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Law, Liberty, and the Pursuit of Terrorism

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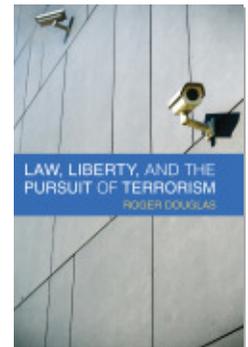
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Introduction

Outrages tend to provoke demands for government responses, and responses tend to include legal innovations. It is therefore unsurprising that terrorist acts have stimulated the development of laws aimed at punishing, denouncing, and discouraging terrorism. However, countries react differently, partly because they experience terrorism differently and partly because responses to terrorism depend on far more than the nature of terrorist attacks and the threat they imply. This book examines the legislative and judicial responses of five liberal democracies to terrorism, both prior to and after the 9/11 attacks.

One of this book's objectives is to identify the nature of those responses. The most obvious examples include laws whose operation is conditioned on some kind of nexus with "terrorism" or "terror," but there are also more-general laws whose timing, context, and justification suggest that they can be understood as responses to terrorist attacks and fears of terrorism. Moreover, since long-standing general laws may sometimes obviate the need for specific counterterror legislation, this book will include references to such laws when they have obvious bearing on the legality of counterterror measures and where the corresponding areas of law in at least some of the jurisdictions make some provision for terrorism-related legal consequences. My aim is to provide an overview and to identify both cross-national differences and areas where legal responses have been or are substantively similar.

My second objective is to contribute to an understanding of the development of counterterror laws in the five countries. In doing so, I address four questions. To what extent can counterterror measures be understood as a hasty response to terrorist attacks? To what extent do responses vary institutionally? What is the role of underlying political beliefs in determining how political actors respond to actual and possible terrorism? And insofar as cross-national differences emerge, how are these to be explained?

The answer to the first question might seem obvious. Civil libertarians assert that the executive's strategy is opportunistic, prompted either by a desire to be seen to be doing something or by a perception that attacks and the subsequent public response provide a brief window of opportunity for the enact-

ment of measures that would normally be politically unacceptable. Moreover, measures passed in haste will be ill-considered and may therefore be defective from both an instrumental and an expressive perspective. Authoritarians tend partly to agree, while arguing that speedy responses are needed in order to respond to new and terrifying threats, they also seem to agree with civil libertarians' charge that pressures for a speedy response are opportunistic in the sense that they represent unique windows of opportunities for the passage of the kind of measures needed to combat terrorism. This is implicit in their general opposition to sunset clauses. If they were confident that the measures would demonstrate their value, such opposition would seem pointless. If, however, they were concerned that the measures would not survive the closer scrutiny they would receive prior to the expiry of the sunset period, resistance would make considerable sense. Moreover, as we shall see in chapters 1 and 2 of this book, there are good evidentiary and theoretical reasons for expecting that terrorist attacks will result in heightened estimates of the terrorist threat posed by terrorism and in heightened receptivity to reactive measures.

Examination of the history of the development of counterterror laws throws light on some of these issues. First, it provides evidence of the degree to which counterterror measures are indeed introduced and passed in haste. Second, if legislation passed after lengthy deliberation tended to be no more "repressive" than legislation passed in haste in other jurisdictions, this would cast some doubt on the "haste" hypothesis insofar as it implies opportunism on the part of the proponents of the new laws. Third, if measures introduced in haste were particularly likely to be subsequently repealed, this would tend to bear out the "brief window of opportunity" perspective.

For reasons given in chapter 2, the "institutional" hypothesis is plausible. It is also readily tested. If enthusiasm for stronger executive powers is greatest within the executive (or, to be more precise, its muscular arms) and least within the judiciary, executive proposals would tend to be "watered down" in the legislature, and it would be exceptional for the legislature to seek to amend legislation so as to confer powers on the executive additional to those it had sought. Courts, however, would sometimes construe powers narrowly and would sometimes find that legislation fell foul of constitutionally protected rights.

The "political predispositions" hypothesis is almost irresistible. We are accustomed to thinking in terms of goodies and baddies: left versus right; authoritarians versus liberals; Democrats versus Republicans; believers versus the damned. Debates on counterterror legislation sometimes suggest that the forces of security are in battle with the forces of liberty. In chapter 2, I advert to a considerable body of academic literature suggesting that our political dispositions can indeed be parsimoniously modeled on a few dimensions, usu-

ally one or two, but possibly and less parsimoniously up to six. Further, albeit with some dissent, the literature suggests that ranks on the dimensions are relatively stable and partly determined by such considerations as child rearing and even DNA. On their face, they appear to have implications for preferences among possible reactions to terrorism.

One complication is provided by the fact that in parliamentary democracies and, to a lesser extent, the United States, party discipline means that individual legislators must subordinate their views to those of the party to which they belong, the views of which may, in turn, be strongly influenced by whether the relevant party is the party of the president or prime minister. Nonetheless, given the hypothesised differences between liberals and conservatives, one might expect that “conservative” legislative majorities would be more likely than “liberal” majorities to favour wide-ranging counterterror laws and that popular support for additional counterterror measures would be greater among the supporters of conservative parties. One would also expect that changes in the political complexion of governments and legislatures would be reflected in amendments to laws relating to terrorism.

Finally, insofar as laws are reactive, one might reasonably expect that they would reflect national experiences of terrorism (or its absence). But given the expected importance of institutions and political predispositions, one might also expect that they would reflect variations in national institutional structures and the predispositions of the elected government.

The Five Countries

In this book, I examine the terrorism laws of the national governments of five common-law countries: the United States, the United Kingdom, Canada, Australia, and New Zealand. While additional insights might be gained from an examination of subnational legal systems, Northern Ireland in particular,¹ the cost would be a vastly more complicated book.

While the five countries are all well-established liberal democracies, they differ in a number of respects. The United States maintains a high level of separation between the executive and legislative arms; in the other four countries, the prime minister (the *de facto* head of government), the members of the cabinet, and other ministers normally must be members of parliament and normally hold office only for as long as they have the confidence of a majority in the lower house. Voting on bills in the parliamentary democracies is normally done strictly along party lines, especially in Australia and New Zealand. Even the current US Republicans are less monolithic than the parliamentary parties. Despite party discipline, governments do not always get their way. Close elections sometimes mean that the government depends for

its continuity on nongovernment members of parliament who support the government on confidence motions but reserve the right to vote against it on bills they do not like. This has proved salient in Canada but not in Australia, where the recent minority Labor government showed little interest in expanding counterterror powers and where its minor liberalising amendments have received cross-party support. More important, control of the lower house does not guarantee control of the upper house, and parliamentary committees are often far less partisan than the parliament itself.

In the United Kingdom, Australia, and New Zealand, differences between the major parties have become increasingly blurred, but if one looks closely, one can still find echoes of once-deep partisan cleavages and corresponding social ones, and smaller parties provide refuges for the less nonideological. Names may sometimes be misleading. Australia's Liberal Party is closer to a conservative party, and its coalition party, the National Party, draws its support mainly from Australia's small nonurban minority. The "conservative" parties tend to be somewhat to the left of the US Republicans. (They tend to accept the desirability of universal health insurance, for instance.) The Labour (UK and NZ) and Labor (Australia) parties were once well to the left of the US Democrats, but differences have decreased over the past 50 years. Barack Obama would be an acceptable Labor leader in all three countries, but their leaders would probably struggle to win a Democratic presidential primary (even if they had been born American).

The Canadian party system has been more fluid and fragmented, but parties can be ranked along a right-left continuum, with varyingly labeled Conservatives tending towards the right, Liberals to the middle, and the Bloc Québécois and the New Democratic Party towards the left. The United States, the traditional home of blurred partisan differences, now gives many of its voters a rather starker ideological choice than that provided by the Labor/Labour parties and their conservative opponents. In all five countries, there have been changes in the governing party between 2001 and 2011, which provides a basis for teasing out the impacts of partisan-related beliefs and the exigencies of being in government rather than opposition.

All five countries maintain a sharp distinction between the political and judicial arms, but they vary in the powers they confer on their courts. Almost since its founding, the United States has given courts the power to strike down legislation on the grounds of its inconsistency with a variety of specified rights. That precedent did not commend itself to British institutional reformers or to the drafters of the New Zealand, Canadian, and Australian constitutions. However, the Canadian and Australian constitutions impose limits on the legislature's powers. Constitutional entrenchment of separation of powers sets (indeterminate) limits on the degree to which legislatures can allo-

cate functions to bodies other than courts and on the degree to which they can require courts to perform nonjudicial functions and act in uncourtly ways. Federal division of powers sets some limits on the powers of national (and provincial or state) legislatures.

The Charter of Rights and Freedoms is now entrenched in Canada. By virtue of its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the United Kingdom is effectively bound by the convention. The convention does not invalidate legislation contrary to its provisions, but it does expose governments to damages awards by the European Court of Human Rights (ECtHR) for failure to comply with the convention, except in circumstances where signatories are permitted to “derogate” from the convention. Political considerations have generally precluded derogating legislation and would constitute a major obstacle to withdrawal from the convention. Indeed, the convention has been given domestic legal force by the Human Rights Act 1998 (UK), passed under the Blair government. New Zealand’s Bill of Rights Act 1990 gives legal force to the rights set out in the International Covenant on Civil and Political Rights (ICCPR) but is subject to legislation to the contrary. Australian politicians have generally resisted calls to limit their powers, and two attempts to amend Australia’s constitution to provide greater protections for rights each failed to achieve majority support in national referenda. Proposals for statutory bills of rights have fallen through at the commonwealth level, but since 2011, drafters of commonwealth legislation have been required by statute to certify that proposed legislation is compatible with the specified human rights conventions.² The countries also differ in two other respects. First, as we shall see in chapter 1, they vary in their experiences of terrorism. Second, they obviously vary in their capacity to throw their weight around internationally.

Outline

Chapters 1 and 2 examine the “terrorist threat” and the variety of possible responses to the threat. In chapter 1, I examine national experiences of terrorism and perceptions of the threat posed by terrorism, arguing that terrorism generally does not seem to constitute a major threat to any of the five nations. There is some evidence to suggest that terrorist attacks produce a temporary increase in the perceived threat, but the evidence also suggests that fears of attacks remain high even after long attack-free periods.

Chapter 2 examines whether heightened fears of terrorism are likely to provoke or facilitate “tougher” counterterror laws. It argues that while laws represent only one of a variety of possible responses to threatened terror, “tougher” laws are a likely response. However, it also argues that receptivity

to tougher laws will vary within governments and within populations. It discusses why institutional roles and interests are likely to be reflected in varying degrees of enthusiasm for greater government powers and why preferred responses to terrorism might be expected to reflect ideology and its analogues.

Chapters 3 through 9 examine the nature and evolution of seven areas of terrorism-related law. In many ways, the five countries' laws are functionally similar, but there are striking cross-national differences in the use of legal powers and in governments' willingness to bypass legal constraints in the name of fighting terror. There are also some substantive cross-national differences, and within countries, laws have changed over time. These differences throw light on the power of particular explanations for responses to terrorism.

Chapter 3 examines the emergence of statutory definitions of the term *terrorism* and their implications. While the chapter highlights the diversity of ways in which *terrorism* and cognate terms have been defined, it argues that the definitions reflect a broad consensus as to what the term entails. It also identifies contested aspects of the standard definitions and their implications. There is little evidence to suggest that the definitions were enacted in haste. There is some evidence that resolution of the definitional issue turns partly on institutional interests, but there is virtually none to suggest that courts disagreed with the statutory definitions. Parliamentary debates evidenced a nexus between underlying beliefs and preferred definitions, but these have not been reflected in changes to the definitions upon changes of government.

Chapter 4 relates to counterterrorism surveillance. Aspects of the history of the relevant US law seem to bear out the haste hypothesis. The circumstances surrounding the passage of the USA Patriot Act seem to provide powerful evidence of executive opportunism and legislative fearfulness, and its subsequent history goes a long way towards bearing out this analysis. But an attempt to strengthen surveillance powers following the earlier Oklahoma bombing came to naught, which indicates that responses to terror may depend on who is responsible for the attack. Moreover, in some ways, the 2001 amendments simply gave the US government powers that were already enjoyed by other governments, and laws subsequently conferring surveillance powers in other countries have passed with little reference to terrorism. Indeed, in relation to domestic terrorism, the US law is in some ways less government-friendly than the laws of the other countries. Moreover, while surveillance laws have tended to meet legislative resistance, they have generally survived judicial scrutiny.

The obverse of interest in other people's secrets is the desire to conserve one's own, which is the subject of chapter 5. Laws provide considerable formal protection for classified information, although they have not proved capable

of preventing errors (such as mislaying laptops and electronically stored data in public places) or theft of poorly protected information (most notably in the United States). These laws have been left largely (but not completely) untouched by counterterror concerns. More problematic is the situation where governments want to keep their secrets yet use them as grounds for judicial decisions with implications for liberty and other interests. By 2001, courts and legislators had already addressed aspects of this problem, and post-9/11 measures have generally built on pre-2001 precedents. On the whole, the legislation in this area cannot be understood in terms of heightened fears, but it nonetheless represents one area of law where the priorities of the political arms have sometimes proved hard to reconcile with courts' concerns with protecting due process rights, especially in Canada and the United Kingdom, though far less so in the United States. There is some evidence of partisan conflict over the issue, but there is little evidence to suggest that changes of government are reflected in corresponding changes to law and practice.

An element common to the legislation of all five jurisdictions is provision for the proscription of terrorist organisations, as discussed in chapter 6. Proscription legislation is not readily understood in terms of heightened fears or distinctive executive interests. Prior to the 9/11 attacks, the United States and the United Kingdom had already established proscription regimes, and the regimes elsewhere owed much to the UK precedent, except that the Australian and New Zealand regimes were less intrusive. Proscription appealed more to governments than to opposition, though not by much. While proscription legislation aroused criticism, it passed through legislatures largely unaltered, except in Australia and New Zealand, where narrowly circumscribed powers were later expanded by successive pieces of legislation. Courts have left proscription legislation largely unscathed, partly because of the obstacles facing organisations that might want to contest their status and partly because courts have been unimpressed by constitutional arguments based on the implications of proscription for those who want to make nonfungible contributions to assist organisations' nonterrorist activities. Partisan differences bear a limited but predicted relation to stance on proscription, though not—except in one minor respect—to the point where changes of government have produced relevant changes to legislation.

Terrorist acts normally fall within one or more of the standard categories of criminal offences, and sentencing laws enable appropriately heavy sentences for any terrorist charged and convicted of a “nonpolitical” criminal offence. All five jurisdictions have, however, created special terrorism offences, which are detailed in chapter 7. These include offences relating to terrorist organisations. They also include precursor offences, designed to catch people who have begun making plans for some form of terrorist attack.

The legislative history of these offences provides limited support for the haste hypothesis, and there is evidence to suggest that institutional perspectives play some role in relation to its enactment and fate. Relevant government bills have sometimes met legislative resistance. But courts have generally upheld the legislation, and interpretative decisions have rarely been subject to subsequent legislative change. There is evidence of the relevance of partisan differences, but these are sometimes weak and not easily separated from government/opposition differences and, to date, have rarely been reflected in amendments to post-2001 legislation following changes of government. However, one context in which post-9/11 innovations have proved highly controversial relates to investigatory detention, an issue that produced sharp divisions between governments and parliaments.

While the criminal justice system serves as a basis for preventive detention, governments doubt that it is sufficient, and all jurisdictions have devised alternative forms of preventive detention, to deal with cases where the criminal justice system appears to be inadequate. These are discussed in chapter 8. They have proved to be highly controversial. The most notorious form of preventive detention has involved the detention of prisoners taken in the War on Terror. Most jurisdictions make or have made special provision for would-be immigrants who are believed to constitute security risks and who cannot be deported. Some make provision for detention for the purposes of avoiding a terrorist attack and to facilitate postattack investigations. In two jurisdictions, laws provide for a form of house arrest for potential terrorists.

Some of the relevant legislation predates the 9/11 attacks, but some seems explicable in terms of heightened fears. In one sense, there is a relationship between institutions and acceptance of preventive detention. Courts have typically found aspects of preventive detention regimes to be contrary to constitutional and quasi-constitutional protections. Executive and legislative differences are more complex. In the United States, beliefs have trumped institutional interests, with President Obama's attempt to close Guantánamo Bay being frustrated by congressional refusal to allow government funds to be used for that purpose. In the United Kingdom, it is difficult to disentangle the impact of institutional interests and beliefs. In Australia, institutional interests seem to trump beliefs.

Detention, whether for investigative or preventive purposes, carries with it the risk of abuse, especially in the absence of external supervision. This is the subject of chapter 9. Public denunciation of torture and the mistreatment of prisoners coexists with the temptation to torture or at least to use its fruits. The treatment of prisoners at Guantánamo Bay and in Afghanistan and Iraq will become a staple of future civil libertarian cautionary tales, and executive abuse coexists with attempts to keep it secret and to deny its unlawfulness.

The circumstances prompting ill-treatment of prisoners have not prompted attempts to rewrite anti-torture laws so as to permit torture in certain circumstances, but US law has been amended both to make it clearer that torture is not permitted and to exculpate prior torture in certain circumstances. Voting on these measures has been strongly related to party. US courts have affirmed the duty of governments to comply with exacting standards, but litigants in torture cases have tended to fall foul of procedural obstacles.

The other four countries' records are better but not perfect. Their laws are more exacting than US law, and their courts and governments are more receptive to torture victims' civil claims. Poll data help explain why terrorism-related concerns have not prompted changes in the relevant laws. In all five countries, there is widespread opposition to the official use of torture, with opposition varying cross-nationally. However, poll data suggest the importance of belief as a determinant of preferred responses to torture. Acceptance of torture (in specified circumstances) varies by party, with voting respondents on the right considerably more willing to accept that torture can be justified than are voters in the centre and, *a fortiori*, on the left.

Conclusions

The analysis in this book warrants several conclusions. First, while there is evidence to support aspects of the haste hypothesis, terrorism-related laws have sometimes been passed in conditions of relative calm. Moreover, there is also evidence to suggest that legislation passed in haste is sometimes no more draconian than similar legislation passed after greater deliberation in other jurisdictions and that "hasty" legislation survives almost as well as legislation passed after careful deliberation.

Second, the analysis highlights the importance of institutional considerations. It is almost unheard of for legislatures to amend government proposals by increasing government powers and expanding the scope of antiterror measures. (There are, however, cases where legislatures have nonetheless given the executive most of what it sought.) One also rarely finds courts ruling that the political arms have underestimated their legislative and executive powers. But—especially in the United States—the courts have tended to be sympathetic to the conferral and use of the powers conferred by contemporary counterterror legislation. If law is what the courts say it is, civil libertarians' confident assertions as to the unconstitutionality of recent counterterror legislation have generally not been borne out.

Third, the role of preexisting beliefs is equivocal. On the whole, roll call votes and poll data suggest that votes and support for counterterror measures vary depending on whether a person's party loyalties lie with a party on the

right or on the left. But partisan divisions often coexist with considerable bipartisanship. Observed relationships are occasionally in the “wrong” direction, and critics of counterterror measures typically do little to change them upon their subsequently coming to power. The effects of civil libertarianism can be blurred and even trumped by the exigencies of office and by attitudes towards the possible targets of counterterror laws.

Fourth, national differences are sometimes reflected in countries’ responses to terrorism in general and in differences in the content of their national counterterrorism laws. But the relationship between national differences and national responses to terrorism is far from simple. National responses cannot be ranked along a simple “repressiveness” dimension. National institutions are loosely coupled, so that “tough” executive action does not necessarily coexist with relatively “tough” legislation. Tough legislation may coexist with liberal courts. Responses to attacks may be influenced by preexisting laws and may involve imitation rather than innovation. Bills of rights may matter, but the mildest response to terrorism has been that of New Zealand, a country whose constitution imposes almost no restrictions on what its unicameral parliament may do.

The analysis in this book also highlights the ambiguous role played by law in the context of counterterrorism. Law both empowers and constrains governments. In the conclusion, I address the implications of these findings, arguing that while law has been a response to fears of terrorism, it has also been a constraint. It is a constraint partly because of politics: while governments tend to want greater powers, quests for power attract widespread opposition, even against the backdrop of terrorist attacks. It is also a constraint because when powers are granted, their exercise is often heavily circumscribed. Moreover, legislation is also constrained by international law and politics and by constitutional and quasi-constitutional limits on legislatures’ powers.

But law’s role and fate in the post-9/11 decade highlights what any lawyer knows: first, laws are malleable; second, they are not self-executing. Law’s malleability is demonstrated by the fact that virtually all of the major counterterrorism cases have involved dissenting judgments and different outcomes at different levels. This may overstate malleability a little: cases tend to be fought and fought to higher levels because each side has some chance of success, and if this condition is satisfied, it is likely that there will be disagreement between judges. More interesting is the way in which judges have responded to ambiguity. In the United States, the Supreme Court’s habeas corpus decisions coexist with other highly deferential decisions, some of which seem flawed by highly questionable logic. In the United Kingdom and Canada, courts have tended to be much less deferential. Decisions by Australian courts reflect the Australian Constitution’s limited protection of fundamental rights, tempered

by the common-law presumption that legislation should be interpreted to minimise inconsistency with international law and common-law rights.

Malleability is one reason laws have not always been sufficient to control executive illegality. Potential lawbreakers may believe that they are complying with the law or, alternatively, that their interpretation of the law is sufficiently plausible to ensure that even if it does not prevail, they will not be punished. But potential lawbreakers may also take comfort from the improbability of being caught or of being punished if they are caught. Where law seems to get in the way of achieving valued outcomes, institutional culture is likely to encourage deviance. It certainly seems to have done so in the United States and may have done so even in New Zealand.

Executive deviance seems to have been far more widespread in the United States than elsewhere. This is not surprising: in terms of lives lost, the 9/11 attacks were the most serious attacks on the US homeland in its history. This, coupled with the humiliation entailed, could be expected to make for receptivity to punitive responses. Moreover, detention and mistreatment of prisoners flow directly from the decision to use massive military force against symbols, supporters, and agents of terrorism. The United States could do so. Smaller powers could do no more than help, and small powers are more accustomed to accommodating the demands and expectations of other countries. Their responses reflected a corresponding assessment that international law was a tool to be used in combating terrorism, rather than an obstacle towards doing so.