

From Precaution to Prejudice: Mistakes in Counter Terrorism

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The area of counter terrorism is littered with mistakes, be these high profile mistakes which have dire consequences (the fatal shooting of John Charles de Menezes) or more mundane errors (such as incorrect detention/questioning of those suspected of terrorism). In this chapter, we seek to disaggregate the mistakes, errors and miscalculations around counter terrorism policy. We begin by noting the particular difficulties and complications in assessing when “something goes wrong” in terms of counter terrorism. There are particular issues around uncertainty in terms of counter terrorism. This uncertainty gives precautionary logics a prominent place in counter terrorism, such that the absence of knowledge about terrorist attacks is often seen to be no barrier to pursuing counter terrorism measures. In such a situation of uncertainty, does the absence of a terrorist attack mean that counter terrorism has successfully averted an attack? Or was an attack not likely/never planned? How do we calculate the impacts, or costs and benefits, of counter terrorism in more subjective terms? Fear is an important dynamic in terrorism, and the extent to which public opinion is broadly supportive of counter terrorism raises important issues concerning their subjective effectiveness (although, as the chapter also notes, certain sub-sections of the population, specifically ethnic minorities and Muslims, frequently do not find counter terrorism measures reassuring and fear assuaging).

Moving to consider specific aspects of counter terrorism, in examples drawn from British counter terrorism policing and measures, there are, we argue, three different types of “mistakes” in counter terrorism policy. Firstly, there is what we might call “genuine” errors, where misinformation or lack of knowledge results in mistaken outcomes. A second form of mistake arises from the misapplication of policy – either in a context or way in which it was not originally designed, or simply used inappropriately. A third form of error lies around unintended consequences, which can be understood as effects other than those which the intervention aimed at. In so doing, we will also consider the effects of such mistakes, in the form of “suspect communities” and the ways in which high profile mistakes come to shape perceptions of counter terrorism practices. We conclude the chapter by arguing that such mistakes are endemic to counter terrorism, and not aberrations which result from faulty application of tools/techniques or individual errors. Given the inherent uncertainty and the seeming decision to prioritise precautionary logics, “mistakes” (in the tripartite sense listed above) are inevitable. Thus, in seeking to enhance security through precautionary logics, such interventions, perhaps understood as a kind of administrative exceptionalism, whilst potentially reducing the threat of terrorism, also inevitably destabilise and disrupt the security of some/others. The chapter concludes by considering some of the consequences of mistakes in counter terrorism. It suggests that high profile mistakes are doubly damaging for counter terrorism programmes, as they are frequently taken by wider populations not to represent aberrations from the norm (of good, effective, policy) but as illustrations of how things really are.

Mistakes in counter terrorism

A number of scholars around the literature on policy mistakes (and the associated language of failures, crises, fiascos and disasters) suggest the importance of disaggregating the idea of mistake or

failure. Bovens et al. (1998: 196) distinguishes between programme failures, where ‘a policy decision, plan or strategy that has been implemented, fails to have the desired impact on target populations, or even produces major unintended and unwanted effects’ and political failures which relate to ‘the way in which policies are perceived in the court of public opinion and the political arena’. This is similar to McConnell’s (2015) distinction between process, programme and politics in terms of mistakes, where the first is the means by which policy is arrived at, the second is the way it is implemented and the last the way the policy is interpreted or viewed. Both authors note that it is perfectly possible for failure in one area to coexist with success in another. Bovens et al. (1998: 198) note the paradox of ‘policies that entail major social costs or conspicuously fail to meet even modest performance standards and yet are not labelled a failure in the political arena’. McConnell (2015: 357) meanwhile explicitly identifies the creation of the Department of Homeland security as just such as policy.

There is a debate between rationalist and constructivist accounts of policy evaluation as to the objectivity (or subjectivity) in the ascription of mistakes and errors (Gray 1998; McConnell 2015). To some extent, we may wish to suggest that programme failures/mistakes, whilst not entirely objective, can *potentially* be assessed through appeal to objective factors (even if there is disagreement about the significance or meaning of this) whereas political failures/mistakes have a much greater degree of subjectivity around them. In this chapter, we mainly focus on programme mistakes, although we will offer some thoughts about the political mistakes/failures of counter terrorism towards the end of the chapter. We begin by noting the complexity and difficulty of finding viable indicators with which to assess the success or failure of counter terrorism measures. There are a number of factors, which make finding viable “objective” indicators of success or failure in counter terrorism difficult. These include lack of clarity as to what success or failure looks like, the invocation of precautionary logics and the almost tautological view of counter terrorism (the presence *and* absence of terrorist violence validates counter terrorism policy). This, we note, has led to problems for the literature on counter terrorism, to explore what is effective in counter terrorism – what “works”. Yet despite these problems, some assessments, particularly at a cost/benefit level, have been conducted that find counter-terrorism spending to be inefficient in the extreme. This suggests that counter terrorism *as a whole* (or at least the recent upsurges in spending and effort) might be considered a mistake, or at least a sub-optimum approach, as it fails to pass a common standard for evaluating policy.

Such objectivist accounts, though, fail to fully capture the issue of mistakes/failure in counter terrorism. For large swathes of the public, counter terrorism is not seen as mistaken and indeed, if there are seen to be mistakes it is frequently that measures do not go far enough. For instance, 67% of people in the UK felt that any British citizen fighting for Islamic State should have their British citizenship revoked, even if they had no other citizenship to fall back on (Holehouse 2014); a position in conflict with international law that the UK government did not pursue. Similarly, in 2008, 69% of the population supported increasing pre-charge detention for terrorist suspects to 42 days from 28 (Pantazis and Pemberton 2012); a measure that failed to find enough support in Parliament. Despite this apparent political success of counter terrorism programmes, there are high profile mistakes and failures in counter terrorism which dog governments, from misapplied laws, incorrect detentions and arrests to fatal mistakes such as the shooting of John Charles de Menezes. Beyond these high profile cases, there are reports and analysis which suggest both that policy is being misused, and in particular, that counter terrorism policy has unintended consequences. This latter issue is perhaps most prominently associated with the literature around suspect communities.

The broad, umbrella definition of mistakes which this volume adopts is the idea of mistakes as “something gone wrong”. Counter terrorism, as we shall see, is, if not unique, perhaps distinctively placed in terms of this criteria. This is because it is distinctively difficult to assess whether something

has gone wrong for two reasons. Firstly, counter terrorism frequently looks tautological. Karl Popper (2002 [1963]: 46) famously argued 'a Marxist could not open a newspaper without finding on every page confirming evidence for his interpretation of history' – so too for certain advocates of counter terrorism for whom the absence *and* presence of terrorist attacks constitutes justification for enhanced counter terrorism efforts. Thus, as Mueller and Stewart (2011) argue counterterrorism measures are impervious to criticism because the absence of attacks demonstrates their effectiveness, whilst new attacks demonstrate the need for even further measures. In other words, if counter terrorism measures correlate with less terrorism, they are seen to be working; if they correlate with increased levels of terrorism, more (not less) counter terrorism is seen to be the answer. In either situation, counter terrorism, like Popper's Marxist, is continually affirmed and validated as necessary and important.

A second reason that makes mistakes in counter terrorism (as "something gone wrong") hard(er) to point to is the increased (since 9/11) way in which counter terrorism is aligned with a certain analysis of risk and the precautionary principle. Aradau and van Munster trace the origin of the concept of precautionary risk to environmental politics, which holds that where the threat is great, uncertainty of knowledge should not be a barrier to action (Aradau and van Munster 2007: 102). They go on to note that the precautionary principle only applies to certain risks; namely, where there is scientific uncertainty and there is a possibility of serious, irreparable damage. Thus, many states designate terrorism as a (potentially) uncontrollable risk, which must be dealt with in a precautionary way. The invocation to action comes not from information, but from the lack of it or the uncertainty surrounding it. This reverses the traditional method of policymaking, where policy is made on the basis of what is known to be the case. Contemporary counter terrorism policies are often based on the opposite; they take the form that they do because of a lack of knowledge, and indeed, policy is seen to be necessary because of an absence of knowledge. As then British Home Secretary Jacqui Smith suggested in arguing for extending the period which terrorist suspects can be held without charge to 42 days, this extension was necessary not because of any "actual" or existing need, but rather because there was a 'potential risk' that a longer period of pre-charge detention would be necessary in the future (The Times 2007: 29). In this sense, policy is being proposed and made, not on the basis of what is necessary, or even perceived to be necessary, but rather on the basis of what might be needed at some undefined point in the future. Comments by Tony Blair in 2004 further illustrate this dynamic at work.

Let me give you an example. A short while ago... we received specific intelligence warning of a major attack on Heathrow. *To this day, we don't know if it was correct and we foiled it or if it was wrong...* We immediately heightened the police presence. At the time it was much criticised as political hype or an attempt to frighten the public.... But sit in my seat. Here is the intelligence... Do you ignore it? But, of course intelligence is precisely that: intelligence. It is not hard fact. It has its limitations... would you prefer us to act, even if it turns out to be wrong? Or not to act and hope it's OK? And suppose we don't act and the intelligence turns out to be right, how forgiving will people be? (BBC News 2004, emphasis added)

In this instance, Blair outlines an approach where policy is being guided by precautionary risk; it is uncertain if intervention or action is required, but action is taken just in case. Dick Cheney similarly argued, in the wake of 9/11 that 'if there is even a one per cent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response' (Susskind cited in de Linde and Kasse, 2015: 360).

The point here is that if policy is made on the basis of uncertainty and nothing happens – no bombing at Heathrow- was the policy a success or a failure? Was the information/intelligence wrong (and hence the action mistaken) or did the intervention thwart the terrorist group (and hence was

successful)? It might be argued that even if it was demonstrated that the risk was not there in the first place policy made on the basis that it was, would not necessarily be seen as a mistake (and certainly not by those who made the decision) because policy is made “*just in case*” not on what is or what is not. The logic of the precautionary principle means that policy is akin to insurance. Someone who buys insurance but does not claim does not (generally) think the buying of insurance a mistake. Policy made in accordance with the precautionary principle is not “wrong” if the event does not transpire – error is factored into a safety first process of decision making.

Thus, for these related reasons, the somewhat tautological picture of counter terrorism, and the way in which precautionary counter terrorism is based trying to prevent things happening, which may not even be happening, identifying errors and mistakes in counter terrorism policy is perhaps distinctively challenging. Yet, as we will argue, there are ways in which we can think about mistakes and errors in this charged and controversial policy area.

Counter terrorism – effective and value for money?

As mentioned above, one of the issues around counter terrorism is how do we know if it has worked? At its broadest level, counter terrorism is aiming at preventing things (terrorist attacks) happening. Yet at two levels, this presents challenges. If a terrorist attack did not happen, is this the result of counter terrorism measures or something else (e.g. a change of tactic or mind by the terrorist group). Similarly, if the terrorist attack did happen, is this a failing of counter terrorism or the dying twitches of a declining terrorist organisation (Spencer 2006: 186)? Or, even if we do think it is a failing of counter terrorism, which bit failed? The whole area of effectiveness of counter terrorism is deeply problematic, not least in terms of how we judge effectiveness. As van Dongen (2011: 359) argues, focussing solely on numbers of attacks could be problematic in a number of ways; terrorist groups on the wane might seek to increase their attacks to show their continued strength, but, as he notes ‘In this case, an increase in the numbers of attacks is certainly not a sign that a counterterrorism strategy is not working’ – indeed, it could suggest the opposite (see also Spencer 2006; Probst 2005). Also terrorism is, at heart, about the mobilisation of fear (Goodin 2006). This can be effectively achieved through a small number of attacks and terrorism is not effective simply by carrying out more and more attacks. Surveying a range of other potential measures including casualty figures, material damage, government popularity, economic wellbeing and arrest figures van Dongen (2011) argues that even if the rise or fall of these indicators could be considered “success” for counter terrorism (and he argues there are reasons to believe this is not straightforwardly the case), there remain two further problems. The first is the attribution problem – how do we know it is counter terrorism (or, even which aspect of counter terrorism) that is responsible for this specific outcome? Counter terrorism aims at creating non-events, that is, to stop things happening. Yet the absence of such things happening is also difficult to attribute to counter terrorism measures. Were they ever going to happen? Even if they were and did not happen, can we attribute this to counter terrorism measures, or to the wealth of “other” factors that could mean any given event doesn’t take place on a given day. A further issue is, mirroring McConnell’s (2015) distinction between process, programme and policy, the distinction between operational and strategic success. Van Dongen (2011) argues that it is possible for counter terrorism measures to be operationally successful, but to be strategic failures. For example the Falls Road Curfew in Northern Ireland in 1970 recovered large amounts of weaponry but was a disaster in terms of the British army’s relationship with the Republican/Catholic community in Northern Ireland (Dixon 2009). Finally, van Dongen (2011) also argues that even if we overcome those issues, we must also be attentive to the potential problem of substitution effects whereby even if counter terrorism is effective in reducing harm, violence or some other form of metric, what happens if this simply shifts the violence into a different geographic area (another country, for example) or into a different realm (criminality and other forms of aggression).

Given these problems, it is perhaps not too surprising to observe the longstanding weakness of terrorism studies in evaluating what works in counter terrorism. A number of studies have looked with something close to despair at the existing literature, finding that there is very little rigorous research on what works in counter terrorism. Research published in 2006 (Lum et al. 2006) found that out of 20,000 pieces on terrorism, only 21 studies conducted rigorous analysis of outcomes of counter terrorism strategies. Later studies broadly repeat this finding. Um and Psoiu (2015) suggest that despite an increase in the number of studies which examine effectiveness in counter terrorism, detailed knowledge of whether it works is still in short supply. As identified above, there remain some inherent problems. Beyond the measurement issues, above, there is also, as Sageman (2014) identified, the problem of data access for academics and researchers in this sensitive area.

Mueller and Stewart's (2011) recent work represents one of the main attempts to gain some kind of handle on whether counter terrorism measures can be considered effective (or successes/failures), through cost/benefit analysis. They note the almost complete absence of this kind of governmental assessment of counter terrorism measures, summed up by a Department for Homeland Security economist who stated 'We really don't know a whole lot about the overall costs and benefits of homeland security' (cited in Mueller and Stewart 2011: 3). In order to supplant this, Mueller and Stewart conduct what they refer to as a 'standard analytic risk management' analysis to try to get to some sort of sense of whether counter terrorism is worth the money.

Their broad conclusions are that counter terrorism is 'wildly inefficient' (Mueller and Stewart 2011: 4), when examined through a cost/benefit model. The costs are huge; they estimate that the US government was spending an *additional* (that is on top of counter terrorism spending prior to 9/11) \$75 billion per year on homeland security/counter terrorism. This, they also point out is not the entirety of the cost of counter terrorism, as it does not include figures for private sector expenditure, nor the opportunity costs of implementing such measures (for example it is estimated that if each air passenger in the US spends half an hour extra in security, that the "cost" of this lost time is \$15 billion (Congleton, in Spencer 2006: 187)). They take this expenditure and model it against terrorist attacks of different sizes and severities. Their conclusions are that terrorism would have to be on a scale approaching the unimaginable for the spending on counter terrorism to pass muster for cost/benefit analysis. For attacks like 7/7, (which they "cost" at \$5 billion), their analysis suggests that there would have to be 30 per year to reach a point of cost effectiveness (Mueller and Stewart 2011: 85) and for attacks like 9/11 (which are estimated to have cost \$200 billion) there would need to be more than one a year. They go on to conduct similar analysis for the UK, where they find there would need to be two "7/7"s per year to achieve cost effectiveness (Mueller and Stewart 2011: 91) and for Australia and Canada, where there would need to be one "7/7" size attack every 1-2 years (Mueller and Stewart 2011: 92). They argue that counter terrorism only approaches cost effectiveness if one makes apocalyptic assumptions about how much terrorist violence is possible/likely (such as the detonation of nuclear weapons in civilian areas) and the harm it would wreak. Considering 'far more likely' attack scenarios of 'property damage and death or injury to a few people and inflicting losses of \$100 million', Mueller and Stewart (2011: 92) argue that 'the lack of cost-effectiveness reaches ridiculous proportions':

In this case, 1,667 such attacks would need to be thwarted annually in the United States by enhanced homeland security expenditures for them to be cost effective. Under the same conditions, enhanced homeland security expenditures would be cost-effective only if they could plausibly be held to have thwarted 111 terrorist attacks each year in the United Kingdom, 42 in Canada, and 29 in Australia. Attack frequencies of that magnitude are scarcely found anywhere outside war zones like Iraq or Afghanistan (Mueller and Stewart 2011: 92-3).

This is, of course, only one way of approaching the issue. It might be argued that calculating the “costs” of terrorist attacks goes beyond the immediate material damage in both material and subjective ways. In terms of the former, for example, how do we “price in” the broader economic effects of a downturn in the airline industry which stems from a terrorist attack (see Spencer 2006)? In terms of subjective factors, how do we assess the impact of counter terrorism measures on individual and societal fear, which, as noted above, is a key aspect of terrorism (see Sunstein 2003; Spencer 2006)? Whilst for reasons noted above (the difficulty in measuring counter terrorism), we might not consider cost/benefit analysis as the best/most appropriate/only way of evaluating counter terrorism, assessing policy in such a way is routine in almost all other areas, except counter terrorism. Mueller and Stewart’s work suggests that under conventional policy evaluation techniques, the vast increases in counter terrorism expenditure which followed 9/11 look distinctively like failures or mistakes.

Despite these concerns, counter-terrorism policies and initiatives have remained bracketed from the strictures of value-for-money measures and cost-benefit analyses that non-security policy domains must typically embed in their policy evaluation cycle. Precaution is tacitly accepted as an appropriate risk-reducing means of managing terror threats to the state (Guiora et al. 2015; see also Sunstein 2005; Goldsmith 2007). As a consequence, counter terrorism policy broadly enjoys a kind of “administrative exceptionalism” for its special precautionary value. Administrative exceptionalism, we hold, involves the suspension of core precepts of policy-making or policy implementation, variously including the avoidance of managerialism-style target-setting, the weakening or wholesale dismantling of legal safeguards, the commission of drastic powers (with a widened discretion in application of those powers), immunity from legal or professional checks and balances, and exemption from standard policy standards or benchmarking. How precaution manifests through exceptionalism is instructive to our understanding of how ‘mistakes’ are tolerated in counter terrorism. It is to the analysis of these that the chapter now turns.

Mistakes, misapplication and unintended consequences in counter-terrorism programmes

Many policing and legislative approaches to counter-terrorism have adopted a precautionary model (Bronitt and McSherry 2010: 982-983).. While the precautionary principle has been applied to motivate legislative action to protect the environment, its (mis)application (whilst not perhaps exclusive to the field of terrorism) has the potential to justify laws which undermine fundamental rights, are ineffective, or worse still counterproductive (Bronitt and McSherry 2010). We see these precepts emerge across the spectrum of CT initiatives, linked to the rationale that the horrors of terrorism – as evidenced by 9/11 – are serious enough to require preventative action and because the potential consequences are so egregious, emergency, non-standard or *exceptional* action is therefore warranted (Legrand et al. 2015).

Mistaken... identity, interpretation, action

The first illustrative case is one of the most confronting instances of the risks and mistakes inherent to counter-terrorism policing. The death of Charles De Menezes in July 2005 in the midst of a London-wide counter-terrorism operation was subject to intense scrutiny from the public, media and, eventually, an independent enquiry: Stockwell 1. It is a case notable not only for the errors culminating in the tragic death of De Menezes, but for the circumstances that expose the contextual conditions that make such errors more likely. On the morning of Friday 22nd July 2005, Jean Charles De Menezes, a Brazilian national, left his home in London SW2 to travel to work. The day before, a group of four men - Muktar Ibrahim, Yassin Omar, Ramzi Mohammed, and Hussain Osman - had attempted to detonate four explosive devices on London transport system. Though unsuccessful,

they fled before they could be apprehended, prompting one of the largest manhunts in London's history. Unbeknown to De Menezes, he shared his address with one of the suspected attackers and the address had been placed under surveillance by security services. As he left his home, he was surveilled as he took a bus then boarded a tube at Stockwell. Under the incorrect impression that De Menezes was a suicide bomber, police officers approached and shot De Menezes dead without attempting an arrest.

Various operational failures in the circumstances that led to the death of De Menezes and overall, the Independent Police Complaints Commission (IPCC) found grave errors of judgment exercised in the operation:

In the context of the events of 7 July and 21 July when, respectively, there had been a successful detonation and an attempted detonation of bombs on buses it was a failure of the management of the operation to permit Mr DE MENEZES to get on the bus at TULSE HILL. If he had been a suicide bomber that event could have been catastrophic (emphasis in original).

A number of tactical failures were also identified in the operation – the poor positioning and coordination of the surveillance team, the failure to positively identify De Menezes, for example - but here we note the role played by the combination of exceptional circumstances and exceptional police powers that produced the eventual killing of De Menezes.

Available to the police services that day was an exceptional policy for armed officers, operating with legal approval, to tackle suicide bombers before they could detonate their explosives. Dubbed 'Kratos', the policy stipulated that suicide bombers could be shot dead – with shots aimed at the brain- without warning. The day of the manhunt for the failed bombers, special police operatives of the unit SO19 were 'fully briefed in relation to the possibility that they might have to intercept a suicide bomber' and they had been issued with special ammunition to use in enclosed spaces, such as those anticipated they would encounter in relation to suicide bombers. This policy was developed in response to the July 7th bombings which, just three weeks earlier, had killed 52 individuals on London transport services. Against this backdrop, the team involved in the De Menezes operation were primed with the exceptional resources and exceptional powers authorized by UK police authorities, and were actively engaged in exigent investigation to tackle a group seemingly intent on replicating the 7/7 attacks.

The error we highlight is the product of how SO19 interpreted the exceptional circumstances, and discretionary powers available to them. Specifically, in relation to the events leading the death of De Menezes, the IPCC found fault in the communication between the operation commander (Cressida Dick) and the SO19 officers in pursuit of De Menezes. At a critical point in the operation, when it seemed likely that De Menezes was one of the suspected suicide bombers and was heading towards London transport, Dick issued a crucial command to 'stop' De Menezes from entering the station and train. Yet the command to 'stop' De Menezes was interpreted by SO19 officers to mean the use of lethal force authorized by the Kratos policy. And so several officers intercepted De Menezes just after he boarded the train, and shot him several times without warning. The IPCC found the interpretation of the SO19 officers to lethally 'stop' De Menezes to be justified in the non-normal (or exceptional) circumstances, even though that was not the intent of the command:

I do not believe that the use of the word 'Stop' can be related to normal policing duties. With the mind set of the SO19 officers believing that a suicide bomber had entered the underground station, to receive such an order to stop him from DSO cannot be related to normal duties. (IPCC)

In the exceptional circumstances, the IPCC found, it was understandable that the everyday use of language to 'stop' would take on a different connotation, and lead the SO19 officers to believe that their exceptional powers had been authorised:

The order given by Commander Dick was to stop the suspect getting onto the underground station and subsequently the underground train. When interviewed she was asked to explain the word "Stop" and her response was that "Stop" is a common word in policing terms and it was meant as "stop and detain". (IPCC)

As one of the SO19 officers involved in the shooting observed that they had become collectively convinced of the imminent dangers posed by De Menezes and that at the time felt fully justified in using lethal force without warning: 'You don't shoot somebody five times if you think you might have made a mistake and may be able to arrest him'. (Evidence to IPCC).

The De Menezes case is thus one of exception: the powers, training and resources given to the policing agencies involved were exceptional insofar as they were geared to prevention of violence, rather than the apprehension and prosecution. The circumstances warranting the commission of the policing agency resources and powers too were exceptional- the prospect of an active suicide bomber in a metropolitan area was all too real after the attacks of July 7th. The erroneous, tragic outcome proceeded from the confluence of exceptional circumstances and powers.

Misapplication: Precautionary policing and 'Stop and search' counter terrorism powers

It is important to hold these claims about the preventative model to critical scrutiny and in this section we will explore the advent of counter-terrorism 'preventative' policing through an examination of section 44 of the *Terrorism Act 2000* (UK). Section 44 introduced wide powers of stop and search to prevent terrorism, which departed – again as an exception - from the usual model of police powers: in non-exigent circumstances a police officer could only detain and search an individual if she had reasonable suspicion or belief that that person was involved in committing an offence. Section 44 of the Terrorism Act excepted the need for reasonable suspicion: it stipulated that where a senior police officer believes that it '*expedient for the prevention of acts of terrorism*', he or she could designate whole areas in which any constable in uniform may stop and search a pedestrian or vehicle for '*articles of a kind which could be used in connection with terrorism*' without the need for reasonable suspicion of involvement in criminality. There were few effective checks on the use of the police powers under this Act to stop and search people and vehicles. The police officer was permitted discretion to stop and search a person subject to just two conditions; namely, that the power (a) may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, and (b) applies whether or not the constable has grounds for suspecting the presence of articles of that kind. The first condition is limiting: the power to stop and search without suspicion under sections 44. Before section 44, the police could only stop and search individuals if they had 'reasonable grounds' for suspicion of involvement in *specific* criminal behaviours and certain criteria were met. That was no longer necessary for section 44.

The exceptional nature of this preventive measure was instrumental in its eventual misapplication. The human rights watchdog, Liberty, pointed out section 44 powers were used against anti-war, anti-weapons and anti-capitalist protestors, and even anti-government protestors. Ministry of Justice statistics showed that in 2008 there was a three-fold increase in the use of the power, but few of those stopped were arrested for terrorism offences or indeed any offence. Statistics demonstrate that as little as 0.6% of stops and searches under section 44 in 2008/9 resulted in an arrest. Even more worryingly, the statistics also reveal that those of black or Asian ethnicity were many times more likely to be stopped than white individuals. 17.7% of the people stopped in

England and Wales were identified by the police as Asian, as against 4.7% of the population. 63.1% of those stopped and searched were identified as White, as against 91.3% of the population (Ministry of Justice 2009). As Liberty has noted in relation to these powers Black or Asian people were between 5 and 7 times more likely to be stopped under section 44 (Liberty 2009).

This data points to the conclusion that black and minority ethnic groups were heavily targeted by the misapplication of this power. Moreover, shortly after the ruling an internal review by the Office for Security and Counter Terrorism revealed that thousands of people have been illegally stopped and searched under section 44 of the *Terrorism Act*. The internal review uncovered 40 cases, between 2001 and 2008, where police forces across England and Wales misapplied the legislation. Errors included 35 occasions of forces seeking authorisations lasting longer than the maximum 28 days permitted under the law and a 2004 Metropolitan police operation in which 840 people were stopped even though the police did not get authorisation from a Government minister within 48 hours. It should be noted that more than 100,000 stops occurred in 2009/10. Crucially, *none of these searches resulted in a prosecution for a terrorism offence*, and only one in every 200 stops led to an arrest.

The section 44 case study suggests that the overuse of these powers against minorities may have stimulated home-grown disaffection in Muslim communities over the past decade. This example reveals that ‘unintended cost’ of new forms of preventative counterterrorism policing must be considered into any ‘cost-benefit’ analysis. Elevating stop-and-search to the plane of counterterrorism by excising key legal constraints had the effect of exceptionalising the application of the power and led to racial profiling without discernible national security benefits.

From precaution to prejudice: unintended consequences and suspect communities in counter terrorism policing

Foley offers a useful definition of successful counter terrorism. He argues that for counter terrorism to be successful it should keep track of and successfully detain and prosecute would-be terrorists, but ‘it must do all this without raising the political temperature in a way that could contribute to radicalization’ (Foley 2015: 317). This injunction is important and it is often argued that in this regard, irrespective of any successes or mistakes in the former aspects, that counter terrorism is often found wanting. In particular, the discourse around “suspect communities” has been frequently mobilised to point to the way in which counter terrorism measures may contribute to alienation and potentially even radicalisation. A counter terrorism policy, which in Foley’s terms, raised the ‘political temperature’, or which at worst, contributed to alienation/radicalisation would constitute a clear “programme failure” by creating unintended consequences and/or failing to have the desired effect.

The term “suspect community” – first coined by Paddy Hillyard (1993) to describe the experience of Irish communities under the UK’s Prevention of Terrorism Act – has been widely invoked to describe such experiences. Hillyard argued that measures introduced to combat terrorism, although framed legally in neutral terms, were aimed at a specific section of the population, namely the Irish.

Despite some conceptual questions (Ragazzi 2016) in the post 9/11 era, this concept of the suspect community has been appropriated by many to characterise the treatment of Muslim populations in Britain (e.g. Breen Smyth 2009). Hillyard (1993: 273) had earlier argued that ‘A suspect community has been constructed against a backdrop of anti-Irish racism. The community has suffered widespread violation of their human rights and civil liberties’. Yet, as Said (2004: 3) notes: ‘A decade later, substitute “Irish” for “Muslim” and this could easily be read as a description of the impact and operation of the Terrorism Act 2000 and the Anti-terrorism, Crime and Security Act 2001’. Pantizas

and Pemberton (2009) similarly argue that the Terrorism Act 2000, with its powers of stop and search, proscription of organisations, and criminalisation by association, has been instrumental in creating a “suspect community” of the Muslim population in the UK. Further evidence for this might be drawn from the way in which the initial Prevent funding was allocated on the basis of local authorities with high Muslim populations.

Taken together, the institution of state policies, media and public discourses that identify, isolate, target and even constitute (see Ali 2015) specific sections of the population seems to be a recurring response to political violence in the UK (also Rygiel 2008: 212). As Gillespie notes in her research with minority groups:

Most interviewees feel that they have become more insecure in recent years and most are more afraid of the consequences of security policy than of terrorism. These include “casual” everyday racism, state surveillance, arrest and detention, creeping militarism and threats to civil rights and traditions of democracy and the rule of law ...A large proportion of racialised minorities base their fears on personal experience of stop and search, identity checks and temporary detention (Gillespie 2007: 284).

There is, though perhaps a sense that the creation of a suspect community is not an entirely *unintended* consequence. Hazel Blears, in 2005, was forthright that the attention of the security services would be focused on Muslims in general:

Dealing with the terrorist threat and the fact that at the moment the threat is most likely to come from those people associated with an extreme form of Islam, or falsely hiding behind Islam, if you like, in terms of justifying their activities, inevitably means that some of our counter terrorist powers will be disproportionately experienced by people in the Muslim community. That is the reality of the situation... There is no getting away from the fact that if you are trying to counter the threat, because the threat at the moment is in a particular place, then your activity is going to be targeted in that way. (H. Blears, cited in House of Commons 2005: 46)

The mistakes listed above cover a range of areas, from individual mistakes in the application of measures to wider and broader misapplications and unintended consequences from policy as a whole. Yet, in research conducted with “ordinary people” (see Jarvis and Lister 2015a; 2015b) about experiences of counter terrorism powers, such mistakes loomed large in their imaginary. Whilst for authorities, mistakes might be something to be learned from and moved on – as aberrations in other words, for some “ordinary people” especially those from ethnic minorities, such mistakes served as powerful illustrations of *how things really are*, as if the counter terrorism mask had slipped and what really lies beneath could be glimpsed.

Jarvis and Lister (2015b) report how two high profile mistakes, the fatal shooting of John Charles de Menezes in 2005 and the Forest Gate raid in 2005, were taken by some to be not anomalies, but paradigmatic of how counter terrorism functioned. In addition to the de Menezes case mentioned above, the latter episode refers to a counter terrorism operation that took place in East London in June 2006, in which armed police raided two properties believing there to be a chemical bomb at the premises. Two men were arrested, one of whom was shot during the operation, but both were later released without charge. In terms of the de Menezes shooting, Jarvis and Lister note how it was invoked in quite separate discussions (about the validity or otherwise of the 2001 Anti-Terrorism, Crime and Security Act). ‘That a mistake was made in one case suggests to our participants the possibility of mistakes in others, leading them to be fearful of counter terrorism measures more generally’ (Jarvis and Lister 2015b: 122). In terms of the Forest Gate incident, when participants

invoked this incident, the concern was not analogous – a sense if mistakes happen in one area, they could happen elsewhere, but direct. One respondent discussed the Forest Gate raid as something that might happen to them. Thus, Jarvis and Lister (2015b: 123) suggest that mistakes, especially high profile ones, can have long-term spill over effects

Therefore it seems that certain decisions or events can cast very long shadows and be generalised either as potential futures, or, as above, as reflective of wider state agendas. Thus a single ‘mistake’ can be taken not as a one-off error, but as revealing the larger and broader way counter-terrorism functions. This suggests that the errors and mistakes of government and security services can have long and significant legacies.

We suggest here that the mistakes, errors and misapplied powers can be traced through the preventative counter terrorism model to an underlying exceptionalist paradigm. As with most state institutions, policing and security agencies have developed procedural or legal checks to curb the most egregious possibilities for mistakes: for example, in the 1990s the London Metropolitan police service was adjudged ‘institutionally racist’ after its mishandling of the racist murder of Stephen Laurence. Yet the initiatives adopted by the MPS to rid itself of practices that were racist were, in one stroke of section 44, excised from its policing model and resulted – as we have seen - in unambiguous racial profiling.

Conclusion: mistakes, misapplications and unintended consequences and failure

What sort of failure(s) do the above constitute? One could make the case for the above constituting, to refer back to the concepts of ‘failure’ which we began the chapter with, both programme failures and political failures (at least to certain sections of the UK population). For example, as stop and search powers alienated many ethnic minority communities (and others) it became both politically problematic and in so doing, produced effects other than that which were intended. Yet despite this point, defenders of the measures – and particularly ones inclined towards precautionary logics – might defend them as successes. This might be done either on the basis of the 1% logic arguing that if there was even a very slim chance that random stop and search powers would prevent a terrorist attack, they should be implemented or on the basis that we don’t know if such powers did prevent or disrupt (potential) terrorist attacks. They could even be justified/defended in terms of reducing fear in the wider population, although this would have to be weighed against the undoubted and clear anxiety that it induced in ethnic minority populations. Thus, whilst there have been clear negative aspects to policies such as stop and search, and for many/most they are considered as mistake (or “things gone wrong”), those inclined to defend the policy might argue that they have not been mistakes. This again, returns us where we began and to the almost inherent ambiguity around success/failure in this contentious area.

The aims and outcomes of counter-terrorism are fundamentally shrouded by a secrecy that prevents thorough evaluation of effectiveness, at least in objective terms. Nonetheless, in the span of the current era of counter terrorism, a range of “mistakes” are discernible, as discussed above, which point to underlying weaknesses in the paradigm of tackling terrorism. Here we suggest that the precautionary approach has become ascendant in counter terrorism, driven by a highly risk-averse institutional environment in which security and policing officials are more anxious to avoid political violence than any other form of crime. The consequence of this anxiety has been to dismantle the orthodox, tried and tested safeguards normally attached to government interventions. And so, as seen in the cases presented here, the police shooting of Charles De Menezes and the Section 44 stop and search powers, the loss of safeguards resulted in fundamental policing errors: a death and systematic racial profiling. These have had further consequences – the emergence of a ‘suspect community’ against whom counter-terrorism measures are misapplied. This is, as we have argued,

the exceptionalist logics of counter terrorism at work: the exceptionalist paradigm is predicated on the rationale that the threat of terrorism is so great, and its consequences so grave, that legal, institutional or procedural safeguards must be removed. In this respect, preventive counter terrorism policy is designed to allow for minimal failures, but in so doing provides considerable tolerance for mistakes.

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