Law, Liberty, and the Pursuit of Terrorism

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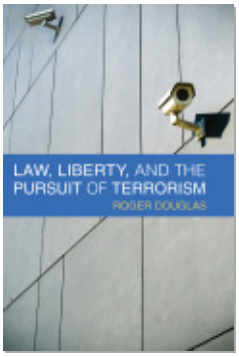

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Terrorism Offences

> If sentences are imposed which are more severe than the circumstances of the particular case warrants this will be likely to inflame rather than deter extremism.
>
> *Lord Phillips*[1]

One of the responses to terrorism has been the development of criminal laws that specifically target terrorism. These laws have been criticised on two incompatible grounds. One is that the law already punishes terrorist acts and preparations for those acts.[2] Accordingly, critics of the creation of special terrorist offences have cited their redundancy as evidence that the new offences are no more than window dressing, aimed at reassuring an "anxious public."[3] An alternative criticism is that terrorism offences have gone beyond what the criminal law should proscribe and, "by piling inchoate liability on top of inchoate crimes," run the risk of creating "monstrosities" such as "attempting conspiracies."[4]

The former proposition is clearly correct in relation to completed terrorist acts, and to a considerable degree, preparations for terrorist attacks could also be punished as conspiracies or attempts. In the United States, conspiracy law is extremely wide. It requires an agreement to perform a criminal act, but it does not require that there be agreement as to details of the offence. If people agree that they will acquire the knowledge and material necessary to make a bomb that they will set off somewhere in the hope that this will involve considerable property damage or loss of life, they are involved in a conspiracy to commit relevant offences (such as murder, damage to property, explosives offences). The elements of conspiracy vary somewhat across jurisdictions. A common element is that there must be an agreement to commit an act that, if committed, would constitute a crime, and it is immaterial that a party to the conspiracy subsequently has second thoughts.[5] Some require overt acts evidencing the conspiracy; others do not, although the absence of overt acts may complicate proof of the conspiracy. In the United States, a person can be guilty of conspiracy as long as there is feigned agreement (as, one hopes, is the case where the only other party to the "conspiracy" is with an undercover

agent). Elsewhere, there must be an actual agreement.[6] Both in the United States and in the other countries considered in this book, an attempt to conspire to create a substantive offence is not itself an offence.[7]

There are several rationales for the creation of special terrorism offences. First, several activities cannot be caught by substantive offences and conspiracy law. A person may give money to a terrorist organisation under the intent that it be used for charitable purposes or to fund propaganda. This hope may be naive but sincere. If so, the person is not guilty of a conspiracy to do the objectionable things that the contribution facilitates, because the donor does not intend to help the terrorist group achieve its terrorist purposes.[8] However, a government may take the view that people should be discouraged from assuming that terrorist organisations act like good trustees who scrupulously refrain from mingling different funds. Hard-hearted government may conclude that even if the organisation uses funds only for the purpose for which they are donated, this may nonetheless enhance the organisation's capacity to engage in terrorist campaigns.[9] Doing good works is, after all, one way to win hearts and minds, which is why terrorists sometimes kill aid workers whose good works compete with theirs.

Attempt laws may not catch terrorist plans in their early stages. If they involve conspiracies, this will normally be immaterial, but if they involve a lone offender, mere preparation is not enough to constitute an attempt. Making it an offence to prepare for terrorism makes it easier to thwart would-be terrorists.

The UK offence of encouragement of terrorism also expands the scope of the law, especially since encouragement can include "glorification." If the glorification is intended to encourage the commission of a terrorist act, it may well constitute incitement. But if it is merely intended to encourage the creation of an ideological climate in which the commission of terrorist acts becomes more likely, it may fall short of incitement.

A second rationale for special terrorism offences is that they may make it easier to secure convictions. For example, it may be difficult to prove that a person who provides material support to a terrorist organisation knows that the organisation relevantly engages in terrorism or that the money they give for charitable purposes will not be used for uncharitable ones. By making it an offence to contribute to a proscribed organisation, proof may be made slightly easier, although not much: insofar as proof of guilt requires knowledge of proscription, the prosecution might be hard-pressed to prove that the hypothetical little old lady who contributes $20 to Hamas knew that it had been proscribed. More striking examples of facilitated proof are provided by offences whose elements either are satisfied if the prosecution proves that the

defendant had reasonable grounds for believing in their existence or cast an evidentiary burden on the defendant.[10]

A third rationale for special terrorist offences is that terrorist crimes may require special treatment. They deserve condign sentences; they might warrant refusal of bail. This belief probably underestimates the degree to which traditional bail and sentencing law allow the requisite pretrial and posttrial detention. Moreover, it does not necessarily require the creation of special terrorism offences. Indeed, US law makes only limited use of freestanding terrorism offences. Rather, it provides that bail should normally be withheld from those charged with "federal crimes of terrorism," and offences may attract a higher sentence if they involved or were intended to promote such crimes. To constitute a federal crime of terrorism, the behaviour must constitute at least one of a number of listed offences. These include but are not limited to offences that are obviously related to terrorism. In addition, however, the offence must be calculated or intended to coerce or intimidate government or to retaliate against government action.[11] The other four countries considered in this book also tend to accommodate terrorist *acts* under the general law, their terrorist offences being largely aimed at precursor activities, and it is hard to see what the Australia and New Zealand achieve via their terrorist act offences that could not be achieved under the general law.

The redundancy argument has some merit, but it underestimates the degree to which the advocates of counterterror laws are seeking to catch those whose conduct would not have brought them within the ordinary criminal law. In particular, it underestimates the degree to which terrorism offences are aimed at catching possible offenders at an early stage of their planning. If there was a risk of particularly serious terrorist attacks, if early intervention could reduce the likelihood of such attacks, and if harm to the innocent was limited, this would be a defensible policy. Critics doubt that any of these conditions are satisfied. They are worried about the use of the criminal law to punish people for what they might do rather than for what they have in fact done, although this is to be blind to the degree to which the criminal justice system looks to the future in nonterrorism cases. They are naturally worried by backdoor relaxation of burdens of proof, since these will necessarily mean more wrongful convictions. They are also worried lest innovations in one area of the criminal law infect other areas of the law, although it is not clear that the likelihood of this is enhanced by special terrorism laws, as distinct from attempts to stretch existing law to accommodate what might be seen as the distinctive needs of terrorism prosecutions.

Legislatures have responded to terrorism to varying degrees and in varying ways, although there has been a general tendency to expand the capacity of the

criminal law to perform a preventive function. Governments have tended to use the new offences sparingly, partly because they are conditioned on the existence of offences, which have been in gratifyingly short supply. Courts have generally given governments and prosecutors what they wanted. The new offences have largely survived constitutional scrutiny, and even when they have been given a narrow construction, defendants have generally been convicted on one or more counts. However, convictions come at a cost. To governments, the expense of prosecutions can be massive. Police and prosecutorial errors can detract from the legitimacy governments might accrue from more carefully exercising their powers. A corollary of these costs is that governments make mistakes, and those who pay most for these mistakes are those whose liberty is limited as a result of the exercise of criminal justice powers.

Offences

The appendix at the end of this chapter summarises offences that are defined by reference to some kind of link with terrorism. In the United States, the word *terrorism* is also used in labels applied to groups of offences of a kind that terrorists might commit, regardless of whether the offender intended to coerce governments or sections of the population and regardless of the offender's motives. One bundle of offences is the basis for the offence of material support of terrorists. For the purpose of this offence, a person is a terrorist as long as they relevantly commit any of the listed offences. Another set of offences constitute "federal crimes of terrorism." These include the material support offences. Whether an offence is a federal crime of terrorism is relevant to bail and sentencing decisions.

In other jurisdictions, laws applying generally to "terrorist" acts apply only to offences against terrorism conventions or offences involving a relevant terrorist intent. Many of these offences overlap with conventional criminal offences, but it is also apparent that terrorism offences are designed to catch precursor acts that would otherwise not fall foul of the criminal law. First, there are offences capable of catching preparations that have not yet become "attempts." The most obvious examples of these include the UK and Australian preparation offences. Other examples include the material support and possession offences. Second, there are offences that catch precursor activities that might not amount to a conspiracy. These include contributions to a terrorist organisation that has no current plans for terrorist actions, as well as contributions for the nonterrorist purposes of terrorist organisations. The most wide-ranging of these offences include the UK encouragement and publications offences. Third, there are offences designed to ease proof. These include the UK offences relating to possession of things useful for terrorism.

The countries clearly vary in the scope of their laws. UK law is broadest, and its encouragement, publications, and membership offences would probably fall foul of the US Constitution. Australian law is heavily based on UK law but narrower, in that it does not extend to encouragement and publications. Canada and New Zealand laws are narrower. Importantly, their laws in relation to organisations do not catch people who "participate" in an organisation without intending thereby to enhance its capacity to engage in terrorism. But even UK law basically respects the "reasonable doubt" test, with the quasi-exceptions doing no more than casting an evidentiary duty on the accused.

The United States lacks the United Kingdom's broad encouragement and publications offences, and unlike UK and Australian law, US law does not make it an offence to be a member of a terrorist organisation. But the material support offence would catch anyone whose membership was other than purely nominal, and after taking account of offences that constitute federal crimes of terrorism, there are some respects in which US law is slightly broader than UK and Australian law.

Pretrial and Posttrial Detention

Investigative Detention

UK and Australian law permit the detention of terrorism suspects pending further investigation.[12] Short initial detention periods are permitted, after which judicial approval is required for further periods of detention. In the United Kingdom, the maximum period of detention is currently 14 days. In Australia, the maximum detention period depends on a complex formula. The maximum aggregate time during which an arrestee may be questioned is 24 hours. In addition, detention is permitted during "dead time" during which questioning is impossible, and it is subject to judicial approval for periods when, for other reasons, it is reasonable to delay questioning. The maximum aggregate duration of such periods is now 7 days. Further detention is conditioned on the suspect being charged and is dependent on a court refusing to allow release on bail.[13]

Pretrial Detention

Even if pretrial detention were permitted solely for the purpose of ensuring a person's presence at trial, it also serves as de facto preventive detention functions insofar as defendants charged with terrorism offences constituted a flight risk.[14] The heavy penalties associated with terrorism offences mean that those charged might be tempted to try to flee the country or go into hid-

ing, and insofar as alleged terrorists have links with terrorist networks, their prospects for being able to go into hiding might be enhanced. Moreover, in the United States, bail legislation requires taking account of the "danger" the arrestee poses to the community, which would also count against release in terrorism cases.[15]

Legislation in the United States, Canada, and Australia requires that pretrial detention decisions take account of whether the defendant is charged with a terrorism offence. In the United States, detention must be ordered if the judicial officer finds that no condition or combination of conditions will ensure appearance at trial and guarantee the safety of any other person and the community. There is also a rebuttable presumption that when a person is charged with particular offences, no conditions will satisfy the appearance and safety requirements. Since 2004, these offences have included those that would also constitute federal crimes of terrorism, regardless of whether they satisfy the requirement of intent to coerce.[16] Since 2006, a judicial officer determining the adequacy of possible conditions for release is also required to consider matters that include whether the offence is a federal crime of terrorism.[17]

Canadian law creates a strong presumption in favour of conditional release, but the presumption is reversed if the accused is charged with specified offences. Since 2001, these have included terrorism offences.[18] Australian law prohibits the granting of bail in the case of terrorism offences, save in exceptional circumstances where a person is charged with terrorism offences and other specified offences and where the "physical element" involves death or the risk of death.[19]

Sentencing

Under ordinary sentencing principles, terrorism offences could be expected to attract heavy sentences. Terrorism offenders seem to have slightly better prior records, and once one discounts for their involvement in terrorism, they are sometimes people of relatively good character. In relation to very serious offences, however, priors and character generally play a relatively minor role. Moreover, those charged with terrorism offences may be hard-pressed to argue other mitigating factors, such as remorse, although some have done so, with some success.[20] The heavy maximum sentences that apply even in relation to precursor offences also mean that sentences determined according to ordinary sentencing principles may be considerable, even for middle-level examples of the relevant offence. However, legislatures evidently do not consider this to be enough. In the United States, federal sentencing guidelines provide for an increased sentence if the offence was intended to promote a

federal crime of terrorism.[21] UK law now expressly requires courts to take into account whether the offence has a "terrorist connection," an aggravating factor for sentencing purposes, and Canadian law is similar.[22] Australian law requires that in terrorism cases (inter alia), the nonparole sentence be at least three-quarters of the head sentence.[23]

The Development of the Law

Some of the laws have a long lineage, and many predate the 9/11 attacks. The United Kingdom's uniform and symbols offence had its ancestry in the Irish troubles of the nineteenth century, and other UK terrorism offences tend to have their origins in laws targeting Irish violence. Their rationale was given close consideration, however, in the years leading up to the passage of the Terrorism Act 2000. Parliamentary concerns about the offences were based largely on objections to their implications, given the breadth of the definition of terrorism, rather than on the contention that they would be inappropriate, even given a narrower definition. The only relevant attempt to amend the offences provisions of the Terrorism Bill 2000 in the House of Commons related to the substantive provision of reverse onus in relation to the offence of possession of articles for terrorism, which was opposed by the Liberal Democrats and two Labour MPs.

The US offence of providing material support to terrorists predates the attacks that prompted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA added the offence of providing material support to a terrorist organisation, an innovation sharply criticised in a dissent to the report of a bill including the provision.[24] The 7 dissenters were all Democrats but comprised only a minority of the 15 Democrats on the committee.[25]

Pre-2000 offences have survived largely unchanged, but new offences have been added in all five countries. In the United States, the 9/11 attacks left little direct mark. The Patriot Act expanded the definition of "material assistance" to include "expert advice or assistance," increased the maximum sentences for material support and other terrorism-related offences, and added the harboring offence.[26] The Intelligence Reform and Terrorism Protection Act of 2004 amended bail legislation to raise the hurdles to the granting of bail in cases involving federal crimes of terrorism.[27]

In the United Kingdom, post-9/11 measures have been more widespread and more controversial. While investigatory detention was uncontroversial, attempts to extend the maximum detention period aroused considerable resistance, even from the government's back bench. (This issue is discussed in more detail in the next chapter.)

The Terrorism Act 2006 also added the encouragement, publications, and

training offences, along with the preparation offence. These were more controversial than the 2000 offences. Despite some early amendments to the bill, the encouragement, publications, and training offences were the subject of a critical report by the Joint Committee on Human Rights, with three of the four Labour MPs dissenting in relation to the encouragement and dissemination offences. (The committee was satisfied of the need for the preparation offence.)[28] All opposition parties and a considerable minority of government backbenchers supported proposed amendments that would have tightened the intention requirements and eliminated the glorification element of the encouragement offence, and the opposition parties also sought to tighten the requirements of the training offences. The bill was later amended to take account of some of the committee's concerns in relation to encouragement and dissemination.

Canadian, New Zealand, and Australian terrorism offences were a response to the 9/11 attacks, although, to varying degrees, they drew on UK precedents. As in the United Kingdom, concerns about the offences was primarily a response to fears based on excessively broad definitions of terrorism, rather than on the grounds that the relevant conduct ought not be criminal even assuming a narrower definition. In Canada, there was debate in committee about the operation of provisions dispensing with any need to prove that activity was oriented towards a particular act, but the doubters seem to have been reassured. Indeed, there was a rare nongovernment attempt to expand the scope of the legislation. A Canadian Alliance amendment would have made membership per se an offence and would have precluded parole for those sentenced to life sentences. At the report stage, there were no attempts to amend the bill's criminal law provisions, except for the organisation offences, although there was debate about the details.

The original Australian proposals included relaxed knowledge and intention requirements and, in several cases, reverse onus provisions. In the face of committee objections and political realities, the government tightened the knowledge requirements, although not sufficiently to satisfy the Australian Democrats and the Greens.

New Zealand's 2002 legislation was opposed in its entirety by the Greens, who also sought (unsuccessfully) to make it lawful to finance well-intentioned liberation movements. For their part, the conservative parties sought to remove the requirement in the participation offence that the defendant intend to enhance the group's capacity to engage in terrorism.

In Canada, the legislation has survived almost unchanged. In New Zealand, engaging in terrorism was made an offence in 2007. The amendment was opposed only by the Greens and the Māori Party. In Australia, the 2002 offences have been left intact, but there have been changes to procedural and

substantive law. In 2004, Australia legislated to provide for investigatory detention. The result was poorly drafted legislation, which was subsequently amended in 2010 to make it less opaque. The offence of associating with a terrorist organisation was also introduced in 2004.

Prosecutions

Pleas, Trials, and Convictions

Despite the paucity of terrorist attacks, there have been numerous terrorism trials, especially in the United States and the United Kingdom. Statistics exist, but the heterogeneity of terrorism cases means that the statistics are not always easy to interpret. The unit of analysis may be a case (with multiple defendants) or a defendant. Statistics are based on a variety of definitions of what makes a case a "terrorism" case: for instance, US authorities use at least three definitions, and analysts of US data use yet further definitions and samples.[29] The Center on Law and Security (CLS) follows cases arising from arrests that were justified on the grounds of the defendant's involvement in terrorism. Zabel and Benjamin have reported comprehensively on cases involving Islamic terrorists.[30] Chesney has provided data in relation to material assistance cases.[31]

The CLS data disclose a sharp decline in the average number of terrorism indictments, from 127 in the year following 9/11 to an annual average of 30 in recent years. Most "terrorism" cases do not involve "terrorism" charges,[32] although reliance on terrorism charges has increased over time. The CLS estimate is that fewer than one in three "terrorism" defendants faced a terrorism charge, with another 12 percent charged with "national security" offences (under the International Emergency Economic Powers Act, or IEEPA) and hostage-taking offences. It found that more than 80 percent of charges in terrorism cases involve "nonterrorism" offences, including general criminal conspiracy, general fraud, racketeering, immigration violations, and national security violations. Zabel and Benjamin broadly agree, noting that one reason for this is that would-be terrorists are likely to commit numerous other offences in the course of their preparations.

Robert Chesney's analyses highlight two matters that do not emerge from the other studies. First, although material support legislation predates the 9/11 attacks, there were very few material support prosecutions prior to 2001. There were two section 2339A prosecutions, one involving a domestic militia; and there were four section 2339B prosecutions, two involving Hezbollah supporters and two involving supporters of the Mujahedin-e-Khalq. There were no IEEPA prosecutions.[33] This changed after 2001. The other striking

finding to emerge from his data highlights a matter not mentioned in other studies, namely, the numerical importance of "uncompleted" offences.[34] Slightly more than half of the 108 section 2339B prosecutions in his sample involved charges of conspiracy only (30), conspiracy coupled with attempt (24), or attempt only (5). Thirty-eight involved a conspiracy and a contribution charge, and only 11 involved contribution only. The lack of charges based on terrorist acts is not surprising given the paucity of actual terrorist attacks, yet it is striking that even would-be contributors to terrorist organisations are so often apprehended before making their contribution.

The CLS study highlights the importance of distinguishing between conviction rates by charge and conviction rates by defendant. Almost 90 percent of defendants were convicted, and fewer than 4 percent were acquitted. (In the remaining cases, all charges were dismissed.) By contrast, more than a third of charges are dealt with by acquittal or dismissal. One reason is that, on the whole, terrorism defendants do not seek to transform their cases into political trials: about 80 percent plead guilty. In exchange or because of redundancy, some of the charges against them are dropped. Acquittals by juries are extremely rare, comprising only 1.7 percent of resolved indictments. Appeals make little difference: guilty verdicts were vacated or reversed in nine cases, but guilty verdicts on some charges survived in five of these. Zabel and Benjamin report similar conviction rates in connection with their sample of trials involving terrorism related to al-Qaeda, although their sample had a considerably higher rate of not guilty pleas (more than 40 percent).[35]

In Great Britain, between 2001–2 and 2007–8, proscribed organisation charges were the principal charge in 31 cases. (The statistics are silent in relation to the extent to which other cases included organisation charges.) In other terrorism cases, the most frequent principal offence charges were possession of an article for terrorist purposes (71), fund-raising (34), provision of information relating to a terrorist inquiry (20), collecting information useful to a terrorist act (15), inciting terrorism overseas (10), preparation for terrorist acts (10), training offences (9), and other offences (8).[36] In addition, there were 118 terrorism-related cases where the principal offence was not a terrorism offence. Principal charges included conspiracy to murder (36), acting with intent to cause an explosion (20), conspiracy to commit armed robbery (8), Firearms Act offences (6), and theft (6).[37]

The Home Office statistics indicate that 58 percent of those charged with terrorism-related offences were convicted. The conviction rate for those tried was considerably higher, 91 percent in 2007 and 80 percent in 2008. Conviction rates among those charged were much higher where the principal charge was a nonterrorism offence than when it was a charge under terrorism legislation (80 percent compared with 46 percent).[38] Otherwise, the Home Office

data throw only limited light on whether particular charges are relatively easily proven. Trial outcomes are tabulated by reference to the principal conviction charge (which is the charge for which the defendant received the heaviest sentence). Since this is not necessarily the principal charge (which is the charge carrying the maximum possible sentence), it is impossible to know whether discrepancies between charge and outcome data reflect acquittals or sentencing.

Thirty-eight people have been charged under Australian counterterror laws, of whom 22 were arrested for their alleged involvement in relation to a loose conspiracy involving 13 defendants from Melbourne and 9 from Sydney. In Melbourne, 1 defendant pleaded guilty and provided evidence against the other 12, 6 of whom were convicted on the 136th day of their trial, with a seventh convicted shortly afterwards. Four were acquitted, and the jury was unable to agree in one case.[39] (The defendant subsequently pleaded guilty.) Five of the Sydney defendants pleaded not guilty, and after a trial that lasted for 10 months, followed by four and a half weeks of jury deliberation, the five defendants were convicted of conspiring to commit acts in preparation for a terrorist act, four others having earlier pleaded guilty to related offences.[40] Three Tamils had originally been charged with membership of and providing funds to a terrorist organisation. While the Tamil Tigers was not a listed organisation, the prosecution was based on the unproblematic assumption that the organisation nonetheless was a terrorist organisation. The defendants eventually pleaded guilty to the lesser offence of providing money in contravention of the UN Charter of the United Nations Act 1945.[41] Five defendants were charged with having planned an armed attack on a Sydney army barracks; Three were convicted.[42] In other cases, four other defendants were convicted, three on nonterrorism charges.[43] In two other cases, charges were dropped. One case became unsustainable after the trial judge ruled that evidence of admissions was inadmissible on the grounds that they had been made after the defendant had been wrongly led to believe that he was required to answer questions put to him by ASIO officers.[44] In the other, charges were dropped after it became clear that they could not be sustained.

In Canada, there have only been three relevant trials or sets of trials. One trial involved a single defendant who was found to have been involved to a limited extent in a multinational terrorist plot, a set of trials arose out of two related Toronto conspiracies, and a third trial arose from a defendant's fundraising activities on behalf of the Liberation Tigers of Tamil Eelam (LTTE). The first trial resulted in a conviction, following a trial by judge alone.[45] The conspiracies resulted in 18 arrests and charges against 17 defendants, 5 of whom were minors. Charges related to involvement in a terrorist organisation (which consisted of parties to the conspiracies in question), and other precur-

sor offences. The prosecution dropped the charges against four of the minors and three adults. Of the remainder, six pleaded guilty (generally only shortly before their trials were due to commence), two were convicted after trial by jury, and two were convicted by judge alone.[46] The third trial was resolved by a guilty plea.[47] In 2011, an alleged al-Shabaab supporter was charged with terrorist group offences.[48] The case has yet to come to trial.

Following a raid on a group of Māori militants, arrestees were charged with terrorism offences, but on the advice of the solicitor-general, these were almost immediately dropped. Other charges against 13 of the 18 people arrested were dropped after the Supreme Court ruled that video surveillance evidence had been illegally obtained. One defendant died, and of the remaining four, who were tried on firearms and criminal organisation offences, convictions resulted for only three and only on firearms charges.[49]

Sentences

Courts seem sympathetic to the sentiments that underlie the legislature's decision to impose heavy maximum sentences for precursor terrorism offences.[50] They attach little weight to the fact that a defendant was arrested before having had an opportunity to give effect to his or her terrorist intentions. What matters are defendants' intentions prior to their arrest.[51] Courts also do not attach much weight to the fact that most of those convicted of terrorism offences have had no prior convictions or to the fact that some of them would have been people of excellent character but for their involvement in terrorism.[52] Lack of remorse and evidence of commitment to terrorism count in favour of a long sentence and are taken as suggesting little likelihood of rehabilitation.[53]

In serious cases, even remorse may not count for much: in a Canadian case involving a conspiracy that, if effected, would have caused massive loss of life and property damage, the ringleader was sentenced to the maximum sentence ("life"[54] imprisonment) on the more serious count, notwithstanding a (late) guilty plea and some evidence of remorse.[55] A US circuit court held that a district court erred in not recognising terrorists as unusual in that their likelihood of recidivism did not decrease with age.

> Although recidivism ordinarily decreases with age, we have rejected this reasoning as a basis for a sentencing departure for certain classes of criminals, namely sex offenders. . . . We also reject this reasoning here. "[T]errorists[,] [even those] with no prior criminal behavior[,] are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation."[56]

Dissenting, Judge Barkett objected that the majority had misread the cases it cited, that the government had not challenged the lower court's sentence on the ground that it had underestimated the likelihood of recidivism, and that there was no evidence cited to warrant the conclusion that terrorists' risk of recidivating did not decrease with age.[57]

In relation to US charges, the CLS has been unable to find much information on the frequency with which sentencing enhancements have been imposed. It reports practitioners' claims that they are frequently imposed, especially in material support cases, but its own research, complicated by inadequate records, disclosed only 24 instances, all but 4 of which were "terrorism" or "national security" cases.[58] However, its continuing importance is documented in Zabel and Benjamin's summary of recent federal appeals decisions and by the egregious decision in *United States v Jayyousi*.[59]

There is better evidence in relation to the sentences actually imposed. Although the relevant terrorism offences have rarely involved actual participation in a terrorist act, those convicted in "terrorism" cases have almost invariably been sentenced to terms of imprisonment, usually to lengthy ones. Sentences in the United States varied according to whether the prosecution included terrorism charges (median 10–14 years), national security or hostage taking (median 5–9 years), or neither of these categories of offence (median less than 1 year).[60] Zabel and Benjamin found that almost 90 percent of those sentenced for offences involving terrorism related to al-Qaeda received prison sentences, the remainder receiving either probation or time served.[61]

Data from the UK Home Office also throw only limited light on sentencing patterns, beyond suggesting that defendants convicted of terrorism offences almost invariably receive custodial sentences of at least one year and that among those receiving custodial sentences, the sentences are not as long for those convicted of terrorism offences as for those convicted under nonterrorism legislation.[62] In Australian terrorism cases, convicted defendants have almost invariably received custodial sentences, and while several of these have been for time served, the defendants had spent three or four years in custody prior to their conviction. However, the three Tamils escaped imprisonment. In their plea in mitigation, they argued that they had intended that the money be used for charitable purposes. Accepting that the defendants had acted on the basis that contributing the funds was the only way to help the Sri Lankan Tamil community, the judge sentenced the defendants to prison terms but released them on good behaviour bonds.[63]

In Canada, where there have been relatively few terrorism trials, all of those convicted have been sentenced to custodial terms, including one life sentence (with a nonparole term of 10 years from the date of arrest).[64] In several cases involving people with relatively minor roles in the Toronto conspiracies, the

defendants were effectively sentenced to time served (which, by the time of their sentencing, was between three and four years). The effective sentences imposed on the conspirators were generally shorter than those imposed on the Australian conspirators, but the Canadians had generally pleaded guilty and had generally shown some signs of remorse.[65] The LTTE fund-raiser received a six-month sentence for raising between two and three thousand dollars.[66]

Pretrial Detention

In Great Britain, suspected terrorists are generally arrested pursuant to the investigatory detention power, rather than under the general law. The detention period is typically two days or less, and even after the extension of the maximum period to 14 and then 28 days, only 6 percent of arrests resulted in detention for periods of 14–28 days. Those detained for 14 days or more were more likely to be charged with an offence than were other arrestees (59 percent compared to 39 percent). Since 2007, no suspect was detained for more than 14 days. In Australia, the power has been used only once. Depending on the outcome of the investigation, further detention will depend on whether the defendant is charged and on the outcome of the subsequent bail application.

Of the 289 defendants in Zabel and Benjamin's sample, 157 were ordered detained without bail.[67] UK statistics are elusive. The defendants in the Sydney and Melbourne conspiracy trials served lengthy periods in pretrial detention (in conditions considerably worse than those to which ordinary criminal defendants were subjected), and those detained included defendants who were acquitted. However, there have been other Australian cases where defendants were released on bail pending trial. (In one case, the defendant was subsequently acquitted, and in the other, charges were dropped.) The convicted defendants in the Toronto conspiracy cases had all been detained from the time of their arrest to the time of their sentencing. (But at least one of those against whom charges were dropped was released on bail prior to the dropping of charges.) The alleged al-Shabaab supporter was released on bail of $200,000 and subject to strict conditions.

Restraints

Criminal law tends to be the public face of law. It has the potential to empower governments by lending legitimacy to the detention of people who might otherwise pose a threat to society. It may cause risk-averse dissidents to turn towards forms of political dissent that are less violent. It may reassure the public that terrorism is under control and that evil gets its just deserts.

However, legitimation is dependent on the government being on its best behaviour. This means closely complying with prescribed procedures and being able to sustain a story capable of convincing judges and jurors that the defendant is guilty. It also means recognising that trials are a form of theatre and that a successful trial is one from which the audience learns the lessons the government wants it to learn. This means concentrating not on the question of whether the accused is guilty but on whether and how others can be convinced of this. Such a focus has obvious implications. It means that it will usually be unwise to prosecute weak cases. It also means that it will usually be unwise to prosecute cases where the evidence justifies conviction but where jurors or members of the public are likely to sympathise with the accused and to consider that the prosecution ought not to have been brought.

Governments appear to take these considerations seriously. High conviction rates indicate both recognition of the importance of having a strong case and the capacity to recognise when one does have such a case and when one doesn't. Legislation almost invariably survived constitutional attack. While US district and circuit courts found aspects of the material support legislation unconstitutional, they almost invariably accepted that knowing financial support of listed terrorist organisations was an offence, even if the person intended the contribution to be used for the group's peaceful activities. Moreover, the concerns expressed in some lower courts were, in the end, not shared by the Supreme Court. The only situation in which a Canadian court has struck down legislation in the context of a criminal trial was one where the decision had the effect of broadening the scope of Canadian counterterrorism offences to include cases where the intent to coerce or intimidate did not coexist with an ideological purpose.

UK courts have read down offences to ensure that the legislation is compatible with the ECHR. *Attorney General's Reference (No 4 of 2002)* related to a charge of belonging to a proscribed organisation. The defence was that the person had joined the organisation before its proscription but had taken no subsequent part in its activities. At issue was whether the defendant had to prove inactivity or whether the obligation was simply to produce evidence sufficient to raise reasonable doubts as to his subsequent involvement. The court of appeal unanimously held that the burden of proof lay on the defendant. The House of Lords held, in a 3–2 decision, that this was the Parliament's intention but that compliance with the ECHR necessitated that the requirement be read down so that the defendant was required to do no more than raise reasonable doubts as to whether he was subsequently active.[68] In cases involving possession of things useful to terrorism, their reading down appears to have involved orthodox statutory interpretation, rather than a response to the ECHR.[69]

However, success comes at a cost. Terrorism trials have often proved extraordinarily complex. In Canada, Mr. Khawaja was charged and denied bail in 2004. Interlocutory disputes continued for years. One related to the pretrial discovery of 1,500 pages from the 90,000 pages of material in the Crown's possession. In 2008, the trial judge lamented that such trials were nearly impossible, although Khawaja was eventually convicted and sentenced.[70] The UK trial of Mr. Khawaja's associates was completed more quickly, but it lasted for a year, and the jury took a month to deliberate.[71] Investigations and trials arising out of the 2006 plane conspiracy came to 35 million pounds.[72] The Melbourne terrorist conspiracy case took 136 days before it yielded a verdict,[73] and the Sydney case (which involved fewer defendants) lasted for 10 months and was followed by more than a month of jury deliberations.[74]

Moreover, prosecutions can sometimes cast the government in a bad light. Unsustainable claims can backfire. When first apprehended, José Padilla was alleged to be involved in a plot to unleash a dirty bomb somewhere in the United States,[75] but the subsequent charges involved far more mundane types of terrorist support: recruitment, soliciting and transferring money, providing communications equipment, and seeking training. When Nuradin Abdi was indicted by a grand jury, the government press release announced that the indictment was "for plotting with other members of an Al Qaeda cell to bomb a Columbus Ohio-area shopping mall,"[76] but the indictment made no mention of the bombing, and it turned out that while Abdi may have boasted of his intention, he had not chosen the mall and had not acquired any explosives.[77] After a plea bargain, Abdi was convicted of providing material assistance to al-Qaeda and of providing information about possible targets for attack. Iyman Faris, who had provided information about Abdi's threat, had been involved in a plan to destroy the Brooklyn Bridge, but after examining the feasibility of doing so, he had concluded that it was impracticable and advised al-Qaeda accordingly.[78] Brendon Mayfield was detained after a poorly conducted fingerprint analysis had wrongly been taken as indicating that he had been involved in bombings in Madrid.[79] There has also been one case where convictions were dismissed as a result of a prosecutor's failure to comply with disclosure obligations. In 2004, a US district court ordered a new trial of defendants convicted of terrorism-related offences after the government conceded that the prosecutor had failed to disclose exculpatory material and evidence impeaching the character of a jailhouse informer.[80]

In the United Kingdom, a series of cases involving people charged with involvement in IRA bombings resulted in initial convictions, which were eventually set aside on the basis of flawed forensic evidence, failure to disclose exculpatory material, and coerced or otherwise flawed confessions.[81] Lessons seem to have been learned, but post-9/11 trials have sometimes seen elaborate

plots evaporate in the face of evidence. One such trial involved the ricin plot. Raids in January 2003 were followed by an announcement that ricin had been found on the premises and that the police had closed down an al-Qaeda terror laboratory. The truth was more mundane: 22 intact castor beans (which contained ricin) were found, as were scales, acetone, rubber gloves, and instructions on how to make ricin. But the provenance of the instructions was American rather than from al-Qaeda. Nine people were charged, but only one was convicted, and that conviction was for an offence that had nothing to do with ricin.[82]

Australia and New Zealand have also yielded examples of apparent terrorism cases that have rapidly unraveled. Dr. Haneef, who worked in a Queensland hospital, was a second cousin of two brothers, one of whom had been involved in the attempted 2008 bombings in London and Glasgow.[83] On the basis of information suggesting his possible involvement, he was arrested and detained for investigation for the next 11 days. He was then charged and shortly afterwards released on bail. His visa having been cancelled, he was once more detained, notwithstanding that the director of public prosecutions (DPP) had decided to drop charges and despite a favourable ASIO report. An inquiry into the circumstances of his arrest and detention reported misunderstandings of evidence, with the effect that the Australian Federal Police (AFP) overestimated the strength of the case against him; defective AFP advice to the DPP (with the effect that the case seemed stronger than it was), failure by the AFP to comply with legal requirements in relation to Haneef's entitlement both to access to legal advice and to communicate with his family, and failure by the DPP's office to apply the proper test in advising whether Haneef should be charged. New Zealand's only terrorism trial ended as a trial for nonterrorism offences. Despite the massive resources devoted to the surveillance that had prompted the arrests, the trial turned out to be a trial of the police as well as the defendants. It ended with a hung jury on the organisation offences. Some of the jurors evidently distinguished between the defendants' violent statements and interest in mastering weaponry, on the one hand, and their actual intentions, on the other.[84]

Conclusions

Authoritarians are wary about the power of the criminal law in the fight against terrorism. They fear that trials will require or involve the disclosure of state secrets; they are concerned that insofar as secrets are protected, the price will be difficulties in securing convictions; and they are mindful of the fact that proof beyond reasonable doubt means that guilty people must sometimes be acquitted. High conviction rates and the severe sentences imposed on con-

victed defendants suggest that these problems are not insuperable, but these statistics are by no means conclusive. They might, after all, reflect no more than the fact that prosecutors prosecute only those cases they expect to win and that, as a result, there is a reservoir of people who might well be terrorists but cannot be convicted. These might include people who might possibly be terrorists, but it may also include people who quite probably are but cannot be shown to be, given the criminal justice system's exacting standards.

This wariness is questionable. First, the paucity of terrorist attacks in the past 10 years indicates that very few terrorists have escaped the clutches of the criminal justice system. Second, revelations of terrorist plots have almost invariably been accompanied by prosecutions. Indeed, with one possible and contested exception, there have been no cases where reported post-9/11 plots in the United States have not resulted in prosecutions and, insofar as they have been concluded, convictions.[85]

These findings point to a paradox. The requirement of proof of guilt beyond reasonable doubt means no more than that people can be detained as terrorists if the government can prove beyond reasonable doubt that they have committed a precursor offence. There is no additional requirement that the government prove that the precursor offence does in fact foreshadow a considerable likelihood that the offender will, if not restrained, go on to engage in or facilitate an actual terrorist attack. Precursor offences mean that as long as their elements can be proved, people who may pose a relatively small risk may nonetheless be convicted and detained. But governments are not content to rely solely on the criminal law, especially when nonnationals are suspected of constituting an unacceptable risk. When this is legally and politically feasible, states sometimes find it tempting to resort to preventive detention, grounded on standards that are less demanding than those required by the criminal justice system.

Appendix: Terrorism-Related Crimes, by Jurisdiction

US	UK	Canada	Australia	New Zealand
Offence: Material support for terrorism and possession of things connected with terrorism				
Provision of material support, knowing or intending that it be used for specified offences including related inchoate offences: 18 USC § 2339A(a); material support includes property, training, services; personnel (including oneself) Provide or collect property, intending or knowing that it will be used for a terrorist act: 18 USC § 2339C(a) (applies to offences within and outside the United States, but in each case only in limited circumstances)	Solicit, receive, or provide property intending or reasonably suspecting that it will be used for purposes of terrorism: s 15 Use or possession of property for purposes of terrorism: s 16 Dealing to make property available for terrorism: s 17 Possession of things such as to give rise to a reasonable suspicion that the thing is to be used in connection with terrorism, subject to a defence that this was not the person's purpose: s 57 Possess record or information likely to be useful for acts of terrorism, but not if person has reasonable excuse for possession: s 58	Provide or collect property, intending or knowing that it will be used for a TA: s 83.02 Soliciting property or financial services to benefit person facilitating terrorist activity or knowing terrorist group will use benefit: s 83.03 Use or possess property for a TA: s 83.04	Provide or collect funds, reckless as to whether they will be used for a TA: s 103.1 Intentionally make funds available to another, or collect funds for another, reckless as to whether the other person will use them for a TA: s 103.2 Collecting funds, making documents known to be connected with a terrorist act: s 101.5(1) (and s 101.5(2) (reckless)) Possess thing known to be connected with a terrorist act: s 101.4 (and s 101.4 (reckless))	Provide or collect funds, intending or knowing that they are to be use to carry out a TA: s 8(1)
Offence: Terrorism				
		Facilitate a TA, thereby being guilty of an indictable offence. Person need not know it is a particular act: s 83.19 Knowingly instruct a person to carry out a TA: s 83.22 (but no need for knowledge that a particular act involved)	Engage in terrorist act: s 101.1	Engage in a terrorist act: s 6A

(*continues*)

US	UK	Canada	Australia	New Zealand
Offence: Preparation				
Insofar as it involves providing material support: 18 USC § 2339A Harboring people involved in specified offences: 18 USC § 2339	Preparation: TA06 s 5	Insofar as it involves providing or collecting property: s 83.03	Acts in preparation or planning for a terrorist act: s 101.6	
Offence: Giving or receiving training				
18 USC § 2339A (giving)	Provide, receive, or solicit the participation of others in particular training, it being a defence that the training was not for a purpose related to terrorism: s 54 Provide, receive specified training for purposes of terrorism: TA06 s 8	Only if terrorist group involved	Training that is known to be connected with preparation for, engagement, or assistance of person in terrorist act: s 101.2(1) (and s 101.2(2)(reckless))	
Offence: Encouragement				
	Encouragement: TA06 s 1 Dissemination of terrorist publications: TA06 s 2			
Offence: Harboring terrorists				
Harboring people involved in specified offences: 18 USC § 2339.				Knowingly or reckless harbouring a person who has or intends to carry out a TA, to enable the person to escape apprehension: s 13A

Offences: In relation to terrorist organizations

Provide material support for foreign terrorist organisation, knowing it is an FTO: 18 USC § 2339B(a)(1)

Material support is defined in § 2339A(b)

Receive military training from an FTO, knowing it to be an FTO: 18 USC § 2339D.

Directing: s 56

Membership: s 11

Inviting support for: s 12

Wear clothing or display symbol suggestive of support: s 13

Participation or contributing to ability of terrorist group to carry out a TA for the purpose of enhancing this ability: s 83.18

Participation or contributing includes: providing or receiving training; providing expertise at group's direction; recruiting a person to commit a terrorist act; entering another country for a terrorist group; making self available at behest of group, for terrorist activity

Commit indictable offence for terrorist group: s 83.2

Knowingly instruct a person to do something for purpose of enhancing the group's capacity to carry out a TA: s 83.21(but no need for knowledge that a particular act involved)

Knowingly directing: s 102.2(1); reckless: s 102.2(2)

Knowing membership: s 102.3(1); reckless: s 102.3(2)

Knowingly recruiting for: s 102.4(1); reckless: s 102.4(2)

Knowingly training or receiving training from: s 102.5; reckless: s 102.5(2)

Knowingly getting funds to or from: s 102.6(1); reckless: s 102.6(2)

Intentionally providing support or resources knowing that the donee is a terrorist organisation: s 102.7(1); reckless: s 102.7(2)

Associating: s 102.8

Knowingly recruiting for a terrorist entity: s 12

Knowing or reckless participation in a terrorist entity, for the purpose of enhancing the entity's capacity to carry ort or participate in a TA: s 13

Provide or collect funds for terrorist organisation, intending or knowing they will benefit an entity involved in TAs: s 8(2)

Dealing with property of a designated entity: s 9

Making property or financial services available to a designated entity: s 10

Note: Except where otherwise stated, United Kingdom references are to the Terrorism Act 2000 c 11; see too Terrorism Act 2006 c 11 (TA06). Canadian references are to Criminal Code Act RSC 1985, c C-46; TA means "terrorist activity." Australian references are to Criminal Code Act 1995 (Cth). For all offences, it is irrelevant that the terrorist act does not occur and that the behaviour does not relate to a specific terrorist act. New Zealand: references are to Terrorism Suppression Act 2002 (NZ).