

**Interdiction and indoctrination:
The Counter-Terrorism and Security Act 2015**

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Abstract

Lying behind the recent Counter-Terrorism and Security Act 2015 is the phenomenon of foreign terrorist fighters which has sparked international and national attention. The 2015 Act deals with many facets of counter terrorism legislation, but its two principal measures are singled out for analysis and critique in this paper. Thus, Part I seeks to interdict foreign terrorist fighters by preventing suspects from travelling and dealing decisively with those already here who pose a risk. The second, broader aspect, of legislative policy, reflecting the UN emphasis on ‘Countering Violent Extremism’, is implemented through the statutory elaboration and enforcement in Part V of the ‘Prevent’ element of the long-established Countering International Terrorism strategy, which aims to stop people becoming terrorists or supporting violent extremism. These measures are explained in their policy contexts and set against criteria of effectiveness, personal freedom, and accountability.

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A Introduction and outline

On 1 September 2014, Prime Minister David Cameron announced that new counter-terrorism legislation would be introduced to address the threat to the United Kingdom (UK) from foreign terrorist fighters ('FTF's').¹ The onward march through Iraq and Syria in its summer 2014 campaign by Islamic State of Iraq and the Levant (also known as Islamic State of Iraq and al-Sham, or in Arabic form, Dawlat al Islamiyafi Iraq wa al Sham – DAISH, or, in its self-proclaimed, grandiloquent Caliphate format, Islamic State - Dawlat al Islamiya),² had caused utmost national and international alarm.

Consequently, the UN Security Council passed two resolutions under Chapter VII of the UN Charter. UNSCR 2170 of 15 August 2014 condemns the gross abuse of human rights by Islamic State, applies travel restrictions, asset freezes and other measures targeted at Al-Qa'ida affiliates under UNSCR 1989 of 17 June 2011,³ and enjoins Member States to take national measures. A further call to action followed in UNSCR 2178 of 24 September 2014, which requires states to prevent suspected FTFs from entering or transiting their territories and to enact legislation to prosecute FTFs (articles 1-10). There is also mention of 'Countering Violent Extremism in Order to Prevent Terrorism' which includes 'preventing radicalization, recruitment, and mobilization of individuals into terrorist groups and becoming foreign terrorist fighters' (articles 15-16). While UNSCR 2178 reaffirms the need to observe all obligations under international human rights law, international refugee law, and

¹ HC Deb vol 585 cols 23-27 1 September 2014.

² These groups are proscribed by the Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 2) Order 2014, SI 2014/1624, and the Proscribed Organisations (Name Changes) (No. 2) Order 2014, SI 2014/2210.

³ Al-Qa'ida has since disavowed Islamic State (A.Y. Zelin, *The War between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement* (Washington DC: RN20, Washington Institute for Near East Policy, 2014)).

international humanitarian law,⁴ it omits any definition of ‘terrorism’ and so is vulnerable to abuse by self-serving national regimes. Nevertheless, the international demand for action has also been answered by the Council of Europe’s Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism 2015, which demands the criminalisation of participating in an association or group for the purpose of terrorism (creating for the first time an international power of proscription or even of *association de malfaiteurs* as in article 450-1 French Penal Code), receiving training for terrorism, and travelling abroad for the purpose of terrorism. The European Union proposes to sign up.⁵

The UN Resolutions were ignored in the subsequent parliamentary debates on the UK’s implementation and barely registered in supporting documentation.⁶ This reticence may have contributed to some initial bewilderment as to the overall purpose of the legislation. The Bill was dubbed ‘An announcement waiting for a policy’ by the Independent Reviewer of Terrorism Legislation (‘IRTL’).⁷ However, the two abiding concerns of UNSCR 2178, FTF activities and Countering Violent Extremism (‘CVE’) responses, became the principal pillars of the Counter-Terrorism and Security Act 2015 (‘CTS Act 2015’).⁸ Thus, Part I seeks to interdict FTFs by ‘preventing suspects from travelling; and dealing decisively with those

⁴ Recital, para 7.

⁵ COM (2015) 292 final. See further EU Counterterrorism Coordinator, *Foreign Fighters and Returnees* (Brussels: 15715/14, European Council, 2014); European Council, *Foreign Fighters and Returnees* (Brussels: 16002/14, European Council, 2014).

⁶ See Home Office, *Counter Terrorism and Security Bill: European Convention on Human Rights: Memorandum by the Home Office* (London: Bills (14-15) 059) para.4; Home Office, *CONTEST*, Cm 8848 (2014) para.1.6.

⁷ Joint Committee on Human Rights, *Counter-Terrorism and Human Rights* HC 836 (2014) [Q8].

⁸ HC Deb vol 585 cols 25-26 1 September 2014.

already here who pose a risk'. The CVE policy is implemented through the statutory elaboration and enforcement in Part V of the 'Prevent' element of the long-established Countering International Terrorism ('CONTEST') strategy.⁹

This dual emphasis on preventive measures seems to contrast with the emphasis in other recent counter-terrorism legislation, namely that 'prosecution is — first, second, and third — the government's preferred approach when dealing with suspected terrorists'.¹⁰ However, there are three strong provisos to this contrast.

First, executive measures, such as Terrorism Prevention and Investigation Measures ('TPIMs') and financial sanctions listings, which impact both pre-crime (instead of criminalisation) and post-crime (following the failure of criminalisation or sometimes its success) continue to be enforced only to a meagre extent compared to criminalisation.¹¹

The second proviso is that criminalisation remains a vibrant tactic. Recruits to Islamic State and other extremist groups in Syria have been prosecuted, especially for offences under the Terrorism Act 2006, sections 5 (preparation of terrorism) and 6 (training for terrorism).¹²

⁹ Home Office, *Countering International Terrorism*, Cm 6888 (2006), as revised by: Cm 7547 (2009); Cm 7833 (2010); Cm 8123 (2011); Cm 8583 (2013); Cm 8848 (2014); Cm 9048 (2015).

¹⁰ HC Deb vol 472 col 561 21 February 2008, Tony McNulty.

¹¹ See C.P. Walker, *The Anti-Terrorism Legislation* (Oxford: Oxford University Press, 3rd ed, 2014) chaps 3, 7. Three TPIMs were in force as at 31 August 2015: Home Office, *HM Government Transparency Report 2015: Disruptive and Investigatory Powers*, Cm.9151 (2015) 22.

¹² See Walker [n 11 above](#), chap.6. Examples include the conviction under the Terrorism Act 2006, s 5, of Mashudur Choudhury which was cited as revealing the need for further legislation: HL Deb vol 755 col 558 15

The third proviso is that the goal of criminalisation continues to be boosted by legislation beyond the CTS Act 2015. For instance, section 81 of the Serious Crime Act 2015 amends the Terrorism Act 2006, section 17, by adding all offences under sections 5 and 6 to the list of extra-territorial offences.¹³ Criminalisation is also reiterated by Part I of the Criminal Justice and Courts Act 2015. The Act increases the maximum penalty on indictment for terrorism-related offences, including weapons training for terrorism (section 54 of the Terrorism Act 2000) and training for terrorism (section 6 of the Terrorism Act 2006). It also adds some terrorism offences to the enhanced dangerous offenders sentencing scheme and creates harsher custodial sentences for certain terrorism-related offenders.

In the light of this background, this commentary will concentrate on the two key measures of interdiction (Part I) and indoctrination (Part V).¹⁴ By way of assessment criteria, one might apply the tests which the Coalition Government set for itself in its 2011 paper, *Review of Counter Terrorism and Security Powers*, in which it reflected standards relating to effectiveness, personal freedom, and accountability as follows:

The first duty of Government is to safeguard our national security;

July 2014. Around 100 persons have been charged with offences on return from Syria at <http://www.bbc.co.uk/news/uk-32735484>, 14 May 2015. All URLs were last accessed 31 August 2015.

¹³ See Joint Committee on Human Rights, *Serious Crime Bill* HL 49/HC 746 (2014) para 1.69 *et seq.*

¹⁴ Thus, we omit: Parts III (data retention), IV (authority to carry scheme); VI (miscellaneous amendments to the Terrorism Act 2000), and VII (including changes to the review structure). Attempts to revive the Communications Data Bill 2013 as an amendment at a late stage in the House of Lords were rebuffed, but see now the Draft Investigatory Powers Bill, Cm 9152 (2015).

The Government will reverse the substantial erosion of civil liberties and roll back state intrusion;

The Government will introduce safeguards against the misuse of anti-terrorism legislation.¹⁵

Before embarking on this critical analysis, one further preliminary issue should be addressed which relates to the manner of passage of the legislation. Despite the Prime Minister promising to ‘consult Parliament on the draft clauses’,¹⁶ following the announcement in the Commons on 1 September 2014, no further details were issued by way of consultation paper or draft Bill. Instead, both the Prime Minister and the Home Secretary drip fed additional information: David Cameron in an address to the Australian Parliament;¹⁷ and Theresa May in a speech to the Royal United Services Institute.¹⁸ Furthermore, when the Bill was introduced into Parliament on 26 November 2014, the ‘fast-track’ legislative process, designed to truncate parliamentary debate, was adopted.¹⁹ There was considerable parliamentary annoyance that this curtailment followed months of apparent lethargy,²⁰ but the

¹⁵ Cm 8004 (2011) 4.

¹⁶ HC Deb vol 585 col 25 1 September 2014.

¹⁷ House of Representatives, Australian Parliament, *Parliamentary Debates*, 14 November 2014, 12710-12715 also at <https://www.gov.uk/government/speeches/australian-parliament-david-camerons-speech>.

¹⁸ T. May, *Speech to the Royal United Services Institute* at <https://www.gov.uk/government/speeches/home-secretary-theresa-may-on-counter-terrorism>, 24 November 2014.

¹⁹ See House of Lords Select Committee on the Constitution, *Fast-Track Legislation: Constitutional Implications and Safeguards* HL 116 (2009).

²⁰ See House of Lords Select Committee on the Constitution, *Counter-Terrorism and Security Bill* HL 92 (2015) paras.1-6; Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Security Bill* HL 86/HC 859 (2015) paras.1.8, 1.10.

‘fast-track’ process actually turned out to be ‘only semi-fast tracked’.²¹ Thus, there followed two solid months of scrutiny (with Royal Assent on 12 February 2015), including several select committee reports²² and the issuance of an extensive slew of Home Office consultation papers,²³ factsheets²⁴ and impact assessments²⁵ mainly in late 2014. Furthermore, the process of implementation continued post-Assent, owing to the production of guidance documents, but by then, the die had been largely cast.

B Interdiction of FTFs the seizure of travel documents and temporary exclusion

Part I of the CTS Act 2015 is designed to prevent FTFs from travelling abroad to engage in hostilities in Iraq and Syria, as well as to manage those British FTFs who seek to return home. Though previous measures have been taken to ensure the exclusion or removal of suspected terrorists from the UK,²⁶ a new terrorism threat was felt to arise from the fact that around 500 FTFs had travelled from the UK, out of a total of 2600 Western Europeans and

²¹ House of Lords Select Committee on the Constitution, **n 20 above** para.3.

²² See *ibid* plus: House of Lords Delegated Powers and Regulatory Reform Committee, *Counter-Terrorism and Security Bill* HL 97 and 110 (2015); House of Commons Home Affairs Committee, *Oral evidence: Counter-Terrorism and Security Bill* HC 838 (2014).

²³ *Prevent duty guidance: a consultation* (London: December 2014); *Code of Practice for Officers exercising functions under Schedule 1 of the Counter-Terrorism and Security Act 2015 in connection with seizing and retaining travel documents* (London: December 2014); *Consultation on establishing a UK Privacy and Civil Liberties Board* (London: December 2014).

²⁴ <https://www.gov.uk/government/collections/counter-terrorism-and-security-bill-factsheets>.

²⁵ <https://www.gov.uk/government/collections/counter-terrorism-and-security-bill-impact-assessments>.

²⁶ See C. Walker, ‘The treatment of foreign terror suspects’ (2007) 70 MLR 427; M. Gower, *Deprivation of British Citizenship and Withdrawal of Passport Facilities* (London: SN/HA/6820, House of Commons Library, 2015).

around 16,000 in total (with 11,000 from the Middle East).²⁷ This level of engagement gives rise to two pressing concerns.

The rationale for the prevention of travel is, first, that most FTFs will be seeking to join groups which are not only designated as terrorists but also are opposing the forces backed by Western powers (and the Iraqi government).²⁸ So, this involvement of UK citizens runs counter to UK foreign policy which was approved at a special meeting of Parliament on 26 September 2014.²⁹ As for returning FTFs, the second concern is that their risk of terrorism has been enhanced since they will be able to apply combat skills to mount attacks and will represent radicalising heroes to potential new recruits.

Empirical assessment of these alleged risks is much disputed. The overall consensus is that between a quarter and a half of FTFs have returned 'home',³⁰ but only a few (one in nine) have the intent to engage in 'home' terrorism³¹ especially as Islamic State had not (yet) 'gone

²⁷ See E.M. Saltman and C. Winter, *Islamic State: The Changing Face of Modern Jihadism* (London: Quilliam, 2014) 45. See also **European Council n 5 above**.

²⁸ Some cases have arisen of involvement in the Kurdish Peshmerga forces (Iraq) or the Lions of Rojava (Syria), but no prosecution has resulted. The death of one fighter, Konstandinos Erik Scurfield was the subject of praise: HC Deb vol 593 col 988 4 March 2015.

²⁹ HC Deb vol 585 col 1255 26 September 2014.

³⁰ See J. Skidmore, *Foreign fighter involvement in Syria* (Herzliya: ICT, 2014) 40; House of Commons Home Affairs Committee, *Counter Radicalisation* HC 311 (2015) 7.

³¹ See T. Hegghammer, 'Should I stay or should I go?' (2013) 107 *American Political Science Review* 1, 10. Compare S.G. Jones, *The Extremist Threat to the U.S. Homeland* (Santa Monica: RAND, 2014); J. Skidmore, *Foreign fighter involvement in Syria* (Herzliya: ICT, 2014); Al Qaeda Sanctions Committee, *Analysis and Recommendations with regard to the Global Threat from Foreign Terrorist Fighters* (New York: S/2015/358, 2015).

global' by seeking to mount attacks in Western states as opposed to the encouragement of sympathetic, independent attacks.³² Yet, that minority may have disproportionate impact because they are better trained and better networked than self-starters.³³ Based on this data, some commentators estimate that the risk of terrorism is relatively small and the international reaction overblown. The organization Cage³⁴ cited a survey of 66 UK terrorist plotters of whom just two fought abroad and six trained abroad, though this result is an underestimate.³⁵ Even more striking is the paper of Daniel Byman and Jeremy Shapiro, *Be Afraid, Be a Little Afraid*,³⁶ in which the threat from returning FTFs was said to be exaggerated. They pointed only to the case of Mehdi Nemmouche, who in May 2014 killed four at the Jewish Museum in Brussels after his return from Syria.³⁷ However, all these assessments must now be viewed in the light of the *Charlie Hebdo* and related attacks in France and Belgium in January 2015, which indicate that prudence might involve being a little more than a little afraid. Amongst the French attackers, Chérif Kouachi had been convicted when attempting to travel to Iraq in 2005 of assisting others to travel; Saïd Kouachi made training visits to Yemen.³⁸ The terrorists killed in Verviers, Belgium, Sofiane Amghar and Khalid Ben Larbi, had both

³² T. Hegghammer and P. Nesser, 'Assessing the Islamic State's commitment to attacking the West' (2015) 9 *Perspectives on Terrorism* 13, 26. Whether the attacks in Paris on 13 November 2015 (resulting in 129 deaths) represent a new attack strategy remains to be investigated.

³³ See M. Sageman, *Leaderless Jihad* (Philadelphia: University of Pennsylvania Press, 2008).

³⁴ *Blowback – Foreign Fighters and the Threat They Pose* (London, 2014).

³⁵ They distinguish between fighting abroad and training abroad and are selective in which 'plots' are counted (ibid. 11, 12).

³⁶ D. Byman and J. Shapiro, *Be Afraid, Be a Little Afraid* (Washington DC: Brookings Policy Paper 34, 2014).

³⁷ C. Bremner, 'French hold Jihadist accused of Jewish museum killings' *The Times* 2 June 2014 31.

³⁸ See H. Samuel and P. Sawyer, 'Charlie Hebdo attack' *Daily Telegraph Online* 14 January 2015; A. Yuhas, 'How Yemen spawned the Charlie Hebdo attacks' *Guardian Online* 15 January 2015.

visited Syria.³⁹ Further evidence of risk will be garnered from the attacks in Paris on 13 November 2015. Looming in the memory was also the ‘horrific and barbaric crime’ of Michael Adebolajo and Michael Adebowale; the former had been arrested in Kenya when seeking to join al-Shabaab in Somalia.⁴⁰ That case further reminds us that the FTF phenomenon is not confined to Syria.⁴¹ Whatever the academic assessments, the Joint Terrorism Analysis Centre on 29 August 2014 tellingly raised the UK national terrorist threat level from SUBSTANTIAL to SEVERE.⁴²

Having outlined the mischief behind the legislation, Part I deals in turn with ‘outgoing’ would-be FTFs still in the UK and with ‘incoming’ suspect FTFs seeking to return to the UK.

(a) Outgoing

Section 1 provides that when a constable has reasonable grounds to suspect that a person is attempting to leave the UK for the purposes of involvement in terrorism-related activity abroad, powers to require production of, search for, inspection of, and retention of, that person’s travel documents (meaning a passport and tickets) may be applied.⁴³ There is no

³⁹ B. Waterfield, ‘Belgian police admit seeking wrong man as Vervier shootout jihadists named’ *Daily Telegraph Online* 22 January 2015.

⁴⁰ *R v Adebolajo and Adebowale* [2014] EWCA Crim 2779; Intelligence and Security Committee, *Report on the intelligence relating to the murder of Fusilier Lee Rigby* HC 795 (2014).

⁴¹ Compare J. Richards, ‘Contemporary terrorist threats in the UK: The Pakistan dimension’ (2007) 2.1 *Journal of Policing, Intelligence and Counter Terrorism* 7; L. Herrington, ‘British Islamic extremist terrorism: the declining significance of Al-Qaeda and Pakistan’ (2015) 91 *International Affairs* 17.

⁴² <https://www.mi5.gov.uk/home/news/news-by-category/threat-level-updates.html>.

⁴³ See further CTS Act 2015, Sched 1, paras. 2, 15; Counter-Terrorism and Security Act 2015 (Code of Practice for Officers exercising functions under Schedule 1) Regulations 2015, SI 2015/217; Home Office, *Code of*

power to detain the traveller, but uncooperative travellers could then become candidates for detention under the Terrorism Act 2000, Schedule 7. A target person must be informed of the suspicion (but not the grounds for it).⁴⁴ The power will be triggered either by prior intelligence or observation at the scene⁴⁵ and is exercisable at a port or border.⁴⁶ For these purposes, travel between Great Britain and Northern Ireland, the land border in Northern Ireland, and the rail link of the Channel Tunnel are all covered, though only if the travel is for the purpose of involvement in terrorism outside the UK.

In order to retain any travel document, the constable must seek authorisation from a senior police officer (of at least the rank of superintendent) as soon as possible, and authorisation may be granted on the same reasonable grounds for suspicion.⁴⁷ If authorisation is not granted, the travel document must be returned (unless other independent legal action intervenes, such as immigration or criminal proceedings).⁴⁸ If authorisation is granted, the travel document may be retained for up to 14 days whilst consideration is given to cancelling the passport, charging with an offence, or making a civil order against terrorism, such as a TPIM.⁴⁹ After 72 hours from the point of seizure, a further review must be undertaken by a

Practice for Officers exercising functions under Schedule 1 of the Counter-Terrorism and Security Act 2015 in connection with seizing and retaining travel documents (London: 2015) ('Code of Practice – Travel').

⁴⁴ CTS Act 2015, Sched 1, para.2(8). Compare Police and Criminal Evidence Act 1984, s 28.

⁴⁵ Home Office [n 43 above](#) para.23.

⁴⁶ See further CTS Act 2015, Sched 1, para.1.

⁴⁷ *ibid*, Sched 1, para.4.

⁴⁸ *ibid*, Sched 1, para.7.

⁴⁹ *ibid*, Sched 1, para.5.

police officer of at least the rank of chief superintendent and must be notified to the chief constable.⁵⁰

At the end of the 14 day period, the travel documents must be returned, unless further extension of the retention period is sought by a police superintendent. Extension of the 14day period is considered by a judicial authority (meaning a designated District Judge (Magistrates' Courts), a Scottish sheriff, or in Northern Ireland, a county court judge or a district judge (Magistrates' Courts)) and must be granted (for up to 30 days in total) if satisfied that the investigation is being conducted diligently and expeditiously but without regard to the merits of the case.⁵¹ The subject must be given an opportunity to make oral or written representations but may be excluded (as may their representative) from any part of the hearing to protect sensitive information.⁵²

This use of Closed Material Procedure goes beyond the jurisdiction in the Justice and Security Act 2013 (which is confined to the higher courts) and is left wholly unstructured. In addition, on the request of the police, information can be withheld on grounds similar to the denial of access to a lawyer under the Police and Criminal Evidence Act 1984, section 58, or on the basis that 'national security would be put at risk'.⁵³ Presumably to aid participation in the hearing process, the Home Office advises that when an application is made to extend the

⁵⁰ *ibid*, Sched 1, para.6.

⁵¹ *ibid*, sched 1, para.8; Home Office [n 43 above](#), para.62. See Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (No. 3) (Miscellaneous) 2015, SSI 2015/283.

⁵² CTS Act 2015, sched 1, para.9. Legal aid can be granted under s 1(2)-(3), a concession made by the government: HL Deb vol 758 col 1207 20 January 2015. See Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No. 2) Regulations 2015, SSI 2015/155.

⁵³ CTS Act 2015, sched 1, para.10.

retention period, the police should, if requested, provide the person subject to the exercise of this power with written reasons for its exercise: ‘The reasons must be as full as possible but without prejudicing national security’.⁵⁴ Another concession is that subjects whose travel documents are retained may be provided with welfare support.⁵⁵

After 30 days, and in the absence of other independent legal proceedings, the travel documents must be returned, and the legislation restricts, albeit rather feebly, the repeated (and potentially oppressive) use of this power against the same individual.⁵⁶ Where section 1 has already been exercised on two or more occasions in the preceding six months, then the travel documents may be retained only for five days, and an application to extend to 30 days will only be granted if the judicial authority thinks that there are exceptional circumstances in addition to the investigation being carried out diligently and expeditiously.

By way of assessment, existing measures have already been applied to interdict many would-be outgoing FTFs. These include the Home Secretary’s prerogative power to cancel a UK citizen’s passport,⁵⁷ an imposition under the Terrorism Prevention and Investigation Measures Act 2011 (‘TPIMs Act 2011’), or a Foreign Travel Restriction Order under the Counter-Terrorism Act 2008, the power to arrest terrorist suspects without warrant under section 41 of the Terrorism Act 2000, powers to stop, search and seize at ports and elsewhere under the Anti-Social Behaviour, Crime and Police Act 2014, section 145 and Schedule 8,⁵⁸

⁵⁴ Home Office [n 43 above](#), para.76 and Annex D.

⁵⁵ CTS Act 2015, sched 1, para.14; Home Office [n 43 above](#), para.54.

⁵⁶ CTS Act 2015, sched 1, para.13. The *Code of Practice – Travel* warns that it would ‘be highly unusual for the power to be exercised in such quick succession...’ Home Office [n 43 above](#), para.68.

⁵⁷ See HC Deb vol 561 col 68ws 25 April 2013.

⁵⁸ See Walker, [n 11 above](#) chap.7; Joint Committee on Human Rights, [note 7 above](#) 2-4.

and the power to stop and detain for up to six hours under Schedule 7 of the Terrorism Act 2000.⁵⁹ The CTS Act 2015 therefore plugs a relatively minor gap in the existing laws. However, a fuller review and restatement of the law on passports is long overdue.⁶⁰

Whilst the powers to retain travel documents may assist the purpose of preventing potential FTFs from traveling abroad, the restraints on personal freedoms can be subjected to several criticisms. The first of these is the absence, during the first 14 days, of judicial intervention, at odds with comparable powers to seize cash at a port under the Anti-Terrorism, Crime and Security Act 2001, whereby an application must be made to the court within 48 hours if the police wish to retain the cash beyond that period of time.⁶¹ Interference with the right to family and private life inflicted by the retention of travel documents is surely no less important than the property rights infringed by the seizure of cash. The courts should, therefore, be engaged long before the 14 day deadline.⁶² Next, the format of that belated court intervention must be questioned. Even when a court is finally allowed to intervene, its role is limited to process not substance because the judge has no power to review the merits of the original decision to retain travel documents even after 14 days.⁶³ Furthermore, these judicial hearings may be held in a rather primitive form of closed proceeding, without any special

⁵⁹ The necessity for s 1 is accepted by the Joint Committee on Human Rights, [n 20 above](#) para.2.15.

⁶⁰ Reform was promised by *The Governance of Britain*, Cm 7170 (2007) para.50 and Cm 7342 (2008) para.247; *The Governance of Britain Review of the Executive Royal Prerogative Powers: Final Report* (London, 2009) para.38.

⁶¹ Anti-Terrorism, Crime and Security Act 2001, sched 1, para 3. A potential to breach Art.6 is claimed by the Joint Committee on Human Rights, [n 20 above](#) para.2.23.

⁶² A deadline of 7 days was suggested by the Joint Committee on Human Rights, *ibid* para.2.26.

⁶³ Reasonable grounds and necessity should be shown: *ibid* para.2.29.

advocate scheme or any minimum level of disclosure.⁶⁴ One concession to these oversight shortcomings is that these powers under Part I have been brought within the purview of the IRTL under section 44.⁶⁵ But the further limit of a sunset clause was rejected.⁶⁶

Contrary to arguments about excessive powers, the opposite criticism has been raised, namely, that after a 30 day period, powers are lacking to thwart a determined extremist. The point may be illustrated by several cases in which the courts have inventively resorted to other jurisdictions to plug gaps. In *Tower Hamlets v M*, the Family Division intervened with a potential application of wardship orders to stop the departure of would-be FTFs aged under 18.⁶⁷ The cases did not culminate in a final order because other resolutions were agreed, but the same point arose in a case from Bristol,⁶⁸ when the Family Division dealt with a 17-year-old girl thought to be at risk of travelling to an IS-controlled area. Mr Justice Hayden made the girl a ward of court and banned her from travelling abroad without the permission of a judge. Her passport was also seized. However, wardship will expire when she turns 18. A third case, *In re X and Y*⁶⁹ involved young children who were to be taken out of the country by suspected FTFs. The resulting conditions imposed on the adult parents, included: passport removal and an all-ports alert; injunctions against removing the children from the jurisdiction

⁶⁴ See *ibid* paras.2.33, 2.35. Compare *XH v Secretary of State for the Home Department* [2015] EWHC 2932 (Admin).

⁶⁵ This extension was a late concession: HL Deb vol 759 col 759 4 February 2015.

⁶⁶ HC Deb vol 590 cols218-219 6 January 2015.

⁶⁷ [2015] EWHC 869 (Fam). See further *Re M* [2015] EWHC 1433 (Fam); S. Edwards, 'Protecting schoolgirls from terrorism grooming' (2015) 3 *International Family Law* 236; M. Downs and S. Edwards, 'Brides and martyrs' (2015) 45 *Family Law* 1073.

⁶⁸ 'Try teens who flee to join IS in special courts' *Bristol Post*, 12 June 2015 2, 3.

⁶⁹ [2015] EWHC 2265 (Fam). See further *Re X and Y (No 2)* [2015] EWHC 2358.

and requiring them to live at a specified address; the monitoring of the parents and the children by a combination of unannounced visits by the local authority, regular reporting to the police or local authority and, in the case of the parents, electronic tagging; and swearing on the Quran that they will abide by the order.⁷⁰ A fourth case, *Tower Hamlets v B*,⁷¹ resulted in removal of a 16 year old girl from her family who were said to be grooming her for departure to Syria. In this way, the Family Division has emerged as a more draconian authority than any fate under the CTS Act 2015 or even under a TPIM.⁷²

On balance, section 1 can provide a proportionate response to suspicions about terrorism, especially when children are involved. Escalation to the next tier of investigative power, an arrest under section 41 of the Terrorism Act 2000 could be inappropriate and even excessive. Section 41 must be based on reasonable suspicion of terrorism,⁷³ a narrower concept than terrorism related activity ('TRA'), which means that a suspected juvenile should be suspected of being a frontline terrorist and not a backline cook or cheerleader for her brothers. The police are allowed to hedge their suspicions by reference to 'support or assistance' by way of TRA, more so than involvement by way of 'the commission, preparation or instigation of acts of terrorism' under section 41. One might say that this is net-widening and could alienate a 'suspect community'. A contrary viewpoint is that what is at stake is disruption to travel, not loss of liberty, and many anguished parents of FTFs (whether Muslim or otherwise) have

⁷⁰ *ibid* [50].

⁷¹ [2015] EWHC 2491 (Fam).

⁷² For future guidance, see Radicalisation cases in the Family Courts: Guidance issued by Sir James Munby President of the Family Division on 8 October 2015 at <https://www.judiciary.gov.uk/publications/radicalisation-cases-in-the-family-courts/>.

⁷³ Admittedly, a low threshold of suspicion applies but some considered aforethought is necessary:

Commissioner of Police of the Metropolis v Raissi [2008] EWCA Civ 1237 [20, 21].

expressed support for official intervention. Of course, no one will be grateful if intervention is not convincingly related to TRA. The lack of formality and independent judicial review under section 1 does not help to ensure this essential attribute.

(b) Incoming

Alongside powers to interdict suspected outgoing FTFs, the CTS Act 2015 equally seeks to interdict incoming FTFs with a system of Temporary Exclusion Orders ('TEO's) in sections 2 to 15 and Schedules 2 to 4. Much criticism of this system arose from the Prime Minister's emphasis on 'exclusion' in his announcement on 1 September 2014.⁷⁴ However, by 14 November 2014, when he spoke to the Australian parliament, he had watered this down to a power to 'stop British nationals returning to the UK unless they do so on our terms'.⁷⁵ Thus, the measures now embody a mode of regulated re-entry and residence rather than some variant of exile redolent of the Eastern Bloc.

By section 2(2), the Secretary of State may impose a TEO provided five conditions (A to E) in subsections (3) to (7) have been satisfied: the Secretary of State must reasonably suspect that the individual is, or has been, involved in TRA⁷⁶ outside the UK, must reasonably consider that it is necessary to impose a TEO to protect the public in the UK from a risk of terrorism, must reasonably consider that the individual is outside the UK when the order is imposed, and the individual must have the right of abode in the UK.⁷⁷ In addition, the TEO may be imposed only after a court has given prior permission or, if the case is urgent, with

⁷⁴ HC Deb vol 585 col 26.

⁷⁵ House of Representatives, n 17 above.

⁷⁶ See s 14(4), (5).

⁷⁷ See Immigration Act 1971, s 2.

subsequent referral and permission. The lack of court scrutiny in the initial draft of the Bill was a key criticism, especially as judicial review would be impracticable.⁷⁸ Eventually, the safeguard of judicial permission was wrung out of the government, especially in the light of the constructive suggestions from the IRTL.⁷⁹

The process of court consideration of prior permission is set out in sections 3 and 4. The relevant court under section 14 will be the High Court or the Outer House of the Court of Session. Where an urgent TEO is issued, the court acts under Schedule 2. In scrutinising a request for permission, the court applies judicial review principles as to whether the decision is ‘obviously flawed’.⁸⁰ The court, which may include advisers,⁸¹ may proceed without notice or without allowing the subject to be present.⁸² Unlike for section 1 proceedings, Schedule 3 and Part 88 of the Civil Procedure Rules⁸³ structure any closed hearings, including by the potential employment of special advocates and by the edict that nothing ‘is to be read as requiring the relevant court to act in a manner inconsistent with Article 6 of the Human Rights Convention’,⁸⁴ that is, the right to a fair trial protected by the Human Rights Act 1998. Given that jurisdiction is allocated to the higher civil courts, the Justice and Security Act 2013 can also apply.⁸⁵ A further restriction in section 3(9) is that only the Secretary of State may appeal against a determination of the court but only on a question of law. However,

⁷⁸ Joint Committee on Human Rights, **n 7 above** [Q9].

⁷⁹ HL Deb vol 758 col 1260 20 January 2015.

⁸⁰ CTS Act 2015, s 3(2), (5).

⁸¹ Compare TPIM Act 2011, Sched para.8.

⁸² CTS Act 2015, s 3(3).

⁸³ Civil Procedure (Amendment) Rules 2015, 2015/406, Sched 1.

⁸⁴ CTS Act 2015, Sched 3 para.5.

⁸⁵ *ibid*, Sched 3 para.11.

section 11 was inserted under parliamentary pressure⁸⁶ to allow the subject to apply to the court for ‘a statutory judicial review’ (not linked to the criterion of being ‘obviously flawed’), provided the applicant is back in the UK.

Section 4 requires the Secretary of State to give notice of the TEO to the excluded person, including an explanation of how permission can be sought to return to the UK. Indeed, the TEO can only come into force when notice has been given⁸⁷ and then remains in force (subject to earlier revocation but regardless of physical return in order that conditions can be imposed under section 9) for two years, the period also applicable to TPIMs.⁸⁸ However, unlike in the case of TPIMs, there is no restraint on the issuance of a subsequent TEO;⁸⁹ no new evidence needs to be amassed. One effect of a TEO is to invalidate any British passport held by the subject; foreign passports are unaffected but can be seized under section 1.⁹⁰

The prime purpose of TEOs is not exclusion but managed return. Therefore, by section 5, a person subject to a TEO will be given a permit to return to the UK. The permit may be useful for travel purposes (given that their passport has been invalidated),⁹¹ but the main official objective is to specify conditions, including the time slot for return and the travel arrangements. So as to encourage communication, the issuance of a permit within a reasonable period is obligatory under section 6 if the subject applies for one. However, a

⁸⁶ HL Deb vol 758 col 1260 20 January 2015. Judicial review would be available but requires leave and may not attract legal aid.

⁸⁷ By s 13(2), notice can be ‘deemed’: Temporary Exclusion Orders (Notices) Regulations 2015, SI 2015/438.

⁸⁸ CTS Act 2015, s 4(3)-(7).

⁸⁹ *ibid*, s 4(8).

⁹⁰ *ibid*, s 4(9)-(11).

⁹¹ As a result, regulations relating to passports may be applied to permits to return: *ibid*, s 13(3).

permit may be refused if the Secretary of State previously required the individual to attend an interview and the individual failed to do so. The likely impact of these permits in practice is uncertain. The designation of a person abroad as a terrorism risk could often result in summary arrest and deportation, with arrangements for return at the behest of the sending country rather than the receiving country. The UK government recognised this reality. Therefore, by section 7, the Secretary of State must issue a travel document if the individual is being deported even in the absence of any request. In addition and even if no deportation is afoot or application has been made, the Secretary of State may issue a permit to return when, because of the urgency of the situation, it is considered expedient to do so. The latter may apply where the person abroad might be considered in peril of their life or of forms of ill treatment.⁹²

The management of the returnee does not end at the border. So, by section 9, obligations can be imposed after return. The obligations amount to a kind of TPIM-lite regime and can include obligations (some of which are defined by reference to Schedule 1 to the TPIM Act 2011) to report to a police station, to notify the police of residence details, and attendance for appointments (such as for de-radicalisation programmes, as well as more welfare-oriented discussion about education or housing).⁹³ The relationship of this scheme to full-blow TPIMs is not explained. As it stands, the possibility of TEO obligations seems to be another incentive not to use the more regulated TPIM system.

⁹² Home Office, *Counter Terrorism and Security Bill European Convention on Human Rights Memorandum*, n 6 above para.13. The UK state may otherwise become liable under arts 2 and 3: *El Masri v FYR Macedonia*, App no 39630/09, 13 December 2012. Art.8 considerations may also be relevant: [14].

⁹³ The idea of compulsory attendance at meetings derives from the (Australian) Criminal Code 1995 Division 104.5(3)(l). See further D. Anderson, *Terrorism Prevention and Investigation Measures in 2013* (London: Home Office, 2014) paras.4.29–30, 6.28–33.

TEOs are civil law instruments, but, as is common in the security field, they are backed by criminal law sanctions regarding return in contravention of a TEO or failure to comply with obligations under section 9.⁹⁴ This disincentive to return echoes the original Cameronian intent to disavow British citizens who have turned to terrorism.

The purpose of TEOs is to reduce ‘the ability of British citizens to influence, plan and/or execute TRA in the UK.’⁹⁵ Will it work? The TEO system commenced on 12 February 2015,⁹⁶ but no reports have appeared of its application.

There may be several practical difficulties standing in the way of effective enforcement. One already mentioned is that some would-be FTFs will return on the terms of the sending state by way of deportation. The second problem is the complexity of detection. FTFs have learnt that booking a flight via Turkey rather gives the game away. Therefore, more elaborate return routes have been attempted, though not always with success. For example, in *R v Bhatti*,⁹⁷ the defendant was convicted of assisting an offender, namely, his FTF relative, Imran Mohammed Khawaja⁹⁸ who returned to the UK and was sentenced to 17 years for terrorism offences. He had sought to avoid detection by picking up Khawaja in Bulgaria by car.

⁹⁴ If a TEO or obligation under it is quashed by a court, then an appeal lies under Sched 4.

⁹⁵ Home Office, *Counter-Terrorism and Security Act 2015 – Temporary Exclusion Orders – Royal Assent* (London: IA No: HO0144, 2015) 3.

⁹⁶ CTS Act 2015, s 52(5).

⁹⁷ [2015] EWCA Crim 764.

⁹⁸ See *R v Imran Khawaja*, *The Times* 7 February 2015 7 (Woolwich Crown Court): conviction for preparation of terrorism, attending a terrorist training camp, and receiving weapons training.

The main policy objection to TEOs is that they represent a disincentive to return and thereby encourage the adoption of terrorism as a way of life. Discouraging voluntary return might be counter-productive. It will run the risk that FTFs will exacerbate foreign conflicts, obtain further skills, become further alienated from the UK, increase their chances of instigating terrorist attacks in the UK from overseas, and pose a greater risk if they finally do return. The result is to some extent a reversal of the official policy not to ‘export risk’ to third countries, especially as many foreign authorities have less capability to deal with the risk than the UK.⁹⁹ This policy followed warnings in the Newton Committee’s report about Part IV of the Anti-Terrorism, Crime and Security Act 2001, which created a ‘prison with three walls’ – the absent fourth wall allowing foreign terrorist detainees to depart the jurisdiction to plot abroad.¹⁰⁰ The policy now being pursued repeats this tendency and may clash with the duty to cooperate with other States to address the threat posed by FTFs (UNSCR 2178, para.8).

Managed return is a worthwhile objective but could have been better delivered by re-entry without the language of ‘exclusion’ or ‘permit to return’. A scheme akin to the situation where a passport is lost or stolen would have been preferable.¹⁰¹ Once a report is made, the British consulate or embassy will issue an emergency travel document which specifies one-off travel arrangements.¹⁰² For FTFs, a similar warrant could be issued but without the withdrawal of the original passport. Notified foreign agencies would no doubt be keen to heed the warning about a terrorist risk and to seek exclusion. Management of the terrorist risk

⁹⁹ HC Deb Standing Committee E col 271 25 October 2005.

¹⁰⁰ Privy Counsellor Review Committee, *Anti-Terrorism, Crime and Security Act 2001 Review, Report* H.C. 100 (2003), Pt D, para.195 (‘Newton Report’).

¹⁰¹ 160,050 passports were registered as either lost or stolen abroad between 2008 and the end of October 2013 at <http://www.bbc.co.uk/news/magazine-26783486>.

¹⁰² ‘Get an emergency travel document’ at <https://www.gov.uk/emergency-travel-document>.

would then be imposed post-return rather than pre-return. This alternative was proposed, *inter alia*, by Baroness Kennedy. In response, James Brokenshire, Minister for Security and Immigration, stuck to the line that:

Even overseas, they may pose a direct threat to the UK by either seeking to radicalise or to control others within the UK, so we need to manage risk in an appropriate way. ... we have the powers under the temporary exclusion order to facilitate the return of an individual in a controlled way and, frankly, to keep them out if they do not adhere to that.¹⁰³

However, this statement highlights the very problems raised above by a policy which hinders FTFs from returning to the UK.

Moving from policy effectiveness to respect for personal freedom, there has been some tangible response in the TEO scheme to the problem underlined by the IRTL, David Anderson QC, who asked ‘where the courts are in all of this’.¹⁰⁴ After concessions during legislative passage, the CTS Act 2015 does require judicial endorsement of a TEO, contrary to the earlier assertion of the Home Secretary, Theresa May, that:

As the Minister with responsibility for national security, it is right that I, as Home Secretary, and not the courts, impose an order of this kind ... With oversight of all other national security and counter- terrorism matters, I am best placed to make an

¹⁰³ Joint Committee on Human Rights, [n 20 above](#) [Q27].

¹⁰⁴ Joint Committee on Human Rights, [n 7 above](#) [Q9].

informed judgment about whether a TEO is appropriate in each case, taking into consideration the wider context of the terrorist threat we face.¹⁰⁵

This assertion is contrary to the increasing trend of the judicialisation of intelligence disputes.¹⁰⁶ At the same time, the court intervention does not amount to a full merits review, and the fairness of the procedures is compromised by the requirement to protect secret intelligence. In addition, unlike TPIMs, successive TEOs could be imposed for life.

Another aspect of fairness concerns whether the TEO breaches international law responsibilities of the State to its citizens.¹⁰⁷ Since there is no physical bar to return and notions of exile were not pursued, the possibilities of breach are diminished, though liability may still arise under articles 2 and 3 of the European Convention on Human Rights and even under article 5 for engineering a needless period of overseas detention. No doubt, counter-arguments will be raised about jurisdiction under Article 1, and the position may become more complicated when citizenship deprivation applies.¹⁰⁸

¹⁰⁵ HC Deb vol 589 col 1208 15 December 2014.

¹⁰⁶ See C. Walker, 'The judicialisation of intelligence in legal process' [2011] *Public Law* 235; A. Kent, 'Disappearing legal black holes and converging domains' (2015) 115 *Columbia Law Review* 1029.

¹⁰⁷ See G. Goodwin-Gill, "'Temporary Exclusion Orders' and their Implications for the United Kingdom's International Legal Obligations' (2014) at <http://www.ejiltalk.org/temporary-exclusion-orders-and-their-implications-for-the-united-kingdoms-international-legal-obligations-part-i/>; H. Lambert, 'Comparative perspectives in arbitrary deprivation of nationality and refugee status' (2015) 64 *International & Comparative Law Quarterly* 1.

¹⁰⁸ See *Khan v United Kingdom*, App. no.11987/11, 29 January 2014; Home Office, *Counter Terrorism and Security Bill European Convention on Human Rights Memorandum*, n 6 above paras.10-13. For protective duties under the royal prerogative, see *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and another* [2002] EWCA Civ 1598.

Though the Home Office Memorandum on the European Convention on Human Rights is cognisant of breaches of articles 2, 3, and 8, potential challenges under the UN International Covenant on Civil and Political Rights are not mentioned. By article 12(2), ‘Everyone shall be free to leave any country, including his own.’ By (3), any restrictions must be ‘provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.’ By (4), ‘No one shall be arbitrarily deprived of the right to enter his own country.’¹⁰⁹ The Human Rights Committee, General Comment 27, Freedom of movement (Art.12),¹¹⁰ paragraph 21 provides that:

The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.

It is not clear that the threat posed by those subject to a TEO would amount to an exceptional circumstance, and there are some contra-indications for TEOs: no legal proof is provided, no hearing or review is offered, and exclusion lasts for just two years.

The foregoing critique mainly seeks the trimming of the CTS Act 2015 on grounds of overreach or unfairness. However, some critics have argued that it does not go far enough,

¹⁰⁹ Compare the situation in *Ilyanov v Kazakhstan* (CCPR/C/111/D/2009/2010, 23 July 2014) which related to re-entry by a foreigner, albeit one who previously enjoyed permanent residence status.

¹¹⁰ UN Doc CCPR/C/21/Rev.1/Add.9 (Geneva, 1999).

and FTFs should be treated as traitors.¹¹¹ Mention of the use of treason law was made by Foreign Secretary, Philip Hammond, but without commitment.¹¹² Lord Macdonald commented that it would be ‘a badge of honour’.¹¹³ Problems with treason are well known and have been the subject of proposals for reform as long ago as 1977.¹¹⁴

A more likely expanded device is to designate areas controlled by Islamic State as forbidden zones of travel and to make any visit (or intention to visit) a criminal offence, thereby avoiding the need for proof of involvement in activities. This device has been implemented by the section 119.2 of the Australian Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014.¹¹⁵ The provision does allow for a defence of ‘legitimate purpose’, but these ‘are limited to providing humanitarian aid, making a genuine visit to a family member, working in a professional capacity as a journalist, performing official government or United Nations duties, appearing before a court or tribunal, and any other purpose prescribed by the regulations.’¹¹⁶ Given the exception, this provision is not very helpful. The effect is to place the burden of proof on the honest and worthy to show they entered the prohibited area for a legitimate purpose. As for FTFs, they will also claim that they were aiding their brothers, so

¹¹¹ HC Deb vol 585 col 746 9 September 2014.

¹¹² HC Deb vol 586 col 482 16 October 2014.

¹¹³ *The Times* 18 October 2014 7.

¹¹⁴ See Law Commission, *Codification of the Criminal Law Treason Sediton and Allied Offences* (London: Working Paper 72, 1977); Lord Goldsmith, *Citizenship: Our Common Bond* (2009) at <http://image.guardian.co.uk/sys-files/Politics/documents/2008/03/11/citizenship-report-full.pdf> para.56.

¹¹⁵ Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al-Raqqa Province, Syria; Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2015 – Mosul District, Ninewa Province, Iraq.

¹¹⁶ Criminal Code Act 1995 (Cth), s 119.2(3).

burden of proof will still demand evidence not just of presence in the area but also evidence of training, logistical support, or involvement in active conflict. Indeed, what other evidence of presence will there be without such involvement? Perhaps a few *jihadi* brides will be caught, but they are probably more in need of counselling than imprisonment.

A third expanded model of control which has been suggested builds on laws against enlistment in foreign armies and seeks to enforce a general neutrality law.¹¹⁷ The current problem is that foreign enlistment laws are too narrowly based. In the UK, the Foreign Enlistment Act 1870 only catches involvement in a foreign armed force at war with a friendly foreign state; it has never resulted in a prosecution for illegal enlistment or recruitment.¹¹⁸ Few terrorism groups will fall within the definition of a 'foreign state' under section 30 of the 1870 Act. Islamic State might have a claim to *de facto* recognition, given its effective control of territory, but this possibility is ruled out by explicit proscription and international condemnation. It is argued that neutrality laws are a preferable basis for action since they avoid reliance on the troubled definition of terrorism and provide a more comprehensive solution which does not pick on one conflict. However, this solution causes more problems than it solves.

First, service in the armed forces of other countries when not at war is not generally considered as disloyalty to one's own country. Prominent illustrations include the Spanish Civil War foreign brigades, the French foreign legion, Nepalese Gurkhas, and overseas

¹¹⁷ See C. Forcese and A. Mamikon, 'Neutrality law, anti-terrorism and foreign fighters' (2015) 48 *UBC Law Review* 305.

¹¹⁸ *Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries*, Cmnd 6569 (1976) para.38. See also J. Jaconelli, 'The recruitment of mercenaries and the Foreign Enlistment Act 1870' (1990) *Public Law* 337.

recruits to the Israel Defence Force.¹¹⁹ Even in the case of Islamic State, the motives of adherents might not be so ignoble – helping fellow Muslims under attack by the Syrian government. For those reasons, the UK has loaned some of its own RAF pilots to the US Air Force to conduct bombing raids.¹²⁰ A related point is that British based private military companies are constantly allowed to take sides in conflicts.¹²¹

The second problem is that recruitment to official state forces does not generally amount to ‘terrorism’ in international law, whereas, even if not linked to a proscribed organisation, fighting against a government such as Syria can still be ‘terrorism’,¹²² and UNSCR 2178 encourages the labelling of non-international conflict opponents as terrorists.¹²³

A third problem is that a wider neutrality law multiplies rather than reduces the problems of exceptional cases where the accused will still claim they are joining forces to protect their kith and kin or to provide humanitarian relief. It also discriminates against persons with dual citizenship who are helping their second country.

¹¹⁹ See D. Malet, *Foreign Fighters* (Oxford: Oxford University Press, 2013); Channel 4, ‘Factcheck: What about the Britons who fight for Israel?’ (7 July 2014) at <http://blogs.channel4.com/factcheck/factcheck-britons-fight-israel/18448>.

¹²⁰ HC Deb HCWS149 20 July 2015.

¹²¹ See L. Cameron and V. Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge: Cambridge University Press, 2013)

¹²² See *R v Jones* [2006] UKHL 16.

¹²³ S. Kraehenmann, *Foreign Fighters under International Law* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2014).

The fourth problem is that this enforced neutrality may not be in the foreign policy interests of the country. It may be convenient to put pressure on a country by encouraging or at least turning a blind eye to dissident militant activities. This was true in the case of Libya at least until the Blair rapprochement from 2003 onwards.¹²⁴ What is unequivocally contrary to state interests is terrorism and not foreign enlistment or foreign opposition. The risk of ‘alienating a population that may view a given conflict through a liberation lens’ is surely much more remote to the anguished parents of befuddled youths who are opting for deadly games than the risk of alienating communities with an allegiance to a recognised state.

In conclusion, TEOs were originally formulated to impose the dire consequence of exile, but the version which emerged from Parliament is substantially (but not entirely) reformulated into a ‘managed returnee’ scheme, albeit still with the needless removal of passports.¹²⁵ Thus, the government did recognise that its initial ideas were not acceptable. Whether the scheme which has resulted will deliver the effective management of suspects depends on the cooperation of other countries (which is by no means assured) and on the quality of de-indoctrination schemes which will be considered in the next part of this paper.

C Indoctrination: ‘Prevent’ duties and mechanisms

The advent of the FTF phenomenon has reinforced official attention to what might be termed ‘indoctrination’ and ‘de-indoctrination’. ‘Indoctrination’ and ‘de-indoctrination’ are not official terms but are preferred here as more neutral terms than the more commonly voiced ‘radicalisation’ and de-radicalisation’. They reflect several threads. One is that a battle of ideologies is to be waged, thereby downplaying arguments that terrorism derives primarily

¹²⁴ See *R v Gul* [2013] UKSC 64.

¹²⁵ See Joint Committee on Human Rights, n 20 above para.3.12.

from socio-economic (relative) deprivation¹²⁶ or cultural influences (though the anomie of later generation diaspora communities is accepted as a relevant factor).¹²⁷ The main target is what might be called ‘*jihadi*’ discourses.¹²⁸ Another thread implied by ‘indoctrination’ is that the adherence to terrorist ideology is not deeply set. This idea sometimes goes as far as implying brainwashing or psychological disturbance,¹²⁹ but the more tenable construction is that *jihadi* beliefs are not deeply embedded. Thus, while no serious effort was mounted by the UK government to seek to eradicate centuries of Irish nationalism as an ideology, the allegedly shallower adherence to *jihadi* ideologies gives hope that de-indoctrination can be achieved.¹³⁰ This point leads into a further thread, which is the official belief that de-indoctrination is desired not just by government but also by all major stakeholders, including by the minority Muslim-heritage communities most affected by *jihadi* beliefs. Therefore, de-indoctrination should become a task for state agencies and for affected communities.¹³¹

¹²⁶ See A. Krueger, *What Makes a Terrorist: Economics and the Roots of Terrorism* (Princeton: Princeton University Press, 2007).

¹²⁷ V.J. Siedler, *Urban Fears and Global Terrors* (Abingdon: Routledge, 2007).

¹²⁸ See D.A. Charters, ‘Something old, something new ...’ (2007) 19 *Terrorism & Political Violence* 63, 69; P. Lentini, *Neojihadism* (Cheltenham: Edward Elgar, 2013) 197.

¹²⁹ Evidence for psychological defects is not sustained in most cases: A. Silke (ed.), *The Psychology of Counter-Terrorism* (Abingdon: Routledge, 2010); J. Horgan, *The Psychology of Terrorism* (Abingdon: Routledge, 2nd ed, 2014).

¹³⁰ See P. Dixon, ‘“Hearts and minds”?’ British counter-insurgency from Malaya to Iraq’ (2009) 32 *Journal of Strategic Studies* 353.

¹³¹ For example, after the attacks in France in January 2015, the then Secretary of State for Communities and Local Government, Eric Pickles, wrote to Muslim leaders to seek their engagement in combating extremism, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396312/160115_Final_Draft_Letter_to_Mosques_PDF.pdf.

By contrast, the more commonly voiced terms, ‘radicalisation’ and de-radicalisation’ immediately raise the problems that radicalisation is not inherently a disreputable process and also that limited correlation between being radical and becoming terrorist has been established.¹³² There is also the difficulty of knowing what messages or processes are required for de-radicalisation.¹³³ For any given individual, the motivations towards and against terrorism are likely to be manifold;¹³⁴ contrary to the views of the then Home Secretary John Reid in 2006, there are no ‘tell-tale signs’.¹³⁵ One also suspects that solemn academic deconstructions too often downplay the factors of emotion, excitement, and adventure, which are perhaps growing in importance as the age profile of FTFs is much younger than that of IRA volunteers.¹³⁶ At least de-indoctrination offers some hope that a range of rational arguments might engineer the desired epiphany.

(a) Background

Part V of the CTS Act 2015 contends with a longer-standing, and arguably even more multifaceted, policy strand than FTFs, namely, the ‘Prevent’ workstream of CONTEST.¹³⁷

¹³² See J. Bartlett *et al.*, *The Edge of Violence* (London: Demos, 2010) 38.

¹³³ See J. Horgan, *Walking Away from Terrorism* (Abingdon: Routledge, 2009); R. Ali and H. Stuart, *Refuting Jihadism* (Washington DC: Hudson Institute, 2014).

¹³⁴ *Report of the Official Account of the Bombings in London on 7th July* HC 1087 (2006) Annex B.

¹³⁵ *The Times* 21 September, 2006 6. Nicky Morgan, Secretary of State for Education, suggested that homophobia was a signifier of extremism (30 June 2015) at <http://www.bbc.co.uk/news/education-33325654>, but guidance from the Department of Education denies any single identifier. *The Prevent Duty* (London, 2015) 6.

¹³⁶ House of Commons Home Affairs Committee, [n 30 above](#). Oral evidence from Mark Rowley 7, 10.

¹³⁷ See C. Walker, and J. Rehman, ‘“Prevent” responses to jihadi terrorism’ in V.V. Ramraj *et al.*, *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2nd ed, 2012); A. Razak *et al.*, ‘“Prevent”

The doctrine of ‘Prevent’ can be traced back to 2002, when it was recognised that ‘a long-term effort would be needed to prevent another generation falling prey to violent extremism of the [Al-Qa’ida] ideology.’¹³⁸ The notion became more pressing after the events of 7/7, which resulted in a more explicit acknowledgment of ‘neighbour terrorism’ – that the terrorist threat was internal rather than external and required engagement with, and the energising of, affected communities at levels other than security and policing.¹³⁹ As a result, ‘Prevent’ was unveiled to the public in 2006 in the following terms:

The PREVENT strand is concerned with tackling the radicalisation of individuals. We seek to do this by: Tackling disadvantage and supporting reform – addressing structural problems in the UK and overseas that may contribute to radicalisation, such as inequalities and discrimination; Deterring those who facilitate terrorism and those who encourage others to become terrorists – changing the environment in which the extremists and those radicalising others can operate; and Engaging in the battle of ideas – challenging the ideologies that extremists believe can justify the use of violence, primarily by helping Muslims who wish to dispute these ideas to do so.¹⁴⁰

This highly ambitious and innovative doctrine has proved contentious in delivery.

Problematic aspects include uncertain boundaries with community cohesion and integration,

policies and laws’ in G. Lennon and C. Walker (eds.), *Routledge Handbook of Law and Terrorism* (Abingdon: Routledge, 2015).

¹³⁸ D. Omand, *Securing The State* (London: Hurst & Co, 2010) 101.

¹³⁹ See R. Briggs et al., *Bringing It Home: Community-Based Approach to Counter-Terrorism* (London: Demos, 2006); C. Walker, “‘Know thine enemy as thyself’: discerning friend from foe under anti-terrorism laws’ (2008) 32 *Melbourne Law Review* 275.

¹⁴⁰ Home Office, *Countering International Terrorism*, Cm 6888 (2006), para.6.

the perception of net-widening and spying on minority communities,¹⁴¹ the employment of former extremists, and inadequate audit.¹⁴² Consequently, a Home Office review paper, *Prevent Strategy*, in 2011,¹⁴³ reformulated ‘Prevent’ as comprising the need to: ‘(i) Respond to the ideological challenges of terrorism and the threat we face from those who promote it; (ii) prevent people from being drawn into terrorism and ensure that they are given appropriate advice and support; and (iii) work with sectors and institutions where there are risks of radicalization which we need to address.’¹⁴⁴ In this way, the redesign reinforces the focus on terrorism, including the monitoring and counselling of those deemed at risk under Project

¹⁴¹ See Home Affairs Committee, *Terrorism and Community Relations* HC 165 (2005) para.225; C. Pantazis and S. Pemberton, ‘From the “old” to the “new” suspect communities’ (2009) 49 *British Journal of Criminology* 646; S. Greer, ‘Anti-terrorist laws and the United Kingdom’s “Suspect Muslim community”’ (2010) 50 *British Journal of Criminology* 1171; C. Pantazis and S. Pemberton, ‘Restating the case for the “Suspect Community”’ (2011) 61 *British Journal of Criminology* 1054; D. Anderson, *Report on the Operation in 2011 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (London: Home Office, 2012) paras.4.42–46, 11.17; B. Spalek (ed), *Counter-Terrorism: Community-Based Approaches to Preventing Terror Crime* (Basingstoke: Palgrave Macmillan, 2013) chap.2.

¹⁴² See A. Kundnani, *Spooked: How Not To Prevent Violent Extremism* (London: Institute of Race Relations, 2009); Communities and Local Government Select Committee, *Preventing Violent Extremism* HC 65 (2010); Home Affairs Select Committee, *Roots of Violent Radicalization* HC 1446 (2012); N. Bouhana and P-O. Wilkström, *Al Qa’ida Influenced Radicalisation* (London: Occasional Paper 97, Home Office, 2011); T. Munton et al, *Understanding vulnerability and resilience in individuals to the influence of Al Qa’ida violent extremism* (London: Occasional Paper 98, Home Office, 2011); J. Bartlett and C. Miller, ‘The edge of violence’ (2012) 24 *Terrorism & Political Violence* 1; P. Thomas, *Responding to the Threat of Violent Extremism—Failing to Prevent* (London: Bloomsbury Academic, 2012); A.Z. Huq, ‘The social production of national security’ (2013) 98 *Cornell Law Review* 637.

¹⁴³ See Home Office, *Prevent Strategy* (Cm 8092, 2011); Lord Carlile, *Report to the Home Secretary of Independent Oversight of Prevent Review and Strategy* (London: Home Office, 2011).

¹⁴⁴ *ibid* para.3.21.

Channel,¹⁴⁵ and leaves cultural and social cohesion and integration aspects to other departmental programmes. Critics were not noticeably assuaged by these changes and especially challenged the attempt to develop counter-narratives by reference to ‘British values’, defined as encompassing ‘democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs.’¹⁴⁶

(b) Statutory intervention

The contents of Part V of the CTS Act 2015, ‘Risk of Being Drawn into Terrorism Etc’, can be related in short order compared to the foregoing preamble. The core mission of Part V is to put ‘Prevent’ (including the flagship Channel Programme, described later)¹⁴⁷ on a statutory footing, but the legislation does so selectively by way of a bare framework approach. Several objectives underline the move towards the implementation of a statutory basis. One is enforcement – that ‘Prevent’ activity demands the co-operation of local organisations, but some have been deficient, reluctant, or even hostile.¹⁴⁸ In addition, legal intervention permits greater standardisation and transparency through the checking of outputs and their quality.

(i) General ‘Prevent’ duties

The general ‘Prevent’ duties are set out in Chapter 1 of Part V. Section 26 imposes on specified authorities (unless acting in a judicial or quasi-judicial capacity) the general ‘Prevent’ duty to have due regard to the need to prevent people from being drawn into terrorism. By Schedule 6, the current specified authorities are local authorities, prison and

¹⁴⁵ See Home Office, *Channel: Protecting vulnerable people from being drawn into terrorism. A guide for local partnerships* (London, 2012).

¹⁴⁶ Home Office, **n 143 above** Annex A.

¹⁴⁷ HC Deb vol 585 col 26 1 September 2014.

¹⁴⁸ T. O’Toole et al, ‘Governing through Prevent? Regulation and Contested Practice in State–Muslim Engagement’ (2015) *Sociology* doi: 10.1177/0038038514564437.

probation authorities, education bodies, health and social care bodies, and the police.¹⁴⁹

Notable omissions include the security agencies and also authorities in Northern Ireland.

Thus, the historically distinct strategies relating to Irish Republican violence persist, despite some opposition from Northern Ireland representatives.¹⁵⁰

The promised enforcement powers are set out in sections 29 and 30. The more emollient is section 29, which allows the Secretary of State to issue guidance to authorities. The specified authorities must then ‘have regard’ to the guidance in carrying out their duty.¹⁵¹ Any guidance is to be brought into force by regulations which are subject to the affirmative resolution procedure.¹⁵² Following consultation, the *Prevent Duty Guidance: for England and Wales* (with a separate version for Scotland) was published in March 2015.¹⁵³ The *Guidance* calls for a ‘risk-based’ approach which indicates (within just 16 pages) how each obligated public sector should comply with the duty in terms of effective leadership, working in partnership, and the provision of appropriate capabilities.¹⁵⁴ Given the modest quantity of guidance and the fact that it mainly refers to existing concepts and arrangements,¹⁵⁵ not much

¹⁴⁹ The list can be changed under ss 27, 28.

¹⁵⁰ HC Deb vol 589 col 1340 16 December 2014.

¹⁵¹ CTS Act 2015, s 29(2).

¹⁵² *ibid*, s 29(5).

¹⁵³ HM Government, *Prevent Duty Guidance: for England and Wales* (London, 2015).

¹⁵⁴ *ibid*. para.14.

¹⁵⁵ For instance, the term ‘due regard’ in s 26 is defined to mean that ‘authorities should place an appropriate amount of weight on the need to prevent people being drawn into terrorism when they consider all the other factors relevant to how they carry out their usual functions.’ (*Prevent Duty Guidance: for England and Wales*, para.4) But ‘appropriate’ and ‘other factors’ are not defined. One factor which will be relevant is the Counter Terrorism Local Profile: Home Office, *Counter-Terrorism Local Profiles: An Updated Guide* (London, 2012).

more certainty has been furnished,¹⁵⁶ though greater clarity may arise in the future with the imposition of legal obligation and the need to monitor.

More assertive than section 29 is section 30(1), which allows the Secretary of State to issue directions to enforce performance when ‘satisfied’ that the specified authority has failed to discharge its duty. More assertive still is the procedure under section 30(2) by which the Secretary of State can apply to the courts to have a direction enforced by a mandatory order. However, any default by a specified authority does not constitute a cause of action under private law,¹⁵⁷ but the possibility of public law enforcement by judicial review is not ruled out.

The broad and undifferentiated duty under section 26 rides roughshod over many sensitivities, but one sector which was highly vocal during debates was higher and further education which claimed that the ‘Prevent’ duty potentially damaged academic freedom.¹⁵⁸ It did not achieve exemption, but did secure special attention.¹⁵⁹ In fact, ever since the advent of ‘Prevent’, successive governments have treated higher and further education with some indulgence.¹⁶⁰ But Ministers have felt the need to react to the fact that some students have

¹⁵⁶ This point was emphasised in the *Advice* given by Robert Moretto to the University and College Union (20 January 2015) at <http://www.ucu.org.uk/index.cfm?articleid=7399>.

¹⁵⁷ CTS Act 2015, s 34.

¹⁵⁸ See Joint Committee on Human Rights, **n 20 above** para.6.11; HL Deb vol 759 col 224 28 January 2015. See further E. Barendt, *Academic Freedom and the Law* (Oxford: Hart, 2010) chap.2.

¹⁵⁹ See HL Deb vol 759 col 279 28 January 2015, col 677 4 February 2015 and col 1026 9 February 2015; See S. Hubble, *Freedom of speech and preventing extremism in UK higher education institutions* (London: CBP 7199, House of Commons Library, 2015).

¹⁶⁰ For previous guidance, see Walker and Rehman, **n 137 above** 257-260.

become terrorists. Students at Bradford, Liverpool John Moores, and Queen Mary Universities have all troubled the courts with their terrorism activities.¹⁶¹ The *cause célèbre* is the Detroit underpants bomber, Umar Farouk Abdulmutallab, who was allegedly indoctrinated while at University College London.¹⁶²

This relatively emollient approach to higher and further education has now been curtailed by sterner intervention under the CTS Act 2015, section 32, by which the Secretary of State can give directions. However, concessions to academic sensibilities have persisted in order to demonstrate ‘unequivocal reassurance that the Prevent duty is not designed to undermine the principle of academic freedom.’¹⁶³ Thus, by section 31(2),¹⁶⁴ the governing body of a higher and further education institution must also have ‘particular regard’¹⁶⁵ to the duty to secure freedom of speech, as specified by section 43(1) of the Education (No. 2) Act 1986,¹⁶⁶ and to the importance of academic freedom, as described in section 202(2)(a) of the Education Reform Act 1988. Section 31(3) places corresponding duties on the Secretary of State to have particular regard to those values when issuing guidance or directions in this sector. The other concession to academic sensibilities is in section 32. Relevant higher and further education

¹⁶¹ See *R v Zafar* [2008] EWCA Crim 184; *Naseer v USA* [2012] EWHC 2333 (Admin) and *US v Abid Naseer*, USDC SDNY, 5 March 2015; *R v Gul* [2013] UKSC 64.

¹⁶² *US v Abdulmuallab* 2012 US Dist LEXIS 20057. See F. Caldicott, *Umar Farouk Abdulmutallab: Report to UCL Council of independent inquiry panel* (London: 2010). Compare *Radicalisation on British University Campuses* (London: Quilliam, 2010).

¹⁶³ HL Deb vol 759 col 1027 9 February 2015.

¹⁶⁴ See further Counter-Terrorism and Security Act 2015 (Risk of Being Drawn into Terrorism) (Amendment and Guidance) Regulations 2015, SI 2015/928, Pt.3 r.5.

¹⁶⁵ The phrase was inspired by the Human Rights Act 1998, s.12(4): HL Deb vol 759 col 1026 9 February 2015.

¹⁶⁶ See *R v University of Liverpool ex p Caesar-Gordon* [1991] 1 QB 124; *R v University College London ex parte Riniker* [1995] ELR 213.

bodies are monitored by authorities already in that sector rather than by the Secretary of State.¹⁶⁷

The higher and further education sector continued to prove troublesome during the formulation of statutory guidance. The draft *Guidance*, published in December 2014, demanded that ‘Universities must take seriously their responsibility to exclude those promoting extremist views that support or are conducive to terrorism.’¹⁶⁸ Their tasks should include: active engagement with partners (such as police); risk assessment; action plans; staff training; welfare and pastoral care; and policies about speakers and events. The latter sparked much attention because it demanded:

- Sufficient notice of booking (generally at least 14 days) to allow for checks to be made and cancellation to take place if necessary;
- Advance notice of the content of the event, including an outline of the topics to be discussed and sight of any presentations, footage to be broadcast etc;
- A system for assessing and rating risks associated with any planned events, providing evidence to suggest whether an event should proceed, be cancelled or whether mitigating action is required (for example a guarantee of an opposing viewpoint in the discussion, or someone in the audience to monitor the event); and
- A mechanism for managing incidents or instances where off-campus events of concern are promoted on campus.’¹⁶⁹

¹⁶⁷ See House of Lords Secondary Legislation Scrutiny Committee, 7th Report of Session 2015–16 HL 28 (2015) para.6.

¹⁶⁸ HM Government [n 153 above](#) para.60.

¹⁶⁹ *ibid* para.66.

The draft *Guidance*, especially the requirements to submit an outline and exclude ‘those promoting extremist views that support or are conducive to terrorism’¹⁷⁰ was criticised as contravening free speech on campus.¹⁷¹ Combined with opposition in Parliament which resulted in the distinct set of provisions in sections 31 to 33, and, reportedly, misgivings within government,¹⁷² revision was secured in the final *Guidance* issued in March 2015 which did not include the offending paragraph quoted above.

Subsequently, the documentation was split, and a revised version of the general *Prevent Duty Guidance* appeared, omitting the sector-specific materials on higher and further education.¹⁷³ Special guides, *Prevent Duty Guidance: for Further Education Institutions*; *Prevent Duty Guidance: for Higher Education Institutions*, were instead published by the Home Office on 16 July 2015.¹⁷⁴ The revised *Prevent Duty Guidance for Higher Education Institutions in England and Wales* now states:

when deciding whether or not to host a particular speaker, [universities] should consider carefully whether the views being expressed, or likely to be expressed,

¹⁷⁰ *ibid* para.50.

¹⁷¹ See Universities UK, *Proposed statutory guidance relating to events on university campuses*, 29 May 2015 at <http://www.universitiesuk.ac.uk/highereducation/Documents/2015/StatutoryGuidanceonExternalSpeakers-May%202015.pdf>, para.8. Its own guidance was similar: *External speakers in higher education institutions* (London, 2013) 17, 27.

¹⁷² T. Ross and R. Mendick, ‘Nick Clegg blocks terror laws banning extremists from universities’ *Daily Telegraph* 14 March 2015.

¹⁷³ HM Government, *Revised Prevent Duty Guidance for England and Wales* (London, 2015).

¹⁷⁴ See further House of Lords Secondary Legislation Scrutiny Committee, [n 167 above](#).

constitute extremist views that risk drawing people into terrorism or are shared by terrorist groups. In these circumstances the event should not be allowed to proceed except where [universities] are entirely convinced that such risk can be fully mitigated without cancellation of the event. This includes ensuring that, where any event is being allowed to proceed, speakers with extremist views that could draw people into terrorism are challenged with opposing views as part of that same event, rather than in a separate forum. Where [universities] are in any doubt that the risk cannot be fully mitigated they should exercise caution and not allow the event to proceed.¹⁷⁵

The *Guidance* also reminds readers of the (arguably more restrictive) Universities UK documentation.¹⁷⁶

By way of assessment, the ‘Prevent’ duties still lack legal clarity and accountability. Neither a list of activities nor performance indicators is specified. The programmes also lack oversight. Whilst the responsibilities of the IRTL are expanded by the CTS Act 2015, they do not extend to Part V.¹⁷⁷ In default, the closest to an overseer is the National Police Chiefs’ Council National Coordinator of Prevent, an arrangement without accountability, visibility, or basis in law,¹⁷⁸ as was the situation in regard to its predecessor, the Association of Chief Police Officers. Aside from police oversight, supervision is fragmented between the bodies

¹⁷⁵ HM Government **n 153 above** para.11.

¹⁷⁶ *ibid* para.8.

¹⁷⁷ CTS Act 2015, s 44.

¹⁷⁸ See <http://www.npcc.police.uk/NPCCBusinessAreas/PREVENT/WhatPreventmeanstoyou.aspx>. Authority is claimed under the Police Act 1996, s 22A, for the (unpublished) Counter Terrorism Collaboration

Agreement and National Counter Terrorism Policing Agreement 2015 at

<http://www.npcc.police.uk/documents/NPCC%20Section%2022a%20Agreement.pdf>.

covering each involved sector (such as Ofsted,¹⁷⁹ the National Audit Office,¹⁸⁰ and so on). Even the Home Office has been half hearted in its lead. Though a non-executive Prevent Oversight Board ‘to oversee the Prevent strategy and its local implementation’ was set up after 2011,¹⁸¹ to date it has been somewhat invisible. It now will have a role under section 30,¹⁸² and an upgrade is forthcoming with the appointment of a ‘Director of Prevent’.¹⁸³

As for efficacy, one might question whether the correct targets have been identified. ‘Prevent’ is meant to be a task shared by all, but the CTS Act 2015 is confined to public authorities. Given the shrinkage of the public sector, why not impose the same duty on employers or retailers? More pressing still, in the light of the Intelligence and Security Committee’s report on the murder of Lee Rigby in Woolwich in 2013,¹⁸⁴ the media, especially Communication Service Providers might be appropriate duty holders. Furthermore, mosques and related religious schools have been the objects of attention, and even the tighter

¹⁷⁹ See Education Act 1996, s 497A.

¹⁸⁰ See Local Government Act 1999, ss 10, 15.

¹⁸¹ Home Office, [n 143 above](#) 96.

¹⁸² HM Government, [n 153 above](#) para.26.

¹⁸³

<https://files.civilservicejobs.service.gov.uk/admin/fairs/aptrack/download.cgi?SID=b3duZXI9NTA1MDAwMCZvd25lcnR5cGU9ZmFpciZkb2NfdHlwZT12YWVmZG9jX2lkPTQyNDE1MyZ2ZXJpZnk9YWFiMmE4NjY0ZTU0NDU5N2RiNTM4MmRIODE3NTMyYTE=>.

¹⁸⁴ *Report on the intelligence relating to the murder of Fusilier Lee Rigby* HC 795 (2014). See further D. Anderson, *A Question of Trust* (London: Home Office, 2015) chap.11; Cabinet Office, *Summary of the Work of the Prime Minister’s Special Envoy on Intelligence and Law Enforcement Data Sharing – Sir Nigel Sheinwald* (London: 2015).

regulation of charities by no means catches all of them.¹⁸⁵ Another limit on the ‘Prevent’ enterprise is funding; though 44 local areas will receive priority funding of between £120-600k, all others will receive a one-off payment of £10k and are expected to absorb ongoing costs through activities such as community safeguarding and child safeguarding.¹⁸⁶

As for the increasing focus on universities, there is limited evidence that universities have acted with negligence or have systemically failed to prevent violent extremism. The government, police, and sectoral bodies have long provided detailed guidance to UK universities as to their responsibilities regarding extremism.¹⁸⁷ There is more evidence pointing towards overreaction by Vice Chancellors than undue tolerance.¹⁸⁸ The government has repeatedly highlighted the fact that 30 per cent of convicted terrorists in the UK since

¹⁸⁵ See Walker, and Rehman, [n 137 above](#) 254-255; C. Walker, ‘Terrorism Financing and the Policing of Charities: Who pays the price?’ in C. King and C. Walker (eds), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Farnham: Ashgate 2014).

¹⁸⁶ See Department for Communities & Local Government, *New Burden Assessment Proforma* (London: 2015); B. Quinn, ‘Government steps up efforts to prevent young Muslims becoming jihadis’ *The Guardian* 13 February 2015.

¹⁸⁷ See Department for Innovation, Universities and Skills, *Promoting Good Campus Relations, Fostering Shared Values and Preventing Violent Extremism in Universities and Higher Education Colleges* (London, 2008); Universities UK, *Freedom of speech on campus: rights and responsibilities in UK universities* (London: 2011) and *External speakers in higher education institutions* (London: 2013).

¹⁸⁸ See the cases of Rizwaan Sabir (*The Guardian* 24 May 2008, 8) and *Ben-Dor and Abu-Sharkh v Vice-Chancellor of the University of Southampton* [2015] EWHC 2206 (Admin). For contrasting overall analysis, see T. Slater, ‘Exposed: the staggering scale of censorship on campus’ *Spiked Online* 3 February 2015 at <http://www.spiked-online.com/newsite/article/exposed-the-staggering-scale-of-censorship-on-campus/16658#.VOpLvy7jyzl>; R. Sutton, *Preventing Prevent?* (London: Henry Jackson Society, 2015).

2001 have attended university or further education.¹⁸⁹ Of course, it is inevitable that some terrorists have attended university just as some have driven on motorways or visited Asda supermarkets. The statistic fails to distinguish correlation and causation, and a level of 30 per cent is roughly what one would expect of a sample of young people of the right age. As commented by Lord Philips:

That seems to me to be an utterly useless statistic. Were they terrorists before they went to university, were they terrorists as a result of going to university or were they terrorists as a result of what happened to them after university? We have not the very slightest idea.¹⁹⁰

In conclusion, the championing of free speech in higher and further education is on the wane, and new ‘Prevent’ duties will augment tendencies toward risk aversion. More generally, there remain defects both in design and delivery. More positively, the new legislative basis for general ‘Prevent’ duties shines a light which will inevitably create a dynamic towards more scrutiny and accountability. Such improvements will be needed since the CTS Act 2015 does not per se deliver an ‘overhaul’ of ‘Prevent’.¹⁹¹

Channel Programme

Chapter 2 of Part V deals with ‘Support etc for people vulnerable to being drawn into terrorism’ which essentially is a reference to what in England and Wales is called the ‘Channel Programme’. The Programme has been running since 2010. It provides a multi-

¹⁸⁹ Home Office, [n 143 above](#) para.10.61. See further R. Sutton and H. Stuart, *Challenging Extremists* (London: Henry Jackson Society and Student Rights, 2012).

¹⁹⁰ HL Deb vol 759 col 728 4 February 2015.

¹⁹¹ O. Gay et al, *Counter-Terrorism and Security Bill* (London: Research Paper 14/63, House of Commons Library, 2014) 9.

agency response to those ‘at risk’ of extremism. The full ground-rules for this important programme have never been published, so it remains uncertain who is referred, by which agency, on what precise grounds, what they are referred to in terms of ‘treatment’, what is the impact of any treatment, and what is the relationship of this Programme with other disposals and actions (including prosecution and entry on databases). In her speech to RUSI on 24 November 2014, the Home Secretary stated, ‘we will legislate to put Channel – the existing successful programme for people at risk of radicalisation – on a statutory basis to improve the consistency of its delivery and ensure the participation of all the appropriate organisations.’¹⁹² Whilst no further evidence of effectiveness was provided during the legislative passage or since,¹⁹³ the CTS Act 2015 begins to address the legitimacy deficit by furnishing a statutory framework.¹⁹⁴

Under section 36, the Programme becomes a statutory obligation for local authorities to maintain. Local authorities must ensure that a panel is in place to assess whether individuals referred by the police are vulnerable to being drawn into terrorism and then to implement required ‘treatment’ functions. Referrals may only be made by the police and only if they have reasonable grounds to believe that an individual is vulnerable to being drawn into terrorism.¹⁹⁵ The panel must prepare a support plan for each ‘identified individual’, but the individual (or their parent or guardian) must consent to the arrangements.¹⁹⁶ Support might be

¹⁹² <https://www.gov.uk/government/speeches/home-secretary-theresa-may-on-counter-terrorism>, 24 November 2014.

¹⁹³ See House of Commons Home Affairs Committee, *Counter-Terrorism: Foreign Fighters* HC 933 (2015) para.9.

¹⁹⁴ See CTS Act 2015, s 36(7)-(8).

¹⁹⁵ *ibid*, s 36(3).

¹⁹⁶ *ibid*, s 36(4).

declined, but the panel must then consider referral to health or social care services.¹⁹⁷ The support plan should address the nature of the support, who is to provide it, and how and when.¹⁹⁸ Section 37 deals further with the membership and proceedings of panels; core membership will consist of local authority and the police. In addition, section 38 requires relevant organisations (such as health, education, and probation authorities) to be cooperative.¹⁹⁹ But the duty must be undertaken consistently with the Data Protection Act 1998 and must not affect sensitive information (such as held by intelligence agencies).²⁰⁰ In addition, section 40 allows for the indemnification of support providers.²⁰¹

Chapter 2 is a welcome step towards legality, but is the Channel enterprise worthwhile? Official assertions that the Channel programme has been successful²⁰² are not sustained by published evidence.²⁰³ Performance measures in terms of referral rates, costs, and outcomes are not specified. Furthermore, the definitions of ‘extremism’, ‘radicalisation’, and ‘Britishness’ fall short of normal standards of legal certainty.

¹⁹⁷ *ibid*, s 36(6).

¹⁹⁸ *ibid*, s 36(5).

¹⁹⁹ *ibid*, Schedule 7. See Counter-Terrorism and Security Act 2015 (Risk of Being Drawn into Terrorism) (Amendment and Guidance) Regulations 2015, SI 2015/928, para.8.

²⁰⁰ CTS Act 2015, s 38(5).

²⁰¹ The Explanatory Memorandum to the Act, para.236, mentions potential difficulty in obtaining appropriate insurance and therefore a disincentive to being a support provider.

²⁰² Not only by the Home Secretary but also by the National Policing Lead for Counter Terrorism, Assistant Commissioner Mark Rowley: House of Commons Home Affairs Committee, [n 30 above](#) 11.

²⁰³ The Home Office’s *Factsheet – Part 5 Chapter 2 – Channel* (London: 2014) reveals only that: ‘Since its national rollout in April 2012, over 2000 people have been referred to Channel and hundreds have been offered support. Between April 2012 and end-March 2014 National Counter Terrorism Policing reported a 58% increase in Channel referrals.’

(c) The counter-extremism agenda

A further indicator that the strategy of ‘Prevent’ is far from perfected is the emergence in October 2015 of the Home Office paper on the *Counter-Extremism Strategy*.²⁰⁴ This agenda involves the further extension of the government’s attempt to ‘defend further up the field’,²⁰⁵ by enabling intervention against those who espouse extremist views even in the absence of any tie to violence.

The *Counter-Extremism Strategy* paper emerged out of the establishment of the ‘Tackling Radicalisation and Extremism Taskforce’ in 2013 in response to the murder of Lee Rigby in Woolwich. Its report, *Tackling Extremism in the UK*,²⁰⁶ was short on detail but promulgated a substantial agenda against ‘Islamist extremism’²⁰⁷ which comprised: disrupting extremists such as by support and advice to organisations about how to confront and exclude extremists, new powers to ban groups, new civil powers to target the behaviour of individual extremists,

²⁰⁴ Home Office, Cm 9148 (2015). For an overview, see J. Dawson, *Counter Extremism Policy* (London: House of Commons Library Briefing Paper 7238, 2015).

²⁰⁵ D. Anderson, ‘Shielding the Compass: How to Fight Terrorism without Defeating the Law’ (2013) 3 EHRLR 233, 240.

²⁰⁶ (London: Cabinet Office, 2013).

²⁰⁷ ‘It is an ideology which is based on a distorted interpretation of Islam, which betrays Islam’s peaceful principles, and draws on the teachings of the likes of Sayyid Qutb. Islamist extremists deem Western intervention in Muslim-majority countries as a ‘war on Islam’, creating a narrative of ‘them’ and ‘us’. They seek to impose a global Islamic state governed by their interpretation of Shari’ah as state law, rejecting liberal values such as democracy, the rule of law and equality. Their ideology also includes the uncompromising belief that people cannot be Muslim and British, and insists that those who do not agree with them are not true Muslims.’
ibid., para.1.4.

new legislation to strengthen the powers of the Charity Commission;²⁰⁸ countering extremist narratives and ideology by building the capabilities of communities and civil society organisations, working with internet companies, and encouraging public reporting of extremist content online;²⁰⁹ preventing radicalisation by making the delivery of Prevent and the ‘Channel’ programme legal requirements (as now implemented by the CTS Act 2015); work on integration through the support of projects and funding; and support for vulnerable institutions such as ensuring that schools support fundamental British values and bar extremists,²¹⁰ improving oversight of religious supplementary schools, and working with universities and prisons²¹¹ to ensure the control of extremist influences.

²⁰⁸ See further Draft Protection of Charities Bill Joint Committee, *Report* HL 108/HC 813 (2015) and *Government Response*, Cm 9056 (2015).

²⁰⁹ The public are invited to sound an alert about extremism and terrorism via a government website (https://eforms.homeoffice.gov.uk/outreach/terrorism_reporting.ofml) which feeds into the Counter Terrorism Internet Referral Unit (‘CTIRU’). The CTIRU secured the removal of 110,000 items from February 2010 to November 2015: Home Office, *HM Government Transparency Report 2015: Disruptive and Investigatory Powers*, Cm.9151 (2015) 28. Europol has commenced an equivalent: *EU Internet Referral Unit at Europol - Concept note* (Brussels: 7266/15, 2015).

²¹⁰ This policy was most evident in regard to infiltration of schools in Birmingham – the ‘Trojan Horse’ affair. See Sir Michael Wilshaw, *Advice note provided on academies and maintained schools in Birmingham to the Secretary of State for Education, Rt Hon Michael Gove MP, as commissioned by letter dated 27 March 2014* (London: DfE, 2014); I. Kerhsaw, *Investigation Report: Trojan Horse letter* (Birmingham: Birmingham City Council, 2014); P. Clarke, *Report into allegations concerning Birmingham Schools arising from the ‘Trojan Horse’ letter* HC 567 (2014); Sir Michael Wilshaw, *Letter to Secretary of State for Education (Advice Notice)* (14 October 2014); HC Deb vol 591 col 1015 29 January 2015; House of Commons Select Committee on Education, *Extremism in Schools* HC 473 (2015) and *Government Response*, Cm 9094 (2015).

²¹¹ However, the Ibaana programme, designed to tackle Islamist extremism in prisons and probation, has been halted: HL Deb HL1769 24 July 2015.

Further steps towards implementation involved the setting up of an Extremism Analysis Unit in the Home Office to develop and analyse policies on community engagement and the exclusion of extremists.²¹² Then a Counter-Extremism Bill was announced as part of the Queen's Speech on 27 May 2015.²¹³ The main elements of the Bill, which 'address the gap in government and law enforcement's powers to deal with extremism that falls below the thresholds in counter-terrorism legislation', were outlined as follows:²¹⁴

- Banning Orders: a new power for the Home Secretary to ban extremist groups.
- Extremism Disruption Orders: a new power for law enforcement to stop individuals engaging in extremist behaviour.
- Closure Orders: a new power for law enforcement and local authorities to close down premises used to support extremism.

The agenda was elaborated further by Prime Minister David Cameron in a speech at Birmingham on 20 July 2015 as being organised under four pillars: counter-ideology measures; targeting both violent and non-violent extremism; supporting moderate Muslims; and building a more cohesive society.²¹⁵

The *Counter-Extremism Strategy* paper ('CES Paper') retains and embellishes these four pillars as well as some of the ideas proposed for legislation signalled in the Queen's speech. Yet, no draft Bill is appended, and the inclination seems to favour softer forms of

²¹² See T. May, 'A new partnership to defeat extremism' 23 March 2015 at <https://www.gov.uk/government/speeches/a-stronger-britain-built-on-our-values>.

²¹³ HC Deb vol 596 col 31.

²¹⁴ Cabinet Office and Prime Minister's Office, *Queen's Speech 2015* (London: 2015) 62-63.

²¹⁵ Dawson, n 204 above.

implementation or delay pending further inquiries. In fact, a substantial part of the agenda either does not require legislation or is already the subject of legislation.²¹⁶ Certainly, the definition of ‘extremism’ remains as foggy as ever: ‘Extremism is the vocal or active opposition to our fundamental values, including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs. We also regard calls for the death of members of our armed forces as extremist.’²¹⁷ With the exception of the latter sub-clause, opposition to fundamental established values, such as whether prisoners should have votes²¹⁸ or homosexuals should be able to marry, is as much the diet of democracy as it is fodder for extremists. Where the line should be drawn beyond which state repression has legitimacy is when extremism is linked to violence. At least the continuing inability to deliver a definition of ‘extremism’ which can withstand political and legal challenge should curtail the emergence of harder legal measures.

A brief summary of measures to be pursued include, in chapter 2, a review of the uses of Sharia law,²¹⁹ an issue peripheral to extremism, and a review of extremists in public services,²²⁰ a McCarthyist purge in the making which should keep lawyers busy if ever implemented. Chapter 2 also asks the Extremism Analysis Unit in the Home Office to build understanding of extremism,²²¹ but an external, more independent body would have been more suitable, while auditing and measuring the ‘answers’ and their translation into counter-

²¹⁶ An example is the criminalisation of speech justifying violence (see Terrorism Act 2006, s.1) or harmful cultural practices (see Female Genital Mutilation Act 2003): *ibid.* chap.1.

²¹⁷ Home Office [n 204 above 9](#).

²¹⁸ The concept makes the Prime Minister physically sick: HC Debs vol.517 col.921 3 November 2010.

²¹⁹ Home Office [n 204 above para.48](#).

²²⁰ [ibid](#) para.48.

²²¹ [ibid](#) para.46.

narratives will be challenging. In reality, Chapter 3, ‘Countering Extremist Ideology’, offers the realistic finding that no single model of extremist ideology has influence,²²² suggesting that the Extremist Analysis Unit has been set an impossible puzzle. Nevertheless, one definite response is to augment the Channel Programme:²²³

Individuals further down the path to radicalisation need a particularly intensive type of support. When necessary this support will be mandatory. The Home Office will therefore develop a new de-radicalisation programme to provide this support by spring 2016. This scheme will be available to be used in conjunction with criminal sanctions.

Alarming aspects of this proposal include the selection of candidates (are these people worse than ‘moderate extremists’?), the measures to be applied (even more earnest than Channel?), and the expectations which, if not met, result in crimes (thought crimes for the unrepentant?). A new network is promised in chapter 4, ‘linking individuals and groups around Britain who are already standing up to extremists in their communities’.²²⁴ Sensible though this sounds, questions will inevitably arise about who is invited (extremists need not apply),²²⁵ what funding is available, and what objectives are set beyond the act of meeting together.

Most alarming is chapter 5, ‘Disrupting Extremists’. Proposed minor changes to statistical practices relating to hate crimes data and new powers for Ofcom to suspend radio stations are

²²² **ibid** para.52.

²²³ **ibid** para.89.

²²⁴ **ibid** para.92.

²²⁵ **ibid** para.96.

sensible. But new legislation to ‘protect the public’ by banning organisations²²⁶ or to encourage public denunciation through an Extremism Community Trigger,²²⁷ offer a platform for intolerance. Presumably, Hizb ut Tahrir or the Muslim Brotherhood, already under review by Sir John Jenkins,²²⁸ are prime targets, despite the absence of evidence of links to terrorism sufficient for a proscription order. Bans based on the intolerance of opposing factions or even the majority population will cause minority resentment and will end up in court.

As for chapter 6, ‘Building Cohesive Communities’, it is unclear how this initiative differs from policies which were rejected by the ‘Prevent’ review of 2011. Another review (by Louise Casey alone) is promised to fill in the details. This strand also raises questions as to the provision of resources for the Cohesive Communities Programme and how it relates to existing programmes (or is it the same money under a new title?). This CES Strategy represents an intensification of ‘Prevent’-type approaches. However, its strategic relationship with the kindred ‘Prevent’ policy is murky, and legitimacy and effectiveness are wanting.

As for legitimacy, the attempts to date to define ‘Britishness’ or ‘extremism’ with legal precision have so far failed, going well beyond existing misgivings about the indistinction of ‘terrorism’. This progression from suppressing violent extremism to suppressing political extremism increases the dangers of repressive state action based on a supposed causal connection which might be depicted as ‘gibberish’.²²⁹

²²⁶ **ibid** para.112.

²²⁷ **ibid** para.117.

²²⁸ <https://www.gov.uk/government/news/government-review-of-the-muslim-brotherhood>.

²²⁹ See C. Gearty, ‘Is attacking multiculturalism a way of tackling racism – or feeding it?’ [2012] EHRLR 121, 125.

As for effectiveness in reducing ‘extremism’, Baroness Sayeeda Warsi, former Minister of State for Faith and Communities, has commented that:

the plans felt like an attack on the very values we were professing to promote.

And this has been the pattern of policy making since the Blair years. More and more, authoritarian counter-terrorism strategies have undermined our values, yet not made us feel any safer. We’re told that our protection and our freedoms can only be secured by the curtailment of freedoms. And the battle of ideas is not fought and won by bigger and better ideas but by banning, silencing through legislation and securitising communities.

... The Counter-Extremism policy development has been much more piecemeal, mainly because of well-documented differences of opinions between Conservative colleagues and others about whether the aim of policy should be to tackle violent extremism alone, or also include non-violent extremism. I’ve always believed we should focus on the former through the Prevent programme, and tackle the latter as part of a broader programme, which for years I have called Promote.²³⁰

The application of ‘Promote’ as an aspect of ‘militant democracy’ in response to extremism is beguiling.²³¹ But the positive promotion of liberal democracy will not be secured by the repression of divisive, intolerant, offensive, or virulent opponents who belong to minority communities which may become dismayed by intense scrutiny for signs of ‘extremism’ and

²³⁰ ‘The way to build British values is to bring people together – not to isolate, ban, and silence them’ (14 May 2015) at <http://www.conservativehome.com/platform/2015/05/baroness-warsi-the-way-to-build-british-values-is-to-bring-people-together-not-to-isolate-ban-and-silence-them.html>.

²³¹ See C. Walker, ‘Militant speech about terrorism in a smart militant democracy’ (2011) 80 *Mississippi Law Journal* 1395.

their portrayal in such terms. Others suggest that organisational changes are needed before these policy changes can hope to succeed.²³²

The implied criticism in the CES Paper is that, despite a decade of refinement, ‘Prevent’ remains inadequate, and further intervention is required not just for those considered vulnerable to being drawn into terrorism or those who espouse violent extremist views, but also for non-violent extremists. In doing so, the counter-extremism policy fosters ‘extractive’ rather than ‘inclusive’ structures.²³³

D Conclusions

The CTS Act 2015 was conceived as panic legislation, but the panic about Islamic State advances in summer 2014 subsided, and even the Charlie Hebdo attacks in Paris in January 2015 did not trigger draconian additions. In the event, the measures of interdiction and indoctrination are not entirely novel or unwelcome: the obstruction of feckless and immature travellers will often be endorsed by their families, while the application of constitutionalism to ‘Prevent’ is a positive development.

Overall, the legislation is not a wholly novel direction of travel but a deepening of the risk management of terrorism, long part of CONTEST and reflecting the manifold aspects of UK counter terrorism laws. The CTS Act 2015 offers a response to a level of risk which is lower than that which justifies arrest and prosecution, but at the same time seeks to apply commensurate interventions falling short of deprivation of liberty. Yet, with risk-based

²³² J. Russell and A. Theodosiou, *Counter-Extremism: a Decade on from 7/7* (London: Quilliam, 2015).

²³³ See D. Aemoglu and J.A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (London: Profile Books, 2013).

responses comes uncertainty, giving rise to the inevitability that innocent persons and communities will be unevenly affected. Even with that price being paid, one can be certain that not every catastrophe will be averted. It is difficult to compete in the market place of ideas against the narratives of *jihadism* which speak in simplistic, hedonistic, and graphic language not available to official spokespersons. The CTS Act 2015 offers a very modest contribution to countering international terrorism and on a lesser scale compared, say, to better security liaison with Turkey²³⁴ or improvements in governance in Iraq and Syria. The dismal prospect is that, no matter how much the state strives to ‘Prevent’, the current emanations of violent extremism will take many decades to assuage²³⁵ and will demand more than the efforts of a transitory government in one corner of Europe.

²³⁴ See European External Action Service, *Syria Foreign Fighters* (Brussels: Ares (2014) 1478983, 2014)

²³⁵ House of Commons Defence Select Committee, *UK national security and resilience* HC 718 (2008) Q.63.