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9/11: USA and UK

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Abstract

This Article is based on the inviolability of the legal principles underlying rule of law and explores the ways in which various governments have responded. In addition, it considers the importance of the legislative processes, recognizing that the failure to honor them leaves open the door to executive exploitation and the misuse of power. It also reflects on the efficiency of anti-terrorist legislation. Does this legislation stop, deter or punish criminals; is it “comfort legislation” directed towards producing and maintaining public confidence; or is it counter-productive through the alienation of innocent victims and ethnic, religious and immigrant groups?

EMERGENCY AND ANTI-TERRORIST POWERS

9/11: USA AND UK

*Philip A. Thomas**

*“Amid the clash of arms, the laws are not silent, they may be changed,
but they speak the same language in war as in peace.”¹*

INTRODUCTION

The murder of some 3,000 people in New York, Washington and Pennsylvania, on September 11th by suicidal terrorists profoundly affected the American psyche.² Political seismic shock waves reverberated around the globe and governments lined up behind President Bush’s swift declaration of “war on terrorism.” This Article addresses the terms of that declaration by reviewing the process of good governance alongside the executive and legislative responses in the United States and the United Kingdom (“UK”).

In times of social, economic, and political calm the applica-

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1. Lord Atkin, *Liversidge v. Anderson*, [1941] 2 All E.R. 612. This is a dissenting judgment for, in essence, the House of Lords stated that it is not for the courts to interfere with the Executive in security matters in wartime. “History teaches that grave threats to liberty often come in times of urgency, when . . . rights seem too extravagant to endure . . . When we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it . . . The first, and worst, casualty . . . will be the precious liberties of our citizens.” *Skinner v. Railway Labor Executives’ Ass’n*, U.S. 602, 635-36 (1989) (Marshall J., also, like Lord Atkin, a dissenting judgment).

2. The American press carried statements such as: “In a few minutes the world changed” and not just the world, “a universe is now lost.” *SAN FRANCISCO CHRON.*, Dec. 30, 2001. Between 1966 and 1999, there were 3,636 deaths in Northern Ireland related to political violence. See DAVID MCKITTRICK ET AL., *LOST LIVES* (1999).

tion of good governance is relatively easy. But in times of unrest, war, and emergency the extraordinary problems that arise test the mechanics and durability of good governance.³ Essentially, do the responses to September 11th constitute good governance by observing the rule of law?⁴ Should these responses fail this test, how do they fare when examined under different criteria: specifically, criminal justice efficiency? What does a cost-benefit analysis of these responses tell us?

In a world dominated by one superpower, that power may, in large part, choose between proceeding on the basis of law or on the basis of pure political, economic, and military power though possibly involving a symbolic genuflection to international law. However, if a country is uninterested in the development of an international criminal court, declares itself not bound by international treaties⁵ or important bilateral agreements concerning the protection of the environment, and moves against international violence with scant regard to established legal principles, then the rule of law is downgraded to a secondary position to be used only when politically expedient. Further, in moments of crisis the elision of law and politics is fractured, and unobserved stress lines become a public spectacle.

Nevertheless, in modern democratic States that operate under the rule of law, the criminal justice system is subject to certain expectations. These include the principles of reasonable

3. Oren Gross, *Chaos and Rules*, 112 *YALE L.J.* 1011 (2003) (forthcoming). O. GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN COMPARATIVE AND THEORETICAL PERSPECTIVE* (2003).

4. *THE WORLD DEVELOPMENT REPORT*, published annually by the World Bank, consistently recognizes and affirms that establishing the rule of law is one of the five fundamental tasks, which governments must perform. *WORLD BANK, WORLD DEVELOPMENT REPORT*, 4 (1997). The OECD recognizes that democracy, good governance, and the rule of law are central to the achievement of the development goals of the 21st century. *OECD, FINAL REPORT OF THE AD HOC WORKING GROUP ON PARTICIPATORY DEVELOPMENT AND GOOD GOVERNANCE* (1997). Good governance is seen as including support for the rule of law. *See SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE 20* (Konrad Ginter, Erik Denters & Paul de Waart eds., 2000). *See generally* R. A. W. RHODES, *UNDERSTANDING GOVERNANCE, POLICY NETWORKS, ETC.* (1997); N. DOUGLAS LEWIS, *LAW AND GOVERNANCE* (2001).

5. For example, in December 2001 President Bush pulled out of the ABM treaty with Russia saying: "it hinders us from developing an anti-missile shield that will deter an attack from a rogue [S]tate." *N.Y. TIMES*, Dec. 13, 2001. *See also*, Costas Douzinas, *Postmodern Just Wars: Kosovo, Afghanistan and the New World Order*, in *LAW AFTER GROUND ZERO 20* (John Strawson ed., 2002).

cause; no detention without trial; *habeas corpus*; innocent until proven guilty; an open trial in a judicial court; legal advice and representation of choice; and punishment reflecting the seriousness of the crime. These principles are sometimes blurred at their edges but they should be expected and present in matters of crime control.

The total immersion of society in legal culture is nowhere better illustrated than in the United States. A century and a half ago, de Tocqueville wrote: "Scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question."⁶ More recently, Hartog has argued: "Throughout American history law was inescapably, at times overwhelmingly, present . . ."⁷ As another observer put it: "The United States has become probably the most law-run and lawyer-run country in the history of mankind."⁸ The importance of law as a cultural icon and the backbone of good governance cannot be overemphasized.

However, a major exception may be found in times of national emergency. At such moments, executive action may become the dominant force. The traditional triumveral balance between the judiciary, the legislature, and the executive, becomes stressed and is reconfigured in the attempt to address the crisis. The threat⁹ or outbreak of war is the paradigm case that produces challenges to good governance.¹⁰ The fear of gross

6. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (1984).

7. Hendrik Hertog, *Abigail Bailey's Coverture*, in *LAW IN EVERYDAY LIFE* 107 (Austin Sarat & Thomas Kearns eds., 1993).

8. HAROLD BERMAN, WILLIAM GREINER & SAMIR SALIBA, *THE NATURE AND FUNCTIONS OF LAW* 3 (1996). Today, there are over one million lawyers in the United States out of a national workforce of some 110 million. Each year, the country's law schools graduate another fifty thousand lawyers, a number that roughly corresponds to the total number of lawyers in China. In two years, the U.S. law graduates outstrip the total number of practicing lawyers in the United Kingdom ("UK").

9. For example, the Official Secrets Act 1911 was subject to hasty Parliamentary consideration. J. Griffith, *The Official Secrets Act*, 273 J. OF L. & SOC. 273 (1989). A more recent illustration of this point was the emergency debate on April 3, 1982 over the Falklands "war." It lasted three hours. Despite the request from a member of the House of Commons, a five-hour debate was refused. See A. BARNETT, *IRON BRITANNICA* 23 (1982).

10. The best illustration is the work of ALFRED WILLIAM BRIAN SIMPSON, *IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN* (1992). See also WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 218 (1998). "Without question, the government's authority to engage in conduct that infringes civil liberty is greatest in

terrorist threats produces similar tensions and reactions.¹¹

Emergency legislation passed as a consequence of national catastrophe associated with terrorism has a predictable pattern. It involves an unseemly scramble between the Executive and legislature so that they are seen by the public and the media to be doing "something."¹² A previously prepared emergency Bill is dusted down and hastily pushed through the legislature.¹³ Policy and law are thereby tightened, with scant recourse to reasoned chamber debate or recognition of standard procedures, in order to respond to the media and public outcry.¹⁴ Thus, the politicians' anxiety to be viewed as resolving the crisis overrides both established process and rational action. Indeed, such hasty responses may even have a negative effect in isolating vulnerable groups and disenchanting sections of society. The result is predictably disturbing: enhanced powers given to security agencies and the police; deviation from established principles of law; human rights abuses;¹⁵ alienation of innocent, affected people;¹⁶

time of declared war." See P. Smith, *The Prevention of Terrorism Act*, 3 WORKING PAPERS IN EUROPEAN CRIMINOLOGY 208 (1982).

11. A recent and new illustration of the use of "national emergency" is the bio-emergency associated with the foot and mouth epidemic in the UK. During that period, it is claimed that the rule of law and natural justice were suspended in order to respond to the epidemic. See D. Campbell & R. G. Lee, *Carnage by Computer: The Blackboard Economics of the 2001 Foot and Mouth Epidemic*, in LEGAL AND SOCIAL STUDIES (forthcoming 2003). See also *Bioterrorists May Mount Foot and Mouth Attack*, OBSERVER, Jan. 5, 2003.

12. "At a time of threat, to be seen to be doing something rather than nothing is a natural human — and perhaps particularly ministerial — reaction." Lord Jenkins of Hillhead, House of Lords, Official Report, Nov. 27, 2001, col. 199.

13. Roy Jenkins, Home Secretary during 1974, wrote in his autobiography, *A LIFE AT THE CENTRE*, that the Prevention of Terrorism [Temporary Provisions] Act 1974 was constructed from contingency plans, which had been carefully prepared in advance. ROY JENKINS, *A LIFE AT THE CENTRE* (1991). This advance provider approach was also probably employed for the PATRIOT Act, given its size and the speed of its introduction as a Bill into Congress.

14. "Circumstances and *public opinion* demand urgent and appropriate action after the September 11th attacks." David Blunkett, House of Commons, Official Report, Dec. 19, 2001, col. 22 (emphasis added). Conspiracy theorists might argue that this is an opportune moment to push through legislation, which in times of normality would not receive the support of the legislature, nor that of the public at large.

15. See e.g., AMNESTY INTERNATIONAL, NORTHERN IRELAND: REPORT OF AN AMNESTY INTERNATIONAL MISSION, A1 Index, EUR45/01/78 (1978); HELSINKI WATCH, HUMAN RIGHTS IN NORTHERN IRELAND (1991); HUMAN RIGHTS WATCH, CHILDREN IN NORTHERN IRELAND: ABUSED BY SECURITY FORCES AND PARAMILITARIES (1992); LAWYERS COMMITTEE FOR HUMAN RIGHTS, HUMAN RIGHTS AND LEGAL DEFENSE IN NORTHERN IRELAND: THE ABUSE AND INTIMIDATION OF DEFENSE LAWYERS AND THE MURDER OF PATRICK FINUCANE (1993).

and disappointing results, even alienating consequences, of these attempts to control anti-terrorist activities, which have not been subject to normal standards of scrutiny. This is a sequence evident both within the United States and the UK as a consequence of September 11th.

The State's responses to terrorism are invariably "extraordinary" in the way wartime responses are extraordinary, although the former has a disturbing habit of being transformed from the category of "abnormal" to "normal" legislation,¹⁷ or at the very least affecting subsequent criminal legislation.¹⁸ For example, the Black Act 1723, as documented by E. P. Thompson,¹⁹ continued to shape the lives of English peasants for over a century, as did the Vagrancy Acts.²⁰ In more recent times, income tax and "pay as you earn," both wartime measures, remain principal methods of tax collection. National identity cards were also introduced as a wartime measure and were not repealed until 1952.²¹ The Prevention of Violence Act of 1939 was also introduced as a short-term measure as a result of an Irish Republican Army ("IRA") bombing campaign in Britain, which began and finished in that year. The legislation remained in force for fif-

16. See Tom Hadden *et al.*, *Emergency Law In Northern Ireland: The Context*, in JUSTICE UNDER FIRE (Anthony Jennings ed., 1988) (documenting the alienation process in Northern Ireland); see also, KEVIN BOYLE ET AL., LAW AND STATE: THE CASE OF NORTHERN IRELAND (1975); KEVIN BOYLE ET AL., TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE (1980); DERMOT WALSH, THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND (1983).

17. Jerry Fitt MP from Belfast commented during the 1981 renewal debate of the Prevention of Terrorism Act: "It is my impression that once a government has these powers in their control they are very reluctant to give them up . . . This Act would certainly come in handy if events took place which did not satisfy the government in power at the time. The Act is always there, it can always be extended, and it could be used to deal with such a situation (social unrest arising from unemployment)." *Hansard*, House of Commons, 1981, vol. 1000/1, col. 382.

18. Joe Sim & Philip A Thomas, *The Prevention of Terrorism Act: Normalizing the Politics of Repression*, 71 J. OF L. AND SOCIETY (1983).

19. E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT (1975).

20. William Chambliss, *A Sociological Analysis of the Law of Vagrancy*, 12 SOC. PROBS. 67 (1964).

21. *Willcock v. Muckle*, 2 KB 367 (1951). This issue reemerged immediately after September 11th and in the form of a consultation paper from the Home Office on "entitlement cards." Entitlement Fraud and Indemnification Cards: A Consultation Paper, 2002, Cm. 5557. Immediately after the Birmingham Bombings by the IRA in 1974, during the passage of the Prevention of Terrorism (Temporary Provisions) Bill, there was a call in Parliament to reintroduce identity cards. P. Smith, *Emergency Laws and the Prevention of Terrorism Acts*, in SECURING THE STATE: POLITICS OF INTERNAL SECURITY IN EUROPE 218 (1982).

teen years.²² Jim Marshall MP, commented on this trend towards unexpected legislative longevity during the 1983 renewal debate of the Prevention of Terrorism [Temporary Provisions] Act:

Quite apart from the anxiety about the way in which the Act is applied, there is the added danger that long term acceptance of its provisions will corrupt our democratic system. I believe that there is evidence that this has begun to happen. The power to detain suspects for seven days, which produced a shock on both sides of the House in 1974, now hardly causes an eyelid to flutter . . . this is an example of an insidious circular process in which draconian laws soften us up for similar laws which become the desired standard for further measures.²³

Terrorist threats and actions test the Executive's commitment to the rule of law and good governance. Because of the extreme powers given by such extraordinary legislation, there is an incumbent requirement to provide limits to its terms, scope, and life span. Legal responses of this nature should be restricted in terms of time to the shortest and most clearly stated period; should refer to closely defined groups or people in order to limit the likelihood of innocent people being dragged into the anti-terrorist legislative net; and, finally, should always remain within the boundaries of good governance. This Article is based on the inviolability of these principles and explores the ways in which various governments have responded.²⁴ In addition, it considers the importance of the legislative processes, recognizing that the failure to honor them leaves open the door to executive exploitation and the misuse of power. It also reflects on the efficiency of anti-terrorist legislation. Does this legislation stop, deter or punish criminals; is it "comfort legislation" directed towards producing and maintaining public confidence; or is it

22. See Chambliss, *supra* n.20. See also Owen Lomas, *The Executive and the Anti-Terrorist Legislation of 1939*, 16 *PUB. L.* 16 (1980).

23. *Hansard*, House of Commons, Mar. 7, 1983, col. 6331983. The annual review attracted the attendance of fewer and fewer MPs. In 1988, Neil Kinnock, leader of the Labour opposition, suggested that Labour MPs should abstain in the annual review, rather than vote against renewal of the Act.

24. "An effective response to terrorism must always be in response to the rule of law and proportionate to the threat . . . A lawless approach risks alienating the population, or a section of it, without producing substantial benefit for the counter terrorism effort." *Inquiry into Legislation against Terrorism*, 1996, Cm. 3420 at 7.

counter-productive through the alienation of innocent victims and ethnic, religious and immigrant groups?

I. THE EXPERIENCE OF HISTORY

The Parliamentary framework of a liberal democracy is structured to accommodate technical and structured debates occurring between the major political parties represented in the House. The structure includes the manipulation of timetables, compilation of amendments, organization of divisions at committee stage, pairing of parties at voting time, and the role of “whips” to ensure sufficient votes for the government at crucial times. National emergencies disturb these traditional arrangements and short-circuit normal procedures. The truncated processes that are applied retain recognizable form, but the principles are lost or diminished.

The most striking recent examples of ill-considered emergency legislation are the responses to terrorist activities.²⁵ There is a strong and clear parallel between the current legislative processes in both the United States and the UK. First, by way of illustration, I examine the Parliamentary passage of the Preven-

25. Britain's colonial history has many examples of the use of emergency powers. See e.g., Brian Simpson, *The Devlin Commission (1959): Colonialism, Emergencies and the Rule of Law*, 22 OXFORD J. L.S. 17 (2002).

In Nyasaland (Malawi) we found that perhaps under the stress of the emergency, there was at every level of the administration an indifference to and misuse of the law. By misuse of the law we mean that the Emergency Regulations were treated solely as a source of power to be exploited and added to if necessary, and not as setting any limits to what the Government could do. When we enquired what power the Government had to do this or that, it was often plain that the question had never previously been considered at all: the Regulations were then searched to see what power there was in the spirit that if there was not such a power, there ought to be.

Id. at 37 (quoting Report of the Nyasaland Commission of Enquiry (the Devlin Report) (1959), Cmnd. 814, para. 291). Leo Abse MP during the Parliamentary debate on the Prevention of Terrorism (Temporary Provisions) Bill 1974 stated:

As in every colonial situation repressive legislation is no substitute for policy. We have no policy whatever . . . It has been simple for them to turn back to the 1939 (Prevention of Violence Act) legislation, which of course, was intended . . . to be in existence for only two years. That legislation lasted for 15 years . . . The draftsmen had not only the benefit of that legislation but also the benefit of legislation which applied under similar circumstances in Kenya, Palestine, Cyprus and Aden. There are remarkable analogies between that legislation and clauses in the Bill.

Hansard, House of Commons, vol. 822, cols. 656-58.

tion of Terrorism (Temporary Provisions) Act 1974.²⁶ It was subject to a mere seventeen hours of debate in the House of Commons before its “draconian powers” were approved. Parliamentary debate was driven by the public outrage caused by the Birmingham pub bombings that resulted in the death of twenty-one people and the injury of a further 180. Brian Walden MP stated in the House of Commons:

The justification for the Bill to my mind, is overwhelming, and I make no bones about the fact that I shall not listen with too much patience to any anxieties about whether this or that or the other civil right may temporarily be somewhat abridged . . . Let us be frank. The overwhelming mood in my constituency and I believe in my city, is one of vengeance.²⁷

The absence of rational discussion and the presence of vengeance fuelled by public outrage characterized the mood of both Parliament and the Nation. Clare Short, currently a Cabinet member of the government, attended the debate on the Bill in her previous capacity as a Home Office civil servant. She whispered to her neighbor, the man who drafted the Bill, that it would do nothing to prevent terrorism. His reply was “that is not what it is about.”²⁸ Dafydd Elis Thomas MP said at the time that despite his personal reservations it was more than a person’s seat was worth to vote against the Bill given the extreme level of public shock and outrage.²⁹ Thus, even concerned politicians were tempted to place their principles on hold during this tense and extraordinary period.

A similar legislative response was made both in Ireland and the UK over the Omagh bombings in Northern Ireland in August 1998.³⁰ In Dublin, the Offences Against the State (Amend-

26. The Act was legislatively updated and revised until the Terrorism Act 2000 through the following legislation: Prevention of Terrorism (Temporary Provisions) Act 1976 (Eng.), Prevention of Terrorism (Temporary Provisions) Act 1984 (Eng.), Prevention of Terrorism (Temporary Provisions) Act 1989 (Eng.), Prevention of Terrorism (Additional Power) Act 1996 (Eng.).

27. *Hansard*, House of Commons, vol. 882, Nov. 28, 1974, cols. 648-50.

28. Francis Wheen, *Bills that Cost too Much*, *GUARDIAN*, Sept. 2, 1998. See also C.A. GEARTY & K.A. KIMBELL, *TERRORISM AND THE RULE OF LAW* 17 (1995).

29. Personal communication with the author in 1974.

30. For a detailed account of the Parliamentary passage of this legislation, see Philip A. Thomas, *Emergency Terrorist Legislation*, *J. OF CIV. LIBERTIES* 240 (1998). See also Colm Campbell, *Two Steps Backwards: The Criminal Justice (Terrorism and Conspiracy) Act 1998*, *CRIM. L.R.* 941 (1999).

ment) Bill was published on August 31st, debated in the Dail on September 2nd between 10 a.m. and 11:30 a.m., and thereafter in the Seanad on the 3rd, followed by an immediate quasi-Presidential signing (this was because the President of Ireland was overseas).

In Westminster, a similarly complex Bill that quickly became the Criminal Justice (Terrorism and Conspiracy) Act, was pushed through Parliament in twenty-seven hours.³¹ It was published and made available to members for reading at 6 p.m. on the day previous to the House of Commons debate. Tony Benn, in debate, compared the procedure with that associated with the former U.S.S.R.: “[w]hat a way to treat Parliament . . . as though we were the Supreme Soviet, simply summoned to carry through the instructions of the Central Committee.”³² From across the Chamber, Richard Shepherd, a Conservative MP, stated: “not in the face of terrorism or anything should we abandon the liberty and freedom to discuss these matters.” This is no way for the House to conduct its business. The government is acting manipulatively. We have been knee-jerked here.”³³ In the House of Lords, Sir Patrick Mayhew, former Northern Ireland Secretary from 1992 to 1997, declared: “We are invited to make law which may turn out to be dangerous and therefore bad law for a purpose which will probably not be achieved in practice.”³⁴ Thereafter, the Queen proved exceedingly obliging. While on holiday in Scotland, she gave the Royal Assent to the Act, before it had completed its Parliamentary passage.

Should the readers be tempted to think that emergencies and zealous executive action are restricted to world wars and terrorism, they would be wrong. Ireland provides illustration after illustration of executive detention from early times of its occupation up to, and including, the present.³⁵ Indeed, it is claimed

31. A personal communication from an MP indicated that his explanation for the extremely swift passage of the Act revolved around the need to be seen as loyal to President Clinton. He had recently visited Ireland, was identified as an important promoter of the Good Friday Agreement, and the United States had recently been outraged by the bombings in Nairobi and Dar es Salaam.

32. *Hansard*, House of Commons, Sept. 2, 1998, col. 717.

33. *Id.* at cols. 714-15.

34. *Hansard*, House of Lords, Sept. 3 1998, col. 31.

35. For example, The Protection of Life and Property (Ireland) Act 1871 (Eng.); An Act for the Better Protection of Person and Property in Ireland, 1881 (Eng.). The history of Northern Ireland, including modern times, is replete with such emergency

that Northern Ireland is the testing ground for UK anti-terrorist legislation.

The architecture of UK emergency and anti-terrorist legislation in the last quarter of the twentieth century and at the beginning of the twenty-first century has therefore been defined by a general transposition of measures developed to deal with Northern Ireland violence to international terrorism. Given that these Northern Ireland measures involved significant erosion of civil liberties and produced sustained criticism from international human rights agencies, it seems likely or at least possible that similar problems may emerge with the application of the new statutes.³⁶

II. *BALANCING FREEDOM AND SAFETY*

Immediately after September 11th, David Blunkett, the Home Secretary, stated: "We could live in a world which is airy-fairy, libertarian, where everyone does precisely what they like and we believe the best of everybody and then they destroy us."³⁷ In the House of Lords, during the second reading of the Antiterrorist, Crime and Security Act ("ATCSA"), Lord Roker, Home Office Minister, stated:

. . . it [the Bill] strikes a balance between respecting our fundamental liberties and ensuring that they are not exploited. The problem is that in a tolerant liberal society, if we are not guarded we will find that those who do not seek to be part of our society will use our tolerance and liberalism to destroy that society. That is a reality.³⁸

Identical sentiments, albeit expressed more elegantly, were offered earlier by the American judge, Learned Hand, while commenting on the delicate balance applicable in time of warfare. He wrote: "a society in which men recognize no check upon their freedom soon becomes a society where freedom is the pos-

legislation. For example, the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 (Eng.). For an account of this legislation, see COLM CAMPBELL, *EMERGENCY LAW IN IRELAND, 1918-1925* (1994).

36. Colm Campbell & Ita Connolly, *A Useful Model?: Emergency and Anti-Terrorist Powers in Northern Ireland* (forthcoming 2003).

37. For an analysis of this statement, see Paddy Hillyard, *In Defense of Civil Liberties*, in *BEYOND SEPTEMBER 11TH* 107 (Phil Scruton ed., 2002).

38. *Hansard*, House of Lords, Nov. 27, 2001, col.143.

session of only a savage few.”³⁹ Thus, the argument runs, the pursuit of safety in the war against terrorism carries a price which is the temporary diminution of freedom. The increased demand for the assurance of public safety brings with it the necessary and lamented reduction in individual freedom. The interests of the many trump those of the individual. In turn, the institutions and principles that support and promote individual freedom must also be trimmed during these unusual times.

The true cost of emergency legislation is that the social unity achieved through the single goal of defeating terrorism results in the discreditation, loss or suspension of established principles that include cherished rules governing the control of criminal behavior, and also, the protection of the rights of the individual. The new but united lock-step march of society in its fight against terrorism results in the suppression of the dissident voice.⁴⁰ Freedom of speech suffers. Critical comment about the executive is interpreted as being unpatriotic. One is either with or against the executive: there is no acceptable alternative position. The wartime spirit, which eulogizes the term “national security,” produces national unity in a single cause.

In this way, the rule of law is both challenged and damaged and thereafter its supporting institutions take on a different, unhealthy form. This change is reflected in the alteration of the criminal process for crimes involving national security. Such changes have the disturbing record of creating an undesirable dual, parallel criminal process structure. Further they can also leach into and change the original, dominant structures established to deal with “ordinary” crime. For example, a closed military tribunal replaces the right to a public judicial trial and imposes assigned counsel rather than permitting legal counsel of choice. Rules of criminal evidence and procedure are changed or waived. These increase the likelihood of a criminal conviction.⁴¹ In Northern Ireland, in a series of cases involving the

39. LEARNED HAND, *THE SPIRIT OF LIBERTY* 191 (1952); see also Richard Posner, *Security versus Civil Liberties*, ATLANTIC, Dec. 2001; Raymond D. Gastil, *What Kind of Democracy?*, ATLANTIC, June 1990.

40. Attorney General, John Ashcroft questioned the patriotism of those speaking out for civil rights: “Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies.” WASH. POST, Dec. 7, 2001.

41. The prosecution’s success, however, is not always guaranteed even under such adverse conditions. For example, consider the case of Clive Ponting, which involved

testimony of security forces, witnesses have given evidence anonymously from behind screens.⁴² Juries have been replaced by sole judges for scheduled offenses,⁴³ while in the UK, the role and frequency of jury usage has been reduced particularly in the cases involving national security through the processes of jury vetting and jury packing.⁴⁴ Convicted criminals, having been offered incentives to provide evidence, have appeared as “supergrass” witnesses for the prosecution;⁴⁵ people convicted of no offense are detained without trial through the internment process; and the police are given extraordinary powers to combat terrorist activities.⁴⁶ The judiciary itself is aware of the high stakes within the trial and the rules they must interpret. In some cases, the courts have proved reluctant to act in a robust fashion in order to test the case of the State⁴⁷ or have been locked into an

issues of national security and official secrets arising out of the Falklands War. R. v. Ponting, CRIM. L.R. 318 (1985); CLIVE PONTING, *THE RIGHT TO KNOW* ch.6-7 (1985); Clive Ponting, *R. v. Ponting*, 14 J. L. & SOC. 366 (1986).

42. “In the course of sending independent observers to trials and inquests in Northern Ireland over the past seven years it has been our experience that screening and anonymity, usually linked to public interest immunity certificates, have been increasingly used to hide the identity of key police and army witnesses. In our view, such devices do nothing to assist in establishing the facts of the case or in delivering a fair trial.” (Private correspondence with the author 1998). The Saville Tribunal enquiring into the deaths on Bloody Sunday also provided anonymity to soldiers, *available at* www.bloody-sunday-inquiry.org.uk. See *McCann and Others v. UK*, (1995) 21 EUR. H.R. REP. 97 (describing the killing by British security forces of three unarmed members of the IRA in Gibraltar in 1988); JILL TWEEDIE, *THE GIBRALTAR INQUEST REPORT* (1988); J. Tweedie & T. Ward, *The Gibraltar Shootings and the Politics of Inquests*, 16 J. OF L. & SOC. 464 (1989); Ian Jack, *Gibraltar*, 25 GRANTA 43 (1988); Ruth Costigan & Philip A. Thomas, *Anonymous Witnesses*, 51 N.I.L.Q. 326 (2000).

43. As in the Diplock courts in Northern Ireland under the Northern Ireland (Emergency Provisions) Act 1973 (Eng.). JOHN JACKSON AND SEAN DORAN, *JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM* (1950); STEVEN GREER & ANTHONY WHITE, *ABOLISHING THE DIPLOCK COURTS: THE CASE FOR RESTORING JURY TRIAL TO SCHEDULED OFFENCES IN NORTHERN IRELAND* (1986).

44. SEAN ENRIGHT AND JAMES MORTON, *TAKING LIBERTIES: THE CRIMINAL JURY IN THE 1990s* 29-32, 38-42 (1990); R. East, *Jury Packing: A Thing of the Past?*, 48 MODERN L.REV. 518 (1985); Philip A. Thomas, *Secret Police on Trial*, 98 PLANET 3 (1993); Andrew Nicol, *Official Secrets and Jury Vetting*, CRIM. L. REV. 284 (1979).

45. STEVEN GREER, *SUPERGRASSES: A STUDY IN ANTI-TERRORIST LAW ENFORCEMENT IN NORTHERN IRELAND* (1995).

46. There is much literature on these issues, but for a recent and valuable overview see NOEL WHITTY, THERESE MURPHY & STEPHEN LIVINGSTONE, *CIVIL LIBERTIES LAW: THE HUMAN RIGHTS ACT ERA* (2001).

47. See, e.g., DAVID LEIGH, *BETRAYED: THE REAL STORY BEHIND THE MATRIX CHURCHILL CASE* (1993) (describing the use of public interest immunity certificates in the Matrix Churchill case).

unjust position by the applicable rules.⁴⁸ There is often, in times of emergency, a less than rigorous testing of executive actions by the judiciary, through, for example, the challenging of public interest immunity certificates.⁴⁹ Legal formalism remains, but the forfeit is the spirit of the law.⁵⁰

The media adopts a reactionary position when terrorism threatens and the Executive is given unprecedented and uncritical media support.⁵¹ For example, the editor of *New Republic* wrote: “[t]his [N]ation is now at war. In such an environment, domestic political dissent is immoral with a prior statement of national solidarity, a choosing of sides.”⁵² Additionally, such executive action in democratic States⁵³ provides an extended license to repressive regimes that nakedly exploit these moments of terrorism to further control and suppress minority voices and those who adopt a critical stance concerning the values and actions of the State. For example, the Chinese government has used the events of September 11th to crack down on Uighur resistance to Chinese rule in the province of Xinjiang.⁵⁴

Not only does terrorism produce widespread distress, anxiety, fear, but as stated, it provokes public responses of unity through adversity. In addition, the threat of terrorism offers financial and growth opportunities to private enterprise,⁵⁵ bureau-

48. Official Secrets Act 1911, Sec. 2 (Eng.) (offering, no public interest defense). See Ponting, *supra* n.41.

49. Lord Simon wrote in *D. v. NSPCC*, 1 All E.R. 607 (1977): “If society is disrupted or overturned by internal or external enemies, the administration of justice will itself by one of the casualties . . . as regards national security in its strictest sense, a ministerial certificate will almost always be regarded as conclusive.” *Id.*

50. Classic examples are found in Germany under National Socialism. See FRANZ NEUMANN, *THE RULE OF LAW* (1935); see also FRANZ NEUMANN, *BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM* (1942).

51. EDWARD W. SAID, *COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD* (1997); E. W. SAID, *ORIENTALISM* (1978).

52. See Lewis Lapham, *Notebook: American Jihad*, HARPER’S, Jan. 2002.

53. See, for example, the Anti-Terrorist legislation introduced post September 11th in Australia, Canada, Colombia, European Union, India, Italy, Jordan, New Zealand, and South Africa.

54. See FINAN. TIMES, July 27, 2002 (providing a detailed account of these developments in China). In other countries, such as Egypt, Israel, Philippines, Russia, and Uzbekistan, U.S. responses have encouraged further repressive executive actions. In Israel, the Prime Minister, Ariel Sharon, described the Palestinian leader, Yassar Arafat, as “our bin Laden.”

55. Vice President, Dick Cheney, is the former CEO of Halliburton Corp. A subsidiary is now involved in a US\$16 million project to construct cells at Guantanamo Bay for new internees from Afghanistan. It is also providing services at Force Provider mili-

crats,⁵⁶ and to institution-builders. For example, an ailing airline industry may receive financial support from the State to keep the country “flying.”⁵⁷ Security forces may be offered a “new enemy” when traditional enemies have been defeated or have diminished in power.⁵⁸ The new enemy demands increased, specialist attention and therefore, a larger budget is required to respond to the new threat.⁵⁹ The arms industry is offered an expanded market and larger profits via an increased defense budget,⁶⁰ and the investment market responds accordingly.⁶¹ The defense budget increases dramatically.⁶² Thus, terrorism provides op-

tary camp, Afghanistan. The oil lobby is strongly represented in the U.S. executive branch: former President Bush is linked with the Carlyle Group; C. Rice was formerly with Chevron; D. Rumsfeld, formerly of Occidental, and President Bush, formerly of Harken.

56. On September 11th, Jo Moore, a special adviser in the Department of Transport, wrote an email stating that the terrorist attacks in the United States offered an opportune moment to release stories that the Department wished to bury.

57. The President produced an emergency package for the airlines: UK£5 billion in cash and US\$10 billion in loan guarantees, though their financial problems existed prior to September 11th. See Steve Tombs, *Markets, Regulation and Risk: The US Airlines Industry and Some Fallout from September 11th*, in *BEYOND SEPTEMBER 11TH* 157 (Phil Scraton ed., 2002).

58. The U.S. war on drugs is being scaled down because of cost and the growing importance of the anti-terrorist program. *GUARDIAN*, Oct. 21, 2002.

59. The Homeland Security Act of November 2002, establishes a department employing 170,000 staff with a budget of UK£38 billion. *INDIAN EXPRESS*, Nov. 21, 2002. The FBI director has announced “a dramatic departure from the past” by making terrorism prevention the FBI’s number one task. Mr. Mueller requested 900 extra agents. Currently, 3,700, one third of the agency staff, are working on these issues. There will also be a total restructuring of the FBI. *GUARDIAN*, May, 30 2002. Previously, President Clinton, after the Oklahoma bombing in 1994, agreed to hire 1,000 extra FBI agents and prosecutors to deal with terrorism. In the UK, the Prime Minister blamed tax rises on the impact of September 11th. *GUARDIAN*, May 15, 2001.

60. President Bush avoided a “guns and butter” budget by cutting taxes and certain social programs, while simultaneously increasing the defense budget, since September 11th, by US\$50 billion. *GUARDIAN*, July 12, 2002. Boeing is currently working overtime to produce sufficient equipment for the proposed invasion of Iraq. *GUARDIAN*, July 29, 2002.

61. Companies that marketed security devices, bomb detection devices, and surveillance and bio-warfare technologies, rocketed up 146 percent after September 11th as did a number of defense contractors. *Picking War Stocks is Hell*, *SAN FRANCISCO CHRON.*, Dec. 20, 2001.

62. The defense budget for 2003 is the biggest in military spending, in both absolute amount and in percentage terms, since the first years of the Reagan Administration. It amounts to US\$1 billion a day. Senator Kent Conrad, North Dakota, who chairs the Budget Committee, said: “We’re at war and when the president asks for additional resources for national defense, he generally gets it.” See World Socialist Web-site postings from Feb.6, 2002, available at www.wsws.org.

opportunities for both ailing and aggressive industries and an unchallengeable expansion program for national security agencies⁶³ and the military.⁶⁴ The *Wall Street Journal* called on the President to take full advantage of the “unique political climate” to “assert his leadership not just on security and foreign policy but across the board.”⁶⁵ Because these developments occur in strained times, the normal checks and balances that would be employed to ensure appropriate use of public finances are suspended or short-circuited.⁶⁶ Immediacy and results are the order of the day.

Dworkin argues that the claim of the Executive that there is an essential balance to be drawn between safety and freedom constitutes a false dichotomy.⁶⁷ The popular political argument is that such is the terrorist threat to our security that the levels of freedom to which we are legally entitled and often experience must be reduced. Thus, safety trumps freedom in special circumstances and for a limited time. This should mean that when the emergency is over, the previous levels of freedom, having been preserved and protected, should be returned and enjoyed. However, strengthening safety exposes alleged terrorists to a higher risk of unjust conviction because traditional procedural safeguards associated with the rule of law are subject to temporary suspension. Dworkin challenges the official explanation that a trade-off suggests that the general population is willing to accept limitations on its personal freedom.⁶⁸ In fact, very few people will be affected by this new relationship. Middle

63. M15, M16 and GCHQ were given significant budget increases in July 2002, rising over 7% annually over the next three years: UK£896 million in 2002 to UK£1.18 billion. This rise excludes the cost of new head quarters for the GCHQ estimated at UK£800 million. *GUARDIAN*, July 16, 2002.

64. In the UK, the Chancellor of the Exchequer, Gordon Brown, announced in his budget speech that the Ministry of Defense would receive an extra UK £1 billion a year, which is the highest increase since the end of the Cold War, rising from UK£29.3 billion to UK£30.2 billion. Brown stated this reflects the need to “meet the urgent moral challenge of global terrorism.” *Id.*

65. *Editorial*, *WALL STREET J.*, Sept. 19, 2001. It encouraged more tax cuts, oil drilling in Alaska, and use of Social Security surpluses.

66. See Gore Vidal, *The Enemy Within*, *OBSERVER*, Oct. 27, 2002 (giving an enthralling account of “conspiracy theory”).

67. *The Threat to Patriotism*, *N.Y. REV. OF BOOKS*, Feb. 28, 2002.

68. “Some of the powers which these Acts give to the police undoubtedly encroach more upon individual’s civil liberties than people would be prepared to tolerate in *normal circumstances*. Successive governments and *the general public* have accepted this in the past as the necessary price of measures calculated to protect the public from terror-

America, like middle England, will continue to operate in ways oblivious and untouched by the new politics introduced by executive action. The white middle classes remain inviolate, uninvolved, and oblivious of the reach of anti-terrorist legislation, its implementation, and enforcement. Those most likely to be ensnared and possibly victimized by the new and lower standards of justice are resident aliens, first generation immigrants, ethnic minorities, especially Arabs and followers of Islam, just as the general Irish community living in mainland Britain were stigmatized by their accents and names at the height of the IRA bombing campaigns.⁶⁹ These are the people who will be targeted through the new procedures for special attention, surveillance, interrogation and possible criminal convictions. It is not a question of how much liberty will the reader of this Article sacrifice. The answer is little or none. The appropriate question is: what does justice require in order to be just?

The idea of trading off freedom for safety on a sliding scale is a scientific chimera, which, in reality, is misleading. Are murderers offered less protection through law than those who commit social security fraud or embezzlement? The punishment will differ but similar rules of practice and evidence are applied to the murderer and the fraudster. Thus, the denial of rights to some that are available to others represents a slippery slope, particularly when those to whom rights are denied are themselves members of a vulnerable group, such as aliens or members of an ethnic or religious minority. Their risk of false conviction for terrorist offences is no less than that of the fraudster and indeed, is greater if their rights are minimized.⁷⁰ The history of terrorist trials in the UK is significantly marred by major miscarriages of justice.⁷¹ Balance should not enter the equation: it is false and misleading. Instead, it should be understood as an issue of re-

ist attack." Inquiry into Legislation against Terrorism, 1996, Cm. 3420, at 9 (emphasis added).

69. PADDY HILLYARD, *SUSPECT COMMUNITIES* (1993).

70. For example, Ali al-Maqtari, a Muslim visitor to the United States, was arrested on September 15th and jailed for eight weeks. Apparently, he was arrested because his wife wore an Arab headdress, he spoke a foreign language, French, and because he had box cutters on him which he used in his job in a market. His testimony before the Senate Judiciary Committee is *available at* <http://www.senate.gov/te120401f-al-maqtari.htm>.

71. The most infamous "terrorist" miscarriages of justice are the Birmingham 6, the Guildford 4, Maguire 7 and Judith Ward.

ducing, in the name of national security, the constitutional and civil rights of possibly vulnerable people and groups who are identified as alleged terrorists.

A. U.S. Legislative Responses⁷²

Commenting on President Franklin Roosevelt's support for the wartime internment of Japanese immigrants and Japanese Americans, Professor Francis Biddle wrote: "[T]he constitution has not greatly bothered any wartime President. That was a question of law, which ultimately the Supreme Court must decide. And meanwhile — probably a long meanwhile — we must get on with the war."⁷³ President Bush's declaration of "war" against terrorism differs in that he used the word "war" rhetorically, not in its legal and constitutional sense, and that he originally intended the war to be "ongoing" against individuals and organizations, rather than against a Nation State.⁷⁴ This commitment was illustrated by the cosmic name he initially gave to his campaign against international terrorism: "Infinite Justice."

The principal legislative response to September 11th is the anti-terrorist legislation, entitled, "Uniting and Strengthening of America to Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001." This creates the powerful acronym, the USA PATRIOT Act of 2001. It is a monster piece of legislation amounting to 342 pages, covering 350 subject areas, encompassing forty federal agencies, and carrying twenty-one legal amendments.⁷⁵

72. It is not intended to provide a detailed analysis of U.S. and UK anti-terrorist legislation. This is available elsewhere, *see e.g.*, David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September*, MODERN L.R. 724 (2002); R.M. Talbot, *The Balancing Act: Counter-Terrorism and Civil Liberties in British Anti-Terrorist Law*, in LAW AFTER GROUND ZERO (J. Strawson ed. 2002); Andrew Tomkins, *Legislating Against Terror: The Anti-Terrorism, Crime and Security Act 2001*, PUB. L. 205 (2002); Casper Bowden, *CCTV For Inside Your Head: Blanket Traffic Data Retention and the Emergency Anti-Terrorism Legislation*, COMPUTER AND TELECOMM. L.R. 21 (2002) 21; *Editorial: Anti-Terrorism, Crime and Security Act 2001*, CRIM. L.R. 159 (2002).

73. FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962).

74. Subsequently, President Bush expanded his "war" to include Nations, which, collectively constitute the "axis of evil," with Iraq being identified as the principal protagonist.

75. See the following section for a brief account of some of the controversial powers in the new legislation. However, this Article does not set out to provide a detailed analysis of U.S. and the UK anti-terrorist legislation. *See* M. P. O'Connor & C. Rumann,

House Judiciary Committee Chairman, F. James Sensenbrenner introduced this legislation on October 2nd. It became law on October 26th. This record-breaking speed was made possible only by forcing the pace to the point where serious debate and discussion were rendered impossible by the executively-restricted time scale and the public demand for political action. Indeed, even Congressional procedure thus truncated was challenged by Attorney General John Ashcroft, who stated that it would be dangerous to delay the Bill's passage for more than a few days.⁷⁶ Senate Majority leader Tom Daschle said: "all hundred of us could go through this Bill with a fine-tooth comb and cherry pick and find improvements . . . We've got a job to do, the clock is ticking and the work needs to get done."⁷⁷ In the Senate, only Russell Feingold voted against the PATRIOT Act, with sixty-six against it in the House of Representatives. With Congressional staff locked out of their offices due to the anthrax scare, few members of Congress had time to read the summaries of the Bill, let alone the fine print of the document that was passed in such haste. Indeed, what red-blooded American politician, with an eye on re-election, would vote against such legislation?⁷⁸ Bush, whose saber-rattling rhetoric demanded immediate political support, urged on the representatives. He declared that "in order to win the war, we must make sure that the law enforcement men and women have got the tools necessary, within the Constitution, to defeat the enemy . . . We're at war . . . a war we're going to win."⁷⁹ The Act, molded by these warrior words and passed in furious and frustrated haste, left federal prosecutors, defenders, regulators and administrators throughout the country scrambling to decipher what Congress and the Bush Administration had packed into the legislation. The pub-

Going, Going, Gone: Sealing the Fate of the Fourth Amendment, 26 *FORDHAM INT'L L.J.* 1234 (2003).

76. Ronald Dworkin, *The Threat to Patriotism*, N.Y. *REV. OF BOOKS*, Feb. 28, 2002.

77. Statements from Oct. 12, 2001, available at <http://www.CNN.com>.

78. Compare *supra* n.29 and accompanying text. Similar sentiments were expressed in that public pressure and the continuance as an MP demanded that the politician refrain from adopting a principled but unpopular position.

79. He further declared that 2002 would also be " . . . a war year. Our war against terror extends way beyond Afghanistan." *GUARDIAN*, Dec. 27, 2001. Draft plans trailed in the media in July 2002 indicate that Iraq is likely to be invaded in January 2003. *OBSERVER*, July 6, 2002. Vice President, Dick Cheney, referred to "forty or fifty countries" that could need military disciplining. John Pilger, *The Real Story Behind America's War*, *NEW STATESMAN*, Dec. 17, 2001.

lic responded in positive terms. The pre-September approval rating of Bush was forty-four percent, but that leapt to eighty-six percent in December 2001.⁸⁰ In various public polls, roughly two-thirds said they supported the actions of the Administration. However, a quarter of those polled stated that President George Bush and Attorney General John Ashcroft did not act in a sufficiently aggressive manner.⁸¹ More recently, those who demanded a more vigorous response would be pleased to read in the President's National Security Strategy of the United States that he contemplates pre-emptive action; the possibility of unilateral action;⁸² and also the readiness to respond with the use of the nuclear option.⁸³

1. USA PATRIOT Act

The possible uses and outcomes of this legislation have horrified many constitutional lawyers and civil rights groups. For example, domestic spying is given a renewed lease of life. Firewalls were erected after the Watergate scandal and the subsequent Senate investigation in 1975 chaired by Senator Frank Church. Church warned that domestic intelligence gathering was a "new form of governmental abuse," unconstrained by law, which had been abused by Nixon and by the FBI which spied on over half a million Americans during and after the McCarthy era. One reform was the separation within the FBI of criminal investigation and intelligence gathering against foreign spies and international terrorists. The Act foreshadows the end of that separation by making key changes to the underpinning law, the Foreign Intelligence Surveillance Act ("FISA") 1978. FISA demanded that wiretaps and searches for intelligence purposes, as opposed to evidence, be undertaken only if the "primary pur-

80. Approval ratings were published in the WASH. POST on Dec. 21, 2001 and N.Y. TIMES, Jan. 3, 2002.

81. *Public Agenda Special Edition: Terrorism*, available at http://www.publicagenda.org/specials/terrorism/terror_pubopinion.htm. Those who wished for a more vigorous interrogation should note that the CIA has used "stress and duress" techniques on Al-Qaeda suspects held at secret overseas detention centers. They have also contracted out their interrogation to foreign intelligence agencies known to routinely use torture. Cofer Black, former director of the CIA counter-intelligence branch, told a congressional intelligence committee: "All you need to know: there was a before 9/11, and there was an after 9/11 . . . After 9/11 the gloves came off." WASH. POST, Dec. 26, 2002. See also GUARDIAN, Jan. 25, 2003.

82. GUARDIAN, Sept. 21, 2002.

83. GUARDIAN, Dec. 12, 2002.

pose” was to listen to a specific foreign spy or terrorist. The new Act lowers the level to a “significant purpose.” Roving wiretaps throughout the United States now operate on a single warrant. Americans engaged in civil disobedience or other forms of civil protest might be charged with “domestic terrorism” if violence occurs. Senator Patrick Leahy, the Senate negotiator on the Bill, said on the day it was passed: “The Bill enters new and uncharted territory by breaking down traditional barriers between law enforcement and foreign intelligence.”⁸⁴ Morton Halperin, a defense expert, stated that if a government intelligence agency “thinks you’re under the control of a foreign government, they can wiretap you and never tell you, search your house and never tell you, break into your home, copy your hard drive, and never tell you they have done it.”⁸⁵ Some of the surveillance provisions expire, or “sunset,” after a period of four years, unless renewed. The UK’s experiences of the “temporary” nature of its anti-terrorist legislation suggest that it is unlikely that the “sun” will set on this Act.

For a modern Nation created largely by immigrants, the new U.S. laws covering non-citizens are ironically harsh. Section 412 of the Act permits indefinite detention of immigrants and other non-citizens. It requires that immigrants “certified” by the Attorney General be charged within seven days with a criminal offence or an immigration violation, which need not be on the grounds of terrorism. Those detained for non-terrorist offences face the possibility of life imprisonment if their country of origin refuses to accept them. Detention would be allowed on the Attorney General’s finding of “reasonable grounds to believe” in the detainee’s involvement in terrorism or an activity that poses a danger to national security, or the safety of the community or any person. A review of the detention takes place at six-month intervals, but what is striking is the absence of a trial in open court to test the State’s case for prosecution.

During the Second World War, President Roosevelt authorized the incarceration of more than 110,000 people of Japanese origin, 70,000 of whom were American citizens of Japanese de-

84. Statement of Senator Patrick Leahy on the Anti-Terrorism Bill, Oct. 25, 2001, available at <http://leahy.senate.gov>.

85. J. Van Bergen, *Repeal the USA Patriot Act*, TRUTH OUT, Apr. 4, 2002.

scent,⁸⁶ 11,000 of German origin, and 3,000 of Italian origin. President Bush is replicating this process, justified through the rhetoric of undeclared war. Should it be thought that these new detention powers are merely precautionary and unlikely to be utilized, the actions of Attorney General Ashcroft constitute a sobering reality. He began by authorizing the detention of 1,200 non-citizens. Some were held for months, and as of July 2002, there were still seventy-four people held on charges of immigration violations, while 131 Pakistanis were deported to Pakistan in June 2002 aboard a privately chartered Portuguese plane amidst great secrecy. Some of those who were deported had lived in the United States for many years and left their families and their jobs. None of the deportees were said to have links with terrorism.⁸⁷

It is lawful under Section 412 to detain people indefinitely. Legal advice is available, but solely funded by the detainee. The government stopped updating the tally of those detained, so that firm figures became unavailable. After refusing to make any information public about the detainees, including their names, location of detention, or nature of the charges, Ashcroft finally announced on November 27, 2001, that 548 detainees were being held on immigration charges and that federal criminal charges had been filed against 104 of them. The Justice Department also announced a plan for investigators to interview 5,000 people: Middle Eastern males between the ages of eighteen and thirty-three, who had arrived in the United States after January, 2000. In response to a claim that this is a racially based roundup, Ashcroft declared that "we are being as kind and as fair and as gentle as we can."⁸⁸ Of particular concern was the CNN poll that revealed that forty-five percent of those polled would not object to the use of torture if it provided information about terrorism. There was also media discussion about the possible need

86. See MARTIN GRODZINS, *AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVALUATION* (1949). See also Eric Yamamoto, *Reluctant Redress: The U.S. Kidnapping and Internment of Japanese Latin Americans*, in *RELUCTANT REDRESS* 132 (Martha Minow ed., 2002); see also PAUL AVRICH, *ANARCHIST VOICES* (1995) (describing, the Palmer Raids in 1920 when approximately 6,000 alleged communists were rounded up).

87. *GUARDIAN*, July 11, 2002.

88. In August 2002, a federal judge ruled that the Bush administration had no right to conceal the identities of hundreds of people detained after September 11th and ordered that most of their names be released within fifteen days. Neil Lewis, *The Victims*, *N.Y. TIMES*, Sept. 11, 2002.

for the use of “truth serums” or sending suspects to countries where harsher interrogation measures were common.⁸⁹ It is important to remember that the “disappeared” and tortured people of South American countries in the 1970s and 1980s were killed and tortured by military personnel trained by the CIA.⁹⁰ It was also announced that the U.S. government is considering plans to send elite military units on overseas missions to assassinate al-Qaeda leaders, without informing the foreign governments. Dick Cheney, the vice-president, was asked whether such action is lawful. He replied that he thought it was legal but “he would have to check with the lawyers on that.”⁹¹ On November 3, 2002, six alleged, Al-Qaeda terrorists were killed in Yemen by a CIA drone plane that carried a missile called “the Predator.”

The final illustration of the new wave of executive action is the Military Order signed by the President on November 13, 2001, which allows non-U.S. citizens suspected of involvement in “international terrorism” to be tried by special military commissions. The term “alien” included combatants captured in Afghanistan and also aliens already resident in the United States. These commissions are not subject to the regular rules and safeguards that cover a military court martial. The President claimed that it was “not practicable” to try terrorists under “the principles of law and the rules of evidence” applicable in U.S. domestic criminal courts. These commissions were empowered to act in secret, to pass the death penalty by a two-thirds majority, and their decisions cannot be appealed to other courts. Subsequently, after considerable pressure, Donald Rumsfeld, U.S. Defense Secretary, refined the rules created by the Executive Order by giving suspected terrorists the following rights: presumption of innocence; choice of counsel; to see the prosecution’s evidence; a public trial; and to remain silent with no adverse inference being drawn. However, in such trials no jury will be intro-

89. See Johnathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5 2001 (saying: “We’ll have to think about transferring some suspects to our less squeamish allies even if that’s hypocritical. Nobody said this was going to be pretty.”).

90. The CIA had plans to murder Fidel Castro and Patrice Lumumba of the Congo.

91. The Hellfire missile hit its target at 950 mph and was controlled by a U.S. team in Djibouti, 150 miles away. GUARDIAN, Aug. 13, 2002. It is reported that the Yemen government was not informed of the impending attack. GUARDIAN WEEKLY, Nov. 13, 2002. It was Israel that pioneered the use of this missile for summary executions. GUARDIAN, Dec. 19, 2002.

duced; hearsay will be accepted in evidence; and there will be no civilian review on appeal.⁹²

The U.S. base in Cuba, Guantanamo Bay, was identified by General Tommy Franks, head of Central Command, as suitable to hold Taliban and Al-Qaeda terrorists. Cuba was preferred ahead of Guam, a Pacific island. Subject to modification, the Cuban base can detain as many as 2,000 prisoners. On January 12, 2002, Camp Delta received its first unlawful combatants and placed them in chain link cages. Ninety men manacled, hooded, with shaved beards, and some sedated, were flown in from Afghanistan. Subsequently, press photographs depicted them as hooded, shackled, and kneeling in front of U.S. soldiers. By October 2002, the figure had risen to six hundred and twenty prisoners. It was expected to house a further two hundred by Christmas 2002.⁹³ The base is to be included in a "twenty year plan" for Guantanamo's naval base.

The men are detained in wire "cages," measuring eight feet by six feet eight inches. They are exposed to the elements. The conditions are described by Amnesty International as "falling below the minimum standards for humane behavior." This is perhaps unsurprising given that Donald Rumsfeld described the men as "the hardest of the hard-core," adding: "I do not feel the slightest concern over their treatment."⁹⁴ He described the base as "the least worst place."⁹⁵ President Bush described all of them as "killers" prior to any tribunal hearings, and that they would not be granted the status of prisoners of war.⁹⁶ Bush stated that

92. N.Y. TIMES, Mar. 21, 2002.

93. GUARDIAN, July 26, 2002 and Oct. 29, 2002; OBSERVER, Nov. 3, 2002. There are seven British nationals held there.

94. GUARDIAN, Jan. 17, 2002. Brigadier-General, Rick Baccus, the camp commander at Guantanamo Bay, was relieved of his duties in October 2002 after a newspaper report quoted a defense source as saying that he was "too nice" to the inmates. GUARDIAN, Oct. 16, 2002. Arc lights provide a 24-hour lighting system. One detainee is fifteen years of age; some are in their seventies. Each man spends thirty minutes a week showering and exercising. The remainder of the time is spent alone in a "cell." Trips to the clinic involve men being shackled to the trolley and then chained to the clinic bed. The men are exercised in shackles on their ankles, waist, and hands. Psychological techniques, including sleep deprivation, are used as part of the interrogation process. There have been four serious attempts at suicide. Thirty other men have tried to injure themselves. OBSERVER, Nov. 4, 2002.

95. MERCURY NEWS, Jan. 2, 2002.

96. Ronald Dworkin, N. Y. REV. OF BOOKS, Feb. 28, 2002. Pakistani anti-terrorist experts are quoted as believing that fifty-five of the fifty-eight Pakistani militants held in Cuba have no ties to Al-Qaeda. NEW STRAITS TIMES, Aug. 25, 2002. Almost 10% of the

“non-U.S. citizens who plan and/or commit mass murder are more than criminal suspects. They are unlawful combatants who seek to destroy our country and our way of life.”⁹⁷ The term “unlawful combatant” is used because the U.S. government has not defined the Taliban as prisoners of war, thereby denying them their rights under the 1949 Geneva Convention; nor have they been defined as criminals, thereby denying them their rights under the U.S. Constitution.⁹⁸

Organizing a defense from within this camp will prove extremely difficult, assuming that it is the intention to try the men in front of military commissions. The alternative is that the men are interrogated and detained at the pleasure of the President. Indeed, on March 28, 2002, Rumsfeld suggested that detainees who had not been tried, or those who had been tried and acquitted, might nevertheless be kept in detention “for the duration of the conflict.” Asked how he would define the end of the conflict, he said it would be “when we feel that there are no effective global terrorist networks functioning in the world that these people would be likely to go back to and begin again their terrorist activities.”⁹⁹ Pierre-Richard Prosper, ambassador-at-large for war crimes issues, reinforced this position when he stated that “the judicial process may have to wait until after the war on terror is won.”¹⁰⁰

B. *United Kingdom*

The ink was hardly dry on the Terrorism Act 2000¹⁰¹ that came into force in February 2001, before a fresh commitment to yet stronger anti-terrorist legislation was issued by the Labour government. Again, the brevity of its passage is exceeded only by

prisoners have no meaningful connection with al-Qaeda or the Taliban and have been held for more than a year because of bureaucratic wrangling and obstinacy. *LOS ANGELES TIMES*, Dec. 22, 2002.

97. *WASH. POST*, Nov. 30, 2001. See also Laurance Tribe, *Trial By Fury*, *NEW REPUBLIC*, Dec. 10, 2001.

98. M. Allen & S. Schmidt, *Bush Defends Secret Tribunals for Terrorism*, *WASH. POST*, Nov. 30, 2001.

99. Anthony Dworkin, *Trial Detention or Release*, in *CRIMES OF WAR*, May 17, 2002, available at <http://www.Crimesofwar.org>.

100. *Guantanamo Britons still a threat, says U.S.*, *GUARDIAN*, Sept. 21 2002. “Criminal proceedings generally occur after the end of hostilities. We will make it clear at that time whether these people are to be fed into the judicial process or whether they will be released.” *Id.*

101. Terrorism Act 2000 ch.11 (Eng.).

the extent of the powers it provides.¹⁰² The government allowed sixteen hours for the Commons debate. The Terrorism Act extended the powers of the police to investigate, arrest, and detain. It created new offences allowing courts to deal with terrorist activities, which occurred outside national borders. The moral panic that consumed the United States was reflected in its most constant ally, the UK.

David Blunkett, the Home Secretary, introduced the government's Anti-Terrorism, Crime and Security Bill into the Commons on November 12th. It was a big Bill, containing 118 pages, 125 clauses, and eight Schedules. After a concentrated House of Lords savaging, it became law on December 15th. The Home Secretary said: "strengthening our democracy and reinforcing our values is as important as the passage of new laws . . . the legislative measures which I have outlined will protect and enhance our rights, not diminish them . . ." ¹⁰³ While claiming that the powers were measured, reasonable, and necessary, on the day of the Bill's Parliamentary presentation Blunkett laid a Human Rights Derogation Order. The UK thereby derogated from the European Convention on Human Rights ("ECHR") Article 5, which guarantees the right to liberty and prohibits detention without trial. The UK is the only signatory to the ECHR to feel it necessary to derogate as a result of this particular terrorist threat. The derogation occurred despite the statement by the Home Secretary that "there is no immediate intelligence pointing to a specific threat to the United Kingdom."¹⁰⁴

The speed of the Bill's passage through the House of Commons, a total of sixteen hours, is reminiscent of previous emergency legislation.¹⁰⁵ The Bill was given its Second Reading on November 19th. A timetable motion was passed, which provided that the Committee Stage and the Third Reading should be

102. "The result of the passage of the Anti-terrorism, Crime and Security Act 2001 is once again a legislative morass . . . There was no time for considered or sustained review." CLIVE WALKER, *THE ANTI-TERRORIST LEGISLATION* 7 (2002).

103. *PARL. DEB., H.C.* (2001), col. 925. Similar descriptions can be seen attached to previous anti-terrorist legislation. For example, Jack Straw, when introducing the Terrorism Act 2000 stated that it was "simply protecting democracy." *GUARDIAN*, Nov. 14, 1999.

104. *Hansard*, House of Commons, Nov. 15 2001, col. 925. See *Lawless v. Ireland*, 1 *EUR. H.R. REP.* 1 (1960).

105. The Prevention of Terrorism [Temporary Provisions] Act 1984 (Eng.) took the House of Commons seventeen hours.

completed in a further two days. The Derogation Order was debated for ninety minutes. The Committee Stage of the full House occurred on November 21st and November 26th. It finished at 11:57 p.m. and was immediately followed by the Third Reading that was concluded at midnight. The Home Secretary spoke for three minutes and Oliver Letwin, the Shadow Home Secretary, responded by saying: "I shall be brief . . ." Indeed, he was — he was interrupted mid-sentence by the vote that went 323 to 79. Royal Assent to the Act was granted on December 14th.¹⁰⁶

While the passage of the Bill through the democratically elected House of Commons traveled at the same whirlwind speed as that of the PATRIOT Act through Congress, the House of Lords refused to participate in the legislative stampede. Paradoxically, it fell to the unelected House of Lords to offer a degree of meaningful reflection and opposition to the Bill. Thus, it was the liberal Lords who held the line for the democratic demand to honor civil liberties. Lord Corbett of Castle Vale said: "after the outrage of September 11th, the way to defend democracy is not to dismantle it; it is to strengthen it. Otherwise . . . the Mother of Parliaments is being asked to put its name to achieving some of the aims of those who carried out the events of September 11th."¹⁰⁷ The Lords made seventy amendments and although most were reversed in the Commons, several were maintained and constituted significant defeats for the government. It was the issue of indefinite detention without charge that raised major opposition. A person reasonably suspected of being an international terrorist could be detained indefinitely and without charge. It was, the Home Secretary claimed, to cover "dozens of foreign" people who could not be prosecuted for insufficiency or inadmissibility of evidence and who could not be deported if they faced either torture or death overseas.

The detainee's appeal against detention is through the Spe-

106. The Joint Committee on Human Rights stated that "many important elements of the Bill were not considered at all in the House of Commons . . . We share the view of the House of Lords Select Committee on the Constitution that the inclusion of many non-emergency measures was inappropriate in emergency legislation which was required to be considered at such speed." *See* Joint Committee on Human Rights, *Anti-terrorism, Crime and Security Bill: Further Report*, House of Lords, Official Report, vol. 51, 2001-02, House of Commons, Official Report, vol. 420, 2001-02, at para. 2.

107. House of Lords, Official Report, Dec. 6 2001, col. 1005.

cial Immigration Appeal Commission (“SIAC”) that will sit in secret. A security-cleared special advocate appointed by the Commission will represent the detainee. The special advocate cannot take client’s instructions without express permission of the Commission. Evidence may be adduced without showing it to the detainee or special advocate. Although an appeal on a point of law could go to the Court of Appeal, there was no appeal against the Home Secretary’s certificate of detention. The government amended the Bill, in the light of the Lord’s opposition, by raising the status of SIAC to that of a superior court of record, thereby ensuring that its decision was not subject to judicial review!

In December and January 2002, several arrests were made in London and Leicester. Detainees, who have not been charged, are in the London high security prison, Belmarsh. They were locked up for twenty hours a day and did not see daylight. Upon detention, they were not given access to lawyers or to their families. They could not speak to families without the presence of an approved translator who visited once a week. They were denied prayer facilities apart from fifteen minutes on Friday, but in the absence of an imam. Gareth Pierce, a solicitor who represents several of them, stated that “these men have been buried alive in concrete coffins and have been told the legislation provides for their detention for life without trial.”¹⁰⁸ In July, the appeal of nine of the interned foreigners was allowed by SIAC and two others left the country voluntarily. Neither was arrested in the receiving country.¹⁰⁹ The Home Secretary appealed against the decision of SIAC. On October 25th, the Court of Appeal led by the Lord Chief Justice, Lord Woolf, overturned SIAC and held that those men who are subject to indefinite detention without charge are detained lawfully and this detention does not contravene the ECHR.¹¹⁰

Wide-scale trawling, retention, and availability of data were other highly charged concerns. Currently, there are over fifty

108. *UK Terror Detentions ‘Barbaric,’* GUARDIAN, Jan. 20, 2002.

109. See John Wadham & Shami Chakrabarti, *Indefinite Detention without Trial*, NEW L. J. 1564 (2001).

110. *A, X and Y and Ors v. Sec’y of State for the Home Dep’t*, EWCA Civ. 1502 (2002). See also GUARDIAN, Oct. 26, 2002. Once again, the evidence put forward by the government to back its argument remained secret on the grounds of national security. The Court of Appeal did not consider this “closed” evidence.

statutes that allow a number of public authorities to disclose information in the light of criminal proceedings. Oliver Letwin complained:

[T]he Home Secretary is saying that to catch terrorists, he has to allow eighty-one government agencies, from the BBC to the NHS, to reveal somebody's records, even if they are being investigated for a traffic offence in the United States. I find that a difficult chain of logic to follow.¹¹¹

The Bill sought to extend "criminal proceedings" to include general "investigations," both within the UK and abroad. The Lords attempted to limit this power and succeeded in so far as the government finally agreed that the Act would carry an express requirement that any such disclosure would be limited by the Human Rights Act. This requires that disclosure be proportionate to what was sought to be achieved by the disclosure. The human rights lawyer, Lord Lester, described this amendment as mere "window dressing."

Serious disagreements also arose over the retention of data. The proposal to adopt criminal justice measures under Title VI of the Treaty on European Union (known as the Third Pillar), including the proposed European arrest warrant, resulted in a defeat for the government. The government agreed that such changes would be introduced through primary legislation and via the backdoor through negative resolution procedure. Nevertheless, the new anti-terrorism measures developed by the Justice and Home Affairs Council ("JHAC") and the European Council after September 11th, will be introduced through powers in the Act.¹¹²

The Bill was also attacked for carrying irrelevant legislative baggage, some of which is controversial. These were not issues requiring immediate attention and it was felt that the Home Office had enjoyed the opportunity to clear its shelves by adding entitlement cards,¹¹³ as well as matters of religious hatred,¹¹⁴ po-

111. *On The Record*, BBC, Dec. 9, 2001.

112. See Thomas Mathiesen, *Expanding the Concept of Terrorism*, in *BEYOND SEPTEMBER 11TH: AN ANTHOLOGY OF DISSENT* (Phil Scraton ed., 2002).

113. In May 1993, Earl Ferrers stated in the House of Lords that he could not think of a single terrorist offence that would have been avoided had terrorists been obliged to carry identity cards, and that the government was reviewing "every conceivable method of trying to prevent terrorism but ID cards do not feature high on the list." H.L. DEBS. May 18, 1993 cols. 1555-56. Lord Lloyd also rejected ID cards as a useful

lice powers, asylum, immigration, corruption, and bribery. D. Hogg stated that “most of the Bill has simply come out of the Home Office back lobby. It has a lot of stuff that it wants to put before Parliament and it has attached it to this Bill.”¹¹⁵

Finally, the Lords successfully introduced expanded sunset clauses and reviews into the Bill. Thus, the provisions for detention without charge will lapse after five years, unless renewed by primary legislation. In the meantime, the provisions will be reviewed after fifteen months and thereafter, annually. The entire Act is to be reviewed by a body of Privy Councilors within two years of Royal Assent. However, the Home Secretary announced that the review body will have no access to the detailed cases that have gone through SIAC, nor to the evidence that was presented in private.

The Bill is a classic example of legislation drafted too quickly, too loosely, and thereafter passed too hastily.¹¹⁶ Nevertheless, concerns voiced by judges and legal experts over the scope and likely efficiency of the Act did little to cool the government’s ardor. The Lord Chief Justice, Lord Woolf, took the unusual step of expressing concern about the passage of the Act, writing: “In previous wars, things have happened which, with hindsight, are now known to have been wrong. We have to be astute to avoid that happening, so far as possible.”¹¹⁷ Michael Zander noted that “this was complex and controversial legislation rushed through Parliament at breakneck speed. We are unlikely to know whether it contributes to making this country a safer place.”¹¹⁸ Zander questioned the efficacy of the legislation,

tool in the fight against terrorism. *Inquiry into Legislation against Terrorism*, 1996, Cm. 3420, at para. 16.31. See generally Philip A. Thomas, *Identity Cards*, 58 MODERN L.R. 702 (1995); Philip A. Thomas, *Identity Cards and Fraudsters*, in *BONFIRE OF THE LIBERTIES* (Phil Scraton ed., 2003) (forthcoming).

114. M.M. Idris, *Religion and the Anti-Terrorist, Crime and Security Act 2001*, CRIM. L.R. 890 (2002).

115. *Hansard*, House of Commons, Nov. 19, 2001, col.94.

116. O. Letwin MP: “I want to say a word about process. I have discerned across the House, as everyone here must have done, a strong feeling that a few days — three days, in the case of this House, are not enough fully to scrutinize the Bill.” *Hansard*, House of Lords, Nov. 19, 2001, col. 39. Lord Dixon-Smith: “The Bill has achieved three day’s discussion, pretty nearly on the trot, in another place. That is not sufficient time to consider a measure of this significance.” *Hansard*, House of Lords, Nov. 13, 2001, col. 155.

117. DAILY TELEGRAPH, Dec. 17, 2001.

118. *The Anti Terrorism Bill: What Happened?*, NEW L. J. 1880 (2001). However,

but considered that there is a lack of evidence that would allow us to make an informed judgment. However, some evidence does exist and this Article moves to consider this point.

III. DOES ANTI-TERRORISM LEGISLATION WORK?

There are strong reasons and powerful interests promoting the expansion and continuation of legislation reputed to defeat terrorism. While the widely promoted arguments of “warfare” and “balance” do not justify the powers found within the most recent legislation, nevertheless, history shows that civil rights consistently come out second best when terrorism dominates the political agenda.¹¹⁹ Terms such as “national security” and “public safety” trump the vocabulary of civil rights. Courts display reluctance in challenging the State’s decision in such cases;¹²⁰ the media becomes an uncritical supporter of executive action;¹²¹ and the general public are encouraged to see the terrorist as demonic, unstable, and a random threat to each and everyone.

Given that civil rights arguments are relatively unsuccessful within the context of the response to terrorism, a more fruitful argument might be via a functional, rational account, based upon the review of results.¹²² Does this legislation work and if so for whom? A set of practical questions, which seek to isolate issues, classify responses, and “de-terrorize” the political atmosphere, may help in promoting a rational account of the efficiency and effects of this corpus of law. There is a range of questions, which could be addressed, such as: how many people have been successfully prosecuted under anti-terrorist legislation; does it have deterrent value;¹²³ do politicians really believe in the

Lord McIntosh of Haringay, did feel that the Bill would be of some value when he claimed that it “would be a significant help in combating television.” *Hansard*, House of Lords, Nov. 28 2001, col. 417 (emphasis added).

119. See EDWARD PALMER THOMPSON, *WRITING BY CANDLELIGHT* (1985) (arguing that the greatest thief of civil liberties is the State).

120. See *e.g.*, *Liversidge v. Anderson*, [1941] 2 All E.R. 612.

121. NOAM CHOMSKY, *THE IRREPRESSIBLE CHOMSKY* (2001). See also *GUARDIAN WEEKLY*, Nov. 13, 2002 (stating the Russian State Duma voted in November 2002 to impose broad limitations on media coverage of terrorism).

122. “However, there is also abundant evidence to show that such responses [repressive overreaction to terrorism] play into the hands of terrorists and, if prolonged, become totally counter-productive.” *Inquiry into Legislation Against Terrorism*, 1996, Cm. 3420 at 2, 59.

123. For example, Faith Mitchell of the National Research Council, National Academy of Science, United States, is reported as saying:

legislation; what unintended harm has occurred; and how is terrorism defined?

The Prevention of Terrorism [Temporary Provisions] Act 1974 (“PTA”) was described by the then Home Secretary, Roy Jenkins, as a “draconian measure.”¹²⁴ During the debate on the ATCSA, Roy Jenkins, later Lord Jenkins of Hillhead, returned to the original Bill and stated:

I think that it helped to steady a febrile State of opinion at the time and to provide some limited additional protection. However, I doubt it frustrated any determined terrorist . . . If I had been told at that time that the Act could still be on the statute book twenty years later, I would have been horrified . . . It is not one of the legislative measures of which I can be most proud.¹²⁵

The ATCSA re-introduces a discredited power to “intern.” Part 4 of the legislation allows for the indefinite detention without charge of certain foreign nationals suspected of terrorism, based on executive decision. This differs from the Northern Ireland internment power in scale, but not in principle. Internment was introduced by the Northern Ireland Stormont government in 1971 when twenty-seven people were killed in the first eight months of that year. Further, it was felt that the normal judicial processes were proving incapable of dealing with the rising numbers of witnesses, juries, and magistrates who were being intimidated by terrorists. However, the intelligence on which the internments were made was gravely deficient and many of those who were swept up had little or nothing to do with terrorism. This decision proved to be a powerful recruiting sergeant for the Provisional IRA. In the following four months, after bringing in that power, 147 people were killed and 1972 saw 467

during the Cold War, at least in retrospect, it was simpler. You threatened to bomb the Soviet Union to death and they didn't want that and that effectively deterred them from bombing us. This approach would not work with groups such as Osama bin Laden's al-Qaeda network. It is more complicated than that because the adversaries are more elusive.

Statement, *available at* <http://www.nap.edu>; *see also* N. SUNDAY TIMES, Aug. 25, 2002. The President's National Security Strategy for the United States, published in September 2002, states: “Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents.”

124. House of Commons, Official Report, Nov. 25, 1974, col. 35.

125. *Hansard*, House of Lords, Nov. 27, 2001, col. 199. He also held this view in 1991. *See* JENKINS, *supra* n.13. Lord Jenkins died in January 2003.

deaths as a result of terrorist action, which is the highest annual total. It has been suggested that the over-reaction of the State fuelled a violent response.¹²⁶ Support for the IRA in the United States increased and the internment camps became a kind of “staff college” for terrorists.¹²⁷

Lord Lloyd of Berwick stated in his review of anti-terrorist legislation that “there is, in my view, no need for such a power in any body of permanent counter terrorism legislation.”¹²⁸ During the Parliament debate on the Northern Ireland (Emergency Provisions) Bill 1998, Frank Dubs stated: “In this Bill, the decision has been taken to get rid of the power of internment. Frankly it has not worked . . . we believe that the use of internment would strengthen the terrorists.”¹²⁹ More recently, in the House of Commons debate on the ATCSA, Douglas Hogg declared that “the general arguments against internment without trial are very powerful. We normally get the wrong people; it is unjust; we depart from the moral high ground and we alienate folk. It is a jolly bad policy to pursue.”¹³⁰ As is noted, the exercise of the “internment” power in the ATCSA was successfully challenged in the SIAC, although not on the grounds of “over-reaction.”¹³¹

Defining “terrorism” is difficult.¹³² Definitions of “good” and “evil” are also confusing.¹³³ For example, Werner von

126. NOEL WHITTY, THERESA MURPHY & STEPHEN LIVINGSTONE, *CIVIL LIBERTIES LAW: THE HUMAN RIGHTS ACT ERA* 122 (2001).

127. It is not difficult to conclude that those interned in Guantanamo Bay will also emerge changed, hardened, determined, and better informed in the ways of violence.

128. *Inquiry into Legislation against Terrorism*, 1996 Cm. 3420, at 100.

129. *See Hansard*, House of Commons, Jan. 12, 1998, col. 909. Section 3 repealed the power of internment. *But see* *Chahal v. UK*, 23 EUR. H.R. REP. 413 (1997).

130. *Hansard*, House of Commons, Nov. 19, 2001, col. 95.

131. *See* *GUARDIAN*, *supra* n.83.

132. One study considered 109 definitions and concluded that “the search for an adequate definition is still on.” ALEX SCHMID & ALBERT JONGMAN, *POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATA BASES, THEORIES AND LITERATURE* (1988). “The latest British legislation seems to draw the definition so wide as to be somewhat meaningless.” Meltzer, *supra* n.71; *see also* State Watch, *Analysis Report No. 4*, available at <http://www.statewatch.org/news> (accounting of EU attempts to define “terrorism”); Philip A. Thomas & T. Standley, *Re-Defining Terrorism*, 4 AUSTRAL. J. OF L. & SOC. 61 (1987). Noam Chomsky does not agree that defining terrorism is hard. He keeps to the official U.S. Code and Army Manuals. “They give definitions that are good enough for practical purposes.” Personal correspondence (Oct. 24, 2002) (on file with the author).

133. The classic and much-quoted illustration is Nelson Mandela: convicted terrorist and prisoner on Robbin Island, Nobel Peace Prize winner in 1994, and President of South Africa thereafter.

Braun was considered by western States to be “evil” for inventing the V2 bombers that were used against London, but became “good” when he used his knowledge on behalf of the Americans. Saddam Hussein was described by the United States as “good” when fighting Iran, but was subsequently redefined as “evil.” Osama bin Laden was also “good” when, supported by the CIA, he acted as a freedom fighter against communism in Afghanistan. The Taliban were also supported as friends when the U.S. strategy towards the country changed after Afghanistan was identified as a possible pipeline route for the oil due to come from Central Asian States.¹³⁴ Perhaps the terrorist can be defined as *homo sacer*.¹³⁵ In ancient Roman law, this person could be killed with impunity and his death had no sacrificial value, as he was already considered to be in the realm of the gods. Thus, the terrorist becomes a non-person: game to be hunted and destroyed.¹³⁶

Employing the cliché of “one man’s terrorist is another man’s freedom fighter” is inappropriate and unhelpful for lawyers. An established principle of statutory interpretation is that legislation seeking to expand law beyond accepted provisions should be interpreted literally and strictly, as in criminal and tax laws.¹³⁷ Expansive definitions of extraordinary laws that stretch the rule of law are contrary to judicial rules of interpretation. Nevertheless, the statutory definition of “terrorism,” as laid out in the Prevention of Terrorism (Temporary Provisions) Act 1989,¹³⁸ has been increased dramatically by the Terrorism Act 2000,¹³⁹ and this has been consolidated in the ATCSA.¹⁴⁰ The

134. See generally AHMED RASHID, *TALIBAN: THE STORY OF THE AFGHAN WARLORDS* (2001) (considering especially the chapter “*Romancing the Taliban: The Battle for Pipelines*”); see also MICHEAL PARENTI, *THE TERRORISM TRAP* (2002) (considering especially, the chapter on “*The Holy Crusade for Oil and Gas*”); PETER BERGEN, *AL QAEDA HOLY WAR INC* (2002); NAFEEZ AHMED, *THE WAR ON FREEDOM* (2002). “The Clinton administration has taken the view that a Taliban victory would act as counterweight to Iran . . . and would offer the possibility of new trade routes that could weaken Russian and Iranian influence in the region.” N.Y. TIMES, May 26, 1997. See generally ZBIGNIEW BRZEZINSKI, *THE GRAND CHESSBOARD: AMERICAN PRIMACY AND ITS STRATEGIC IMPERATIVES* (1997) (laying out regional U.S. foreign policy).

135. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (1998).

136. See Slavoj Žižek, *Are We in a War?*, 3 LONDON REV. OF BOOKS, May 23, 2002.

137. DPP v. Ottewell, [1970] AC 642, Farrell v. Alexander, 3 WLR 642 (1975), *Inland Revenue Commissioners v. Ross & Coulter*, 1 All ER 616 (1948).

138. Prevention of Terrorism (Temporary Provisions) Act 1989, Sec. 20 (1) (Eng.).

139. *Id.* at Sec. 1.

140. *Id.* at Sec. 21.

Terrorism Act 2000 moved away from the Northern Ireland focus and included "religious fundamentalists" and "individuals with fanatical leanings."¹⁴¹ The expanded definition is found in Section 1(1):

[T]he use of threat, for the purpose of advancing a political, religious or ideological cause of action which: (a) involves serious violence against any person or property; (b) endangers the life of any person; or (c) creates a serious risk to the health or safety of the public or a section of the public.

This Act makes terrorist legislation permanent, thereby recognizing the continuing existence of a terrorist threat to our society. The result is: there now exists emergency legislation against a permanent state of affairs.

Turning detentions into convictions is another sign of an efficient enforcement policy. In *Brannigan & MacBride v. UK*,¹⁴² Judge Walsh, in a dissenting opinion concerning a terrorist case, stated:

The government has not convincingly shown, in a situation where the courts operate normally, why an arrested person cannot be treated in accordance with article 5 para. 3. The fact that out of 1,549 persons arrested in 1990 only thirty were subsequently charged, indicates a paucity of proof rather than deficiency in the operation of the judicial function.

Official figures recorded by the police give an indication of the efficiency of the relevant legislation. Published arrest figures relating to the Terrorism Act 2000 and the ATCSA suggest that arrest patterns associated with previous anti-terrorism legislation continue today.¹⁴³ For example, the Home Secretary announced that 144 arrests have been made since September 11th under the Terrorism Act. No convictions for terrorist offences

141. See Inquiry into Legislation Against Terrorism, 1996 Cm. 3420, paras. 1.21-1.24.

142. (1994) EUR. H.R. REP. 539.

143. The official published figures from the Home Office, *Statistics on the Operation of the Terrorism Legislation*, were published in September 2001. The data in this bulletin includes the first seven weeks of 2001. The Terrorism Act 2000 commenced on February 19, 2001, and is therefore not included. The figures that follow in the body of the Article are gleaned from Parliamentary Answers. In 1975, Ian Gilmour, then conservative opposition spokesman, stated in the House of Commons in the renewal debate of the Prevention of Terrorism [Temporary Provisions] Act, that "the draconian powers have resulted in very few prosecutions . . ." *Hansard*, House of Commons, vol. 892, col.1094.

have been achieved.¹⁴⁴ Eleven people have been detained under Part 4 of the ATCSA. Two of the eleven have left the UK voluntarily.¹⁴⁵ The nine remaining people detained since October 2001 under Part 4 of ATCSA appeared before the Special Immigration Appeals Commission. The commissioners decided that the power to detain foreign nationals only on the grounds that they posed a risk to national security was discriminatory and breached article 14 of the ECHR.¹⁴⁶ Figures on the use of the Criminal Justice (Terrorism and Conspiracy) Act 1998 similarly show that no one has been arrested or charged under that legislation.¹⁴⁷ A similar pattern emerges in the United States. As of September 2002, only Zaccarias Moussaoui has been so charged and he was arrested before the round-up commenced.¹⁴⁸

Paddy Hillyard's authoritative study describes in detail the publicly indefensible use to which the Prevention of Terrorism [Temporary Provisions] Act was put.¹⁴⁹ He states that nearly nine out of every ten people detained under this statute on entering Britain were released without any further action taken against them.¹⁵⁰ There were 7,052 people detained under the PTA in connection with Northern Ireland affairs between November 1974 and December 1991. 6,097 were released without charge. Of the rest, 197 were charged with offenses under the PTA, 411 were charged under other legislation and 349 were excluded from Britain. Of those charged under the PTA, three-quarters were found guilty. Of these, over half received non-custodial sentences and of those who went to prison, the majority were sentenced to one year or less. Of those who were prose-

144. Most have been charged under Section 57 of the Terrorism Act 2000, which is a trawling section: "A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism." *Id.*

145. *Hansard*, House of Commons, July 18, 2002, col. 553W and *Hansard*, House of Lords, May 7, 2002, col. WA160.

146. *See* A & ORS v. Sec'y of State for the Home Dep't, July 30, 2002, ltl 1/8/2002 (unreported elsewhere).

147. *Hansard*, House of Commons, 25 June 1999, col. 471.

148. As of April 2002, government officials stated that out of the 2,000 detainees in the United States, 10 or 11 may be members of Al Qaeda. Cole, *supra* n.72.

149. PADDY HILLYARD, SUSPECT COMMUNITY (1993). Cole produces figures which show that the U.S. authorities are using the PATRIOT Act in a similar manner: low level intelligence gathering from the "Suspect Community" — the Arabs. Cole, *supra* n.72.

150. HILLYARD, *supra* n.149.

cuted under other legislation three-quarters were found guilty. Of this group, forty-two percent received non-custodial sentences, twelve percent were sentenced to less than one year in prison, and thirty-five percent to over five years.¹⁵¹ He concludes that the principal aim of the ordinary criminal justice system was to take some formal action against those suspected of being involved in a crime. On the other hand, the main objective of the PTA was to gather intelligence.

The impact of anti-terrorist legislation on innocent people swept up by that law and those empowered to enforce it, is negative, painful, and invariably alienating. Hillyard's research includes interviewing 115 people about their experiences in relation to the PTA 1974. Each person has a story of grief, disillusionment, anger or frustration to tell, some more dramatic than others do. One standard illustration is that of a person detained for four days and then released without charge stated: "after the detention I was off work for six or seven weeks. I was like a wreck . . . You always think they're watching."¹⁵² This social alienation thesis is further supported in the Northern Ireland context by Hewitt and McVeigh,¹⁵³ who suggest that the abrasive implementation of emergency legislation created a situation among the Nationalist community that allowed terrorists to operate with the awareness, if not support, of large sections of the public. Hewitt, drawing upon statistical information suggesting that "increasing repression did not lower the level of terrorist violence" and also upon anecdotal material on the impact of mass house searches, stated that "heavy handed repression is counterproductive."¹⁵⁴

The social confidence and perceived safety of Muslims and Arabs has also declined since September 11th. The Runnymede Trust reported that the issues of Islamophobia and anti-Muslim

151. *Id.* at 92.

152. *Id.* at 240. One of the author's Irish law students was stopped at the port of Holyhead, Wales, on returning to Cardiff University from Northern Ireland. He was detained for four hours, questioned, and searched. He was questioned about the academic reading in his bag and his "civil liberties" syllabus was taken from him and photocopied.

153. See generally CHRISTOPHER HEWITT, *THE EFFECTIVENESS OF ANTI-TERRORIST POLICIES* (1984); ROBBIE McVEIGH, 'ITS PART OF LIFE HERE': *THE SECURITY FORCES AND HARASSMENT IN NORTHERN IRELAND* (1994).

154. HEWITT, *supra* n.153, at 94.

prejudice have become tragically more prominent.¹⁵⁵ The events in the United States produced further expressions of racism in the UK.¹⁵⁶ There is evidence that national newspapers are seeking to categorize as one both asylum seekers and terrorists.¹⁵⁷ Currently, despite conflicting evidence that immigrants constitute a net gain to national productivity,¹⁵⁸ the Nationality, Immigration and Asylum Act 2002¹⁵⁹ offers little to those seeking to enter and stay in this country, and more to those xenophobes who seek to benefit by conflating the terms “foreigner” and “terrorist.”¹⁶⁰

155. *Islamophobia, Runnymede Trust Report*, available at <http://www.runnymedetrust.org>.

156. It is important to note that criminal acts of racism are ongoing and preceded September 11th. See ADDRESSING PREJUDICE AND ISLAMOPHOBIA (2991). However some illustrations immediately post 9/11 are found in the media. See *Racist Wave of Hate Engulfs Islamic Targets*, TIMES, Sept. 27, 2001; *Muslim Community Refuses to be Victims of Racism*, OBSERVER, Sept. 30, 2001; *We are terrified, say Moslems*, DAILY MAIL, Sept. 22, 2001; *Mosque Attacked*, GUARDIAN, Sept. 15, 2001; *A Bad Time to Asian in Britain*, TIMES, Sept. 17, 2001; *European Muslims Under Attack*, TIMES, Sept. 19, 2001; *His girl died in New York . . . but HE is hate attacked*, SUN, Sept. 21, 2001.

157. The largest-selling tabloid, SUN, Jan. 20, 2003, printed a series of claims under the headline “Asylum Meltdown” and urged: “Read this and get angry . . . Britain is now a Trojan horse for terrorism . . . While Tony Blair tries to convince us to go to war with Iraq we have an open invitation to terrorists to live off our benefits.” *Id.*

158. Heather Stewart, *Unlocking Fortress Britain*, GUARDIAN, May 21, 2002, which quotes Home Office research that states that immigrants contributed UK £31.2 billion in taxes in the financial year 1999-2000, but increased government expenditure by less, or UK £28.8 billion. It concludes: “Migrants reduced the amount that the existing population paid in taxes.” *Id.*

159. It received Royal Assent on November 7, 2002.

160. Such people could seize upon the words of politicians, such as the Conservative leader, Iain Duncan Smith, in the House of Commons, during Prime Minister’s question time, who on January 15, 2003 said that there was a need to ensure borders were secure to “stop terrorists abusing the asylum process.” *Terror Arrests Prompts Asylum Questions*, BBC NEWS, available at http://news.bbc.co.uk/1/hi/uk_politics/2660737.stm. See *Statement by Dr. R. Stone, Commission on British Muslims and Islamophobia, London*, DAILY MAIL, Oct. 27, 2001:

There is, however, growing fear among Muslim communities, following a series of attacks on individuals and places of worship. It will take a huge effort of national will to resist the discriminatory logic of those who conduct and condone such violence. All people need to take care with language, for example, avoiding loaded words like “crusade,” “Islamic terrorist” and “civilized/uncivilized world.”

Id. Fazil Kawani, Communications Director of the Refugee Council, said: “These [news-paper] reports give the impression that all asylum seekers are terrorists or criminals. We would urge the media to recognize that the overwhelming majority of asylum seekers do not engage in any criminal activity.” Steven Morris, *Press Whips up Asylum Hysteria*, GUARDIAN, Jan. 24, 2003.

CONCLUSION

It is argued that the normal balance that exists between the executive, legislature, and the judiciary is upset in times of national emergency. The judiciary becomes somewhat cautious about challenging the case presented by the State.¹⁶¹ The traditional position of the judiciary is classically presented by Lord Diplock:

National security is the responsibility of the executive government, what action is needed to protect its interests is . . . common sense itself dictates, a matter upon which those upon whom the responsibility rests, and not courts of justice, must have the last word. It is *par excellence* a non-justiciable question. The judicial process is totally inept to deal with the type of problems which it involves.¹⁶²

More recently, in *Home Sec'y v. Rehman*,¹⁶³ Lord Hoffman said that the attacks in the United States "underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security." The Court of Appeal followed this statement when considering the Home Secretary's ban on the leader of the Nation of Islam, Louis Farrakhan, from entering the UK. The court declared that it was a matter where it is "appropriate to accord a particularly wide margin of discretion to the Secretary of

161. See Maura Dolan & Henry Weinstein, *America Attacked: Preservation of Principles*, L.A. TIMES, Sept. 14, 2001, at A1. Professor Keane, Dean of the Golden Gate University Law School, predicted that "judges would be more willing to grant wiretap authorizations, search warrants and other types of 4th Amendment intrusions. Judges tend to be stampeded in times of danger like this." *Id.* Hussein Ibish, spokesman for the American-Arab Anti-Discrimination Committee, Washington, said that they had reports of Arab-American lawyers urging clients to find other lawyers "because of the way they feel they are being perceived by judges" since September 11th. See also William Glaberson, *Arab-Americans See Hazards in Courtrooms*, N.Y. TIMES, Oct. 3, 2001.

162. Council of Civ. Service Unions v. Minister of the Civ. Service, AC 374 (1985). See also Lord Parker in *The Zamora*, [1916] 2 AC 77, at 107. "Those who are responsible for the national security must be the sole judge of what national security requires. It would obviously be undesirable that such matters be made the subject of evidence in a court of law or otherwise discussed in public." *Id.*

163. [2001] UKHL 47, [2002] 1 All.E.R. 122. See also, *Korematsu v. U.S.*, 323 U.S. 214, 236 (1944), where the leading civil libertarian, Mr. Justice Hugo Black, wrote the lead Supreme Court opinion upholding the constitutionality of the relocation of Japanese Americans during World War II.

State.”¹⁶⁴

However, the Lord Chief Justice, Lord Woolf, has responded directly to the events arising from September 11th. He addressed the “pressures created by the need to protect this country from the merciless acts of international terrorists.” He added that it was almost inevitable that, from time to time, under these pressures “parliament or the government will not strike the correct balance between the rights of society as a whole and the rights of the individual.” He placed significant value on the power of the Human Rights Act to “strengthen our democracy by giving each member of the public the right to seek the help of the courts to protect his or her human rights in a manner that was not previously available.”¹⁶⁵ It is to be hoped that this statement heralds a new dawn for judicial activism when faced with issues arising out of national security and emergency, because of the developing jurisprudence of the Human Rights Act. However, the authors of a leading text dealing with this subject matter wrote:

. . . anyone taking even a tally-sheet approach to judicial decision making must be struck by the consistency of results in the cases . . . in virtually all of them the executive emerged victorious. Statistical randomness cannot explain so striking a pattern, and it is highly unlikely that all the unsuccessful litigants were asserting fanciful claims or suffered from poor representation.¹⁶⁶

The legislature may be pushed into hasty and ill-considered action. In addition, legislation passed as a consequence of the reputedly short-term, but nevertheless altered balance, has a disturbing history of creeping into the realm of political and public

164. R v. Sec’y of State for the Home Dep’t *ex parte* Louis Farrakhan, EWCA Civ. 606, (2002) 3 WLR 481.

165. Lord Chief Justice Lord Woolf, Human Rights: Have the Public Benefited (Thank-Offering to Britain Fund Lecture, British Academy, Oct. 15, 2002). *See* Brannigan & McBride v. UK, (1994) EUR. H.R. REP. 539 (dissenting judgment of Judge Pettiti), stating: “If the judiciary is to continue to play its central role under the common law system in upholding the rule of law, it is crucial that it should not only be rigorously independent of the Executive, including the police, and the prosecuting authority, but that it should be seen to be independent.”).

166. LAURENCE LUSTGARTEN & IAN LEIGH, IN FROM THE COLD: NATIONAL SECURITY AND PARLIAMENTARY DEMOCRACY 320 (1994). Note the date of publication is prior to the introduction of the Human Rights Act 2000.

acceptance and ultimately, becoming permanent.¹⁶⁷ The mindset of those employed to enforce such legislation cannot but be influenced by such radical powers and expectations of the public for high profile results. Thus, there is a consequential expansion and hardening of State powers in the domains of social control and criminal law.

It is argued that those at greatest personal risk from ill-conceived and enthusiastically enforced legislation are the weakest and most vulnerable in society: immigrants, asylum seekers, non-citizens, ethnic minorities, Muslims,¹⁶⁸ and the Irish. Anti-terrorist legislation does not make us safe, though it may offer a degree of comfort to “middle England.” The price for this comfort is the establishment of dual criminal law structures of police powers, court processes, and prison detentions. It also includes the possible loss of confidence in the rule of law from law-abiding people who feel victimized by an incorrectly presumed association with terrorists.

The rule of law, equality, proportionality and fairness are challenged by terrorists and also by ill-conceived *carte blanche* terrorist legislation. The police and the security services cannot be allowed a complete license through law to tackle terrorists. The European Court of Human Rights has laid down limits: “The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against terrorism, adopt what measures they deem appropriate.”¹⁶⁹ Thus, while terrorism is a threat to democracy, the legislative responses of Nation States and the European Union, may carry similar dangers. In the particularly sensitive area of responses to terrorism, it is incumbent upon politicians that their executive and legislative decisions be considered, proportionate, time-restricted, and appropriate, and also, that both content and process accord with the principles of the rule of law. Neither the PATRIOT Act nor the Anti-Terrorism, Crime and Security Act satisfy these basic criteria. Should this argument fail

167. Joe Sim & Philip A. Thomas, *The Prevention of Terrorism Act: Normalising the Abnormal*, J. OF L. & SOC. 71 (1983).

168. Hate crimes surged in the United States against Muslims and Arabs after September 11th. There was a jump of 1,600 percent. The FBI stated that most incidents involved assaults and intimidation. INT'L HERALD TRIBUNE, Nov. 26, 2002.

169. *Klass v. Germany*, EUR. H.R. REP. 214 (1978).

to convince, as has been the case to date, then the alternative, supporting argument of effectiveness is offered. There is scant evidence that anti-terrorist legislation works to control terrorism. Even the suggestion that it is merely symbolic¹⁷⁰ is misleading, for positive damage occurs to the fabric of society and to the rights of individuals, especially vulnerable minorities.¹⁷¹ In addition, the commitment to social justice appears hollow as is the maintenance of a single and standardized legal system.

In 1993, a senior Labour politician stated in Parliament:

If we cravenly accept that any action by the government and entitled Prevention of Terrorism Act must be supported in its entirety without question, we do not strengthen the fight against terrorism, we weaken it. I hope that no Honorable Member will say that we do not have the right to challenge powers, to make sure that they are in accordance with the civil liberties of our country.

The speaker? The former Shadow Home Secretary and current Prime Minister, Tony Blair.¹⁷²

170. JOSEPH GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (1986).

171. JAMES DEMPSEY & DAVID COLE, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (2002); Samuel R. Gross & Debra Livingstone, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002).

172. *Hansard*, House of Commons, Mar. 10, 1993, col. 975.