. There is no discussion of the selection criteria. There is no requirement of community engagement. Finally, there is, like the US and UK powers, no requirement of regular legislative review.

CONCLUSION

None of the powers discussed in this chapter adhere fully to Walker's principles for containment. That they should do so is a necessary first step. The practice and caselaw over the past decade or so suggests that additional restraints are needed to effectively control these powers. Adherence to the *Gillan* high watermark, which in essence required all-risks powers be time limited and intelligence driven, would be desirable. However, as discussed, there appears to have been a retreat from this standard. To ensure the constitutionality of all-risks powers as currently practiced, I would suggest the following additions to Walker's principles. First, evidence of non-terrorist criminality found during the exercise of all-risks measures be non-admissible in subsequent trials. Second, evidence from interviews conducted under all-risks measures be non-admissible in subsequent trials. Notwithstanding the ECtHR's disappointing permissiveness towards 'safety interviews',[101] interviews conducted with persons who are not suspected of an offence or subject to the appropriate safeguards should not be admissible in court. This should be achieved by way of an explicit statutory bar.[102] As well as ensuring adherence to the right to a fair trial, these requirements should serve to encourage officers to use all-risks measures solely to determine whether the person is risky or not. If it is determined that the person is risky, then the 'ordinary' counter-terrorist or criminal law should apply.[103]

The significant upturn in the number of attacks across Europe and their 'diversified and simplified' modus operandi lend themselves to precisely the type of precautionary logic that underpins all-risks policing.[104] It is perhaps not surprising that, in the UK, some seven years

[101] *Ibrahim v United Kingdom* (2015) 61 EHRR 9, app.no 50541/08. See further A Roberts 'Fair Trial: *Ibrahim v United Kingdom*' (2017) 11 Criminal Law Review 877. See also ch 2 (Dickson) in this collection.

[102] Compare *Beghal* (n 37).

[103] See Ch 3 (Walsh) in this collection.

[104] Anderson 'Attacks in London and Manchester' (n 105).

after it was introduced, section 47A was authorised in September 2017. This followed the sixth terror attack in a year punctuated by warnings from the head of MI5 and the Metropolitan Police Service regarding the increased severity of the terrorist threat.[105] While the attacks may fit the justifying narrative well, this chapter has demonstrated that the underlying concerns around the constitutionality of these measures, as identified by Walker, continue to persist.

[105] C Dick (Commissioner of the MPS) 'Interview with Nick Ferrari– Met Police Have Thwarted FIVE Terror Attacks – Some Just Minutes Before' (LBC radio July 14, 2017). Available at: http://www.lbc.co.uk/radio/presenters/nick-ferrari/met-police-thwarted-five-terror-attacks/ (last accessed: February 28, 2018). A Parker (n 35). See further D Anderson *Attacks in London and Manchester: March-June 2017'* (Home Office, London 2017) 1.5. D Casciani 'Parsons Green: What do the police do next?' (BBC News 16 September 2017).