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Law, Liberty, and the Pursuit of Terrorism

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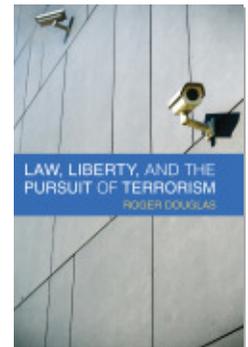
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TWO

Responding to the Threat

My blood was boiling. We were going to find out who did this and kick their ass.
*George W. Bush*¹

Today I want to reassure Canadians that their government has listened to them and acknowledged their desires for action.

*Anne McLellan, minister for justice and attorney general,
introducing Canada's 2001 counterterrorism legislation*²

Threats tend to elicit responses, but the relationship between threats and responses is likely to be complex. People may respond by taking steps which they believe will reduce their vulnerability. Or, unable to conceptualise such steps, they may descend into mental illness. In the absence of further manifestations of the threat, they usually revert to traditional practices. People also have expectations of governments. In the short term, they are likely to expect and welcome symbolic reassurance. They also expect that governments will take measures to minimise future threats, although they may leave it to the government to decide what these measures might be. Governments may respond in a variety of ways. These include responding to the emotions unleashed by terrorist attacks, but they are also likely to include measures designed to reduce the likelihood of future attacks.

Responses may include war, incapacitation, deterrence, symbolic reassurance, protection, harm minimisation, and concessions, and they will usually involve a mixture whose content changes over time. Facilitating these responses may involve removing limits on powers, but it may also involve providing added resources. These responses seem to lie along a continuum from coercion to accommodation, but while it is possible to conceptualise responses in these terms, it is also important to recognise that some responses are not so easily conceptualised. Governments may respond to threats with both coercion and concessions. A government might rationally conclude both that its coercive arms should be legally constrained and that they should be given added resources so that they can perform their functions effectively notwithstanding the legal constraints on their behaviour. This chapter nonethe-

less assumes that bundles of responses can be ranked along a coerciveness-accommodation continuum parsimoniously, if approximately, and that the same can be said for legislative and judicial responses.

Choices are likely to turn on a variety of considerations. Governments normally insist that their measures are rational and more or less proportionate, and while there is considerable evidence to the contrary, responses can be partly understood in terms of their probable effectiveness and their probable cost. They are likely to be influenced by timing: initial responses are likely to be complicated by ignorance and are more likely to reflect expressive considerations, possibly at the expense of instrumental ones. Institutional interests and cultures are likely to influence preferences. Preexisting belief systems are likely to affect the choice of response, and government choices are likely to be influenced by (and to influence) public opinion. These generalisations apply to both legal and non-legal responses, but—I shall argue—there are some grounds for believing that instrumental considerations may play a greater role in influencing decisions about the content of law than in relation to the use of more extreme responses.

Rationality

Governments and their critics both agree that counterterrorism measures should be calculated to reduce the terrorist threat, and the ubiquity of public statements to this effect suggests that counterterror policies should therefore tend to be both effective and cost-effective. Governments may pursue such policies simply because they are staffed by reasonably public-spirited decision makers who are dispassionate and devoted to the public interest. To some extent, this is the case. Alternatively, governments have good reasons for pursuing such policies. Since people expect governments to provide security, future terrorist attacks may come at some cost to those who might have been able to avoid them. (But this is not necessarily so: 9/11 generated political capital for the Bush administration.) Moreover, given scarce resources, governments have some incentive to use their resources as effectively as possible.

But even if public officials act rationally, this does not necessarily mean that they act effectively and proportionally. There are several reasons why counterterror measures may fall short of cost-effectiveness—or its human rights analogue, proportionality. First, from some perspectives, ineffective and expensive strategies are rational. The pork-barreling associated with the use of counterterror funds³ made no sense from the standpoint of threat minimisation, but given that parochialism can trump patriotism (just as patriotism tends to trump internationalism), members of Congress who used counterterror funds as a source of bribes to their electorates may have been acting rationally. Critics of counterterror measures point to other conflicting objec-

tives, such as catering to or reflecting the emotions generated by a terrorist outrage. But while such measures may be ineffective and may even backfire, catering to emotions may not be irrational. Law, after all, treats retribution as a legitimate purpose of punishment.

A second and related reason why counterterror measures may fall short of cost-effectiveness is that cost-benefit and proportionality analyses involve subjective assessments of values and relative values. Whether measures do or do not satisfy the effectiveness/proportionality standards will depend on such considerations as the relative weight to be attached to the interests of neighbours, fellow nationals, and foreigners; whether revenge can count as a benefit, even if it serves no instrumental purpose; and the value one is prepared to assign to a hypothetical reduction of risk. International standards on human rights law may provide what looks like a relatively objective yardstick, but to understand responses to terrorism, it seems necessary to recognise that those standards may be contested.

Third, choice of response is necessarily based on imperfect information. One obstacle to assessing the rationality of responses to terrorism is that their effects are often extremely difficult to determine. Methodologically sophisticated assessments of the impact of counterterrorism measures are rare. A 2006 paper reported the results of a literature survey that started with the identification of more than 20,000 works on terrorism. The researchers found that of these, only 290 articles and 64 books made any reference to an evaluation of counterterror measures. Closer inspection of the abstracts, notes, and titles of the 290 articles yielded 94 promising articles, of which 79 could be tracked down. Of these, only 21 actually attempted an analysis of the impact of a program, and only 7 were methodologically sophisticated enough to warrant confidence in the findings.⁴ These 7 articles generally provided evidence that some measures (notably military intervention) made things worse. Other measures (criminal sanctions) seem to have made no difference. Even when measures did influence behaviour, there seem to have been displacement effects.

Responses are likely to be further complicated by the difficulty of knowing whether what worked in one context will work in another. Terror groups are notoriously diverse. Their aims, structures, and strategies are likely to change in response to changes to their environment. In addition, political, religious, and ideological objectives are likely to coexist with organisational and personal objectives. Like governments, terrorist groups are far from being monolithic wholes. Complicating matters still further are the blurred boundaries between terrorists and their immediate milieu, with moves in both directions as terrorists tire of being terrorists and as disaffected potential terrorists join or find themselves involved in terrorist groups. Information about terror

groups and about their reaction or likely reaction to particular measures is in danger of being out of date, inaccurate, and limited.

Yet there is some evidence that governments act as if they were semirational. First, faced with growing evidence of the futility of military involvement in Iraq (which was justified partly as a counterterror measure) and Afghanistan, governments have withdrawn or have started withdrawing, rather than continue to pay and inflict the costs of continued involvement. Second, their policies tend to be roughly consistent with their capacities. The United States can sometimes afford to use military force in attempts to achieve its aims. Canada, Australia, and New Zealand recognise that their success in countering international terrorism is dependent on the cooperation of other countries. This means being nice to the United States and providing symbolic or practical support for some of its wars. But it also means cooperating with other countries and treating international law as a resource rather than a cost. So, for example, Australia's response to the Bali bombings was not to send commandos into Sumatra but to offer assistance to the Indonesian police.

Third, counterterror measures tend to involve experimentation and a willingness to abandon policies that seem not to be working. Canada resolved the limited problem posed by secessionist terrorism by attending to Québécois grievances. Even in the early 1970s, the UK government was exploring the possibility of concessions in exchange for peace in Northern Ireland. Having tried internment and found that it exacerbated the problem, it abandoned that solution. Having introduced repressive legislation in response to particularly serious attacks, it arranged inquiries into their operation and frequently, if gradually, alleviated their repressiveness. Spain seems to have achieved a settlement with the ETA. Finally, if one accepts that the current terrorist threat is negligible, it follows that government strategies have, at worst, not been particularly counterproductive.

There are, of course, the exceptions. Exhibit 1 is the Iraq War fiasco, which highlights the fact that a devastating war may be the result not of inadequate information but of a determination by decision makers not to allow inconvenient facts to get in the way of their folly. It also highlights the possibility of responses that are devastating, whether assessed from the standpoint of the nation, the government, those responsible for the decision, or those the war was supposed to help. Exhibit 2 is the torture and mistreatment of suspected terrorists and known nonterrorists in Guantánamo Bay and elsewhere.

There are also likely to be cases where it is not clear whether or to what extent counterterror policies are working or have worked, which complicates the enterprise of assessing the degree to which government policies are dictated by their probable effectiveness. War seems unreliable. Conciliation seems promising. However, complicating attempts to relate this to the rela-

tive rationality of coercive and accommodative responses is the question of the role of government threats in convincing terrorists that they might have to settle for less than they would have liked. After all, if terrorist threats can extract concessions, it is not clear why government threats cannot.

Timing

A common criticism of post-9/11 measures is that they were taken in haste. Haste, of itself, is not necessarily a bad thing. If responses actually had the potential to ward off further attacks, it would be highly desirable that they be taken quickly. Moreover, it is possible that those responsible for the measures have been thinking about them for some time, believe with some justification that they could work, and see the aftermath of an attack as a propitious time for their introduction. But if the measures are taken in response to an unexpected attack, there is a considerable danger that should those responsible for them have little basis for knowing whether they will make any difference to the danger posed by the threat, they may be responsive to the temptations of expressive politics.⁵ Policymakers themselves feel the mixture of emotions that follow exposure to an outrage. There are also opportunistic politicians who believe that there is political capital to be won by measures that demonstrate confidence and resolve and a determination to punish those responsible for the outrage.

Poll data throws some light on whether there is indeed political capital to be made out of postattack toughness. As noted in chapter 1, they suggest that fears of terrorism increase after attacks and tend to subside within months. They also suggest that attacks may increase support for illiberal measures but that this support erodes over time. Immediately after the Oklahoma bombing in 1995, half of Americans surveyed thought that it would be necessary for them to give up some civil liberties to curb terrorism, but this figure had fallen to 29 percent two years later.⁶ Following 9/11, far more people thought that such a measure would be necessary.⁷ (There is also evidence for the unsurprising finding that people were even more willing to give up other people's liberties.)⁸

Until 2006, sizeable majorities considered that curbing terrorism would require the average person to give up some civil liberties. But by 2006–7, majorities no longer saw the need to surrender any more of their liberties. (Logically, this might simply reflect the fact that some liberties had already been given up and that people did not want to give up the liberties that remained.) Then, in 2010, following the attempted Christmas Day bombing in 2009, a majority once more considered that it was necessary to give up some liberties.⁹

Even in the immediate aftermath of terrorist attacks, belief in the necessity

of giving up some liberties coexisted with a belief that the danger that the government would fail to enact “strong new laws” was only slightly greater than the danger that it would enact laws “which excessively restrict the average person’s civil liberties”: 39 percent shared the former concern, and 34 percent feared the latter danger. By November 2002, concerns about lost liberties outweighed concerns about weak laws. By 2008 (by which time new laws had been enacted), 31 percent were concerned about reticence, and 54 percent were concerned about threats to liberties.¹⁰ Other polls suggest similar levels of anxiety about threats to liberty.¹¹

Outside the United States, pollsters have not generated such a rich body of time-series data. The limited evidence suggests that fear of terrorism increases receptivity to illiberal measures. In two 2005 UK polls, majorities agreed that it was sometimes necessary to restrict civil liberties without a court’s approval, the majority increasing from 58 percent to 70 percent in the aftermath of the 7/7 attacks.¹² A 2008 poll indicated that 41 percent favoured giving equal weight to concern over civil liberties and to defeating the threat from terrorism, but 38 percent favoured giving more weight to defeating the threat from terrorism.¹³ Canadian polls conducted in 2001 suggest some (but not much) support for limiting liberties, and a 2004 poll found that only a bare majority disagreed that Canadian police and security services were going too far in their use of antiterrorism powers.

These figures must be handled with care. They reflect sentiment rather than the considered response of people who are familiar with the content of existing and emerging laws. Sentiments might strengthen the resolve of those who favour tougher laws, but they hold out little promise of long-term electoral gains for those who favour illiberal legislation.

The chapters that follow will tend to bear out the importance of timing in relation to postattack legislation. But in those chapters, I shall argue that the relationship between attacks and legislation is more complex than the critique of hastiness suggests.

Institutional Interests, Preferences, and Practices

A common civil libertarian complaint is that terrorist attacks are seized on as opportunities for governments to expand their powers.¹⁴ This complaint, which overlaps with but also refines the “timing” argument, assumes that the impetus for coercive responses tends to come from the executive arm rather than the legislative and, a fortiori, the judicial arms. There is an authoritarian variant on this: namely, that security is protected by the executive, sometimes assisted by legislatures, and only too often imperiled by the judiciary.

The “institutional” argument assumes that the executive arm tends to fa-

your coercion, that legislatures are less supportive, and that courts seek to constrain legislatures. This assumption seems self-evident in the light of both history and recent experiences. But in extreme forms, it sits uneasily with governments' willingness to initiate measures whose effect has been to impose some constraints on their coercive capacities.

That said, there are several reasons why the executive arm may be particularly likely to want to include repressive measures within its armory of responses to the threat of terrorism. The most obvious is that coercion is largely an executive function and is performed by specialised agencies. Members of agencies specialising in coercion and intelligence gathering believe that their activities are socially valuable, and they are likely to be wary of those who seek to impose limits on the circumstances in which they may use their powers. Restraints may be experienced both practically and morally. Practically, they may be treated as obstacles to the agencies' proper performance of their functions. Morally, they may be treated as downgrading the value of those functions or as reflecting adversely on the agencies' competence and integrity. Agencies' views are not necessarily accepted by the political executive, but the more salient a threat is, the more attentive the elected executive is likely to be to the security forces.

At the other extreme are the courts. Their role and likely response is more complex. Courts are relevant in two related respects. First, government and legislative decisions are likely to be made in the shadow of the law. This does not necessarily mean that the political arms will comply with "law." They may quite excusably get it wrong: after all, if law is what courts say it is, those who get it wrong sometimes turn out to be in the company of almost half (and sometimes more than half) of the judges who handle the subsequent litigation. The political branches may also know that law rarely moves fast, so they can enjoy the fruits of their illegality pending a final decision. Governments may calculate that they can get away with infringements: not all irregularities will come to the notice of those affected, and not all of those who have been affected will have access to the courts.

Moreover, legislators may support unconstitutional legislation for opportunistic reasons. They may calculate that legislation will be able to do some good before it is eventually struck down. Muscular conservatives may support repressive legislation, hoping that if it is struck down, that will discredit the courts. Liberals may support electorally popular repression in the expectation that it will be struck down, thereby both propitiating the voters and appeasing their consciences.¹⁵ But officials are aware that failure to comply with law can be hazardous. Besides, while legislators may sometimes knowingly pass unconstitutional legislation, political expediency may dictate attentiveness to its likely fate in the courts. If legislation is indeed a response to a brief window

of opportunity, legislators are likely to be mindful of the need to ensure that it has a reasonable chance of survival.

Courts also matter because they may quash unlawful decisions, and governments almost invariably comply with their decisions. But the degree to which courts matter depends on the degree to which their responses to threats differ from those of the political arms. There are several grounds for believing that they will. Indeed, the obverse of civil libertarian concerns about overweening executives is authoritarian concern about the pernicious role of courts and lawyers.

First, judges' professional reputation is bound up with a perception that they are committed to applying the law and acting on evidence. Moreover, their decisions, much of the material on which they are based, and the reasoning in terms of which they are justified are public. Courts are expected to afford a particularly high level of procedural fairness to those who appear before them. The heroic judge applies the law to the evidence, come what may. The heroic spy is prepared to disregard legalities for a greater cause. Law and facts may well be ambiguous, and judges sometimes have little alternative but to make both in their own image. But unlike other political actors, judges can take pride in choosing law over political preferences when they see conflict between the two.

Second, judges' decisions may be subject to a rather different kind of "availability bias" than that which arguably influences the behaviour of the executive and legislative branches. Trials have the potential to focus on the implications of laws for particular individuals, and one would expect attention to the individual to mean that the highly visible effects of denial of civil liberties will be more apparent than any contribution to the collective good that such denial may produce. Moreover, organisations sponsoring attacks on repressive laws are likely to select cases that emphasise the unjust results that can follow from contested laws.

Further, if executive and legislative decisions are responses to a sudden crisis, the delay that typically characterises judicial proceedings will mean that the court will be considering the issue in calmer circumstances and with the advantage of being able to see whether and how the measure has been working. Judges also enjoy a degree of security denied to members of the political branches. If they allow someone who turns out to be a threat to the state to go free, they have someone to blame: the government, for not presenting them with strong enough evidence to warrant their doing what it wanted (and what they themselves might have wanted). Moreover, judges are almost immune from dismissal and demotion, which means that they are largely immunised against some of the pressures and temptations that can lead members of the political branches away from the path of civil libertarian virtue.

The effect of these considerations is blurred somewhat by judicial reluctance to become involved in security-related issues. Judges are not immune from the fears generated by terrorist attacks and are sometimes concerned about how to deal with factual issues that cannot be resolved with any degree of precision on the basis of normal curial procedures. They are sometimes sensitive to issues concerning the separation of powers, and while courts have retreated from the position that security decisions lie outside the purview of judicial review, they are sometimes willing to grant governments a very broad discretion in relation to security matters. Governments that want to wage wars on terror still have considerable freedom in relation to how they do so, but—as we shall see—one of the legacies of the War on Terror has been a series of decisions that have made it clear that while wars on terror are permitted, they must be conducted subject to law.

To varying degrees, legislators and the elected executive are accountable to the electorate. Politicians who disregard public opinion do so at their peril, and attempts to explain past and current illiberalism have argued that illiberal measures have sometimes been pursued in order to appease the general public rather than in response to their perceived merits.¹⁶ An analysis of West Germany's reaction to the violence of the 1970s argues that the Social Democrats favoured a restrained response but considered it electorally unsustainable.¹⁷ More recently, Roach has argued that the unelected Canadian Senate may be more protective of the rights of unpopular minorities than is the elected House of Commons,¹⁸ and there is evidence that US Democrats' votes on counterterror issues have been prompted by a fear of looking "soft."¹⁹ But the poll data previously described suggest that the political costs of being "soft" can be exaggerated, especially when "softness" involves protecting the liberties of nationals.

Beliefs and Dispositions

When asked, most people are able to locate themselves on unidimensional scales tapping the degree to which they are "liberal" or "conservative," "left" or "right." People appear to have some understanding of what these terms mean, and position on the scales tends to be related to stances in relation to a variety of issues, including that involving civil liberties. In any case, there is some evidence to suggest that attitudes towards civil liberties issues tend to be related and that they bear some relation to attitudes towards equality and hierarchy. They are often assumed to be relatively stable. This stability was implicit in the idea that they reflected personality and its antecedents. Alternatively, it could be explained in terms of both the role of social position as a determinant of beliefs and the role of beliefs in determining how people

constructed their social environment. If so, it would be reasonable to assume that preferred responses to terrorism would reflect preexisting dispositions, and the stock responses to be found in the relevant legislative debates seem to confirm this expectation.

As a description of the belief systems of nonactivists, this analysis is hard to reconcile with Converse's classic 1964 study, which found that mass attitudes on economic and foreign policy issues bore little relation to their self-placement on a liberal-conservative scale and that attitudes measured in 1958 correlated very weakly with responses to the same items in a poll two years later.²⁰ His findings bear only tangentially on whether popular attitudes to liberty-related issues are more coherent and more stable, but they do demonstrate that one should not lightly assume that they are. Converse did find, however, that attitudes appear to be much more coherent among activists.

Subsequent research has tended to support the proposition that people can be meaningfully ranked on a liberalism-conservatism scale.²¹ Moreover, twin studies suggest that scale scores reflect both childhood environment and genetic influences, and there is some evidence linking beliefs with the interaction between particular genes and environmental factors.²² Other studies have suggested that liberalism-conservatism may be better understood as involving several related (but stable) dimensions. Eysenck developed a two-dimensional model—one dimension of which tapped civil libertarianism, while the other tapped egalitarianism—and found some evidence to bear out his analysis.²³ Gastil and colleagues tested Wildasky's hypothesis that people constructed their responses to political issues according to their "ways of life" and that these could be classified two-dimensionally: according to the degree to which the person values autonomy over conformity to the group and according to the degree to which the person attaches moral significance to social differentiation. They found that rank along these dimensions predicted responses on particular issues reasonably well, even among people who knew relatively little about politics. Even among the politically active, they predicted policy preferences somewhat better than did party allegiance and ideological self-identification.²⁴

The dimensional analysis has implications for understanding reactions to coercive measures. In particular, it suggests what seems plausible in any case—namely, that responses to threats will be influenced by their attractiveness, given the person's prior dispositions. First, we are likely to draw on ideology, or "way of life," as a heuristic device to assist us in determining responses to situations about which we know very little. Second, ideology is likely to determine how people process information. We tend to welcome information that reinforces our prejudices and to filter out information that does not. Third, in some cases, ideology can be the basis for a sense of iden-

tity. Where moralities or “ways of life” are at stake, issues become personal. Policies symbolise the degree to which the views of “people like us” prevail. So the emotional stakes may be higher than the practical ones. But much depends on what aspects of an issue are prompting the reaction. Converse’s research reminds us that very few people react to the finer details of a political measure, and his research suggests that what matters to members of the political elite may be of little significance to the less informed. So while it may be possible to predict who will react most favourably to a president who promises tough action, it may be harder to use a person’s dispositions to predict whether and how that person will react to a proposal to change the law with respect to applications for warrants to access stored communications.

Moreover, relative civil libertarianism is not everything. Among egalitarian libertarians, its implications will be blurred in relation to racist terrorists and gun-toting militiamen, and when it is militias rather than Muslims who most symbolise a terrorist threat, Republican authoritarianism is blunted. Ideology may also conflict with role. Groupthink may triumph over personal views. Members of parliament must become accustomed to voting for laws that garner their disapproval, and members of Congress may be subject to pressures to conform to the views of the party majority.

Law as a Response to Terrorism

On the whole, one would expect the preceding generalisations to apply to counterterrorism legislation. However, law differs from some other counterterror responses in ways that are potentially relevant to this book’s discussion. First, laws tend to be general. A law that can be used in a particular way in relation to Islamist terrorism is also available for use against terrorists in general. This will not particularly concern pacifists, but it is likely to concern people who might simultaneously favour the torture of Muslims and envisage a positive role for terrorists who want to overthrow any government that wants to take away their guns. Second, laws are formally public, and governments and people tend to behave themselves better when their activities are public, which is one reason why privacy is popular. Governments may want to engage in unpalatable practices while pretending that they do not, and those who vote for them may agree. Third, law usually evolves slowly. Even when laws are enacted with what looks like unseemly haste, they often receive considerable attention. More important, laws usually require judicial interpretation, which normally involves delay and close scrutiny. It also means that the payoff for trying to use loose language to allow unpalatable exercises of power is likely to be minimal.

Conclusions

This chapter examined several possible reasons responses to fears of terrorism have taken the form they have, noting the potential importance of effectiveness, timing, institutional concerns, and preexisting beliefs. It has argued that legal responses to terrorism may be constrained by considerations that do not necessarily apply to the same extent in relation to nonlegal responses. The following chapters examine various legal responses and the degree to which they can be explained in these terms.