View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Seton Hall University Libraries

Seton Hall University
eRepository @ Seton Hall

Law School Student Scholarship | Seton Hall Law

5-1-2014

Fighting The War On Terror With Words: A Comparative Study Of Anti-Terror Legislation And Its Impact On Free Speech And Free Exercise Of Religion Rights

Benjamin Kachuriner

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

Recommended Citation

Kachuriner, Benjamin, "Fighting The War On Terror With Words: A Comparative Study Of Anti-Terror Legislation And Its Impact On Free Speech And Free Exercise Of Religion Rights" (2014). *Law School Student Scholarship*. 502.
https://scholarship.shu.edu/student_scholarship/502

TABLE OF CONTENTS

I. INTRODUCTION

Terrorism can never be accepted. We must fight it together, with methods that do not compromise our respect for the rule of law and human rights, or are used as an excuse for others to do so.[1]

On a cool Sunday morning in Washington, D.C., protestors stood outside the White House expressing their concerns over the Patriot Act.[2] It was March 2011, and three key provisions of the highly scrutinized Act had been recently extended.[3] Coincidentally, those outside the White House may not have realized that legislators at one point were considering the very act of political protesting to be restricted by the Act.[4] This is one example of the type of legislation that has arisen due to the constant threat of terrorism.

Terrorism has caused worldwide security concerns for centuries. Recently, though, it has emerged at the forefront of international issues and has been the focus of ongoing legislation efforts. Anti-terrorism legislation has been commonly used as a reactionary measure following direct instances of terror to a nation.[5] Sometimes the attack on a single nation can have the impact of multiple nations responding with new laws. Because the new laws are reactionary, they may often have unintended and undesirable secondary effects. For example, the aforementioned United States Patriot Act arguably burdens the rights of those that practice the Muslim religion

---

[1] Anna Lindh, Speech by FM Anna Lindh in the Helsinki Conference—Searching for Global Partnerships, 4 December 2002 (December 4, 2002), available at http://www.regeringen.se/sb/d/1111.
[2] Protestors in DC demonstrate against the Patriot Act, available at http://www.rawstory.com/rs/2011/03/13/protesters-demonstrate-against-the-patriot-act-in-dc/.
[3] Id.
[4] Susan Nevelow Mart, Protecting the Lady from Toledo: Post-Usa Patriot Act Electronic Surveillance at the Library, 96 LAW LIBR. J. 449, 469 (2004).
[5] Gregory C. Clark, History Repeating Itself: The (D)evolution of Recent British and American Antiterrorist Legislation, 27 FORDHAM URB. L.J. 247 (1999).

by placing restrictions on giving to charity.[6] This article seeks to trace the developments of anti-terror legislation in three nations during the last century while considering the impacts, such as the ones just mentioned, on free speech and free exercise of religion rights.

Part II consists of a historical overview of anti-terror enactments in England, Israel, and the United States. Part III will consider the effects these enactments have had on free speech and free exercise of religion rights in the three nations. Finally, Part IV will suggest methods that the hypothetical nation can implement in an effort to balance security and freedom. These methods will be based on conclusions drawn from Parts II and III.

II. A HISTORICAL OVERVIEW OF ANTI-TERROR ENACTMENTS

A. The United Kingdom

The United Kingdom's anti-terror legislation for the latter part of the twentieth century was focused toward its ongoing conflicts with Northern Ireland. One of the first enactments was The Prevention of Terrorism (Temporary Provisions) Act 1974, which "allowed a suspected terrorist to be held for 48 hours and on order from the government for an additional five days without a court appearance."[7] The Act was passed within a week of the Birmingham pub bombings, where twenty-one people were killed.[8] From 1974 onward, the Act was changed on several occasions.[9] Then, The Prevention of Terrorism (Temporary Provisions) Act 1984 was passed.[10] The Act gave the Executive "the powers of arrest, detention, and exclusion."[11]

---

[6] Christina C. Logan, Liberty or Safety: Implications of the USA Patriot Act and the U.K.'s Anti-Terror Laws on Freedom of Expression and Free Exercise of Religion, 37 SETON HALL L. REV. 863, 878 (2007).
[7] Roberta Smith, America Tries to Come to Terms with Terrorism: The United States Anti-Terrorism and Effective Death Penalty Act of 1996 v. British Anti-Terrorism Law and International Response, 5 CARDOZO J. INT'L & COMP. L. 249, 278-79 (1997).
[8] Laura Halonen, Catch Them If You Can: Compatibility of United Kingdom and United States Legislation Against Financing Terrorism with Public International Law Rules on Jurisdiction, 26 EMORY INT'L L. REV. 637, 657 (2012).
[9] Id.
[10] America Tries to Come to Terms with Terrorism, supra note 7.
[11] Id.

Furthermore, the Act "proscribed the IRA and the INLA, made contributions to acts of terrorism and withholding information about acts of terrorism criminal offenses, and gave the police power to carry out security checks on travelers."[12] The IRA (Irish Republican Army) and INLA (Irish National Liberation Army) were two of the organizations known to be involved in terrorist activity occurring in the United Kingdom and arising out of Northern Ireland. [13] However, the 1984 Act was found to be in violation of the European Convention of Human Rights.[14] The European Court of Human Rights made this ruling "based on a case brought by four men from Northern Ireland who were held for periods ranging from four days to sixteen days without court appearances. All four men were released without charge."[15] After this "binding decision," new legislation was needed.[16]

In 1989, the previous 1984 Act was re-enacted with new changes.[17] The Act, similarly named as the Prevention of Terrorism (Temporary Provisions) Act 1989, "principally deals with proscribed organisations, exclusion orders, financial assistance for terrorism, and related powers of arrest and detention."[18] The IRA and INLA were both again the two proscribed organizations.[19] In addition, the Act also allowed government to proscribe organizations found to be "concerned in... promoting or encouraging terrorism occurring in the United Kingdom and connected with the affairs of Northern Ireland".[20] The Act featured seven parts which included

---

[12] Id., quoting Caleb M. Pilgram, Terrorism in National and International Law, 8 DICK. J. INT'L L. 147, 190 (1990).
[13] Graham Zellick, Spies, Subversives, Terrorists and the British Government: Free Speech and Other Casualties, 31 WM. & MARY L. REV. 773, 812 (1990).
[14] America Tries to Come to Terms with Terrorism, supra note 7.
[15] Id.
[16] Id.
[17] Spies, Subversives, Terrorists and the British Government, supra note 13.
[18] Id.
[19] Id.
[20] Id., quoting PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1989.

Exclusion Orders, Financial Assistance for Terrorism, and Powers of Arrest, Stop and Search, Detention, and Control of Entry, among other things.[21]

As referenced earlier, the Act targeted individuals "concerned in the commission, preparation or instigation of acts of terrorism."[22] Individuals falling under that category could potentially be excluded, or "banished" from their place of living.[23] The Secretary of State would have the ability to "prohibit a person from being in, or entering, Great Britain" if that targeted person has lived in Great Britain "less than three years."[24] Furthermore, the act criminalized the giving of "any money or other property" that is "intend[ed] [to] be applied or used for the commission of, or in furtherance of or in connection with, acts of terrorism...or having reasonable cause to suspect that it may be so used or applied."[25] In addition, a person who even "solicits or invites" another person to give "any money or other property" toward terrorist efforts would also be criminally liable under the Act.[26] Another notable provision consisted of the criminalization of "wear[ing] any item of dress... in such a way or in such circumstances as to arouse reasonable apprehension that he is a member or supporter of a proscribed organization."[27] Finally, the Act allowed for officers to "arrest without warrant a person whom he has reasonable grounds for suspecting to be... a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism."[28]

The 1989 Act entitled Government to broadly defined powers that were quickly criticized.[29] The far-reaching provisions came under heavy attacks by those who felt that civil

---

[21] PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1989.
[22] Spies, Subversives, Terrorists and the British Government, supra note 13.
[23] Id. at 813.
[24] Id. at 817.
[25] Id. at 806.
[26] Id. at 813.
[27] Id.
[28] Id. at 815.
[29] America Tries to Come to Terms with Terrorism, supra note 7.

liberties were being violated. However, with public safety being such a crucial issue, the Act's provisions remained enforceable through the 1990s.[30] In fact, even in March 1995, seven months after a ceasefire in Northern Ireland, the Act was renewed for another year.[31] The Act, while unquestionably stringent in its application, turned out to be completely necessary because the IRA continued terrorist activity in February 1996.[32] The 1989 Act only finally was repealed by the Prevention of Terrorism Act 2000.

The Prevention of Terrorism Act 2000 has been said to "mark a turning point in British counterterrorism law and policy, as it reflects an effort to create a uniform counterterrorism law to apply to all parts of the United Kingdom, and not specifically created to deal with Northern Ireland or other specific conflict situations."[33] The Act defines terrorism as actions where "the use or threat is designed to influence the government or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious or ideological cause."[34] This definition uses broad language and affords Government even more power than it previously maintained. In addition, "catch-all language" in the definition, including the further explanation of terrorism as being actions "involv[ing] serious damage to a person...or to property" gives Government further power.[35] However, this Act did not last very long, as the September 11th terrorist attacks on the United States led the United Kingdom to responding with new legislation once again.

---

[30] Id.
[31] Id. at 281.
[32] Id. at 282.
[33] Sudha Setty, What's in A Name? How Nations Define Terrorism Ten Years After 9/11, 33 U. PA. J. INT'L L. 1, 32 (2011).
[34] Id. See footnote 116.
[35] Part I, Section 3 of the Act states that "[t]he use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied. Thus, as pointed out by Setty and others, this Section removes the requirement set forth in Section 1(b) that the action would have to advance a "*political*, religious, or ideological cause." Setty correctly states that "the text of the definition suggests that any violent act committed against another person where a firearm is involved may be considered terrorism by the government and treated as such."

While the United Kingdom was not directly impacted by 9/11, the nation chose to pass The Anti-Terrorism, Crime, and Security Act 2001 (ATCSA) a little over two months after the attacks.[36] According to Home Secretary David Blunkett, "[c]ircumstances and public opinion demanded urgent and appropriate action after the...attacks on the World Trade Centre and the Pentagon."[37] The ATCSA defined a terrorist to be "a person who (a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism, (b) is a member of or belongs to an international terrorist group, or(c) has links with an international terrorist group."[38] Those that met the statutory requirements of a suspected terrorist became subject to "indefinite detention... without a trial or process."[39]

The ATCSA is another piece of legislation passed by the United Kingdom that has been criticized for its expansive scope and broad language.[40] For example, some of the terms used to define a terrorist leave much room for interpretation. One who "instigates acts of international terrorism" is considered a terrorist under the Act. However, the word 'instigate' is quite unclear. The Act does not explain what instigating specifically means, allowing Government to decide if an individual is a terrorist without having to justify how it made its determination due to the Act's expansive scope. Furthermore, the same issues arise of the phrase "links with an international terrorist group." Specifically, the work "link" arguably allows Government to label an individual a terrorist as long as that person can be traced to another's terrorist activity. An individual need not have a direct link, but simply any link whatsoever. These were only some of

---

[36] Keiran Hardy & George Williams, What Is "Terrorism"?: Assessing Domestic Legal Definitions, 16 UCLA J. INT'L L. & FOREIGN AFF. 77, 111 (2011).
[37] David Blunkett, House of Commons, Official Report, Dec. 19, 2001, col. 22.
[38] What Is "Terrorism"?: Assessing Domestic Legal Definitions, supra note 36, at 110.
[39] Id.
[40] Id.

the concerns that led the ATCSA to being deemed in violation of the European Convention on Human Rights in 2004.[41]

The next enactment was the Prevention of Terrorism Act 2005, which further added to "Parliament's trend toward increasing police power."[42] The 2005 Act notably gave government the ability to make "control orders," which are orders "against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism."[43] The control orders would "impose obligations" on those targeted by the orders.[44] These obligations spanned from "restricting possession or use of specified articles or substances" to "require[ing] to report to a specified person at specified times and places."[45] Failing to abide by a control order without "reasonable excuse" resulted in a violation of the law.[46] Furthermore, the Act allowed for two types of control orders to exist: "derogating and non-derogating."[47] Derogating orders were orders that "interfered with" an individual's liberty rights under Article 5 of the Human Rights Convention. These types of orders would "require Parliamentary approval via an Article 15 ECHR designated derogation order under the HRA 1998 and could only be authorized by a judge."[48] The more common "non-derogating" orders would be made by the Secretary of State. The standard of review given to each type of order also differed. Non-derogating orders required only a "reasonable suspicion" requirement while derogating offers were evaluated under a "balance of probabilities" standard.[49]

---

[41] Id., see footnote 121. Specifically, the detention provision was "incompatible" with the ECHR.
[42] What's in A Name? How Nations Define Terrorism Ten Years After 9/11, supra note 33 at 37.
[43] PREVENTION OF TERRORISM ACT 2005, available at http://www.legislation.gov.uk/ukpga/2005/2/section/1/enacted.
[44] Id.
[45] Id. A total of 14 orders existed.
[46] Id.
[47] Dominic McGoldrick, Security Detention-United Kingdom Practice, 40 CASE W. RES. J. INT'L L. 507, 512 (2009).
[48] *Id.*
[49] Id.

The Prevention of Terrorism Act 2005 was quickly followed by the Terrorism Act 2006. The 2006 Act arose out of the July 7, 2005 bombings on London's Underground Transit System.[50] The Act first increased "pre-charge detention" for suspects from 14 to 28 days.[51] The Act also includes provisions which criminalized the "encouragement of terrorism." [52] This was defined to include "a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences."[53] This law was meant to "supplement the existing common law offence of incitement..."[54]

Section 3 of the Act, arguably one of the more controversial provisions, criminalizes the "glorification" of terrorism. The section provides that statements found to "encourage terrorism" shall also be in violation of the Act if the statement "glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances." This section is problematic because it does not establish a clear standard for courts to follow. To satisfy Section 3, a listener would only have to "infer" that the speaker hopes the conduct suggested in the speech will be followed. An individual could thus be prosecuted even if those he spoke to heard the speech and took no further action. The next issue becomes defining glorification, which is a term that can lead to many interpretations.

---

[50] What's in A Name? How Nations Define Terrorism Ten Years After 9/11, supra note 33 at 38.
[51] Id.
[52] See Terrorism Act, 2006, c. 11, §§ 1, 3, available at http://www.legislation.gov.uk/ukpga/2006/11/contents.
[53] Id.
[54] Michael C. Shaughnessy, Praising the Enemy: Could the United States Criminalize the Glorification of Terror Under an Act Similar to the United Kingdom's Terrorism Act 2006?, 113 Penn St. L. Rev. 923, 931 (2009)

In an effort to clarify ambiguous language, the Act includes explanatory notes which offer additional guidance. However, the notes "only lead to greater confusion."[55] The notes provide the following explanation on the meaning of glorification:

> Glorification is defined in section 20(2) as including praise or celebration. Section 20(7) clarifies that references to conduct that should be emulated in existing circumstances includes references to conduct that is illustrative of a type of conduct that should be so emulated. For example, if it was reasonable to expect members of the public to infer from a statement glorifying the bomb attacks on the London Underground on 7 July 2005 that what should be emulated is action causing severe disruption to London's transport network, this will be caught.[56]

This explanation is problematic because the terms used to define glorification pose additional interpretation issues. For example, the words "praise" and "celebration" are unclear. It may be difficult to draw a distinction to actions that either do or do not praise something. Furthermore, the determination of what constitutes praise is highly subjective and is even more ambiguous than the term it seeks to describe. Further complications arise when the note explains that the statement would be "illustrative...of conduct...that should be emulated." This suggests that glorification could only be seen as such if the conduct were to be such that suggest the public should engage in whatever activity the statement advocates. Again, this type of explanation leads to subjective decision making on how a statement should be perceived by others.

The United Kingdom's anti-terror legislation has given Government increasing power over the years. An increase in the threat of terrorism has caused this. Interestingly, however, the power of Parliament to make judgments on individuals' actions has not led to a corresponding increase in challenges made by those who believe their free exercise rights have been abridged. A look into one of these rare challenges will be seen in Part III.

---

[55] Id.

[56] See Terrorism Act, 2006, c. 11, §§ 1, 3, supra note 52. The excerpt here is from the explanatory notes, available at http://www.legislation.gov.uk/ukpga/2006/11/section/1/enacted?view=interweave

B. Israel

Israel as a nation has been under constant threats of terrorism since gaining independence in 1948.[57] In an effort to both procure safety as well as react to an "international terror crisis," Israel passed the Prevention of Terror Ordinance in 1948 (PTO).[58] The crisis emerged out of an incident "when the United Nations sent the Swedish diplomat Count Folke Bernadotte to Israel to act as a mediator in the Israel-Palestine Conflict. Upon his arrival, a militant Israeli group believed Bernadotte to be pro-Arab, so they shot and killed him."[59] Only six days after the incident, the PTO was passed in response to the growing criticisms toward Israeli government.

The PTO sets forth standards for determining if a terrorist organization exists and allows government to act against those deemed to be terrorists. A terrorist organization is defined as "a body of persons resorting in its activities to acts of violence calculated to cause death or injury to a person or threats of such acts of violence."[60] This broad definition was necessary because Israel was both under scrutiny at the time of the PTO's passage as well as in an ongoing state of emergency which has continued to the present day. The PTO establishes categories for different acts of terror, and allows government to liberally prosecute suspected terrorists.

The PTO was amended in 1980, 1986, and 1993.[61] It has been suggested that "the amendments to the PTO liberalized its provisions and reflected Israel's intent to uphold democratic principles of freedom."[62] For example, the 1980 amendment allowed for individuals to be tried as civilians as opposed to in military courts, which was mandated by the original

---

[57] Eunice G. Buhler, The Israeli Prevention of Terrorism Ordinance and its Impact on the Quality of Democracy, Stan. J. Int'l. Relations (2010), available at http://www.stanford.edu/group/sjir/pdf/Israel_11.2.pdf.
[58] Id. at 59.
[59] Id.
[60] Id.
[61] Id.
[62] Id.

version. Thus, the PTO has attempted to strike a balance between national security and individual freedoms. A further examination of particular provisions will be considered later.

Within the last few years, Israel has created new laws to combat terrorism. The reasoning behind new legislation was that the Prevention of Terror Ordinance did not by itself account for all of the laws which government needed to pursue terrorists. For example, government "ha[s] often used provisions of the criminal code and administrative measures, such as the Defense (Emergency) Regulations of 1945, the Incarceration of Unlawful Combatants Law 5762-2002, and the Criminal Procedure (Detainee Suspected of Security Offense) (Temporary Order) Law 2006.[63] However, those laws did not "clearly define what constitutes an act of terrorism."[64]

In an effort to create clearer guidelines and to "consolidate and coordinate all the relevant legislation in one comprehensive bill", the Ministry of Justice published a Draft Bill on April 21, 2010.[65] Drafters recognized the need to "...act effectively against the threats posed by terrorists, on one hand, and...preserve and secure the values of democracy and human rights, on the other hand."[66] While the goals of the bill were similar to that of the PTO, the provisions differed. For example, the new bill "offers a very broad definition of 'terrorist organization.' A terrorist organization is defined as "a group of people who act to execute an act of terrorism or in order to enable or promote the execution of an act of terrorism."[67] Thus, individuals may be prosecuted simply for 'promoting' terrorism, although they may not be terrorists themselves. The reasoning behind this is that "auxiliary organizations," while not explicitly partaking in terrorist activity, still may supply terrorist organizations with money and advance the terrorists' agenda

---

[63] New Comprehensive Counter-terrorism Memorandum Bill, available at http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-17/new-comprehensive-counter-terrorism-memorandum-bill.
[64] Id.
[65] Id.
[66] Id.
[67] Id.

indirectly.[68] The bill also "creates a rebuttable presumption, which places the burden of proof on a person that was once a member of a terrorist organization to show that his or her participation in the organization's activities has terminated."

The "Counter-Terrorism Bill" was published on July 27, 2011. Then, on August 3, 2011, "the bill passed its first reading in the Knesset," which is the legislative branch. This year, on June 9, the Ministerial Committee on Legislation applied the "continuation procedure" to the bill.[69] This means that although "all of the necessary legislative steps to pass the bill into law" had not been satisfied, the bill "will proceed to the Knesset's Constitution, Law, and Justice Committee for approval of the final wording..."

In comparison to the anti-terror legislation trends of the United Kingdom, Israel's legislation has been somewhat similar. Although the United Kingdom has not been under a constant state of emergency as Israel, both nations have had the need for anti-terrorism legislation. Both nations have had recent enactments which have broadened the scope of their respective government's ability to criminalize terrorism. In both cases, this was done by way of including broad definitions for what constitutes terrorist activity. The effect of broadly defined provisions will be explored later. For now, this article will turn to the United States' recent anti-terror enactments.

---

[68] Id.

[69] Update: Ministerial Committee on Legislation Approves Comprehensive Counter-Terrorism Bill, available at http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-54/update-ministerial-committee-on-legislation-approves-comprehensive-counter-terrorism-bill

C. The United States

Like Israel, the United States has had the threat of terrorism looming since its independence.[70] Unlike Israel, however, the United States has recently had to enact legislation in response to direct terror attacks. The September 11th attacks led to the swift passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, commonly referred to as the Patriot Act.[71] The Patriot Act, passed only six weeks after 9/11, altered "more than fifteen different U.S. statutes in an attempt to enhance national security."[72] Since its passage, the Act has been highly criticized due to the wide range of power it grants to government in combating terrorism.

One of the controversial provisions of the Patriot Act is Section 203, which allows for "cooperation between law enforcement and intelligence agencies" by allowing for the sharing of "foreign intelligence information."[73] This information can be obtained through surveillance methods such as wiretapping an individual's telephone or computer and tracking his or her conversations.[74] While these issues raise mostly privacy concerns, they are worth noting because of the impact the Patriot Act had on courts. Section 206 of the Patriot Act "lower[s] [the] standard of proof necessary for obtaining warrants for the collection of foreign intelligence information."[75] Furthermore, it removes the "due process restrictions that limit law enforcement" and "eliminate[s] the requirement that law enforcement obtain a separate order for monitoring

---

[70] John T. Soma et. al., Balance of Privacy vs. Security: A Historical Perspective of the Usa Patriot Act, 31 RUTGERS COMPUTER & TECH. L.J. 285, 287 (2005)

[71] This section will focus only on the Patriot Act because it is the central enactment which has arguably caused free speech and free exercise of religion rights to be abridged. Some of the other enactments, such as AEDPA, raise other concerns that can be left for another discussion.

[72] Balance of Privacy vs. Security: A Historical Perspective of the Usa Patriot Act, supra note 71 at 307.

[73] See PATRIOT Act, § 203(b) and (d). "Foreign intelligence information" is defined as "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons or international terrorist activities."

[74] Balance of Privacy vs. Security: A Historical Perspective of the Usa Patriot Act, supra note 71.

[75] Id. at 305.

each communication device..."[76] A court's ability to make determinations is arguably compromised through these and other provisions of the Patriot Act. This will be a focus of discussion in the Recommendations section later on.

The Patriot Act has also been highly scrutinized for the effects it has had on free speech and the free exercise of religion. While there are no sections of the Patriot Act that limit these rights "per se", "the exercise of the Islamic faith" is arguably abridged.[77] Section 311 of the Patriot Act allows "governs the treatment of organizations, including charities, which are found to have 'laundered money' for the material support of terrorism by the Secretary of the Treasury."[78] Challenges to the Patriot Act have been made by Muslim-Americans who have argued that their free exercise of religion rights were abridged when being barred from "the act of almsgiving" because "charity is one of the Five Pillars of the Islamic faith."[79] These challenges have been unsuccessful, as government has passed a strict scrutiny analysis each time.[80] This standard will be reviewed once again later on. For now, it is worth noting that courts have been largely deferential when considering the validity of the labeling of a terrorist organization.

To this point, several anti-terror enactments have been considered. It is clear that each of the nations examined have had to deal with the threat of terrorism. The United Kingdom, in terms of sheer numbers, has enacted the greatest amount of legislation that arguably burdens free speech and free religion rights. Interestingly, however, the next section will reveal that there have been greater amounts of challenges to these rights in Israel and the United States.

---

[76] Id. at 311.
[77] Liberty or Safety: Implications of the USA Patriot Act and the U.K.'s Anti-Terror Laws on Freedom of Expression and Free Exercise of Religion, supra note 6.
[78] Id., citing USA PATRIOT Act, § 311.The material support definition will be considered in greater detail when examining a case considering the provision.
[79] Id. at 878.
[80] Id.

III. A LOOK INTO THE EFFECT ANTI-TERROR LEGISLATION HAS HAD ON FREE SPEECH AND FREE EXERCISE OF RELIGION RIGHTS IN THE 3 NATIONS

It is undisputed that while legislation may be passed, it does not necessarily meet constitutional muster. Therefore, any enactment is capable of being deemed in violation of a nation's laws. Thus far, this article has suggested that anti-terror legislation is often reactionary in nature and tends to be passed soon after particular terror threats. This Part first traces the development of free speech and free exercise of religion rights in the United Kingdom, Israel, and the United States. This section then explores crucial cases in which the three nations' judiciary has had to determine if the anti-terror legislation in question had gone too far and violated said rights.

A. The United Kingdom

The United Kingdom does not have a written constitution. Instead, its laws are derived from other sources. The U.K. is a "signatory" to the European Convention on Human Rights.[81] The nation "passed the Human Rights Act of 1988, which incorporates the main rights of the ECHR into British law."[82] These rights include free speech and the free exercise of religion. Specifically, Article 9 states that "[e]veryone has the right to freedom of thought, conscience and religion."[83] Article 10 states that "[e]veryone has the right to freedom of expression."[84] However, unlike the United States, Article 10 contains an exception which indicates that the rights "may be subject to such formalities, conditions, restrictions or penalties as are prescribed

---

[81] Liberty or Safety: Implications of the USA Patriot Act and the U.K.'s Anti-Terror Laws on Freedom of Expression and Free Exercise of Religion, supra note 6 at 881.
[82] Id.
[83] Id., quoting European Convention on Human Rights, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf
[84] Id.

by law and are necessary in a democratic society..."[85] One such restriction arguably occurred in a case where the Court almost completely excludes a freedom of expression problem that would leave the speaker unable to speak at all.

Portions of the Terrorism Act 2000 remained even after later legislation was passed. Police were still allowed to conduct stops and searches upon reasonable suspicion that an individual may have some connection to terrorism. This ability of law enforcement has often been challenged by those whose liberty rights have arguably been violated. One such challenge was made by two individuals who were at the scene of a protest in September 2003.[86] Mr. Gillan, a PhD student, "came to protest peacefully against an arms fair..."[87] Gillan, who was on his bicycle, was stopped by two officers.[88] The officers "searched him and his rucksack and found nothing incriminating."[89] The stop and search, which lasted twenty minutes, was justified under Section 44 of the 2000 Act.[90] That Section, states, in part, that "[a]n authorisation under this subsection authorises any constable in uniform to stop a pedestrian in an area or at a place specified in the authorisation and to search—(a) the pedestrian; (b) anything carried by him."[91] Ms. Quinton, the second appellant in the case, was a journalist who came to London to witness and film the same protest Mr. Gillan was attending. She too, was stopped and searched, even after showing her press pass. Ms. Quinton claimed that the entire incident was half an hour long.[92]

The appellants argued that the Act violated four sections of the European Convention on Human Rights. This included Article 5, which, in part, states that "[e]veryone has the right to

---

[85] Id.
[86] R v. Commissioner of Police for the Metropolis and another, [2006] UKHL 12.
[87] Id.
[88] Id.
[89] Id.
[90] Id.
[91] Id.
[92] Id.

liberty and security of the person."[93] The appellants argued that their liberty rights were violated when stopped and searched.[94] The Court disagreed, and reasoned "the procedure will ordinarily be relatively brief. The person stopped will not be arrested, handcuffed, confined or removed to any different place. I do not think, in the absence of special circumstances, such a person should be regarded as being detained in the sense of confined or kept in custody, but more properly of being detained in the sense of kept from proceeding or kept waiting."[95]

This is a case where the court failed to recognize that the procedure was essentially muting the speaker. Here, those who were stopped and searched chose to attend a protest. Their attendance at the protest was a pre-requisite, in a sense, for being stopped. Had these individuals not been at the protest, law enforcement arguably would not have stopped them. Thus, by being stopped, these individuals' freedom of speech was obstructed for the duration of the stop. Normally, an issue here would not be raised, as public safety arguably trumps that of an individual being unable to speak for a short period of time. However, these individuals were stopped for an extended period of time. This prevented them from contributing to the protest. Thus, their choice to express themselves was directly impacted by the stop and search procedure. The Court, in discussing this issue for no more than a few sentences, stated that even if an individual's free expression rights were violated, the circumstance would be permissible because of some other provision of the law. The Court failed to address these free speech concerns because the appellants inadequately raised the issue.

---

[93] Id.
[94] Id.
[95] Id.

B. Israel

Like the United Kingdom, Israel does not have a written constitution. Instead, its law is guided by the Basic Laws, common law, and case law. Courts have recognized free speech and free exercise of religion rights to exist through the Basic Law: Human Dignity and Liberty. This law serves to "protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state."[96]

With the Counter Terrorism Bill only recently being passed, the cases looked at in this section relate to claims raised by those challenging the Prevention of Terror Ordinance. The first case involved Azmi Bashara, who was a member of the Knesset.[97] Bashara "made political speeches at public gatherings...that praised the violent terrorist group Hezbollah and challenged the right of Israel to exist as a state."[98] As a member of the government, Bashara received immunity from being charged with crimes for his speech. However, this immunity was removed by the Knesset and Bashara was prosecuted. The Israeli Supreme Court, after an extended review, "restored the candidacy of Bashara in the legislature."[99] Although "the court did not issue an opinion," its determination preserved Bashara's free speech rights.[100] The next two cases more explicitly describe the court's decision making process.

The next case involves Yousef Jabrin, a journalist, who "published articles in Arabic newspapers that included expressions of praise and sympathy for the throwing of Molotov

---

[96] Basic Law: Human Dignity and Liberty, available at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm
[97] The Israeli Prevention of Terrorism Ordinance and its Impact on the Quality of Democracy, supra note 58.
[98] Id.
[99] Id.
[100] Id.

cocktails by Palestinians during the first intifada."[101] Jabrin was prosecuted under section 4(a) of the PTO, which states, in part:

> In order to find the publisher guilty of the offense . . . the court need not be convinced that the expressions of praise, sympathy, or encouragement of acts of violence . . . were likely to lead to acts of violence that would cause the death or injury of a person. It is sufficient that acts of violence, that the publisher praised, expressed sympathy for, or encouraged, are of the sort that are likely to cause one of the said results.

This section of the PTO is problematic for two distinct reasons. First, it does not set forth any test that the Court should consider in making its determination. The provision is especially subjective when considering the language "likely to cause one of said results." Second, Section 4(a) also questionably punishes the speaker for an act that may lead to no actual detriment to society.

After initial consideration, the Israeli Supreme Court upheld the lower court's conviction of Jabrin.[102] The Supreme Court then held an additional hearing and reversed its previous decision, acquitting Jabrin. Because the Court "does not have a general power to strike down unconstitutional statutes that had been enacted prior to the Basic Law," the court was left to rule "by way of interpretation."[103] Thus, the Court held that the PTO's "broad language...should have been narrowly construed." [104] Without the power of judicial review, this case demonstrates a deficiency in the Israeli judiciary system.

The final case involved Binyamin Kahanae, the head member of a political party seeking to be elected.[105] Kahanae created a pamphlet which expressed religious beliefs that arguably violated Israel's sedition laws. The pamphlet stated the following:

> [W]hy is it that every time a Jew is killed we shell Lebanon and not the hostile Arab villages within the State of Israel? For every attack in Israel-- shell an Arab village, a nest

---

[101] Miriam Gur-Arye, Can Freedom of Expression Survive Social Trauma: The Israeli Experience, 13 Duke J. Comp. & Int'l L. 155, 166 (2003).
[102] Id.
[103] Id. at 167.
[104] Id.
[105] Id. at 168.

> of murderers in the State of Israel! Only Kahanae has the courage to tell the truth! Give power to Kahanae, he will take care of them.[106]

While this case did not deal with the PTO, the Court's ability to resolve the matter was again hindered by the laws in place. The sedition law did not require any impact that the act in question had to have on government. Thus, the trial court held that "we have no choice but to add another element, which is not expressly stated in the provisions of the law. [The additional element] is that those seditious acts . . . be acts that have the potential to endanger public peace in a manner that involves endangering the proper functioning of government."[107] The Court's decision to interpret the statute in a way where it arguably deviated from the legislative intent was highly unusual here. A court's legitimacy may become questioned if the court chooses to act on its own and provide additional elements to an existing law. Again, this occurred because the Court was unable to deem the sedition laws unconstitutional. The power to do so would have simplified the role of the Court and would have led to the same result.

The Israeli courts have tended to be very protective of individuals' rights. Because religion is an essential element to the nation, courts are hesitant to prevent people from expressing and following their beliefs. Unlike the United Kingdom, Israel's laws do not contain an explicit exception where burdening these rights is allowable. Thus, there would have to be a showing that the conduct in question would actually lead to some harm.

C. The United States

The United States has a written Constitution which grants free speech and the free exercise of religion in the form of a negative right. Thus, these are fundamental rights which may not be burdened unless government can prove the legislation in question is the least restrictive

---

[106] Id.
[107] Id.

means of advancing a compelling governmental interest. This strict scrutiny standard is applied in the cases discussed in this section.

In Farrakhan v. Reagan, a United States District Court considered the constitutionality of an executive order made by President Ronald Regan.[108] The order "impose[d] wide-ranging and comprehensive economic sanctions against Libya...halt[ing] virtually all economic intercourse with Libya."[109] Plaintiff Muhammad Mosque, Inc., challenged the order by making a free exercise claim. Muhammad Mosque, Inc. "received a $5 million loan from the Islamic Call Society, an agency of the Libyan government." [110]After the executive order was implemented, the plaintiff was unable to repay this loan. The plaintiff argued that "its only dealings with the Society have been religious in nature."[111] Furthermore, one of the plaintiff's religious beliefs included the "repay[ment] [of] all loans in a timely manner and preclu[sion] of the payment of interest."[112]

The Court in Farrakhan held that "the Free Exercise Clause does not mandate that a religious organization be allowed to transmit money to foreign governments during a national emergency."[113] Interestingly, the Court's analysis referenced strict scrutiny but did not explain how the government met that standard in the case. The Court did not find that Muhammad Mosque's "interest in the free exercise of its religious principles outweighs the legitimate and compelling security interests of the United States."[114] The Court did not reference the narrowly tailored standard that government must meet until resolving the plaintiff's subsequent Free

[108] Farrakhan v. Reagan, 669 F. Supp. 506, (D.D.C. 1987).
[109] Id. at 508.
[110] Id.
[111] Id. at 509.
[112] Id.
[113] Id. at 511.
[114] Id. at 51

Speech claims. The Court itself stated that its holding was "defer[ential] to the President."[115] This contradicts the rigorous inquiry that the strict scrutiny standard requires.

In Holder v. Humanitarian Law Project, plaintiffs challenged the provision of the Patriot Act, which criminalized those providing "material support or resources to certain foreign organizations that engage in terrorist activity."[116] Material support is statutorily defined to include "among other things, speech, in the form of "expert advice," "training," "service," and "personnel."[117] Here, those involved "advocated only nonviolent, lawful ends:"[118]

> The plaintiffs principally sought to advocate for human rights to and with the Kurdistan Workers' Party, a Kurdish organization in Turkey that the Secretary of State had designated as a "foreign terrorist organization." They did not intend to further the organization's illegal ends; indeed they sought to dissuade it from violence, and to urge it to pursue lawful ends through peaceful means.[119]

However, the Court did not agree, and "found for the first time in its history" that speech, even if nonviolent in nature, can be impermissible if it "unintentionally assist[s] a third party in criminal wrongdoing."

Although the Court in Holder acknowledges that in other contexts, the provision of Patriot Act being challenged may still be found unconstitutional, it gave government increasing power to restrain speech in contexts where the speech itself is not harmful. Scholars have pointed out that "the result calls into question the continuing validity of the Brandenburg incitement

---

[115] Id.
[116] David Cole, The First Amendment's Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine, 6 HARV. L. & POL'Y REV. 147 (2012), citing Holder v. Humanitarian Law Project, 561 U.S. 1, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010)
[117] Id., quoting 18 USC §2339b.
[118] Id. at 148
[119] Id.

test."[120] In Brandenburg, the governing standard was whether the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[121] In Holder, the speech was not incitement but mere advocacy. Taken out of context, the speech was completely legal. Allowing Government undefined powers in regulating free speech is a concern that will be addressed in the Recommendations section of this article.

IV. CONCLUSION / RECOMMENDATIONS

This section suggests the measures a nation can take to satisfy both security and individual freedom concerns when enacting anti-terror legislation. First, it is recommended that a nation have a written constitution. The purpose of a written constitution is so that the branches of government in addition to the people are explicitly aware of the rights they have. It is further recommended that these rights include free speech and the free exercise of religion. In the case of the United Kingdom, a lack of a written constitution arguably grants government additional power in making laws that impact these rights. Israel's lack of a constitution is less problematic because laws were created to grant individuals said rights. Free speech and free exercise of religion should be fundamental rights that a government can only restrict through legislation if certain standards are met.

The starting point for any discussion on legislation is whether the legislation is essential to a nation's functional purposes. With anti-terror legislation, there is little doubt that the need exists. The issue then becomes to what extent legislation should protect national security. It seems obvious to suggest that because national security is at the height of a nation's concern,

[120] Id. at 149
[121] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

legislation should be created to promote this interest as expansively as possible. However, this article has identified and described several situations where anti-terror enactments have intruded into individuals' free exercise rights. Thus, a balance must be stricken in order to achieve laws that protect both the interests of national security as well as each individual's unique free speech and free religion rights.

It is recommended that a particular enactment be tailored to a nation's present needs and concerns. This article has shown that in many instances, anti-terror legislation is reactionary and in response to recent terrorist attacks experienced in the nation itself or in an allied nation. Next, it is essential that legislators choose careful language in setting forth how Government can proceed in given circumstances. Of course, there can be no perfect way of going about this. However, there are certainly ways which are more optimal than others. For example, the United Kingdom's choice of the word "glorification" was extremely unclear. Part of the issue was that the notes explaining the definition of "glorification" included words such as "praise" and "celebration," which is language that is vaguer than the word it is defining. Therefore, in choosing language, legislators should seek to do either one of two things: (1) choose language that has its own independent significance or (2) provide reasoning as to how certain provisions were intended on being construed.

As for the first suggestion, it seems simple to suggest that those making the law need to choose better language. However, the point here is that certain words do not adequately explain conduct that is or is not prohibited. Words should be carefully selected so that the language can only be interpreted in certain ways. The better alternative may be to incorporate relevant portions of legislative history into the legislation itself. Whether by offering an explanatory note or otherwise, those enacting the laws should be able to describe situations where the law would be

applicable. For instance, if the law seeks to criminalize some type of speech, certain examples of the illegal speech should be suggested.

It is not always possible for legislators to create laws that precisely balance security and freedom. Therefore, in most cases, the judicial branch will be left with the responsibility to ensuring this balance. This article has considered judicial decisions in three nations. In a United States case, the Supreme Court restricted the advocacy of ideas only because those whom the ideas where directed toward had been labeled as a terrorist organization. In an Israeli case, the Court interpreted a law after adding its own "additional element" to the law. There, the individual's freedoms were protected. Finally, in the United Kingdom, the court largely neglected free speech concerns and upheld a conviction where the speaker was detained for an extended period of time by law enforcement officials. Taking these cases together, it is recommended that the following criteria be followed by courts.

In the United States, courts use a strict scrutiny standard when considering legislation that abridges fundamental rights. A similar standard is recommended here. The analysis itself should be structured so that government has the burden of proving that it both has a compelling interest and that the method its chosen is narrowly tailored. However, unlike the United States, deference should not be granted to government when conducting a rigorous analysis.

First, national security will likely always be considered a compelling governmental interest. Next, however, courts should be less reluctant to accept legislation as the least restrictive means in which government's compelling interests are achieved. This part of the strict scrutiny test should require a court to consider all of the other possible alternatives for achieving government's interest. Government should be required to explain that it considered other alternatives, but those alternatives would have been even more restrictive than the one selected.

Finally, it is important to suggest that courts should also have the ability to declare any statute unconstitutional. If courts do not have this power, government will still be allowed to act with the premise that the law is still applicable. The Israeli case illustrates a situation where the Court had to improvise and base its findings on an interpretation that legislators would not have agreed upon. The case would have been much simpler if the Court had the ability to deem the entire law unconstitutional.

While this concludes the recommendations, this article finally suggests that a further discussion should occur when additional case law becomes available on recent legislation in the United Kingdom, Israel, and the United States. As for the case law referred to in this paper, some conclusions can be made about anti-terror legislation and individual liberties in the three countries. First, the nation most restrictive of individual liberties is the United Kingdom. With several enactments during the past few decades, national security has been a major concern. Furthermore, the language chosen by legislators was specifically designed to be broadly interpreted. Meanwhile, the research in this article suggests that Israel has been most protective of individual rights. This may be so because of the country's religious origins and emphasis of freedoms through its Basic Laws. Finally, while the First Amendment in the United States is often cited by plaintiffs challenging anti-terror laws, courts have been largely deferential to government, often failing to fully analyze legislation under the strict scrutiny standard the Court itself had previously set forth. In each nation, it is clear that there has been both a recent increase in legislation as well as a corresponding increase in government's ability to prosecute terrorists and terrorist organizations. This trend is likely to continue in the foreseeable future.