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Resistance to Tyranny versus the Public Good: John Locke and Counter-Terror Law in the United Kingdom

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ABSTRACT

John Locke was a social contract theorist. He envisaged that individuals had domiciled in a state of nature, enjoying natural rights. But because of the insecurities of the natural state, individuals transitioned to the stability of civil society, guaranteed by a sovereign. There were fetters on the sovereign, however, such as passing laws for the public good. Is modern legislation to counter terrorism for the public good? Locke also expressly granted a right of resistance on the people. But is this right terrorism? Reflecting on these principles, this study examines counter-terror statutes and determines whether Locke would support them.

KEYWORDS

Social contract; John Locke; a right to resistance; public good; counter-terror law

Introduction

At the time of writing there has been a war on terrorism for more than 20 years. Infamously, the Al-Qaeda terror group spectacularly attacked the United States on September 11 2001 ("9/11"), deliberately flying hijacked passenger planes into both towers of the World Trade Center in New York and the Pentagon in Washington, DC; a fourth plane was downed in a field in Pennsylvania, when the passengers fought with the terrorists in an attempt to take back control of the aircraft. In total, nearly 3000 people were killed on 9/11. But these were not the first attacks by Al-Qaeda on American interests: in 1998 the embassies of the United States in Kenya and Tanzania were bombed; and in 2000 the USS Cole was attacked in Yemen. Unlike those Al-Qaeda attacks in 1998 and 2000, the 9/11 attacks occurred on American soil.

As an immediate consequence of 9/11, the then US President, George W Bush, informed the Secretary-General of the United Nations (UN) that America was exercising its inherent right of self-defense under international law, as per Article 51 of the UN Charter. The UN Security Council, which, under the UN Charter, has primary responsibility for the maintenance of international peace and security, as per Article 24, took action,

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too. It passed, for example, Resolutions 1368 and 1373. Resolution 1368 was passed on September 12 2001, the day after 9/11, unequivocally condemning the terror attacks and expressing the UN's readiness to take all necessary steps to respond to the attacks. How the UN responded to the attacks was reflected a few weeks later in Resolution 1373, for example; this obliged all Member States of the UN to "criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used ... in order to carry out terrorist acts." To monitor compliance with this duty, the UN created the Counter-Terrorism Committee (CTC).

Relying on UNSC Resolution 1373, America and many of its allies, such as the UK, have passed ever more liberty-interfering, counter-terror law. (Some countries in the world have preferred not to prosecute terrorism through special laws but have relied on their existing criminal codes. Other countries have enacted counter-terror law as an excuse to suppress political dissent.) The UK has passed a raft of counter-terror statutes, such as the Anti-Terrorism, Crime and Security Act 2001; this legislation came into force only a matter of weeks after 9/11. There were the terror attacks in London on July 7 2005, followed by further attacks , two weeks later, on July 21 2005. The UK passed the Terrorism Act 2006 following these atrocities. There were more recent terror attacks, at the Ariana Grande concert in Manchester in May 2017 and on the London Bridge in June 2017; these atrocities preceded the Counter-Terrorism and Border Security Act 2019. Where does counter-terror law in the UK currently sit, say, on the spectrum between liberty and state absolutism? One of the purposes, therefore, of this academic piece is to assess present counter-terror legislation in the UK. This evaluation should appeal particularly to lawyers, especially those with interests in human rights and/or security.

Theoretically, a balance between liberty and state absolutism is no better represented for this author than in the philosophies of the "Age of Enlightenment," the great "Age of Reason." There are many interpretations of what actually constituted the Enlightenment – "a group of capsules or flash-points where intellectual projects changed society and government on a world-wide basis,"[1] for example – and indeed the period in which the Enlightenment occurred – "[between] the lives of two philosophers: Gottfried Wilhelm Leibniz [1646-1716] and Immanuel Kant [1724-1804],"[2] . Roughly, therefore, the Enlightenment lasted for about 150 years and ranged broadly from about 1650 to 1800. The author of this piece, with his research interests in constitutional law and theory, has a particular regard for the philosophy of the social contract. Thus, within the period of the Enlightenment, he is particularly drawn to the theories of Thomas Hobbes, 1588-1679; Benedict de Spinoza, 1632-1677; Samuel Pufendorf, 1632-1694; John Locke, 1632-1704; and Jean-Jacques Rousseau, 1712-1778.

These social contract theorists treassured the protection of natural rights of the individual. But these freedoms could only be secured by the institution of political community. To do so, there was (generally) a covenant between the people and a sovereign to provide the former with security. But there had to be some trade-off in liberties; for a civil society to maintain safety, individuals were no longer able to exercise fully their natural freedoms, otherwise chaos would ensue. The idea was that individuals, therefore, departed a "state of nature" for civil society and sacrificed some, if not all, of their natural rights, in exchange for security provided by a sovereign authority. Thomas Hobbes and Benedict de Spinoza, for example, were famous for instituting an absolute sovereign. Spinoza states: "The sovereign power is not restrained by any laws, but everyone is bound to obey it in all things . . . [Individuals] are obliged to fulfil the commands of the sovereign power, however absurd these maybe, else they will be public enemies."[3] Were the other social contract theorists state absolutists?

This article not only analyses counter-terror law, it assesses the statutes through the lens of the social contract philosophy of the Enlightenment. However, for reasons of word length, the author cannot undertake a study of all the theorists listed above, so confines his legislative assessment to John Locke. Unlike, say, Hobbes and Spinoza, Locke was not a state absolutist: civil society, for Locke, was instituted to protect specifically the natural rights of the individual to life, liberty and property; to (further) achieve this, Locke imposed many fetters on the powers of the sovereign, such as those in its legislative capacity. In assessing the liberty implications of UK counter-terror legislation, who better, therefore, than the classical liberal John Locke? But, given Locke was also not a freedom absolutist – the anarchy of the state of nature was too unsafe to secure the natural rights of the individual, thus necessitating civil society – he was very much alive, therefore, to the need for state security. So, whilst *prima facie* Locke may not seem sufficiently impartial to provide a balanced, liberty assessment of current UK counter-terror legislation because of his natural desire for individual freedom, in fact, he is perfect (at least for this author). He very much appreciated, not only the significance of personal liberty, but also that personal liberty had to be qualified, otherwise there would have been a return to the chaos of the state of nature. Thus, not only will this piece appeal to lawyers because of its counter-terror law evaluation, it will also appeal to political philosophers; it provides, a unique study into the likely positioning of John Locke on the spectrum between liberty and security. Indeed, Locke warrants further attention for another reason: is there a contradiction within his political thought, since, for example, he expressly conferred a right of resistance on the people? In modern parlance is this right merely an expression of terrorism? That said, for Locke, sovereign powers were confined to, say, legislating for the public good. Is counter-terror law not for the public good? and therefore logically at odds with the right of resistance?

This piece comprises several parts. First, there is an analysis of UK counter-law, after which there is an examination of Locke's theory of the social contract, including the perceived clash between a right of resistance and the public good. Then, Locke's social contract philosophy provides the lens through which counter-terror legislation in the UK is assessed.

UK counter-terror law

For reasons of word length, it is not possible to analyze every statute passed in the UK to counter threats to its security, such as the Emergencies Act 1920. (This legislation, for example, was first used in 1921 to suppress the actions of striking miners.) This article is therefore confined to analyzing only UK law that is still in force. Moreover, it is not possible to examine every piece of current security legislation, such as the Public Health (Control of Disease) Act 1984 and the Coronavirus Act 2020. (These two statutes were both invoked during the height of the covid crisis to implement emergency powers such as lockdowns.) Drawing on the earlier reference to UNSC Resolution 1373, which, following 9/11, obliged all Member States of the UN to criminalize terrorism in domestic law, this piece analyses statutes passed as a direct consequence of the Islamist terror threat (though the UK laws apply equally to individuals of all terror "persuasions," such as the Extreme Right). Indeed, given the UK authorities have been particularly active in passing specific counter-terror legislation over the past 25 years or so (rather than, say, utilizing existing criminal law), the author must still be selective about which parts of the UK counter-terror legislation are examined. Here, therefore, notable aspects of UK law – the definition of terrorism; proscription; stop and search; speech offenses; Terrorism, Prevention and Investigation Measures (TPIMs) – are relied upon. To facilitate this, the statutes are primarily arranged by issue, not chronology.

The Terrorism Act 2000

Prior to 2000, the UK had temporary legislation pertaining to counter-terrorism: it was only with the enactment of the Terrorism Act 2000 that the country moved to a permanent counter-terror statute. Key features of this legislation include the definition of terrorism. Terrorism in the UK is defined by s.1 as harm for either political, racial, religious and/or ideological reasons. The harm of terrorism involves either serious violence against people and/or property or endangerment, such as to a person's life (other than that of the person committing the action), or creating a serious risk to the health and safety of the public. In addition, there is another purpose: a target audience. If an attack is targeted at people, then this must be designed to intimidate the public; but, if an attack is targeted at the UK government (or an international

governmental organization), there only needs to be evidence of "influence." According to a previous Independent Reviewer on Anti-Terror Legislation in the UK, David Anderson QC, "influence" draws the definition of terrorism in the UK so broadly that political journalists and bloggers, for example, could be subject to the full range of anti-terrorism powers.[4] Similar concerns about the breadth of the definition were also expressed by the UN Human Rights Committee (UNHRC), in 2015, in that year's report on the UK's compliance with the International Covenant on Civil and Political Rights (ICCCPR)[5] (though the significance of the 'influence' issue has been limited in practice by the Court of Appeal of England and Wales in *Regina (Miranda)* v. *Secretary of State for the Home Department*[6]). And there is no "freedom fighter" defense in the UK definition, as confirmed by the ruling of the Court of Appeal of England and Wales in *Regina* v. *F.*[7] There is also a possible clash between domestic law and military attacks by a non-state group against state forces in the context of a non-international armed conflict, as per international humanitarian law. This was an issue in the UK's Supreme Court in 2013, in *Regina* v. *Gul.*[8] *Obiter dictum*, the court said: "While acknowledging that the issue is ultimately one for Parliament, we should record our view that the concerns and suggestions about the width of the statutory definition [of terrorism] . . . merit serious consideration."[9]

The broad nature of the definition of terrorism in the UK has a significant impact on terror offenses since they rely on the definition for criminalization. Proscription, the banning of terror groups, is permitted within s.3 of the Terrorism Act 2000. According to s.3, the Secretary of State for the Home Department has a wide, subjective discretion in proscribing an organization in the UK, as well as determining whether they can be removed from the list of proscribed groups. A consequence of proscription is that being a member of a proscribed organization is a serious criminal offense, as per s.11. Even supporting a proscribed organization is outlawed, as per s.12. In s.1 of the Counter-Terrorism and Border Security Act 2019, the offense in s.12 of the Terrorism Act 2000 was widened to include the mere expression of support for a proscribed organization.

The Terrorism Act 2000 also contains counter-terror powers. Section 41 is the power of arrest: a police officer can arrest a person on reasonable suspicion that the latter has engaged in the commission, preparation or instigation of acts of terrorism. The legislation also contains powers to stop and search terror suspects, such as s.43, which, like s.41, also requires reasonable suspicion. As originally drafted, there was a notorious power in the Terrorism Act 2000 granting the police the right to stop and search an individual without reasonable suspicion, as per s.44. The application of the s.44 power in practice was astonishing. For example, in 2008, the power was exercised by the police 170,000 times just in the London area.[10] Following overwhelming criticism, including a damning judgment by the

Strasbourg based European Court of Human Rights (ECtHR) in *Gillan v. United Kingdom*,[11] s.44 was replaced by another stop and search power in s.47A of the Terrorism Act 2000 (as amended by s.61 of the Protection of Freedoms Act 2012). However, whilst the exercise of the s.47A power is now more tightly circumscribed than the original one in s.44, in reference to, say, its geographical location and length of time, for example, s.47A still does not require reasonable suspicion. Article 5(1) of the European Convention on Human Rights (ECHR) is the right to liberty. Assuming the degree of intrusion in a counter-terror stop and search is a denial of liberty, human rights law prescribes that a reasonable suspicion of a person having committed a crime must be held before they are denied thieir liberty

The Terrorism Act 2006

Further counter-terror legislation in the UK was passed six years after the Terrorism Act 2000, in the Terrorism Act 2006. Section 1 of this statute outlaws the encouragement of terrorism. This involves a statement that is likely to be understood by a reasonable person as a direct or indirect encouragement to terrorism. In 2008, for example, the UNHRC, in considering the UK's observance of its responsibilities under the ICCPR, was particularly concerned about the effect the offense of encouragement of terrorism would have on freedom of expression. This was because s.1 was defined in "broad and vague terms."[12] Certainty in the law is a key criterion of human rights norms. Article 7 of the ECHR, for example, states that there should be "no punishment without law." This reflects the important constitutional principle of the rule of law, that is, governmental action must not only have lawful authority for its interference with rights, but the power upon which the action is drawn must be clear. Specifically, in curtailing Article 10(1) of the ECHR, freedom of expression, countries cannot do so without relying on limitations that are "prescribed by law," as per Article 10(2) (this is perhaps another way of expressing Article 7 of the ECHR). Which provisions of the encouragement of terrorism offense lack clarity? Of note, according to s.1(2), the crime can be committed intentionally, as well as recklessly, so, even though an individual may not have intended that their behavior incited others to engage in terrorism, they could still be liable. Thus, in 2005, when the then Terrorism Bill was progressing through the British Parliament, alarm was expressed by, say, Human Rights Watch that a person could encourage terrorism without realizing it.[13] Moreover, s.1(5) says that it is irrelevant whether any person was in fact encouraged. Indeed, there is no need to prove a genuine risk that someone might by encouraged by the individual's behavior, dismissing, therefore, a causal link between the defendant's encouragement and another person's alleged terror activity.[14] Section 2 of the Terrorism Act 2006 widens the

offense of encouragement of terrorism, in criminalizing the dissemination of terrorist publications.

The Anti-Terrorism, Crime and Security Act 2001 and related statutes

What has proved particularly problematic has been the UK's limitations on individuals whom it believes have engaged in terrorist activity but whose conduct does not satisfy the criminal standard of proof, "beyond reasonable doubt." Almost immediately after 9/11, the UK passed the Anti-Terrorism, Crime and Security Act 2001. One of the provisions of the statute was the indefinite detention of international terror suspects, as per s.21. This was executive custody for those merely suspected of terrorism. As per Article 5 of the ECHR, the right to liberty, imprisonment can only be pronounced by a court after a conviction for a crime, not on the mere standard of proof for arrest, "reasonable suspicion." The provisions contained in s.21 were also civil in nature, not criminal, so the protections afforded to criminal proceedings, as per Articles 6(2) and 6(3) of the ECHR, such as an entitlement to see all the evidence , were denied. To justify the detention of international terror suspects, the UK derogated from Article 5 of the ECHR, by virtue of the emergency powers permitted in Article 15(1) of the ECHR, "derogation in times of war or public emergency."

However, in 2004, the (then) House of Lords in *A* v. *Secretary of State for the Home Department*,[15] ruled that Article 15(1) of the ECHR, "derogation in times of emergency," was not satisfied, since the indefinite detention provisions had been disproportionate to the terror threat. Moreover, as the provisions applied only to international terror suspects, not British individuals, they were not a justifiable breach of Article 14 of the ECHR, protection from discrimination. The s.21 powers of indefinite detention were replaced by "control orders" in the Prevention of Terrorism Act 2005. Individuals were no longer imprisoned – they were largely allowed to remain at home with their families – but were subject to bespoke controls, as per s.1(4), such as electronic tagging, curfews, restrictions on who they could associate with etc. And the low standard of proof, "reasonable suspicion," remained, as per s.2(1). Being civil in nature, control orders continued to deny defendants the right to know the evidence against them, for the purposes of a fair trial, as per Articles 6(2) and 6(3) of the ECHR.

Control orders were replaced by Terrorism Prevention and Investigation Measures (TPIMs) in s.1 of the Terrorism Prevention and Investigation Measures Act 2011. The standard of proof for a TPIM was raised from "reasonable suspicion" for a control order to "reasonable belief," as per s.3, but it was still below the standard of proof to satisfy a criminal trial, "beyond reasonable doubt." And TPIMs were still civil in nature. The standard of proof for a TPIM was raised, in s.20 of the Counter-Terrorism and Security Act

2015, from "reasonable belief" to the civil standard of proof, "a balance of probabilities," but, again, still below the criminal standard. Following the slow raising of the standard of proof from reasonable suspicion for, say, a control order to a balance of probabilities for a TPIM, in true "snakes and ladders" style, the standard dropped back to "reasonable belief" in s.34 of the Counter-Terrorism and Sentencing Act 2021.

In summary, the UK has passed several statutes specifically dealing with the danger of terrorism, especially as a consequence of the continuing Islamist threat. Whilst the permanent Terrorism Act 2000 preceded 9/11, it followed Al-Qaeda terror attacks in Africa in the late 1990s. The Terrorism Act 2000 has been amended in several areas since 2001. Of note, the legislation suggests a wide definition of terrorism, as per s.1. The terror net in the UK is, therefore, drawn very widely, affecting, not only the exercise of counter-terror powers, such as stop and search, but the reach of terror offenses. Indeed, with a broad definition of terrorism, there is almost a double deference shown to the state, in that some terror offenses are also widely drawn, such as the encouragement of terrorism, in, for example, not requiring evidence that in fact a person was encouraged, .

The Terrorism Act 2000 also confers very wide powers on the UK's Secretary of State for the Home Department to proscribe terror groups, which, of course, also rely on a broad definition of terrorism in s.1. With the proscription of terror organizations, this then triggers a number of criminal offenses, such as membership and support of such groups, as per ss.11 and 12 respectively. Unlike other countries, the UK has sought to move beyond an ordinary criminal justice model in terror cases and enacted special laws to respond (better) to harms that threaten national security. Of the Enlightenment period, social contract theorists sought to institute a sovereign whose responsibility was to protect the community from the anarchy of the state of nature, in return for obedience. One of these philosophers was John Locke. The principal aim of this piece is to assess key elements of counter-terror statutes enacted by the UK through the lens of Lockean thought. Before doing so, however, the next section analyses John Locke's approach to the theory of the social contract.

John Locke's approach to the social contract

Much of John Locke's ideas on the social contract can be found in his *Second Treatise of Government*, which was written between about 1679 and 1683. It was allegedly a reaction to the oppressive government of King Charles II of England, who died in 1685. Charles was replaced by his brother, James II, who was more tyrannical than Charles. Locke was a Protestant; Charles was also a Protestant but sympathetic to Roman Catholicism; James was a Roman Catholic and intolerant of other faiths. *The Second Treatise of Government*

was not published until 1689, however, after Locke's return to England from exile in the Netherlands and the deposing of James in the "Glorious Revolution" of 1688. Locke had been implicated in "the Rye House Plot," a plot to kidnap Charles and James on their return from horse races in Newmarket, and had fled England in 1683.[16]

The "state of nature"

Pre-the institution of sovereign power, Locke, like many of his fellow social contract theorists of the Enlightenment period, believed that individuals had lived in a "state of nature." For Locke this was "a State of perfect Freedom' and 'Equality,"[17] and "Peace, Good Will, Mutual Assistance, and Preservation'"[18] There, the individuals were "absolute Lord of . . . [their] own Person and Possessions"[19] Locke qualified this "perfect Freedom" of the state of nature, however, by natural law.[20]

In the state of nature individuals had a right to punish and/or seek reparation from the transgressors of natural law.[21] Locke described this as the "Executive Power of the Law of Nature."[22] But individuals were judges in their own cause.[23] Of course they had natural law to guide them, but "for the Law of Nature being unwritten . . . [it is] no where to be found but in the minds of Men."[24] Thus, when people took the punishment of alleged violators of the law of nature into their own hands, there was no guarantee of equal justice. Each person's bias toward their own interests was likely to make the violations seem worse than they really were, risking excessive punishment.[25]

"Natural" rights of the individual

Again, like many of his fellow social contract theorists , "natural rights" of the individual were very important to Locke. Locke believed in the right of self-preservation, together with "Lives, Liberties and Estate, which I call by the general name, Property."[26] The former was relinquished on the institution of civil society,[27] but the other natural rights to life, liberty and estate endured.

Of other natural freedoms for Locke, there is perhaps freedom from slavery. Locke opens the *First Treatise of Government*, 1689, with the following statement: "Slavery is so vile and miserable an Estate of Man, and so directly opposite the generous Temper and Courage of our Nation; that 'tis hardly to be conceived, that an Englishman, much less a Gentleman, should plead for't."[28] Indeed, Chapter V of the *Second Treatise* is a specific chapter on slavery; there, Locke doubts whether a person, having a natural right to life, has the power to give themselves up to slavery.[29] This relates to Locke's approach to equality, which was an important principle of natural law. In *A Letter Concerning Toleration*, 1689, Locke states: "Princes indeed are born superior onto other men in power, but in nature equal."[30] A fundamental tenet

of Lockean philosophy was also the separation of church and state.[31] Within this, therefore, Locke was opposed to religious compulsion, believing everyone had a supreme and absolute authority of judging for themselves.[32] Thus, Locke believed that freedom of thought, at least over matters of individual religious conscience, was a natural right.[33]

The institution of civil society

In Enlightenment social contract theory, we often talk about individuals almost falling over themselves to escape the state of nature. But not so perhaps for Locke: for him, civil society was really a means to secure the "advantages" of the state of nature, but without the negative effect of subjective interpretations and arbitration of natural law, giving rise to conflicts.[34] In view of the "Inconveniences of the State of Nature"[35] individuals should join together, therefore, in a commonwealth. This was an original contract or "compact" with everyone's consent.[36] For Locke, the commonwealth was a society of individuals constituted only for the procuring, preserving, and advancing civil interests: "Civil interests I call life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like."[37] The commonwealth then covenanted with a sovereign, chosen by the majority, to provide the former with security.[38]

The separation of governmental powers

To (further) limit the powers of the state, for Locke, there was a separation of governmental powers, that is, the separation of legislative, executive and judicial powers; individuals would not leave an insecure state of nature for (potentially) an insecure civil society, ruled by a despot.[39] But unlike, say, the later Charles de Montesquieu's strict separation,[40] Locke's approach was largely a separation of the legislative, executive and federative powers. (The function of the federative power was protection from foreign enemies and communication with other communities and individuals still in the state of nature).[41] The judicial power, for example, came under the auspices of the legislative function,[42] so was not strictly separate from the other branches of government. But judges were bound to dispense justice and decide the rights of their subject by promulgated standing law, however.[43] "For if the laws of the state were made as they ought to be, equal to all the subjects . . . and the faults to be amended by punishments, were impartially punished, in all who are guilty of them; this would immediately produce a perfect toleration."[44]

And there was fidelity to the principle of the rule of law, that is, the power of the executive was reliant on the law passed by a sovereign: "All the power the government has . . . ought to be exercised by established and promulgated laws,"[45] from which "No man in civil society can be exempted"[46] (though the

executive had some discretion in the application of the law). For the private judgment of any person concerning a law enacted in political matters "does not take away the obligation of that law."[47] To be outside, and above, the law was the beginning of "tyranny"[48]; for "Liberty is to be free from restraint and violence from others, which cannot be, where there is no Law."[49]

The limits imposed on the powers of the legislature

Following the attempt at limiting the powers of the state by (largely) respecting the principle of the separation of powers and upholding the rule of law, Locke also imposed other fetters on the power of the sovereign in its legislative capacity, such as respect for natural law.[50] Another interpretation of the rule of law is the condemnation of retrospective and secret laws[51]; for Locke, laws propounded by the sovereign were prospective and publicly announced.[52] In addition, whilst the legislative branch was the supreme power of the state,[53] it could not act in an arbitrary way over the lives and fortunes of its people.[54]

(Some) contradictions within Lockean thought

Within the liberal constitutionalist tradition, John Locke is famous for his emphasis on, say, natural rights. But there are apparent contradictions within his political thought, such as the legislative acting outside the law. To be outside, and above, the law was the beginning of "tyranny"? These contradictions cannot be ignored in any appreciation of Locke's place on the spectrum between liberty and state absolutism and its application to UK counter-terror law.

The "public good"

A limitation imposed on the legislature was respect for natural law. Another fetter imposed on the sovereign was the "public good," which, for Locke, was "the rule and measure of all law making."[55] However, Locke never expressly defined the "public good." The purpose of leaving the state of the nature and instituting a civil society to secure the natural rights of the individual, and the impartial enforcement of transgressions of natural law. So the public good presumably meant laws to protect individual rights and fund a judicial system that applied the law fairly and equitably? But was this literally for the good of the public? Maybe not, when prioritizing the rights of the person over the group. What happened when, say, the property rights of an individual were invaded by the state, without consent, to fund collective security, such as defense from a foreign conqueror? Here, was legislation passed by the sovereign to authorize taxation for the purposes of defense not for the "public good"? Elsewhere, in his writing, Locke says: "The business of laws is . . . to

provide for the safety and security of the Commonwealth and of every particular man's good and person."[56] This seems to support both individual and collective perspectives.[57] At a basic level, is legislation to counter terrorism not for the public good? Counter-terror law certainly protects the majority, but does it protect the minority? The liberty of the minority is (often) sacrificed for the security of the majority, sometimes for only symbolic gain.[58]

A right of resistance to tyranny

The realization of the public good is ambiguous but we can say, categorically, what it does not mean, since, for Locke, the sovereign was expressly forbidden to "destroy, enslave, or designedly . . . impoverish the Subjects."[59] That said, individuals were expected to endure some hardship.[60] However, when the state became too powerful – in that it had breached the trust conferred on it, for example – it had forfeited its authority.[61] Indeed, individuals had a right to prevent governmental abuse.[62] A right of resistance or revolution against oppression is a significant principle of Lockean philosophy.

The legal case of *Regina* v. *F*,[63] where the court considered the inclusion of a "freedom fighter" defense within the definition of terrorism in the UK, was referenced in detail above. But, here, it is noteworthy that the judge, Mr Justice Irwin, said:

> The call of resistance to tyranny . . . evokes an echoing response down the ages. We note . . . that many of those whose violent activities in support of national independence or freedom from oppression, who were once described as terrorists, are now honoured as "freedom fighters" . . . Those who died in these causes were "martyrs" for them. Indeed we can look about the world today and identify former "terrorists" who are treated as respected, and in one case at least [Nelson Mandela?], an internationally revered statesmen. In many countries statues have been erected to celebrate the memory of those who have died in the course of . . . their violent activities, but who in time have come to be identified as men and women who died for the freedom and liberty of their countries or their consciences.[64]

John Locke was a revolutionary, a freedom fighter. Was he a terrorist? He was implicated in the "Rye House Plot," the plot to kidnap the English King, Charles II, and his brother, James. Literally speaking, though, Locke was not a terrorist, since the term terrorism did not actually become a term of art until after his death, it deriving from a French word, "terrorisme," and having its origins in the French Revolution of the 18th Century.[65] Locke was maybe a traitor but what does this word even mean? Are the terms "traitor," "terrorist" etc just labels bandied about by authoritarian regimes for condemning resistance to their oppression? That said, can Locke's revolutionary ideals be squared with terrorism, as presently understood? They are (kind of) synonymous, especially in the UK where a freedom fighter defense is excluded from the legal definition of terrorism. But Locke does seem to condemn actions that

modern day commentators would describe as terrorism (at least in the absence of tyranny). As an overarching statement, Locke says: "Those that are seditious, murderous … etc, whether national or not, ought to be punished and suppressed. But those whose doctrine is peaceable, and whole manners are pure and blameless, ought to be up on equal terms with their fellow-subjects."[66] Terrorism can hardly be described as "peaceable."

Slavery

Locke is traditionally seen as a "libertarian;" the state is there for minimal security such as civil and military defense. Now this is true: Locke reluctantly exited the state of nature for the protection of the natural rights to life, liberty and estate that only a civil society could provide. But was Locke the so-called lover of individual freedom he has so often been portrayed? Equality was a principle of natural law, so should every person have been equal? But were rights of the individual only to be enjoyed by men to the exclusion of women?[67] Were freedoms only to be ascribed to wealthy men to the exclusion of the poor?[68] And should persons of color have no rights at all?

It was stated above that Locke was against enslavement. But was he categorically opposed to all forms of slavery? After all, Locke was a shareholder in a slave trading company, the Royal African Company.[69] And the first drafting of *Fundamental Constitutions of Carolina*, in 1669, some of which was literally written in Locke's hand,[70] legitimized slavery since it served the economic interests of the day: "Every Freeman of Carolina shall have absolute power and Authority over his Negro slaves of what opinion or Religion soever."[71] However, some scholars have doubted whether Locke was even responsible for significant parts of the first drafting of the *Constitutions of Carolina*, or at least its revisions, most notably in 1682 and 1689.[72] Indeed, in the 1690s, when Locke had real power, being on the Board of Trade, he helped to reform Virginia laws and government, objecting especially to royal land grants that had rewarded those who bought "negro servants."[73] Moreover, Locke expressly referenced slavery that was permissible but this was not the transatlantic slave trade: it was a form of punishment for soldiers captured in a just war.[74] Thus, whilst the claims of Locke's support for transported African slavery still persist,[75] and (maybe) justify, therefore, some application of his alleged racism to current UK counter-law, this piece does not proceed to consider them.[76]

Legislative supremacy

It will be recalled that, for Locke, the legislative branch was the supreme power of the state. The supremacy of the legislature is a principle rarely found in liberal democracies.[77] Locke is supposed to be the founder of liberal

constitutionalism, the theorist of natural rights. So why in the *Second Treatise* does he argue that the legislature is supreme, that it must never be subject to any other body, at least while the government lasts?[78] In this regard Williams argues:

> Locke sees no conflict of interest arising from the fact that the legislature is assigned the task of deliberating about the nature of its own limits – a view which seems dangerously naive when judged from a contemporary standpoint. Who among us would be willing to trust that legislative power could be constrained simply by relying on legislators' own commitment to respect the dictates of natural law?[79]

Does Locke's support for legislative supremacy automatically legitimize counter-terror legislation passed by the British Parliament?

The exercise of the prerogative

In "unforeseen and uncertain Occurrences,"[80] the state (or to be exact the Executive branch) had a prerogative that may sometimes require immediate action "without the prescription of the Law."[81] Thus, there was "a latitude left to the Executive power, to do many things of choice which the Laws do not prescribe."[82] Indeed, Locke went further: "Without the prescription of the Law, and sometimes even against it."[83] Moreover, the exercise of this prerogative power was never to be questioned.[84] Do powers exercised by, say, the executive to counter terrorism, especially those lacking lawful authority, satisfy Locke's exercise of the prerogative? Often emergency powers remain after the terror threat, which precipitated them, ceases.[85] This is surely not what Locke had intended. But certainly the words "unforeseen and uncertain Occurrences" are sufficiently vague to warrant (most) counter-terror responses.

John Locke and UK counter-terror law

Thus far, there have been analyses of UK counter-terror law and John Locke's approach to the theory of the social contract. Both analyses set up nicely the principal objective of this academic piece: to assess counter-terror statutes in the UK through the lens of Locke's political philosophy. This is the aim of this section.

The Terrorism Act 2000

Section 1 of the Terrorism Act 2000, the definition of terrorism in the UK, was referenced above, particularly in relation to the wide terror net it draws. It was stated that, for the UK government or an international governmental organization to be targeted, there only needs to be evidence of "influence." How

many British citizens seek to "influence" the government through, for example, either public protest? or the ballot box (though of course these elements on their own do not engage the definition)? However, if the target is the public or a section of the public, the standard is higher: "intimidate." So, where alleged terror acts are aimed at the public, rather than government, there is a greater respect for the rights of the individual suspect. There does not seem to be a direct Lockean aspect of the social contract to be applied to the UK definition of terrorism. But as a security theorist, with the spectrum falling more on the side of individual liberty than many of his contemporaries, Locke would surely have welcomed the qualification of the definition, in requiring a higher standard to terrorize the public. That said, the standard is still lower if the target of the violence is the government. Yes, for Locke, the state of nature lacked, say, the just application of natural law, hence the need for a transition to civil society. And, whilst he was keen to escape the chaos of the state of nature, he surely did not want to encounter it again in the face of the sovereign within the political community. So it is very unlikely that Locke would have supported an unequal treatment of the victims of terrorism, in giving preferential treatment to the state over the public.

In regards to proscription, it will be recalled that the Secretary of State for the Home Department for the UK can either add or remove a group from the list of proscribed groups. Would Locke have objected to the proscription of a political group by the Executive branch of the State, the Home Secretary, rather than, say, the courts? Despite his fidelity to law – recall, government was not above the law (subject to the exercise of the prerogative) – Locke did accept there had to be some discretion in the law's application. But the exercise of this discretion was still regulated by equality and impartiality. So, presumably, if the exercise of proscription by the Secretary of State was governed by, say, independent intelligence reports, and there was an absence of discrimination, this would have been satisfactory? Proscription decisions do seem to rely on independence and fairness, as confirmed in annual reports by the UK's Independent Reviewer of Terrorism Legislation and by reference to a "Proscription Review Group," which is convened before the exercise of the Home Secretary's power to proscribe.[86] Proscription concerns the banning of associations, such as political groups. In John Locke's time religious association was encouraged but other groups were not. To this Locke replied: "Why are assemblies less sufferable in a church than in a theatre or market?"[87] As well as tolerating associations other than those linked to religion, Locke believed that individuals were free to join a group and leave it: "No man by nature is bound onto any particular church or sect, but everyone joins himself voluntarily to that society."[88] So, *prima facie*, Locke would have opposed the banning of political groups. But the UK Minister's power to proscribe is not unlimited: they must be assured that the group is "concerned in terrorism," as per s.3(5) of the Terrorism Act 2000. So political groups of a "peaceable"

nature, that is, those not "concerned in terrorism," are excluded from proscription.

Several groups banned in the UK are so proscribed because they are committed to serious violence for purposes of faith, such as those linked to Islamism. Given Locke's strong religious beliefs, would he have condoned violence on religious grounds? If so, was religious violence only tolerated to advance his Christian persuasion, Protestantism – he was implicated in the Rye House Plot, after all? – therefore excluding groups supportive of violence in the name of either Roman Catholicism or Islam? Some commentators have argued that Locke's toleration of religion did not include either Roman Catholics or Atheists.[89] (The former, for example, would have been agents of a foreign power so were they to be trusted?) But other commentators disagree: Locke did tolerate other faiths.[90] Indeed, this writer's interpretation of the works of Locke supports the latter.[91] That said, on the issue of violence for religious purposes, Locke says, without any apparent discrimination: "Now I appeal to the consciences of those that persecute, torment, destroy, and kill other men upon pretence of religion, whether they do it out of friendship and kindness towards them or no … No body … has any just title to invade the civil rights and worldly goods of each other, upon pretence of religion."[92] Given Locke's famous support for toleration, he would surely have supported persuasion, even that on religious grounds, as a way of effecting change, but to have done so only peacefully, without violence.

There is an opportunity to be "deproscribed" from the list of proscribed groups in the UK, as per s.4 of the Terrorism Act 2000, but this requires the approval of the Minister. As per the above, where the original proscription was determined by the Secretary of State – assuming there was some independence informing the decision, such as intelligence reports, and the power was exercised equitably – presumably Locke would have been not opposed to the exercise of s.4? Indeed, there is a right of appeal from the Minister's decision, to the Proscribed Organizations Appeal Committee (POAC), as per s.5, and a further appeal to the Court of Appeal of England and Wales, as per s.6. Article 6(1) of the ECHR is the right to a fair trial by and independent and impartial court or tribunal. The opportunity to challenge the Minister's decision to proscribe to POAC and then to the Court of Appeal permits independent judicial oversight. Again, recall Locke's fidelity to legality. However, the basis of the appeals under ss.4-6 of the Terrorism Act 2000 is not actually an appeal in the strict sense: they are founded on the grounds of judicial review. So, applicants seeking to reverse the minister's decision to proscribe, as per s.3, and (presumably) their failure to deproscribe, as per s.4, must prove that the Minister was acting unlawfully, not wrongly. This is a more difficult hurdle to overcome than one claiming that the Minister was incorrect in refusing to deproscribe: see, for example: *Lord Alton* v. *Secretary of the State for the Home Department*.[93] But note: redress to the courts is not excluded, respecting

Locke's fidelity to law, albeit the process of a judicial reversal of the Minister's original decision is onerous.

For John Locke there was a natural right to liberty, so arguably the counter-terror powers in the Terrorism Act 2000, such as the power of arrest, as per s.41, *prime facie* violate his principles of freedom. But Locke was not an anarchist – individuals exited the state of nature for the stability of civil society – so naturally liberty was not absolute. Recall, Locke only condoned behavior that was "peaceable," so there had to be (some) enforcement of the criminal law outlawing unpeaceable conduct. And s.41 is not unlimited: a police officer must have reasonable suspicion to exercise a power of arrest; they cannot arrest a person at will. Indeed, this power, requiring reasonable suspicion, respects Article 5 of the ECHR, the right to liberty. The same goes for the standard stop and search power in the Terrorism Act 2000: s.43.

Section 44 of the Terrorism Act 2000 was a power permitting the police to stop and search an individual without reasonable suspicion; it was discontinued by the UK government following overwhelming criticism, including a damning judgment by the ECtHR in *Gillan*. Section 44 was replaced by s.47A of the Terrorism Act 2000. Section 47A still does not require reasonable suspicion, however. Given the natural right to liberty, would Locke have been opposed to this (seemingly) limitless stop and search power? Furthermore, since the exercise of s.44 was insufficiently certain to guide human behavior – another way of describing a violation of the rule of law – would Locke, with his fidelity to law, have objected to the vagaries of this new provision on these grounds, too? But s.47A of the Terrorism Act 2000 is a much more tightly circumscribed stop and search power than s.44. Indeed, it has only been exercised by four police forces in the UK – the British Transport Police, the City of London Police, North Yorkshire Police and West Yorkshire Police – and then only over a couple of days, in 2017. This is hardly intrusive of individual liberty. And recall Locke was not a freedom absolutist: if he had been, he would not have advocated leaving the state of nature.

The Terrorism Act 2006

Whilst John Locke would apparently have supported most of the provisions of the Terrorism Act 2000 referenced above, would he have taken issue with provisions in the Terrorism Act 2006, such as the encouragement of terrorism in s.1? First, it will be recalled that Locke described free speech, or at least religious toleration, as a natural right. Why did Locke attach so much significance to the freedom? In *An Essay Concerning Human Understanding*, 1689, Locke welcomed the positive effect the principle of free speech had on social cohesion: "God, having designed man for a sociable creature, made him not only with an inclination and under a necessity to have fellowship with those of his own kind, but furnished

him also with language, which was to be the great instrument and common tie of society."[94] In the same book, Locke also argues: "For language being the great conduit whereby man convey their discoveries, reasonings, and knowledge, from one to another."[95] And from one generation to another.[96] Indeed, Locke blamed a lack of toleration on wars: it was not the diversity of opinions that caused conflict, but the refusal of toleration to those that were of different opinions.[97] Thus, freedom of expression is central to Locke's ideas of rights. Moreover, Tate argues that Locke, in writing *A Letter Concerning Toleration* while himself in political exile to escape persecution for the Rye House Plot, could have failed to identify with, or express concern for, the victims of persecution "is counter intuitive to say the least."[98]

Prime facie, given Locke's strong views on freedom of thought and expression, especially individual religious conscience, arguably he would have condemned authorities in the UK censoring speech through the offense of encouragement of terrorism? Recall, too, there is no need to show intention – the offense can be committed recklessly – and there is no need to show a causal link between an alleged incitement and a specific terror act. Thus, the offense has been criticized for its lack of specificity. To lawfully infringe Article 10 of the ECHR, freedom of expression, a violation must be "prescribed by law." For Locke, therefore, is the benefit here too much in favor of the state at the expense of the individual? In *A Second Letter Concerning Toleration*, 1690, Locke said: "And I say, any sort of punishments disproportioned to the offence … will always be *severity, unjustifiable severity*, and will be thought of by the sufferers and bystanders; and so will *utterly produce the effects* you have mentioned, contrary to the design they are used for."[99] Is the punishment for the encouragement of terrorism out of proportion to the harm? (The maximum sentence for the offense was raised to 15 years by s.7 of the Counter-Terrorism and Border Security Act 2019.) If so, is there not a risk, therefore, that public safety is compromised by, say, greater radicalization, because of the outrage this offense provokes, as Locke implies? Indeed, is the individual, for Locke, to blame here at all? Locke says: "For where there is no fault, there can be no … punishment."[100]

However, whilst Locke was a strong advocate of free speech, it was apparently qualified by responsibility. In *An Essay Concerning Human Understanding*, 1689, Locke says: "Propriety of speech is that which gives our thoughts entrance into other men's minds with the greatest ease and advantage; and therefore deserves some part of our care and study."[101] Free speech is not absolute. Under human rights law Article 10(1) of the ECHR is freedom of expression, but Article 10(2) of the ECHR limits this right by reference to responsibility. Would John Locke have agreed with this? And Article 17 of the ECHR is the "abuse of rights," meaning that free speech, for

example, cannot be relied upon to deny the Holocaust. Article 17 is therefore a provision to promote equality and nondiscrimination.

Moreover, because of Locke's demand for religious toleration, individuals had a right to profess a religion, and presumably the power of persuasion over others to share the same beliefs? However, similar to previous arguments pertaining to the association of groups and proscription, individuals could not use violence to impose their religious will on others: "Every man has commission to admonish, exhort, convince another of error, and by reasoning to draw him into truth: but to give laws, receive obediences, *and compel with the sword, belongs to none but the magistrate* [my italics]."[102] Thus – at least in the absence of tyranny, being the justification for resistance – would Locke have condemned the offense of encouragement of terrorism?

The Anti-Terrorism, Crime and Security Act 2001 and its related statutes

It was stated above that almost immediately after 9/11 the UK passed the Anti-Terrorism, Crime and Security Act 2001. One of the provisions of the statute was the indefinite detention of international terror suspects. These were replaced by "control orders" in the Prevention of Terrorism Act 2005, though the standard of proof, "reasonable suspicion," remained the same. Individuals were no longer imprisoned: they were (for the most part) allowed to remain at home with their families, under curfew. And the powers were no longer discriminatory: they applied to everyone, not just foreigners. Control orders were replaced by Terrorism Prevention and Investigation Measures (TPIMs) in the Terrorism Prevention and Investigation Measures Act 2011. Controls were (further) relaxed, such as the use of mobile phones and the internet, curfews became "overnight residence." And the standard of proof was raised from "reasonable suspicion" to "reasonable belief." The standard of proof for a TPIM was raised in the Counter-Terrorism and Security Act 2015, from "reasonable belief" to the civil standard of proof, "a balance of probabilities," but this was still below the criminal standard of proof, "beyond reasonable doubt." However, the Counter-Terrorism and Sentencing Act 2021, in true "snakes and ladders" fashion, brought the standard of proof back down a peg or two to "reasonable belief."

The original s.21 measures in the Anti-Terrorism, Crime and Security Act 2001 affected only foreigners: British terror suspects were excluded. Recall, for Locke, equality was a principle of natural law. It is likely, therefore, that Locke would have been opposed to this discrimination. But, following an adverse court judgment, later, in 2004, in the then House of Lords, in *A*, these measures in s.21 were replaced by control orders, now TPIMs, applying to everyone. They, therefore, no longer apply inequitably. However, TPIMs are still civil orders, not criminal ones. And there is still the issue of being subject to significant restrictions on individual freedom well below the criminal

standard of proof – a breach of Locke's natural right to liberty? Furthermore, as was suggested previously for the offense of encouragement of terrorism, can it also be said that TPIMs respect the Lockean principle that a punishment must not be out of proportion to the harm? Indeed, is the individual to blame at all?

And how do the contradictory principles of legislative supremacy and the exercise of the prerogative affect control orders, TPIMs etc? Recall, for example, the old indefinite detention of international terror suspects, after 9/11, as per s.21 of the Anti-Terrorism, Crime and Security 2001. Here the UK first derogated from Article 5 of the ECHR, the right to liberty, as per Article 15 of the ECHR, because of the public emergency at the time. Would Locke have approved of the executive measures, as an exception? Yes, later, in 2004, the then House of Lords, in *A*, ruled that they were unlawful, but earlier the terror threat, immediately following 9/11, may have necessitated the measures? If so, for Locke, they surely would have been a permissible action of the executive requiring immediate action? Indeed, Locke would probably have permitted the measures still further because they were not "without the prescription of the Law," being powers conferred on the Secretary of State by the Anti-Terrorism, Crime and Security 2001? There is also the additional issue of Locke's support for legislative supremacy: the 2001 powers were passed by the British Parliament. But the powers of the legislative were not unqualified: laws propounded by the sovereign, for Locke, needed to be prospective and publicly announced, for example.[103] The Anti-Terrorism, Crime and Security 2001 was not a retrospective statute and passed in secret. Moreover, the legislative could not act in an arbitrary way over the lives and fortunes of its people.[104] It has already been established that the measures discriminated against foreign terror suspects but this discrimination was removed with the introduction of control orders, and retained for TPIMs. Indeed, can it not be said that the s.21 measures were an exercise of the public good, especially if they immediately followed 9/11? (Indeed, could not the same public good argument be relied upon for other statutes, such as the Terrorism Acts 2000 and 2006?) These s.21 measures no longer exist, but, of course, they remain in kind, in the form of TPIMs. TPIMs are much more respectful of individual liberty than, say, the powers in s.21, presumably because the terror threat has greatly diminished since 9/11. Given Locke's natural right to liberty, TPIMs must be (more) welcome? And, like the s.21 powers, TPIMs were passed by Parliament, prospectively and in public (as were the Terrorism Acts 2000 and 2006).

Conclusion

John Locke was a social contract theorist of the Enlightenment. He is particularly remembered for his natural rights to life, liberty and property and is often considered, therefore, a darling of the liberal tradition. Like his relative

contemporaries, such as Thomas Hobbes and Benedict de Spinoza, Locke believed that individuals must exit the insecurities of the state of nature for the stability provided by civil society. Who better, therefore, to assess the freedom implications of counter-terror law than, say, Locke – a theorist very much alive to respect for the liberties of the individual, but, equally, recognizing that complete freedom was a return to the chaos of the state of nature? Where does Locke present, therefore, in an appreciation of recent UK counter-terror legislation? Any such appreciation, however, is clouded by, say, Locke's right of resistance against tyranny. Today, is this right not just an expression of terrorism?

First, Locke would probably have had mixed views on the definition of terrorism in the UK, as per s.1 of the Terrorism Act 2000. In regard to the public being the target, there is a relatively high threshold, with the use of the term "intimidate," meaning the balance falls more in favor of the individual suspect than the state. But the state is granted greater privileges with a lower threshold within the use of the term "influence," when the former is the target. Given the maintenance of a fair balance between the state and the individual (assuming this is what Locke had meant by the "public good"), a difference between the two in the definition would probably not have been justified. Moreover, since the definition is widely drawn, the terror net in the UK is probably larger than necessary: not only in the exercise of counter-terror powers, such as stop and search and arrest, as per ss.43 and 41 of the Terrorism Act 2000 respectively (though these powers do require a reasonable suspicion), but the offenses the definition relies upon, such as the encouragement of terrorism, as per s.1 of the Terrorism Act 2006.

Given the significance of free speech to Locke, would he have objected to the offense of encouragement of terrorism, especially because of its low threshold – it only requires recklessness – and lack of specificity? Indeed, is the punishment for the crime out of proportion to the harm? Does this compromise public safety, since a disproportionality between the two principles, will have, for Locke, the opposite effect of encouraging further criminality? However, Locke would probably have condemned the exercise of speech, coupled with violence, to compel a person to share the same beliefs as the speaker. Similarly, he would have been opposed to the banning of associations such as the proscription of groups. But, again, if this had been because its members were committed to violence, to effect a change in individual beliefs, for example, then maybe proscription would have been permissible, too.

What of Locke's support for legislative supremacy and the exercise of the prerogative? This suggests that executive powers, conferred on Governmental Ministers by Act of Parliament, especially in times of public emergency, are *prima facie* not going to be incompatible with Lockean thought. Indeed, this would appear to confer *carte blanche* authority on the state to pass counter-terror law, especially if the "public

good" is interpreted in favor of the majority. How is this squared with Locke's ideas of a right to revolution, though? Is there an inherent contradiction here? Recall, citizens had to endure some hardship. Yes, they did not have to live literally under tyranny before they could institute constitutional change, but the right of resistance was still qualified.

Digging deeper, given Locke's views on emergency powers, to be exercised by the executive branch, what is to be determined by, say, the measures in s.21 of the Anti-Terrorism, Crime and Security Act 2001? These measures were declared unlawful by the then House of Lords in 2004, in *A*, but, immediately following 9/11, they were surely necessary, even in a Lockean sense? Indeed, they were not "without the prescription of the Law," as they were conferred on the executive by the legislative. The fact that they had their authority in statute surely supports them still further, since Locke was a legislative supremacist? Nevertheless, Locke did not grant absolute authority to legislatures: the powers of the legislative were limited to the public good, as is known, and the passing of statutes that were prospective and in public. Surely the s.21 measures were an exercise of the public good? Indeed, the legislation was not retrospective and passed in secret. Can the same not be said for control orders, now TPIMs, which replaced the s.21 measures? TPIMs are much more respectful of individual liberty than the powers in s.21. As the terror threat has greatly decreased since 9/11, this must (better) respect Locke's natural right to liberty? But there is a lingering concern that TPIMs, being civil in nature, are a disproportionate punishment, especially since they are granted on a low standard of proof.

Notes

1. Dorinda Outram, *The Enlightenment* 4th ed. (Cambridge: Cambridge University Press, 2019), 3.
2. Ibid.
3. Benedict de Spinoza, "A Theologico-Political Treatise" in *A Theologico-Political Treatise and A Political Treatise*, edited by Benedict de Spinoza, (Mineola: Dover Philosophical Classics 2004), 3-266, 205.
4. David Anderson QC, "The Terrorism Act in 2013: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006," July 2014. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/335310/IndependentReviewTerrorismReport2014.pdf (accessed March 18, 2019), 27-32.
5. United Nations Human Rights Committee, "Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland," CCPR/C/GBR/CO/7 August 17 2015, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsg%2fOK3H8qae8NhIDi53MecJ8Es8JxwwaL1HQ8hgVMkgor%2ba2BnDTW%2fHC6BIyM8TPJNF%2f6qe%2bcdb0NBnXp%2bA57rBA17cvjmBwuivD2gq5FYEj (accessed March 4, 2019), para 14.

6. [2016] EWCA Civ 6. Lord Dyson said, at para 48: "Terrorism as it is ordinarily understood is the attempt to advance some political or religious cause not by persuasion but by violence, the endangerment of life etc. To describe a newspaper writing political stories that inadvertently reveal the identity of members of the intelligence service or oppose government policy on vaccination as committing an act of terrorism is to use the word terrorism in a way that bears no relationship to any ordinary understanding of the concept." So, for the purposes of influencing the government, since *Miranda*, there has to be some mental element such as intention, or at least recklessness, to commit an act of terrorism.
7. [2007] EWCA Crim 243.
8. [2013] UKSC 64.
9. Ibid., para 62.
10. Anna Cavell, "Capital Sees Rise in Terror Stops" *BBC London News* May 6 2009, http://news.bbc.co.uk/1/hi/england/london/8034315.stm
11. [2010] ECHR 28.
12. United Nations, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland* CCPR/C/GBR/CO/6 July 30 2008, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsg%2FOK3H8qae8NhIDi53MecK%2F2gqd4WjxGafXAOvi2gd8MGnqbt1avQnaNolUy2XcvBwJ5RjyX8HLStgrG3Gvb212L1D8aWEhetjn9vv7zgmO (accessed March 4, 2019), para 26.
13. Human Rights Watch, *Briefing on the Terrorism Bill 2005* November 2005, https://www.hrw.org/legacy/backgrounder/eca/uk1105/uk1105.pdf (accessed March 21, 2019), 10.
14. David Anderson QC, *The Terrorism Act in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*. June 2012, https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/report-terrorism-acts-2011.pdf (accessed June 5, 2019), 123.
15. [2004] UKHL 56.
16. John Dunn, *Locke: A Very Short Introduction* (Oxford: Oxford University Press, 1984), 12.
17. John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), *Second Treatise of Government*, Chapter II, 269.
18. Ibid., 280.
19. Ibid., 269.
20. Ibid., 270-1.
21. Ibid., 317.
22. Ibid., 272-4. But the idea of a right to punish raises further difficulties. One of these is that we may think that, if someone is said to be punished, this must involve the application of some *institutional* process, rather than a mere act of will on the part of an individual. In addition, what about carrying out many forms of punishment (such as custodial sentences) without an institutional structure? See: D.A. Lloyd Thomas, *Locke on Government* (London: Routledge, 1995), 21-22.
23. Ibid., 275.
24. Ibid., 358.
25. D.A. Lloyd Thomas, 1995, 23.
26. Locke, 1988, 350. There is a significant debate about the precise meaning of "property" n Locke's writing. Does Locke define the term in a "narrow" sense of material possessions or in an "extended" sense as a classification of these natural rights? Laslett, for example, prefers the latter option – Peter Laslett, "Introduction" to John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), 3-122 – but

still states: "Locke's doctrine of property was incomplete, not a little confused and inadequate to the problem as has been analyzed to this day." (107)

27. John Locke, *An Essay Concerning Human Understanding* (Ware: Wordsworth Classics, 2014), Book II, Chapter XXVIII, 334.
28. Locke, 1988, 141.
29. Ibid., 284.
30. John Locke, "A Letter Concerning Toleration" in John Locke, *Letters Concerning Toleration* (Maroussi: Alpha Editions, 2019), 33-65, 46.
31. Ibid., 35.
32. Ibid., 56.
33. Ibid., 60.
34. Assaf Sharon, "Locke, Liberty, and Law: Legalism and Extra-Legal Powers in the *Second Treatise*," *European Journal of Political Theory*, no. 2 (2022): 230-25, 236.
35. Locke, 1988, 276.
36. Ibid., 331.
37. Locke, 2019, 35.
38. Locke, 1988, 428. This interpretation, that there is a bargain between the people and the sovereign that the latter provides the former with security is supported by, for example, one of the most famous philosophers of the 20th Century, Bertrand Russell – see: Bertrand Russell, *History of Western Philosophy* (London: George Allen and Unwin, 1961), 607. However, others disagree that there was in fact a further covenant between the public and the sovereign, meaning that the latter was not in a reciprocal bargain of protection with the former. Thomas, for example – Lloyd Thomas (1995) – does not believe that there is a double bargain: there is only the first one, instituting the commonwealth. The second agreement is to vest the executive power of the law of nature in the government on trust, meaning that that the power is held by the people and can be revoked by them. If it was a contract then the sovereign had rights against the people (31-32). Indeed, you would need an independent arbiter to determine whether the terms of the sovereignty had or had not been fulfilled (78).
39. Ibid., 328.
40. See, for example: Charles Louise de Secondat, Baron de Montesquieu, *The Spirit of Laws* (CreateSpace Independent Publishing Platform, 2015); and Articles I-III of the Constitution of the United States.
41. Locke, 1988, 365.
42. Ibid., 326.
43. Ibid., 358.
44. John Locke, "A Second Letter Concerning Toleration" in John Locke, *Letters Concerning Toleration* (Maroussi: Alpha Editions, 2019), 66-116, 113.
45. Ibid., 57.
46. Ibid.
47. Ibid.
48. Locke, 1988, 400.
49. Ibid., 306.
50. Ibid., 358.
51. See, for example, L. L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 51-62.
52. Sharon, "*European Journal of Political Theory*," 234.
53. Locke, 1988, 356.
54. Ibid., 357.
55. Ibid.

56. Locke, 2019, 55.
57. For an interpretation of the "public good" that sees Locke as attaching less emphasis to the individual, see, for example: Susan P. Liebell, "The text and context of 'Enough and as Good:' John Locke as the foundation of an environmental liberalism," *Polity* 43, (2011): 210-241.
58. Jeremy Waldron, "Security and Liberty: The Image of Balance," *Journal of Political Philosophy* 11, no. 2 (2003): 191-210, 210. See also, for example: David Luban, "Eight Fallacies About Liberty and Security" in edited by Richard Ashby Wilson, *Human Rights in the "War on Terror"* (Cambridge: Cambridge University Press, 2005), 242-257; and Lucia Zedner, *Security* (London: Routledge, 2009).
59. Locke, 1988, 357.
60. Ibid., 414-5.
61. Ibid., 367.
62. Ibid., 411.
63. [2007] EWCA Crim 243.
64. [2007] EWCA Crim 243, para 8.
65. Bruce Hoffman, *Inside Terrorism* (New York: Columbia University Press, 2006), 3.
66. Locke, 2019, 63.
67. See, for example: D.A. Lloyd Thomas, *Locke on Government* (London: Routledge, 1995), 29-31.
68. Ibid.
69. Dunn, 1984, 51.
70. Brad Hinshelwood, "The Carolinian context of John Locke's theory of slavery," *Political Theory* 41, (2003): 562-590, 567.
71. John Locke, "The Fundamental Constitutions of Carolina (1669)" in John Locke, *Political Essays* (Cambridge: Cambridge University Press 1997), 160-181, 180.
72. Mark Spencer, "Introduction" to John Locke, *An Essay Concerning Human Understanding* (Ware: Wordsworth Classics 2014), ix-xxiv, xiv.
73. See, for example, Holly Brewer, "Slavery, Sovereignty and 'Inheritable Blood:' Reconsidering John Locke and the Origins of American Slavery," *The American Historical Review* 122, no. 2 (2017): 1038-1078.
74. Locke, 1988, 322-323.
75. Notwithstanding the degree to which Locke authored the first draft of the Carolina Constitutions, if at all, Armitage believes that Locke was clearly an equal partner in the discussions around them and their revisions. See: David Armitage, "John Locke, Carolina, and the Two Treatises of Government," *Political Theory* 32, no. 5 (2004): 602-627, 615. Moreover, on the subject of permissible slavery, that is, prisoners captured in a just war, who were they in Locke's time, other than Native Americans? Was John Locke also a colonialist? Locke believed in the legitimate right to colonize because England's utilization of property was more efficient than that of the Native Americans. Thus, Arneil argues: "The famous chapter on property, which contains most of the references to American *Indians* in the *Two Treatises*, was written to justify the seventeenth-century dispossession of the aboriginal peoples of their land, through a vigorous defense of England's 'superior' claims to proprietorship." See: Barbara Arneil, *John Locke and America: the Defence of English Colonialism* (Oxford: Oxford University Press 1996), 2. Given the charges of slavery, colonialism etc, Bernasconi and Mann conclude: "It is impossible to defend Locke against the charge of racism." See: Robert Bernasconi and Anika Maaza Mann, "The Contradictions of Racism: Locke, Slavery and the *Two Treatises*" in Andrew Valls (ed), *Race and Racism in Modern Philosophy* (Ithaca: Cornell University Press 2005), 89-107, 100.

76. In an earlier draft of this piece the author did in fact go on and apply Locke's alleged racism to UK counter-terror law but this was rejected as an absurd exercise by some reviewers.
77. Of course it is a principle of constitutional law in the UK. It was famously described as the "dominant characteristic" of the UK constitution, according to the celebrated 19th Century constitutional writer Alfred Venn (AV) Dicey: A.V. Dicey, *An Introduction to the Study of Law of the Constitution* (Carmel: Liberty Fund, 1982), 3-4.
78. Juliet A. Williams, *Liberalism and the Limits of Power* (New York: Palgrave Macmillan, 2005), 9.
79. Ibid., 10-11.
80. Locke, 1988, 373.
81. Ibid.
82. Ibid.
83. Ibid.
84. Ibid.
85. Waldron, "*Journal of Political Philosophy*," 210.
86. See, for example, Jonathan Hall QC, *The Terrorism Acts in 2020 Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006, and the Terrorism Prevention and Investigation Measures Act* 2011 April 2022 https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2022/04/Terrorism-Acts-in-2020.pdf (accessed July 22, 2022), 27.
87. Locke, 2019, 61.
88. Ibid., 36.
89. See, for example, Richard R. John, "Freedom of expression in the digital age: a historian's perspective," *Church, Communication and Culture*, no. 4 (2019): 25-38.
90. See, for example, J.C. Walmsley and Felix. Waldman, "John Locke and the toleration of Catholics: a new manuscript," *The Historical Journal* 62, (2019): 1039-115.
91. Taking a more holistic interpretation of Locke's writing, and arriving at a similar conclusion to this author, is: Alex Tuckness, "Rethinking the intolerant Locke," *American Journal of Political Science*, (2002): 288-92.
92. Locke, 2019, 33-42.
93. [2008] EWCA Civ 443.
94. Locke, 2014, 387.
95. Ibid., 92.
96. Ibid., 491.
97. Locke, 2019, 63.
98. John William Tate, "Locke and toleration: defending Locke's liberal credentials," *Philosophy and Social Criticism* 35, (2009): 761-91, 762.
99. Locke, 2019, 75.
100. Ibid.
101. Locke, 2014, 496.
102. Locke, 2019, 37.
103. Sharon, "*European Journal of Political Theory*," 234.
104. Locke, 1988, 357.

Disclosure statement

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