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Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism

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ABSTRACT *In this article the authors address the impact which post-September 11 counter-terrorist legislation has had on human rights and civil liberties in a number of common law jurisdictions. The authors conclude that the counter-terrorist legislative regimes in the countries discussed in the article do impinge significantly upon human rights, and argue in favour of a 'balancing approach' towards reconciling such legislation with domestic, regional and international human rights obligations. The authors conclude with some general guidance for legal and policy decision-makers on how to balance the (frequently opposed) interests of national security and human rights protection.*

Introduction

For many western nations, a first-order response to the so-called "War on Terror" has been to make new laws. Some had counter-terrorism laws in place prior to the attacks on September 11, 2001, which were then expanded after that date. Others gained new regimes enacted, often with great haste, because the events of that day were seen as requiring swift and strong action on the part of national legislatures. These new statutes provided an extensive regulatory system dealing with the problem

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of terrorism. Among many other things, the statutes sought to define terrorism, to criminalize acts of terrorism, to give wider powers to intelligence and law enforcement bodies, to authorize electronic and other surveillance of terrorist suspects and to quarantine and freeze the assets of banned terrorist organizations. In a short period of time, changes were made that could run, in any one nation, to many tens or even hundreds of tightly worded pages of new law. Furthermore, in the wake of other terrorist attacks since September 11, such as the Bali bombings of October 12, 2002, the Madrid bombings of March 11, 2004 and the London bombings of July 7 and 21, 2005, western nations have sought to consolidate, and indeed to extend upon, this post-September 11 body of counter-terrorism law.

This new body of law has often qualified, and even departed from, accepted understandings of basic legal principles. These include conceptions as fundamental as the rule of law, as well as the human rights that underlie western liberal democracies such as the right to silence, the rights to freedom of expression and association and the right not to be detained except after a fair trial. The impact of these counter-terrorist laws upon such principles has been their most controversial aspect. The laws have upset long held understandings of how legal systems should operate, especially in regard to the treatment of criminal suspects and the powers given to investigating authorities.

In this article we address the broad conceptual question of how, as a matter of "first principles" legal analysis, this new counter-terrorism legislation should be assessed, especially in regard to human rights and public law values. We start by asking whether the protection of human rights should always necessarily "trump" the protection of national security. From our analysis of international, regional and domestic human rights instruments, we conclude that human rights, whilst central to the operation of modern western liberal democracies, are nevertheless not inviolable. That is, they can be abrogated or modified in the pursuit of countervailing or overriding societal objectives, such as the protection of national security. We thus argue that the proper method for assessing the new counter-terrorism laws, from a human rights perspective, is to adopt a "balancing approach" according to which the importance of the relevant human right is weighed against the importance of the societal or community interest in deciding whether to take legislative action (or, from the position of a judge, in deciding whether a certain law is valid). Central to our argument in this regard is our engagement with the writings of Canadian Attorney-General Irwin Cotler, and Australian Attorney-General Phillip Ruddock, both of whom argue (contra the balancing approach) that human rights and national security can be reconciled through reconceptualizing counter-terrorism legislation as "human security legislation" directed towards securing the necessary preconditions for the enjoyment of peace, prosperity, human wellbeing and indeed human rights themselves. In opposition to this approach, we take the view that the recent counter-terrorism legislation *does* impinge upon human rights and that it is preferable to acknowledge this fact and to openly apply a balancing approach rather than to elide serious legislative restrictions on human rights with semantic and conceptual re-categorizations. Finally, having advocated the use of a balancing approach, we turn to provide some indicative guidelines on how legal and policy decision makers might constructively weigh the interests of human rights and national security in the post-September 11 environment.

To address these issues, we draw upon a particular factual context. Our contribution is located in the new counter-terrorism regimes in the United States, the United Kingdom, Canada, New Zealand, Australia and South Africa. While many other nations have legislated with respect to terrorism (and indeed have a long history of such legislation), we confine our discussion to these jurisdictions because the countries share a common legal and political heritage derived in large part, with the exception of Québec and elements of the South African legal system, from the English common law tradition. The structural similarities of these legal systems allow us to make more informed comparisons across different jurisdictions and national contexts.[1]

We now introduce the counter-terrorism regimes in these nations. Our purpose is twofold: first, we aim to give the reader a short introduction to these new laws and to highlight some of their more important common features; and, secondly, we hope to demonstrate how, and to what extent, these new laws derogate from accepted human rights and public law principles. This provides a basis from which to examine whether human rights are inviolable or whether they can (or should) be balanced against the dictates of national security.

Counter-Terrorism Laws and their Impact on Human Rights

Some nations had domestic counter-terrorism laws in force prior to September 11, 2001. For example, the United Kingdom has had a range of temporary counter-terrorism measures in place for decades, enacted (and re-enacted) primarily in response to the mainland bombing campaign of the Irish Republican Army conducted throughout the 1970s, 1980s and 1990s (see D. Williams 2003). Similarly, New Zealand had counter-terrorist legislation in place that conferred "emergency powers" upon the police and armed forces after an "international terrorist emergency" had been declared (see Greener-Barcham 2002). The New Zealand legislation was enacted in response to the 1985 bombing of the Greenpeace boat, the "Rainbow Warrior". Finally, in 1996, the United States enacted the *Antiterrorism and Effective Death Penalty Act* in response to the events in Oklahoma and at the World Trade Centre (see Cole and Dempsey 2002). These historical examples illustrate a feature also common to the recent round of counter-terrorism laws – their *reactive* nature.

Another feature common to the post-September 11 counter-terrorism laws is the *speed* with which they were (sought to be) enacted. The United States Congress, for example, passed the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001* (*USA PATRIOT Act*) on October 25, 2001, some six weeks after the events of September 11. Indeed, most western governments attempted to pass their counter-terrorism laws as quickly as possible. However, some parliaments resisted this trend and referred the proposed legislation to bipartisan parliamentary committees for closer scrutiny (for example, Australia, Canada, New Zealand and South Africa).[2] In these jurisdictions, the greater opportunity for deliberation resulted in significant changes being made to the original legislation and greater protection secured for human rights and civil liberties (see Uhr 2004). In the case of South Africa, where trade unions, human rights groups and various non-government organizations mounted a strong opposition to the government's initial Bill, it was a factor in the legislation not being enacted.

The events of September 11, 2001 galvanized national legislatures into quick and responsive action. Reacting both to domestic pressure and international obligations, such as Resolution 1373 of the United Nations Security Council, made on September 28, 2001, which requires that States "[t]ake the necessary steps to prevent the commission of terrorist acts",[3] the United States and other western nations rushed to legislate. As we have already noted, the United States enacted the *USA PATRIOT Act*, the United Kingdom enacted the *Anti-terrorism, Crime and Security Act 2001*, Canada enacted the *Anti-terrorism Act 2001* and New Zealand enacted the *Terrorism Suppression Act 2002*. Australia enacted a range of different measures contained in several different Acts, of which the two most important are the *Security Legislation Amendment (Terrorism) Act 2002* and the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002*. Finally, the South African Government introduced the Anti-Terrorism Bill (2003). It was later withdrawn and replaced with a second Bill, the Protection of Constitutional Democracy Against Terrorist and Related Activities Bill (2003), which was eventually passed in late 2004.[4]

This "first round" of counter-terrorist legislation, made in response to the events of September 11, has been supplemented, or extended, with further pieces of legislation enacted in response to subsequent terrorist activity. For example, in the United States, a Department of Justice draft of the "Domestic Security Enhancement Act of 2003" (dubbed "*PATRIOT Act II*" by commentators) was leaked on February 7, 2003. This controversial Bill sought to extend some of the more controversial measures contained in the original *USA PATRIOT Act* but has yet to be enacted (for an analysis of some of its provisions and details of the successful campaign against the Bill's implementation, see Strossen 2003, Graham 2004–2005). In the United Kingdom, partly in response to the landmark ruling of the House of Lords in *A. (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department*,[5] the government has enacted its second major piece of post-September 11 counter-terrorist legislation: the *Prevention of Terrorism Act 2005* (UK). Furthermore, in the wake of the London bombings the government has signalled its intention to introduce a new round of counter-terrorist legislation.[6] Australia, for its part, has passed further counter-terrorist legislation in the form of the *Anti-Terrorism Act* (2004) *[Nos 1, 2 and 3]* and has also signalled its intention, after the London bombings, to move forward with a further raft of changes.[7]

We can see that (in addition to being reactive and speedily enacted) counter-terrorist legislation is now very much an *ongoing* part of the domestic legislative programmes in the countries we are looking at. A detailed study of the post-September 11 evolution and extension of these counter-terrorist legislative regimes is beyond the scope of this article. However, in the remainder of this section we aim to sketch a general picture of the new statutory regimes and to demonstrate their negative effect on human rights.

It is possible to isolate some general features that the laws in these nations have in common. First, each of the new laws seeks to define concepts such as "terrorism", "terrorist acts" and "terrorist activity". These definitions vary in their range, scope and application (see Golder and Williams 2004), yet at their core all refer to political, religious or ideologically-motivated violence that causes harm to people or property, and which is intended either to coerce a civilian population or government or to instil fear in the population (or, more narrowly, a certain sector of the population).[8] As a

practical matter, these definitions are almost all used either to ground a substantive criminal law offence of terrorism or to create ancillary offences such as financing, supporting, recruiting, or harbouring, terrorists.[9] Secondly, not only are terrorism and its related activities criminalized, but the legislation gives the government (or members of the executive government) the power to proscribe membership of designated terrorist organizations.[10] Thirdly, the counter-terrorism regimes seek to quarantine and freeze the assets of terrorist organizations.[11] Fourthly, the new counter-terrorism legislation gives to police and other agencies expanded investigative, surveillance and enforcement powers with respect to terrorism.[12] Finally, many counter-terrorist regimes have made significant changes to deportation, immigration and asylum laws.[13]

In general, then, the approach of domestic legislatures in enacting new laws on the subject of terrorism after September 11, 2001 has been to create new criminal sanctions and to increase police and security intelligence organization powers in the pursuit of national security. This has been achieved at a cost to traditional civil liberties and human rights principles in each of the nations and has placed some of the fundamental values and assumptions of each legal system under strain. We discuss two particular examples of this trend below.

Our first example relates to the legal definition of terrorism. This threshold question is of crucial importance when a government seeks to attach criminal liability or administrative consequences to the designation of a citizen's acts (or associations) as ''terrorism''. Indeed, the length and divisiveness of the parliamentary and committee debates in the respective countries on this point attest to its political significance. Some of the current definitions of terrorism are cast in broad enough terms to catch legitimate acts of industrial action or civil protest. This is the case with both the United Kingdom and United States, which define the concept of terrorism at a high level of generality but fail to make express exceptions in favour of industrial action or civil protest.[14]

Whether the definition explicitly references ''political, religious or ideological'' motivations (as does the United Kingdom definition) or whether it is framed in terms of intimidating a population or a government so as to effect policy changes (as does the United States definition), these definitions have the potential to criminalize a range of political activity, such as civil disobedience, public protest and industrial action. An example could be a student protest that becomes violent, an industrial dispute in the emergency services, or some of the mass anti-corporate globalization protests (such as in Seattle, Melbourne, and so forth). Without specific exceptions in favour of certain forms of political activity, such as exist in the Canadian, Australian, New Zealand and South African legislation,[15] definitions like those of the United Kingdom and the United States have the potential to seriously impair the exercise of citizens' rights to freedom of expression and assembly.[16]

Our second example is taken from the powers given to police and other enforcement and intelligence agencies, which have caused the greatest concern among lawyers, policy makers and civil libertarians. In Australia, for example, the powers given to the Australian Security Intelligence Organisation (ASIO), as opposed to the police, permit the detention of *non-suspects*. In its original form, the Australian Security Intelligence Organisation Legislation Amendment (Terrorist) Bill sought to give ASIO the power to detain non-suspects in secret. These people

could be kept for rolling two-day periods that could be extended indefinitely, and the detainees could be denied access to people outside ASIO (including their family, their employer, or even their lawyer).[17] It was only through intense public scrutiny and critical parliamentary committee reports that the Bill was amended to permit ASIO to question Australians for a total of 24 hours over a maximum of one week. The ability of the state to detain suspects (or in this case even non-suspects) for such extended periods without charge is a major challenge to established criminal law procedural protections designed to avoid forced confessions, undue police pressure and unfair convictions.

These examples illustrate how counter-terrorism can drastically impact on human rights. There are many other possible conflicts, such as the way information-sharing between government agencies or the collection of data at airports might impinge upon the right to privacy; the way laws proscribing "seditious" or "radical" speech might hamper freedom of expression; or the way that immigration and asylum regimes might offend against principles of racial non-discrimination and equal protection under the law. The next question to be answered, however, is whether it is appropriate that human rights be "traded away" in this manner in order to safeguard the community. Should human rights be inviolable?

Must Human Rights Always Win?

International and regional human rights instruments distinguish between those rights from which it is possible to derogate, and those rights from which this is never appropriate. For example, Article 4(1) of the *International Covenant on Civil and Political Rights* (*ICCPR*) provides:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Even if the current "War on Terrorism" does amount to a "public emergency" under this Article (see Jinks 2003), Article 4(2) goes on to state that "No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision". Hence, the *ICCPR* recognizes that public emergency or national security laws may derogate from Article 17(1), which provides: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence". On the other hand, no derogation can be justified in regard to Article 7, which states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment", or Article 18(1), which provides: "Everyone shall have the right to freedom of thought, conscience and religion".

The Council of Europe has given its member States similar guidance. On July 11, 2002 the Council adopted *Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism* (*Guidelines*). The preamble

to the *Guidelines* recognizes that "it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law". The *Guidelines* then establish in Article 1 that: "States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life". Article 3(2) states that: "When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued". Moreover, Article 15 provides:

> When the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law. The State must notify the competent authorities of the adoption of such measures in accordance with the relevant international instruments.

The *Guidelines* also suggest approaches on specific human rights issues and, like the *ICCPR*, establish a hierarchy of rights. For example, while the *Guidelines* state that "The use of torture or of inhuman or degrading treatment or punishment, is absolutely prohibited, in all circumstances", they also provide in Article 6 that a person's right to privacy may be interfered with. Thus, in setting up a hierarchy of rights, the *ICCPR* and the *Guidelines* provide assistance for domestic legislators on what may be regarded as permissible or impermissible in the field of human rights and counter-terrorism legislation.

The trial of those accused of the terrorist bombings on October 12, 2002 in Bali, Indonesia illustrated this in a national context.[18] Shortly after the bombings, the Indonesian Government passed counter-terrorist legislation that purported to operate retrospectively. Thirty-three defendants were convicted. Indonesia's Constitutional Court then held that the legislation was unconstitutional on the grounds that it contravened Article 281 of the Indonesian *Constitution*, which provides that "the right against retrospective prosecution is a basic human right that cannot be diminished in any circumstances at all".[19] This Article makes a distinction between those rights that cannot be diminished "in any circumstances at all" and those that can.

A Balancing Approach

Even where particular rights are accepted as being beyond abrogation, they may still need to be subject to some form of balancing exercise that allows for their limitation. After all, inviolable rights may themselves conflict and some accommodation between them may need to be reached. One controversial example in the context of terrorism might be the right to life and freedom from torture, where unless a suspect is tortured the information necessary to protect a person's right to life will not be available. Hence, it has been argued that the law should authorize the torture of terrorist suspects though the use of a "torture warrant" in the event of a large-scale, imminent danger to the community (Dershowitz 2002).[20]

In the Australian context, Simon Bronitt (2003: 80) has recently critiqued the idea of weighing other societal interests against human rights and civil liberties. In dismissing the notion of balancing as a "crude metaphor" inapposite as a descriptor of policy analysis in the context of counter-terrorism legislation, Bronitt (2003: 80) has advocated that "[w]e should pursue the choices that promote, rather than destroy, fundamental rights and constitutional values". In acknowledging that conflict will inevitably arise between societal and individual interests, Bronitt argues for an approach that prioritizes individual rights and freedoms.

However, in applying human rights, judicial bodies have recognized the need to weigh rights against other concerns (such as national security against privacy or public health against freedom of movement). A balancing approach of some kind might be implied from a Bill of Rights or might be expressed, such as in section 1 of the Canadian Charter of Rights and Freedoms 1982, which provides that "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The need to weigh rights against other non-rights interests is also inherent in general concepts of the nature of human rights (Henkin 1990: 4).

How, then, do we go about balancing the competing interests of national security and community safety against those rights which are deemed of lesser status? It is here that it becomes crucial to articulate our approach to balancing. What do we mean by balancing? What interests are being balanced? Is balancing a sufficiently precise and descriptive metaphor for what we are seeking to achieve in legal and policy terms? Before we explain what we mean by "balancing", we address a contrary position based upon a different understanding of the relationship between national security and human rights.

Are National Security and Human Rights in Conflict?

The orthodox understanding of counter-terrorist legislation is that, in seeking to safeguard national security and community safety, the State places limits upon the exercise of human rights and civil liberties. In order for investigative and enforcement agencies to apprehend terrorists and prevent acts of terrorism, it is often thought necessary to derogate from, or to limit, rights such as those to privacy or silence. As citizens, we cede a measure of our rights and liberties to the State in order to secure the common good. Thus, in this utilitarian understanding of counter-terrorist legislation, the interests of national security and the protection of human rights are placed at opposite ends of the conceptual spectrum, with the aim of any counter-terrorist legislation in policy terms being to balance the diametrically opposed interests, to achieve one without sacrificing the other. That civil libertarians and advocates of increased security measures may well regard the weight to be given to the respective interests differently, and may well disagree as to the terms upon which the balancing exercise is to be conducted, does not obscure the fact that the debate on counter-terrorist legislation has proceeded on the assumption that the demands of national security and the protection of human rights are opposed.

However, some influential commentators have recently questioned this view. Canadian Attorney-General Irwin Cotler (who prior to his appointment to that

position was a distinguished legal academic and proponent of human rights) has advocated a different approach to evaluating the human rights compatibility of counter-terrorist legislation. In his article entitled "Thinking outside the box: foundational principles for a counter-terrorism law and policy", cited by his Australian counterpart, Attorney-General Philip Ruddock, Cotler stated that counter-terrorism legislation: "has been characterized, if not sometimes mischaracterized, in terms of national security versus civil liberties – a zero sum analysis – when what is involved here is "human security" legislation that purports to protect both national security and civil liberties" (Cotler 2001: 112). Ruddock has built upon Cotler's notion of "human security" legislation in order to construct a human rights-based rationale for the Australian counter-terrorism legislation. Like Cotler, Ruddock criticizes the orthodox understanding of counter-terrorist legislation as being inaccurate and reductive:

> Unfortunately the debate on counter-terrorism issues has been dominated by traditional analysis of protecting *either* national security, *or* civil liberties, as if the protection of one undermines the protection of the other. This discourse is unhelpful as it implies that counter-terrorism legislation is inevitably at odds with the protection of fundamental human rights. (Ruddock 2004a: 117)

According to what Ruddock labels the "new theory . . . whereby national security and human rights are not considered to be mutually exclusive" (Ruddock 2004b: 254), the aim of the recent round of counter-terrorist legislation is to achieve and safeguard human security. "Human security", according to Ruddock, "is a broad concept focused on the individual or the community, rather than the state. Human security rests upon security for the individual citizen, which requires not only the absence of violent conflict, but also respect for human rights and fundamental freedoms" (Ruddock 2004a: 116–117). Adopting the words of United Nations Secretary-General Kofi Annan, a state of human security (which entails not only the absence of violent conflict but the positive conditions for human wellbeing) is necessary for the realization of human potential and the exercise of human rights. In this schema, human security is a necessary precondition to the exercise of human rights. Thus, whenever national governments enact counter-terrorist legislation in the pursuit of human security, even if that legislation derogates from accepted rights and freedoms in the process, it is ultimately beneficial legislation because by promoting human security it is "preserving a society in which rights and freedoms can be exercised" (Ruddock 2004a: 117). In making this point Ruddock echoes the judicial comments of Lord Donaldson MR in *R. v. Secretary of State for the Home Department, ex parte Cheblak*: "In accepting, as we must, that to some extent the needs of national security must displace civil liberties, albeit to the least possible extent, it is not irrelevant to remember that the maintenance of national security underpins and is the foundation of all our civil liberties".[21] Ruddock has also deployed the concept of human security not simply as a necessary precondition to the exercise of human rights but rather as a primary, almost inviolable, human right in and of itself. In his contribution to the Second Reading debates on the *Anti-Terrorism Act 2004* (Cth), the Attorney-General stated that: "Security is not anathema to freedom and liberties. I might say, if you read the Universal

Declaration of Human Rights, it gives primacy, amongst other matters, to the responsibility of governments to secure a person's right to life – a person's entitlement to live in a situation of safety and security''.[22]

Thus, in drawing on the writings of Irwin Cotler, the Australian Attorney-General has attempted to reconcile national security and human rights through recourse to the overarching principle (or, as we have seen, right) of human security. Ultimately, this is unconvincing, as we move on to discuss below. It is perhaps appropriate that before we do so we indicate why we feel it is necessary to engage directly with the writings of these two Attorneys-General. To begin with, we believe it is important to scrutinize, and of course critique where appropriate, the philosophical justifications of governments for the actions they take in prosecuting the ''War on Terror''. However flimsy we might find their positions in an academic sense, the views of leading lawyers in the administration benefit from a certain institutional legitimacy. If not strongly contested, they accrue not only legitimacy (and public acceptance in the absence of contrary views) but have quite serious practical effects. This is a position shared by David Cole in his critique of the writings of former US Justice Department lawyer John Yoo (Cole 2005: 8). Additionally, as we have already seen in the migration of these views from a noted human rights advocate (Cotler) to an Attorney-General who has been strongly criticized for his lack of attention to human rights (Ruddock), the way in which philosophical justifications for government action in the context of counter-terrorism can be extended, transposed and re-deployed in a opportunistic and under-theorized manner. Finally, we feel that this particular argument, being essentially a human rights-based rationale for what is in many significant respects quite repressive legislation, is of enormous political value to conservative commentators seeking to justify government action in the ''War on Terror''. For these reasons we believe it is crucial to mount a critique of the position. We turn now to do so.

For a start, it can be admitted that not all human rights protection will necessarily weaken national security and, correspondingly, not every security measure will necessarily be in derogation of human rights. Indeed, as Bronitt (2003: 69) observes, it is a mistake to assume that ''crime control and due process stand in an inverse hydraulic relationship in which measures designed to enhance crime control will necessarily diminish due process, and vice versa''. He instances the statutory requirement (in Australian criminal law jurisdictions) to tape interviews with suspects. Such a measure, designed to prevent police fabricating confessions, does not only act to protect the accused person's right to a fair trial but also functions to protect officers from the threat of false accusations and might ultimately lead to more valuable prosecution evidence being adduced at trial. Ruddock has himself raised the *instrumentalist* value of human rights: ''Maintaining a fixed time limit for questioning, as well as other investigatory safeguards [such as the right to legal representation]... should enhance the reliability of the evidence that is gathered and the potential for successful prosecution'' (Ruddock 2004a: 121). However, the fact that it is in theory (and occasionally in practice) possible to describe a positive relationship between national security and human rights should not blind us to the demonstrable fact that in the domestic counter-terrorist legislation passed since September 11, and indeed in much counter-terrorism legislation predating September 11, significant inroads have been made into human rights protections

and civil liberties in the name of national security. Ruddock's theoretical reconciliation between national security and human rights in the form of the overarching goal of human security is an abstract model that cannot explain why it is necessary in the first place to reduce protections for human rights in order to achieve the ultimate goal of human security. Neither does it tell us to what extent human rights should be reduced, or how we are to judge which human rights should be derogated from.

Even on Ruddock's model, as he himself admits, decisions about which interests may be regarded as paramount must still be made. In the Second Reading speech mentioned above, he stated that "[o]f course . . . [the right to life] has to be weighed against other values that we see as important".[23] Elsewhere in the same speech he admits that in making security transfer orders (that is, orders to transfer federal, state and remand prisoners between gaols) decision makers will need to "balanc[e] the interests of the administration of justice, as well as the prisoner's welfare, against the interests of security".[24] Thus, the major problem with Ruddock's approach to counter-terrorism legislation and the new conceptual framework that he is articulating is that, far from relieving the policy maker or legislator of the burden of having to choose between, or balance, competing interests (Ruddock's metaphors of "weighing" and "balancing" are illustrative of this point), it simply elides this balancing act with the overarching goal of human security. The difficult policy choices remain. How much weight should be given to the right to silence when placed alongside the interest in gathering information in order to prevent possible future attacks? What priority should be given to freedom of association when placed next to the need to cut off financial aid to suspected terrorist organizations? His approach does not assist in making these difficult policy decisions by simply referring to an ultimate goal of human security. It is far preferable in policy terms to admit openly that what is being engaged in is in fact an act of balancing, rather than masking the exercise behind an apparent singular goal such as human security.

If certain human rights can be derogated from (as the *ICCPR*, for example, demonstrates), and the counter-terrorist legislation – as we have argued here – almost always involves in practice a security/human rights calculus, then the question must be raised as to what is the proper approach to take towards balancing? At first glance, "balancing" appears to be simply another one of the many metaphors or standards, such as "reasonableness", "necessity" and "proportionality", which populate judicial decisions. Like Ruddock's formulation of human security, the notion of balancing appears to subsume crucial policy decisions beneath a vague concept of uncertain, and malleable, content. On its own it tells us nothing about which rights or interests are to be balanced against which other interests. Similarly, it does not enlighten us as to what concepts are to guide the decision maker in his or her balancing endeavour. In the next section we discuss some existing approaches to balancing in domestic human rights legislation.

The Balancing Process

The approach taken to balancing differs across jurisdictions, but in essence comes down to an attempt to compare the values inherent in the protected right against the object of the legislature in making the law that conflicts with the right. Such tests

usually have a concept of "proportionality" at their heart in seeking not simply to determine which interest "wins out" but to determine the extent to which a particular right might be infringed by the competing public policy goal.

The rule of law as expressed in nations such as Canada, South Africa and the United States requires that all laws be open to judicial assessment for compliance with constitutional norms. In such a forum, balancing can play a key role. In Australia, for example, this can involve a court seeking to ascertain whether, in the context of a law that restricts communication about a subject matter relating to terrorism, the law is directed to "a legitimate end", and is "reasonably appropriate and adapted" to serve that end.[25] In New Zealand, section 5 of the *Bill of Rights Act 1990* echoes section 1 of the Canadian Charter of Rights and Freedoms. It states that the rights and freedoms contained in the Act "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Other nations use different and often more elaborate formulae, such as the Canadian Supreme Court, which, in the judgment of Dickson CJ in *R. v. Oakes*[26] applied section 1 of the Charter as part of an elaborate proportionality-based test.

While the proportionality test laid down in *Oakes* is apparently of greater sophistication than that set out in the Australian context, both establish a process by which the policy basis of a limitation on power such as a particular human right may be set against the policy objective behind the impugned law. This is a task that the constitutional structures of western nations mandate must be undertaken by the judicial arm of government. However, it is also a task for which courts may not be well equipped. Among other things, the rules of evidence and procedural limitations may restrict the information that comes before the court (especially in regard to sensitive national security issues). Judges and the lawyers that argue before them may also be ill-equipped to undertake the sophisticated policy analysis that is inextricably linked with the legal question of "proportionality" in the context of terrorism.

For example, under the *Oakes* test, how capable are judges of ascertaining whether, in the context of a rapidly changing and complex international security environment after September 11, a particular law impairs "as little as possible" the right or freedom in question or whether the same object might have been met with a different approach? This requires an assessment not only of the impact of the actual law but also of the alternative approaches that might have been taken by the legislature in combating terrorism and an assessment of the relative effectiveness of each of these. On the other hand, the courts are still the best body to undertake this task even if they, as inevitably seems to be the case, end up displaying a high degree of deference to legislative judgment in assessing laws in the field of national security. The rule of law as embodied in nations such as Canada, South Africa and the United States requires that all laws be subject to assessment for their compliance with constitutional norms. Such an assessment ought to be made by as expert and non-partisan a process as possible, even if that process needs itself to be constantly assessed to determine if the decision-making capacity can be improved.

Guidelines for Balancing

In this section we suggest some non-exhaustive guidelines for balancing, whether by a court or another decision maker. Our aim is to give some content, structure and

direction to what is an imprecise task. First, from our foregoing discussion of instruments such as the *ICCPR*, it is apparent that some rights are more important than others. It is never appropriate to derogate from certain absolute human rights, regardless of the exigencies of the "War on Terror". The right to life and liberty and the freedom from torture represent examples of these absolute rights against which it is never appropriate to balance the community interest in security. Of course, on occasion, non-derogable rights will be in conflict with each other, such as in cases like the "ticking bomb" scenario where the right to life may conflict with the right to be free from torture. In such cases the balancing approach will necessarily be engaged, and legislators and policy makers will have to balance (in line with the principles we set down here) the interest of one right against the other in attempting to ensure the least possible derogation from each.

Our second guideline is that, if the decision maker is required to balance the importance of a non-fundamental right against community safety or national security (or, as we have indicated above, the interests of one non-derogable right against another), the decision maker should require the most cogent empirical evidence available that the proposed means of achieving the goal of community safety and national security will actually be effective. This rule of balancing requires the decision maker to justify the derogation of human rights by reference to a demonstrated link between the means (which derogates from the human right) and the end (community safety or national security). In the context of a parliament legislating prospectively, this will require policy makers to make some attempt to forecast the social, political and economic effects of their proposed action. If they cannot demonstrate with reasonable clarity that the legislation will actually achieve the stated policy goal, the legislation should not be enacted or might be struck down by a court where the court has the benefit of a domestic Bill of Rights.

Little empirical evidence has been gathered on the actual effectiveness of the post-September 11 counter-terrorism legislation. Indeed, the policy and legislative time frames adopted after September 11 by many states precluded an adequate investigation into the relative merits of the available measures. The result is that it remains to be conclusively demonstrated that the counter-terrorism legislation *does* actually make communities safer from terrorist harm.

Admittedly, the idea of adducing empirical evidence about the effectiveness of such legislation is problematic. Legislation, as with other governmental action, often produces many (often unintended) consequences. The judicial discourse on "legislative intent" in the context of construing statutes is testament to the fact that legislation often transcends the original intentions of its drafters, causing many different effects. So, the notion of saying that a law "works" or does not work is more complex than simply referring to a statement of original intent and comparing it to the practical application of a statute. Similarly, it is often almost impossible to describe a simple causal relationship between an Act and a particular event (which it is said to have produced or prevented). Requiring a government to prove such a causal link may well be asking too much. Additionally, secrecy imperatives in the context of counter-terrorism may preclude the possibility of adducing evidence about, for example, the number of attempted terrorist attacks pre-empted or intercepted by security agencies since the enactment of an Act (even if it were theoretically possible to describe an exclusive causal relationship in these terms).

Nevertheless, the impossibility of *definitively* linking the cause and effect of counter-terrorism legislation should not absolve government from the obligation to account for the negative effects of their legislation, nor from the obligation to forecast the likely practical results of a course of action. Certain counter-terrorist strategies seem, on their face, not only rationally unconnected to their putative objective but dangerously ineffective in terms of securing it. An example is the technique of racial or religious profiling. Proponents of the strategy in government, media and national security circles argue that it is effective and efficient as a law enforcement strategy and that its successes outweigh its social drawbacks such as the generation and reinforcement of harmful racial stereotypes and the isolation of members of minority groups. However, as Cole and Dempsey (2002: 170) point out, the technique is likely to isolate members of racial or religious groups whose help is needed to prosecute the domestic counter-terrorist effort: "Studies of policing have shown that it is far more effective to work with communities than against them. Where a community trusts law enforcement, people are more likely to obey the law, and more likely to cooperate with the police in identifying and bringing to justice wrongdoers in their midst". In addition, racial profiling appears likely to fail from another practical perspective: "When one treats a whole group of people as presumptively suspicious, it means that agents are more likely to miss dangerous persons who take care not to fit the profile" (Cole and Dempsey 2002: 170). Racially discriminatory policing practices like profiling are in fact *not discriminatory enough*, for they simply allow agents to focus on large segments of the population based on unhelpful criteria and not on pursuing leads from credible sources. The strategy thus appears not only to produce harmful social effects (Bahdi 2003) but is also, on the level of practical law enforcement and the apprehension of individual terrorists, an expensive and inefficient mismanagement of resources. We should make clear that we are not maintaining that in *all* circumstances a racial profiling approach will be *completely* ineffective. We do acknowledge that on occasion such a technique may well apprehend a potential terrorist, and that the breach of human rights and anti-discrimination principles involved on that occasion may well have saved human lives. However, we do maintain that even in such instances there is contained within the practice a kind of failure, in that further stigmatization and marginalization of a racial group is perpetrated through government action. The negative social ramifications of such profiling transcend any given instance of its putting into effect, and governments have to be wary of this and factor this into their "balancing" approach. Racial profiling, we contend, is generally inefficient in its day-to-day operation but even when it supposedly succeeds it still reproduces racism and discrimination. This is the sort of short-sighted governmental strategy which, we suggest, would fall foul of our second balancing guideline which requires a legislator or policy maker to take into account the empirical, practical effectiveness of a counter-terrorist measure.

Thirdly, if the desired goal of national security and community safety can be achieved through means which do not derogate from human rights, or which do so to a lesser extent, then that is the legislative course which should be adopted. This concept of proportionality requires the legislator or policy maker to consider and evaluate alternative means. If they do not do so, this may be another reason for the law to be struck down by a court.[27] It is worth mentioning that there is, especially

within legal circles, a belief in the ability of legal measures to combat terrorism which is not necessarily borne out by empirical evidence or logical argument. Indeed, the raft of counter-terrorist legislation which we have discussed above is testimony to the faith that parliamentarians (and many in their constituencies) place in legislation to outlaw, prevent, deter and punish acts of terrorism.

Quite aside from psychological and criminological debates about the extent to which standard criminal law notions of punishment and deterrence operate within the current milieu of suicide terrorism,[28] it is vital for legislators to acknowledge the limits of a strictly legal approach towards combating terrorism. The attractions of legislating against terrorism are obvious – legislation provides a quick, cheap, tangible and relatively easy means through which national governments can respond both to international and domestic pressure to contribute to the so-called ''War on Terror''. However, we argue that terrorism is a complex problem that transcends the disciplinary boundary of law, just as it transcends the geographical boundary of the nation-state. Accordingly, a solely legal approach to the question of terrorism is fated to be of little use. Policy makers should be encouraged, before adding to the already long list of counter-terrorist legislation, to investigate options such as initiating community education, fostering meaningful cross-cultural/religious community dialogue or critically reviewing the social and economic effects of their foreign policies (on this, see Pape 2005).

This rule of balancing may also require that legislation contain a ''sunset clause'' to bring the operation of the legislation to an end upon the expiry of a set period of time. If it cannot again be demonstrated at the end of this period that the legislation has achieved and will continue to achieve the goal of safeguarding the community, it should not be re-enacted. Some domestic legislation has provided for ''sunset clauses'' in respect of certain aspects of the legislation, such as section 5 of the New Zealand *Terrorism Suppression Act*, which states that a prime ministerial designation that an entity is a ''terrorist entity'' under section 22 of the Act shall expire three years after its making. However, only the 2001 United Kingdom legislation, the *Anti-terrorism, Crime and Security Act*, provided instead for a general review. Section 122 required the Secretary of State to conduct a review of the Act after two years, the report of which could disallow certain provisions of the Act unless Parliament passed a contrary motion. Bearing in mind our earlier caveats about the use of empirical evidence in this context, we nevertheless maintain that it is important to insist upon *some form* of democratic audit of counter-terrorism legislation.

Finally, when lawyers, policy analysts and academics employ the balancing approach in this context, their formulation of the process as simply weighing the importance of individual human rights protections against the goal of national security frequently glosses over the fact that the balancing process is in fact racially, and religiously, *unbalanced*. In real political terms, what most often takes place in western liberal democracies is the restriction on the rights of minorities (increasingly, since the events of September 11, the Muslim and Arab communities) in the name of national security.[29] Framed in this way, the human rights/national security calculus actually asks of the legislator or policy maker: how many of a minority group's rights can you countenance restricting or taking away in order to safeguard the majority? As will be evident, without overriding constitutional protection for the rights of minority groups, the political dynamics of majoritarian democracy

(especially in a climate of increased fear, paranoia and racism such as in the current "War on Terror") will fail to provide a sufficient bulwark against state power and the incursion into minority rights (see Williams 2002, 2004).

Historical and contemporary examples of the abuse of the rights of minority groups in times of perceived threats to national security are rife, and indeed, as the infamous United States case of *Korematsu v. United States* demonstrates,[30] even the presence of a domestic Bill of Rights is no guarantee of the protection of minority rights. Thus, it is important to state explicitly as a balancing guideline the principle of racial non-discrimination and equal protection. In balancing security concerns versus human rights protections, legislators and policy makers must state exactly whose rights will be affected by the proposed measure (in both a formal and a substantive sense), and whose security is supposedly thereby to be advanced. In almost no circumstances will the limitation of a national security measure's negative effects to a certain racial or religious group, such as in racial or religious profiling, the banning of religious expression in public places or the detention or deportation of non-citizens, be justified. The recent United Kingdom House of Lords decision in *A. v. Secretary of State* provides an example of such reasoning. In that case, the House of Lords found that the provisions in Part 4 of the *Anti-terrorism, Crime and Security Act 2001* which empowered the government to indefinitely detain non-citizens suspected of being "international terrorists" were discriminatory and not proportionate to the terrorist threat faced by the United Kingdom (and hence were in contravention of the *European Convention on Human Rights*).

Conclusion

We have argued that human rights are not inviolable in all circumstances, and on occasion can be derogated from by national legislatures in the pursuit of overriding or countervailing social interests. Indeed the recent, and continuing, round of counter-terrorist legislation demonstrates just how far governments have already gone in this regard, reversing in some cases the hard-fought accumulation of human rights protections and the centuries-old development of rule of law principles in the name of fighting terrorism. Instead of maintaining that measures designed to ensure national security are necessary preconditions for the exercise of human rights (per Cotler and Ruddock), or enjoy some sort of presumptive validity, we argue that governments need to openly acknowledge that what they are doing in legislating against terrorism is in fact engaging in a complex balancing exercise. Many of the examples we have examined, across the jurisdictions of the United States, the United Kingdom, Canada, New Zealand, South Africa and Australia, go too far in curtailing human rights. In part, this is because such nations have often passed new laws to address recent events in great haste, without an adequate assessment of their likely impact upon human rights and even their actual effectiveness in combating the problem.

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Notes

1. We note the developments in counter-terrorist law and practice in non-common law jurisdictions but for the reasons referred to above (as well as time and space constraints), our analysis is limited to common law jurisdictions. However, the reader is referred to Ramraj *et al*. (2005), a recent collection of essays which addresses legal counter-terrorist developments in jurisdictions such as South East Asia, the Middle East and the European Union.
2. For example, see Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (2002), available at: http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/report/report.pdf (accessed July 26, 2004); Foreign Affairs, Defence and Trade Committee, Parliament of New Zealand, *Counter-Terrorism Bill*, available at: http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/27bar2.pdf (accessed August 21, 2004). The South African Bill was referred to the Portfolio Committee on Justice and Constitutional Affairs of the National Assembly. The Canadian Bill was referred to both the House of Commons Standing Committee on Justice and Human Rights and the Special Senate Committee on the Subject Matter of Bill C-36.
3. SC Res 1373, UN SCOR (4385th mtg), UN Doc S/Res/1373 (2001).
4. There is an enormous volume of literature on these Acts. For example, see Cole and Dempsey (2002) (US), Conte (2003) (NZ), Hocking (2003) (Australia), Roach (2003) (Canada), D. Williams (2003) (UK), G. Williams (2003) (Australia).
5. (2004) UKHL 56 (''*A. v. Secretary of State*''), delivered on December 16, 2004. This case is discussed in more depth below.
6. See the Hon. Tony Blair, MP, Prime Minister's Statement on Anti-Terror Measures, available at: http://politics.guardian.co.uk/terrorism/story/0,15935,1543385,00.html (accessed September 13, 2005).
7. See Prime Minister John Howard, Counter-Terrorism Laws Strengthened, Media Release, September 8, 2005, available at: http://www.pm.gov.au/news/media_releases/media_Release1551.html.
8. The Australian, United Kingdom, Canadian and South African legislation makes reference to the public or a certain section of the public, while the United States and New Zealand legislation simply refers to the public in general. See the references to specific definitions, note 15 below, and the text adjoining.
9. For example, see ss. 12, 13, 15–20 of the *Terrorism Act 2000* (UK); ss. 7–10, 12–13A of the *Terrorism Suppression Act 2002* (NZ); ss. 101.1–101.6 of the *Criminal Code Act 1995* (Cth); ss. 83.02–83.04, 83.18–83.23 of the *Criminal Code*, RSC 1985, c. 46; ss. 2339A–B of Title 18 to the *United States Code*; and ss. 2–3, 11–14 of the *Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004* (SA).
10. For example, see s. 3 of the *Terrorism Act 2000* (UK); ss. 20, 22 of the *Terrorism Suppression Act 2002* (NZ); s. 102.1 of the *Criminal Code Act 1995* (Cth); and s. 83.05 of the *Criminal Code*, RSC 1985, c. 46.
11. Some of these laws implement national obligations assumed under the *International Convention for the Suppression of the Financing of Terrorism*, December 9, 1999, 39 ILM 270 (entered into force April 10, 2002). For example, see Part 2 of the *Anti-terrorism, Crime and Security Act 2001* (UK); and s. 23 of the *Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004* (SA). Compare President George W. Bush's Executive Order of September 23, 2001, *Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism*.
12. For example, see the powers contained in Part 5 of the *Terrorism Act* (UK) and Part 10 of the *Anti-terrorism, Crime and Security Act 2001* (UK); the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth); ss. 83.3(6)–(7) of the *Criminal Code*, RS 1985, c. 46; and ss. 22–24 of the *Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004* (SA).
13. For example, see Part 4 of the *Anti-terrorism, Crime and Security Act 2001* (UK) and the changes made by the *Border Security Legislation (Amendment) Act 2002* (Cth). See also some of the planned measures in the wake of the London bombings, discussed in the Prime Minister's Statement on Anti-Terror Measures, above note 6.
14. Section 802 of the *USA PATRIOT Act* amended the definition of ''domestic terrorism'' within Title 18 of the *United States Code* (it also inserted a definition of ''international terrorism'' which is, for our purposes, substantively similar). Section 2331 of Title 18 now provides as follows:

    (5) the term ''domestic terrorism'' means activities that –
    (a) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

(b) appear to be intended –
  (i) to intimidate or coerce a civilian population;
  (ii) to influence the policy of a government by intimidation or coercion; or
  (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
(c) occur primarily within the territorial jurisdiction of the United States.

In the United Kingdom, s. 1(1) of the *Terrorism Act 2000* (UK) contains the following definition of terrorism:

1. (1) In this Act "terrorism" means the use or threat of action where –
  (a) the action falls within subsection (2);
  (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public; and
  (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
  (2) Action falls within this subsection if it –
  (a) involves serious violence against a person;
  (b) involves serious damage to property;
  (c) endangers a person's life, other than that of the person committing the action;
  (d) creates a serious risk to the health or safety of the public or a section of the public; or
  (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
  (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
  (4) In this section –
  (a) "action" includes action outside the United Kingdom;
  (b) a reference to any person or to property is a reference to any person, or to property, wherever situated;
  (c) a reference to the public includes a reference to the public of a country other than the United Kingdom; and
  (d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
  (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

15. Compare s. 1(1) of the *Terrorism Act 2000* (UK) (this definition is also adopted in the *Anti-terrorism, Crime and Security Act 2001* (UK) and s. 2331 of Title 18 to the *United States Code* with s. 83.01 of the *Criminal Code*, RSC 1985, c. 46; s. 100.1 of the *Criminal Code Act 1995* (Cth); s. 5 of the *Terrorism Suppression Act 2002* (NZ); and s. 1(1)(xxv) of the *Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004* (SA).
16. It is of course necessary to bear in mind the differing levels of constitutional protection in the jurisdictions we are discussing. For example, The United States *Bill of Rights* provides overriding constitutional protection for freedom of speech in the First Amendment. This instrument, and the high degree of protection afforded to the concept of freedom of speech in American constitutional jurisprudence, is likely to prevent the application of general definitions of terrorism to civil protest that would not normally be regarded as terrorism. On the other hand, the United Kingdom Bill of Rights, the *Human Rights Act 1998* (UK) c. 42, only enables courts to interpret legislation "[s]o far as it is possible to do so" in a way that is compatible with rights such as "freedom of expression". Although the *Human Rights Act* also enables a court to make a declaration of incompatibility where it finds that a statute, such as the *Terrorism Act*, is incompatible with a listed right, the making of such a declaration does not affect the operation of the statute.
17. See cll. 34F(1), (4), (8) of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 1] (Cth).
18. Another example of a hierarchy of rights protection at the national level is provided by the Canadian Charter of Rights and Freedoms, which states in section 33(1): "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that

the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." A declaration made under this section operates for five years, after which the override can be re-enacted. The clause does not apply to all of the rights listed in the Charter, just to the rights listed in sections 2 and 7–15. This means that a Canadian parliament can override rights such as "the right not to be arbitrarily detained or imprisoned" in section 8 or even the right to equality under the law in section 15, but rights such as the right to vote in federal elections in section 3 are, as a matter of constitutional law, beyond its reach.

19. The Constitutional Court's decision of 23 July 2004 in the *Masykur Abdul Kadir* case is reported in the *Australian Journal of Asian Law*, **6**, 2004, pp. 2176–2196.
20. We are not endorsing the view of Professor Dershowitz here. We are merely pointing to the example of how the right to life might conflict with the right to be free from torture – an example much discussed in the literature on counter-terrorism and human rights. For example, see the recent exchange in the *New York Law School Law Review* (Strauss 2003–2004, Dershowitz 2003–2004).
21. [1991] 2 All ER 319 at 334.
22. Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, p. 31,701 (Philip Ruddock, Attorney-General).
23. Ibid.
24. Ibid., p. 31,702.
25. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 per the Court.
26. [1986] 1 SCR 103 at 138–139 ("*Oakes*").
27. There is precedent for the suggestion offered here. In many jurisdictions it is a requirement for the making of delegated legislation (that is, legislation made by a delegate of the democratic body such as a Governor in Council or an administrative body) such as rules, regulations, by-laws, and so forth, that an impact statement be prepared in advance of the delegated legislation. Moreover, it is often a requirement of such a statement that the delegate consider the implementation of alternative measures. For example, see s. 5 and Sch. 2 of the *Subordinate Legislation Act 1989* (NSW). More generally, in the field of human rights, many domestic human rights statutes place a requirement upon the government (which usually falls to the Attorney-General) to account for any planned legislation's compatibility (or otherwise) with protected rights. Whether or not non-compliance with the rights necessarily vitiates the proposed legislative action, these mechanisms do provide for a kind of democratic accounting (in advance) for the legislation's human rights impact. For example, see s. 7 of the *Bill of Rights Act 1990* (NZ) and s. 19 of the *Human Rights Act 1998* (UK).
28. For a useful discussion of the role of law in the context of deterring terrorism, see Murphy (1981–1982). For a more recent discussion of deterrence in the context of terrorism, written primarily from a psychological and criminological perspective, see the collection of essays in Silke (2003).
29. For a comprehensive account of this phenomenon as it has occurred in the United States, see Hagopian (2004) and Nguyen (2005).
30. 323 US 214 ("*Korematsu*"). *Korematsu* concerned the internment and exclusion of people of Japanese descent in the Second World War. Mr Korematsu was an American citizen who knowingly violated Civilian Exclusion Order No 34, was convicted and subsequently (unsuccessfully) challenged the constitutionality of the Order in the Supreme Court. The executive detention of Muslims in Guantánamo and other United States military bases post-September 11, 2001 provides a contemporary analogue.

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