Law, Liberty, and the Pursuit of Terrorism

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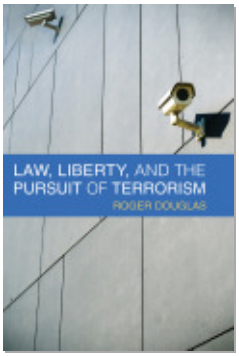

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Preface and Acknowledgments

Some years ago, Joo-Cheong Tham, a colleague at La Trobe University Law School, suggested that we propose a subject on Australian counterterrorism law. We duly drafted the relevant documentation, but the head of the school suggested that our ambitions were far too modest and that our subject should compare the counterterrorism laws of a number of countries. For a variety of reasons, we never got around to doing so.

In 2006, I was planning to take some well-earned study leave, a condition for which was that I propose a project. At the time, I had largely completed a study of the uneasy relationship between Australian law and the Australian Communist Party, one of the underlying themes of which was the symbiotic relationship between the party and its adversaries, each of which somehow convinced themselves that the party constituted a threat to bourgeois Australia. Laws were enacted to deal with the threat, but they proved largely unworkable, because they were conditioned on there being evidence, and there was pitifully little. This could be and was interpreted as evidence of the party's devilish cunning, and this, in turn, prompted years of extralegal anticommunist measures. A common argument against banning the party was that doing so would drive it underground. Ironically, one of the effects of law's constraint on anticommunism was to drive some anticommunist activities underground. With these memories in mind, I proposed a comparative study of the counterterrorism laws of Australia, Canada, New Zealand, the United Kingdom, and the United States, with a view to examining some of the ways in which law both facilitated and restrained counterterror activities.

Like most projects, this one has proved much more demanding than I had expected. Counterterror law is wide ranging and extends to areas such as asset freezing, money laundering, emergency preparedness, and infrastructure security. It overlaps with other bodies of law. Especially in the United Kingdom and the United States, it continues to be in a state of flux. Moreover, the threat of terrorism is elusive, as is information about what governments do with their powers, despite legal constraints. Furthermore, testing one of the most plausible explanations for preferences in relation to counterterror

measures—namely, that they reflect underlying political dispositions rather than the "objective" threat—is difficult, given the paucity of information available in the public domain. This difficulty is a pity, because I find the explanation persuasive.

This book does not attempt to be a comprehensive summary of counterterrorism law in the five countries. Rather, it examines a number of areas of counterterror law with a view to setting out salient features of the laws in the five countries. These areas have been chosen partly because they represent some of the areas that most concern legal scholars. They have also been chosen because they illustrate different relationships between laws, institutions, public opinion, and beliefs.

My argument (adapted from earlier research) is that counterterror law has been a response to pressures from the enforcement arms of the executive for greater powers to fight terrorism but that, in a sense, it continues to be a force for liberty. One reason is that executive ambitions meet resistance, from opposition parties, from organised civil libertarians, from the public (up to a point), and sometimes from the courts. But, because the executive does not always get its way, executive deviance may become tempting and facilitated by various forms of delinquency neutralisation. One of these draws on the ambiguity of law and involves reliance on interpretations that would seem strained to almost anyone but those who passionately want to be convinced of the rightness of their interpretation. (Executive deviants are not alone in this respect; one also encounters some impressive examples in the law reviews.) Executive deviance varies, major reasons being variations in temptation, opportunity, and capacity. This is reflected in the contrast between the law-bound criminal justice system and the far less law-bound regimes operating in places where prisoners in the War on Terror are kept. It also helps explain cross-national differences: using war rather than law as a tool in the fight against terrorism is more likely to seem to make sense to the United States than to New Zealand. My overall suspicion is that the recent response to terrorism has been disproportionate, even allowing for the enormity of the 9/11 attacks. However, part of my argument is that the uncertainty surrounding law and terror means that beliefs about what is appropriate must necessarily reflect basic political orientations. It follows that my suspicions must partly be a product of my own political orientations. Terrorism and the law relating to it continue to be in a state of flux. To the best of my knowledge, this book's statements about fact and law were correct as of 30 June 2012.

The law has not stood still since that date, and neither have terrorists and counterterrorists. I have made reference in the text to some of the more recent legal developments, none of which have been particularly surprising. There have been several terrorist attacks, one particularly serious when measured

by injuries (but not by deaths), others less serious. Most plots continue to be frustrated, the proposal to place a bomb on a Canadian train being thwarted partly on the basis of information supplied from Canada's Muslim community. Recent (June 2013) revelations about the extent to which the US government has used its surveillance powers have provoked predictable outrage, and predictable claims that it has saved lives. Mistreatment of prisoners transferred to Afghanistan forces has continued to be a problem, and recently resulted in decisions by the United Kingdom and Australian governments to cease handing prisoners over to some Afghan authorities. None of these developments (which are not discussed elsewhere in this book) is inconsistent with the analysis I have developed on the basis of pre 30 June 2012 material, but recent US polls on support for surveillance suggest that its partisan correlates are dictated more by the president's party than by party-related dispositions and underlying civil libertarianism.

Books, even when written by a congenital introvert, are a team effort. Above all, I would like to thank my wife, Robin Burns, not only for her direct contribution to the book—she read and commented on a draft—but also for doing far more than her share of gardening and housework and for tolerating the absentmindedness inherent in thinking about the book when politeness would have dictated thinking about more important things. As always, I am grateful for her support and encouragement. Thanks are also due to Melody Herr, commissioning editor at the University of Michigan Press. She played a role not unlike that of a first-rate dissertation supervisor, encouraging me to develop my early proposal, pointing out when draft chapters needed tightening, and suggesting ways to overcome some of the more serious weaknesses in successive drafts.

I also owe much to my colleagues at La Trobe University Law School, who provide a congenial and collegial work environment. Professors Jianfu Chen and Paula Baron arranged my teaching load so as to give me time to work on the book. I have talked with numerous colleagues about my arguments: I would particularly like to thank Jeffery Barnes, Magda Karagiannakis, Keith Kendall, Oliver Mendelsohn, Marilyn McMahon, Jill Murray, Balu Rao, Savitri Taylor, John Willis, Ann Wardrop, and David Wishart. Thanks are also due to La Trobe's law librarian, Dennis Warren, whose skills at tracking down elusive sources have proved invaluable.