

University of New South Wales
University of New South Wales Faculty of Law Research Series
2008

Year 2008

Paper 1

Terms of Engagement in Times of Terror

Martin Krygier*

*University of New South Wales

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/unswwps-flrps08/art1>

Copyright ©2008 by the author.

Terms of Engagement in Times of Terror

Martin Krygier

Abstract

According to Dr Johnson, ‘when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.’ Wondering whether you might be attacked by terrorists seems to have similar, if not always wonderful, effects. Certainly it concentrates, or at least galvanises, the minds of governments. Ours is no exception. From a standing start in 2001, when we had no national laws specifically dealing with terrorism, we have now enacted over forty-five.

There are laws defining, often in very broad terms, what will count as terrorist crimes, organisations, membership, advocacy, financing. Even without another attack, counter-terrorist activity will not stop there or soon. And when, not if, such an attack occurs, the pace will no doubt quicken again, particularly if the attack is spectacular or novel in any way, all the more so if it happens here. The pressure to be seen to ‘do something’ about unpredictable and deliberate acts of murderous destructiveness will never be resisted by democratic governments. Some will see this as a responsibility of their office (and if it isn’t, it is hard to see what is), others as an opportunity for exploitation, but every government will do something. The question is whether it is the right thing.

In debates around responses to terrorism, four terms constantly recur: terrorism itself, war, balance, and the rule of law. This article is organised around those terms. My concern is with things, not words; but what we think about things is closely connected to what we call them.

Terms of Engagement in Times of Terror

Martin Krygier

According to Dr Johnson, 'when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.' Wondering whether you might be attacked by terrorists seems to have similar, if not always wonderful, effects. Certainly it concentrates, or at least galvanises, the minds of governments. Ours is no exception. From a standing start in 2001, when we had no national laws specifically dealing with terrorism, we have now enacted over forty-five.

There are laws defining, often in very broad terms, what will count as terrorist crimes, organisations, membership, advocacy, financing. These are prohibited or, in the case of organisations, governments (rather than parliaments) are authorised to proscribe them. New forms of sedition have been announced, laws allowing preventative detention and control orders of persons (whether or not they have been tried, found guilty of, or been suspected of committing an offence) have been passed. New laws restricting access to evidence have come into being. New ministerial discretionary powers have been introduced. Police powers have been enhanced, and the Australian Federal Police and ASIO have become much richer, more populous, more active, and more powerful. ASIO has extraordinary new powers of surveillance, detention and interrogation of suspects (and even of non-suspects if they are thought to have useful information). A few organisations have been outlawed, individuals arrested and prosecuted (with rare success so far), visas have been revoked.¹

Even without another attack, counter-terrorist activity will not stop there or soon. And when, not if, such an attack occurs, the pace will no doubt quicken again, particularly if the attack is spectacular or novel in any way, all the more so if it happens here. This will be so whatever party happens to be in power. The pressure to be seen to 'do something' about unpredictable and deliberate acts of murderous destructiveness will never be resisted by democratic governments. Some will see this as a responsibility of their office (and if it isn't, it is hard to see what is), others as an opportunity for exploitation, but every government will do something. The question is whether it is the right thing.

It's not an easy question. Few of us are experts in operational matters of surveillance, interrogation, crime prevention, bomb detection, border protection, airline safety, and so on. And the experts are often in the dark too. There are international fashions in counter-terrorism. Models are followed as often because of the prestige or sway of those who author them as because they have been shown to be effective. And while occasionally we are made painfully aware of what hasn't worked, it is harder to tell what has. There is a lot of whistling in the dark going on here. 9/11 was, after all, a big surprise and there will be other surprises. For terrorists like surprise. It is what they do.

In any event, expertise is not everything. In a democracy, non-experts, citizens, must judge what experts do, not by denying or ignoring expertise, but by asking what is at stake: what of value is threatened, what are acceptable modes of response, and what are the costs of what we do and don't do, in terms of principle as well as price.

Otherwise we have no way to assess either what we are up against or what we are up to, particularly in stressful times. And neither does the government itself. Whistling in the dark is one thing; shooting in the dark quite another.

There are no experts on these questions of value, and they are and must be matters of public debate. In that debate, words are weapons. Different words give different sides different advantages and disadvantages, set discussions down different tracks. That is why, when argument gets heated, battles so often occur over words: are asylum seekers refugees or queue-jumpers? Is Hamas a terrorist organisation or a liberation movement? Was Australia settled or invaded?

In debates around responses to terrorism, four terms constantly recur: terrorism itself, war, balance, and the rule of law. This article is organised around those terms. My concern is with things, not words; but what we think about things is closely connected to what we call them.

Terrorism

This is a good word, since it catches exactly what is distinctive about its subject. The core business of terrorists is terror, not murder or mayhem, though these are their stock in trade. Of course, terrorists murder people, but most murderers are not terrorists. Murderers typically have an interest in their victims; not just anyone will do. Terrorists, however, need have nothing special, nothing particular, against their victims at all. Tactically, they might be found anywhere; strategically, they are elsewhere and everywhere. They are us.

If there is a gangland killing, most of us who don't inhabit the gangland will feel no special identification with the victims. But a terrorist attack could happen to anyone, and that's the point. Acts of terror are intended to radiate far beyond their immediate victims. Generalising fear is the end; particular killings just the means. As the philosopher Samuel Scheffler observes, an act of terrorist violence 'sets off a kind of moral cascade ... The primary victims are used – their deaths and injuries are used – to terrify others, and those others are used – their fear and terror are used – to degrade and destabilise the social order.'²

Note that Scheffler moves from primary victims hurt or killed, to secondary ones terrified, to a third target: the social order. The quality of our lives depends crucially upon the texture of social relations made possible and supported by a particular social order. Threaten the order, and you threaten the relations. Threaten those and you threaten the lives and ways of life that it is possible to live within them. Terror is meant to 'degrade and destabilise' these constitutive environments, and if there is enough of it, and if it is successful enough, that is precisely what it will do. In particular, beyond its threat to individual lives, terrorism threatens the possibility of particular kinds of societies and ways of life, in particular *civil* societies and civil ways of life. For terrorism, while a crime against many things including humanity, is specifically a crime against civility. That is not the worst of it, but it is central, since civility is a condition of many other good things.

In a civil society it makes sense to assume that, even if you are not my friend, you need not therefore be my enemy. Unfamiliarity is not the same as hostility, 'stranger' is not necessarily danger, and chance encounters are not necessarily collisions, or reasonably feared to be. Civil engagements, even among strangers, are routine.

Such engagements don't happen naturally. They will only occur where they are made possible, lubricated, rendered unthreatening by various devices and protectors of civility. The architecture of civility is actually rather complicated, though members of some societies, including our own, have lucked into useful institutions and traditions. But it can be rendered fragile, degraded, destabilised, even destroyed, and this is what terror strives to do.

Terrorism assaults the possibility of civility, deliberately and directly. Terror and civility cannot co-exist: where one thrives the other does not. Moreover, *jihadist* terrorism is not only the enemy of civility in its tactics, but also in its goals. Osama bin Laden's caliphate, for example, is to exclude all but those ultra-faithful to a fundamentalist and murderous interpretation of holy writ. These are the goals of fanatics. Their ambitions are, in a quite literal sense, totalitarian.

Of course, terrorists are commonly less successful than they would like and than we might fear. That must be factored into any response, to distinguish justified concern from paranoia. Still, anyone committed to the benefits and virtues of a civil society must oppose terrorism, particularly in its modern incarnation.

But how to oppose? Given the complexity, urgency, public necessity and need for co-ordination of the tasks involved, governments must lead. And this raises one of the central dilemmas and potential paradoxes of civil society: it depends on effective and strong government prepared and equipped to do what only governments can do, while it is threatened by governments that are willing and strong enough to do what governments should never do. Where government is too weak, we will suffer at the hands of others; where too strong or strong in the wrong ways, we will suffer at its hands. Civil society depends on a government whose powers are strong and limited at the same time. And strong in the right way because it acts within limits.

How, then, should governments respond to threats against civil societies, without their responses threatening precisely what they purport to protect?

War

This is not, of course, the first time such questions have been asked. They are often asked in war, and it is no surprise that the word figures prominently in our discussions. Both President Bush and ex-Prime Minister Howard were particularly fond of it. Precisely because of its mobilising implications, however, there are bitter divisions over whether we are embarked upon a 'war on terror' that requires and justifies the logic and methods of war, or whether terrorists should be treated as criminals in the normal ways of the law, or perhaps not quite normal but within the boundaries of civil rather than military engagement.

The answers are not self-evident. The invasions of Afghanistan and Iraq were acts of war, plain enough. But, for all the rhetoric, Australia's role in both has been small, and in Iraq becoming smaller. Most of our efforts have been focused on terrorism at home. Is that war? A war on terror seems something of a category mistake, as many have pointed out, since terror is a tactic, not an opponent. Al-Qaeda is an opponent, to be sure, but not of the sort against which states usually wage war. It governs no populations, administers no territories, raises no taxes, and though it breaks many laws it passes none.

That has significant implications for the *kind* of threat we face. On the one hand, terrorists have nothing like the firepower of a conventional state such as Australia, let alone of a nuclear super-power. On the other hand, states can be defeated in familiar ways, whether because they lose the battles, lose their territory, and/or are threatened with the annihilation of their population. It's not clear that international terrorists can be defeated or even deterred by any of these things. The drawing power of contemporary terrorism will probably end some time, not soon, but it will not be ended by military means alone, since at present military defeats do not appear to diminish recruits. On the contrary. More likely it will be a victim of its own overreaching and failures, but that will take time. If governments are to assume war powers, these are likely to last for a long haul, an 'emergency' that might be permanent or at least indefinite. That didn't even happen in the Cold War, and that *was* a war. It threatens very long-term consequences and can affect people who have nothing to do with terrorism. Indeed, all of us.

Civil libertarians therefore tend to argue that terrorists should be combated with the means and within the limitations of the criminal law. They also remind us that terrorism is not new. However, while modern terrorists certainly are criminals, they are special in many respects, including their global ambitions, society-wide threats and unrestrained tactics. Nor are modern terrorists quite the same as Russian anarchists of the nineteenth century, or more recently the IRA in Northern Ireland or ETA in Spain. The international co-operation and reach of modern terrorists are without precedent, as are the weapons they are already prepared to use, and those they might come to be able to use. These threats might well be exaggerated; they cannot, however, be ignored.

This is not a dispute to be settled by definitional fiat. It would be better to acknowledge that modern international terrorism is hard to classify neatly with existing terms, and that we might need to rethink some of our standard characterisations.

What can be said, however, is that powers and responses that might be readily justifiable in the language of war fit less easily if we are speaking of crime. We are prepared to cut more slack for commanders-in-chief and generals than for ministers and police commissioners. The due process required of the latter is often waived in war; no presumption of innocence rules in the field of battle; 'collateral damage' is a cost less tolerated from police than soldiers. More generally, as David Golove and Stephen Holmes point out, '[t]he war paradigm and the crime paradigm ... dictate different attitudes toward false positives and false negatives.'³ A false positive occurs when innocents are treated as guilty; a false negative when someone guilty slips through the net. It would be better to have no false readings, but the paradigm of criminal law seeks to bag real positives only by procedures which strain to avoid false ones. Wars seek to eliminate false negatives, often with a high tolerance for error. Such errors, however, will be borne by real negatives, that is, innocent citizens, so for their sake and for other reasons too we should not speak lightly of war.

Modern terrorists are often found among citizens of our own societies, who have rights as citizens, who are not terrorists, and who we hope will not be drawn to terror or can be drawn away from it. A major aim of governments, therefore, must be to distinguish and separate law-abiding from terrorist citizens, both because it is right to do so, and because it might prove useful. So, for reasons of both principle and prudence, we must honour the rights of our citizens. The law's traditional insistence

on protecting innocents while pursuing the guilty makes this more likely than the fog of war-talk.

Balance

Terrorists plan and conspire before they bomb. There is thus a constant temptation to get in early with surveillance and pre-emption, detention and interrogation, rather than await – as the criminal law generally prefers to await – commission of an offence. Better, so the understandable logic goes, to stop the train before a collision rather than be left to collect the dead. This logic has fuelled our recent spate of counter-terrorist laws.

Many lawyers respond that these new offences involve unwarranted augmentation of government powers and erosion of people's rights, unwarranted both because of what they now allow governments to do, and because of what the criminal law already allowed them to do. David Neal SC has put the argument forcefully. Conspiracy, attempt, possession of bomb-making equipment and other preparatory acts were all criminal offences before counter-terrorism became a concern. It is simply untrue, as securitators claim, that criminal law can only come in after the event, whereas counter-terrorism alone can get in early. It is true, however, that traditional criminal law is more constrained by legality and by the need to prove guilt of defined offences beyond reasonable doubt than are some of the new laws.

The objection can't merely be, however, to the passing of new laws for new sorts of crimes. Law is routinely updated as circumstances change, new forms of crime appear, and so on. And with every such law, someone's rights are abridged; something that could legally be done before is not legal now.

But not every right is as important as every other. Indeed we have come to recognise some as 'human rights,' not the gift of governments but owed to all humans simply by virtue of their common humanity. Central among these, in the words of the Universal Declaration of Human Rights, are 'life, liberty and the security of the person,' 'a fair and public hearing by an independent and impartial tribunal,' 'the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence,' freedom from 'torture or ... cruel, inhuman or degrading treatment or punishment,' 'the right to freedom of movement and residence within the borders of each state,' as well as freedom from 'arbitrary arrest, detention,' and from 'arbitrary interference with his privacy, family, home or correspondence, [and] attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'

All western governments know this catalogue, but some of them, including the late Howard government, have been prepared to curtail some or all of these rights in the cause of the 'war on terror.' The most common justification offered is that these are not normal times. In these special circumstances, so it is said, even such rights need to be 'balanced' against the security the community needs and the government must provide. The difficult but necessary task of government is to weigh the claims of both liberty and security and strike the proper balance between them. At the moment, we are told, the claims of security are especially weighty.

Treated loosely, there is obviously some sense in this talk of weighing and balancing. At least it suggests that deliberation is called for. There is no reason to think that the demands of morals always point in the one direction, still less those of morals,

politics, fear, security. Rights are not absolute. Still, it would be nice if governments were to recognise that if they are *rights* they are something more than mere negotiable preferences or interests. Indeed niceness is the least of it, when *human* rights are at stake. Nevertheless, rights might clash with other rights, rather than merely with wrongs, and with values other than rights. A serious life will not be without choices, sometimes inescapable, and sometimes tragic. A politician, charged with responsibility for the fate of his citizens not just himself, has to be up to making such choices.

Nevertheless, to portray our present predicament as one in which liberties and rights are balanced against security, and in which governments can and do manage to ‘strike the right balance,’ as Mr Howard so often used to boast, is misleading on many levels.

Firstly, it suggests a precision that is totally lacking. A balance can be struck between different things when there is a common currency in terms of which they can be compared: money, weight, size. We don’t have such a currency to compare the weight or value of preventative detention of non-suspects, or withholding evidence from suspects, say, against the right to liberty of movement, or the presumption of innocence, or the right to silence, or the right to a fair trial. If we are required to choose, we should have reasons for our choices, but we have nothing as simple as a balance to strike, no scale to establish where it lies. It is merely rhetorical sleight of hand, an attempt to stop conversation, to suggest otherwise; as though, if this is where the balance falls anyone who demurs must be, well, unbalanced.

Secondly, the balance is typically portrayed as between ‘security’ and some necessary restrictions on a few particular ‘liberties.’ But even if these things were measurable, comparable and freely tradeable, this way of talking stacks the deck. We are never actually offered security on one scale and liberty on another. Rather, particular measures said by their proponents to be necessary to increase *future* security involve reduction in *present* liberties. We don’t, we *can’t*, know whether those security measures will produce security, but we do know that legal restrictions on civil liberties and human rights are likely to restrict them. And yet we also know that governments, police and security services under pressure for results will want more power to do what they think necessary and will say, and likely believe, that our security depends on their having the power they want. That is a universal tendency, an operational logic, and in this case it will claim special authority. Countered by objections from what right-wing opinion writers sneeringly deride as the ‘civil liberties lobby,’ those in the security business (curiously never derided by those same folk as the ‘security lobby’) are likely to invoke their expertise and office as warrants to declare the balance, the calculations of which are typically difficult to check as they are so often classified – by them – as secret.

Thirdly, the scales themselves are always likely to be shaky and skewed to one side at the very time that the most energetic ‘balancing’ takes place. It is just after a shock has occurred that counter-terrorist measures are most urgently demanded and produced. Our own measures have followed each dramatic foreign calamity – New York, Bali, London – like waves. At such moments, for the most obvious of reasons, long-term threats to liberties, the texture and structure of the rule of law, rights and so on, are likely to appear as feathers in comparison with the leaden weight of the need for security. And yet the laws and practices that enter the legal system at such times will not easily disappear even when the heat is off. Indeed they are likely to spread to other parts of the system, and infect the values that underpin it.

A fourth consideration, mentioned by many authors, is that talk of balancing *our* liberties against our security falsely suggests some symmetry and mutual self-denial, belt-tightening, among all of us. And yet most of us give up nothing for our security. Instead, the liberties that are invaded are at the moment predominantly if not solely those of Muslims, particularly young male Muslims, as Drs Haneef and ul-Haque have found to their cost.

Apart from puncturing the imagery of mutually foregone rights for mutually enjoyed security, this simple truth about the distribution of burdens also raises issues of principle and policy. As a matter of principle, all citizens should be treated as equals by the law and agencies of state; hackneyed but true. Moreover, civil societies depend upon mutual trust, both between citizens and between them and governments. If, as a result of generalised (and not hard to understand) suspicions, particular groups become targets of special measures of surveillance, investigation and restriction, this can generate a self-fulfilling logic. Even if it does not produce terrorists – who really knows *what* produces terrorists? – it might well dampen the willingness of such groups, who might be key groups, to co-operate with those pursuing terrorists.

Terrorism is real, so ‘eternal vigilance’ is appropriate. It is often smart, however, and has the advantage of being right, for a government to reach out rather than cast out. The new attorney-general’s talk, immediately on assuming office, of ‘building bridges with communities at risk of alienation’ is therefore good talk.

Finally, balancers assume that the costs of their measures are all on the other side of the scale. But that is hardly obvious. For freedom is not the only casualty of unconstrained power. In general and for many reasons, old wisdom has it, it is not a good idea to enhance the unconstrained powers of the powerful. This is the insight that over centuries has motivated partisans of constitutionalism and the rule of law. It is a deep insight.

Rule of Law

Where the rule of law prevails in a society, those with power are inhibited from exercising it arbitrarily, capriciously, wilfully. They must take account of legal constraints and of legal values, and typically many other sources of civilising restraint. Those societies where the rule of law is strong, among them our own, are blessed; many societies are not. Our legal traditions contribute, crucially if not alone, to this state of affairs. Our institutions, values and practices are the product of long experience of dealing with competitions between eager evaders, ambitious prosecutors, falsely accused innocents and many other of the fraught predicaments that the law habitually confronts. Perhaps terrorism changes everything, as governments like to say, but that needs to be demonstrated. It is not obviously true, and we lose something precious if we assume too quickly that it is true. And given what legal orders like ours have had to deal with over centuries, it would take a lot to show it.

No single change in law will spell the end of the rule of law where, as in Australia, it is well established and institutionalised. Reflexive hysteria is out of place. Our best legal traditions embody rule-of-law values, and make them concrete in legal principles, practices and procedures. Among those most relevant to our subject are that anyone accused is entitled to know why, to be subject only to interrogation within specific limits that respect life and dignity, to benefit from a presumption of

innocence, to see and be able to confront all the evidence on which their prosecutor relies, to the right to *habeas corpus*, to limitations on powers of detention, to a hearing by third parties institutionally independent of their accusers, more generally to be able to demand justification from anyone who invades their liberties, and to restrict the possibility of capricious or whimsical exercise of power. These are regulative ideals, and like all ideals they are often evaded. Even then, because they are embodied in practices and traditions, they are available to be insisted upon, and people do insist upon them. We don't have to invent them.

In general all these principles exhibit a simple logic: no one should be in a position detrimentally to affect the lives (and dignity) of others without institutional safeguards. Even strong legal cultures like our own will suffer, however, from deliberate and sanctimonious violation of the rule of law by agencies of state. For they don't just change laws. They justify and legitimise the corrosion of principles and values.

In recent years, we have witnessed such sanctimonious violations. These endanger legal rights but also, in an only apparent paradox, they threaten the very ends the counter-terrorism laws were supposed to serve.

For one very common, but false, misapprehension about the rule of law, which has underlain recent corruptions of it, is that legal constraints undermine effective government. It is this misapprehension that makes so apparently plausible the idea that in times of terror executive power needs to loosen normal restraints in order to be effective. In fact, however, as we have seen recently in the cases of Drs Haneef and ul-Haque, arbitrary power is not only incompatible with citizens' rights. It also threatens intelligence, in the old-fashioned meaning of the word. Unrestrained power, to put it bluntly, is typically dumb or, in Stephen Holmes' word, autistic. For this is perhaps the greatest flaw in the notion of 'balance': the rule of law is not a curb on effective government, but a condition of it.

The institutions of the rule of law are commonly interpreted in exclusively negative terms, as constraints on whatever the government is trying to achieve. And they certainly do make it harder to exercise power in some ways than in others. But to rest here is to ignore a less obvious but fundamentally important aspect of these institutional devices. Such disciplines actually increase the effectiveness of power in achieving good purposes, while diminishing its ability to do harm. Holmes has made the point often and well. He is worth quoting at length:

The intuitive claim that grave emergencies require discretionary authority to act outside and against inherited rules and standard operating procedures is much less plausible than its defenders seem to believe. ... Such rules evolve over time because the errors that professionals make in situations of stress and panic are predictable. That politicians and bureaucrats are just as susceptible to avoidable error as doctors and nurses (or airline pilots or fire-fighters) goes without saying. Grave emergencies do not suspend the laws of human fallibility or eliminate the need for checklists, devil's advocates, second opinions, after-action reviews, and orderly adversarial procedures ...

... The rule of law enforces an uncomfortable degree of transparency on the executive. It requires that the factual premises for the government's resort to coercion and force must be tested in some sort of adversarial process, giving interested and knowledgeable parties a fair opportunity to question the

accuracy and reliability of evidence. That is how due process serves the public interest and helps reduce the risk of error. To reject the rule of law is reckless because it frees the government from the need to give reasons for its actions before a tribunal that does not depend on spoon-fed disinformation and is capable of pushing back. A government that is not compelled to give reasons for its actions may soon have no plausible reasons for its actions.⁴

These are important points, too rarely acknowledged by those officially entrusted with our security. Instead, in response to serial embarrassments in the court proceedings against Mohamed Haneef and Izhar ul-Haque, Federal Police Commissioner Mick Keelty retorted late last year: 'The burden of responsibility for protecting the community lies not on the shoulders of journalists, nor does it lie on the shoulders of commentators. It lies on the shoulders of frontline police (and) frontline intelligence agents.' These are no doubt serious and responsible jobs, which no one should treat lightly or with disrespect. However, both these cases suggest that responsibility was not aided but at times subverted by some of the frontline forces Keelty names, for predictable reasons. It was, as it happens, only restored by the courts and a few determined lawyers, aided or at least publicised by the ruffraff Keelty denigrates. A sense of common enterprise might have been more helpful than zero-sum confrontations in these circumstances.

As Confucius might have said, governments that act in the dark too often lose their way. They do the wrong things, catch and harrass the wrong people, miss the right ones. Often they blunder, and if ill-motivated they do worse than blunder, because they can conceal their blunders. The simple need to justify one's actions before independent bodies backed by long legal traditions familiar with the dangers of criminality, the temptations of prosecution, the virtues of process, and those of liberty, actually does have the power to 'concentrate the mind wonderfully.'

The greatest contribution of a new government in this field would be to strain, against real and recurrent temptations, to resist pressures to undermine legality and rights and to ensure that their activities in pursuit of security be and remain open to institutionalised scrutiny and challenge. There may still occur moments when the urgencies and dangers seem too great and immediate to allow this to happen, or to happen as amply as when business is as usual. This should then be explained with full and serious respect for the gravity of the circumstance, for what is at stake, and what is being risked. Energies should then be devoted to crafting institutional mechanisms of justification and review which, in seeking to defend security, will also respect liberty and not endanger competence. Some new laws and institutions might be needed, but the principles are old. And they matter.

¹ The legislation is well summarised and discussed in Andrew Lynch and George Williams, *What Price Security?*, UNSW Press, Sydney, 2006. There is a good collection of Australian and international materials at the Australian Parliamentary website:

<http://www.aph.gov.au/library/intguide/law/terrorism.htm>.

² 'Is Terrorism Morally Distinctive?' *The Journal of Political Philosophy*, 14, 2006: 9.

³ David Golove and Stephen Holmes, 'Terrorism and Accountability: Why Checks and Balances Apply Even in "The War on Terrorism",' *NYU Review of Law and Security*, April 2004: 4.

⁴ *The Matador's Cape. America's Reckless Response to Terror*, Cambridge University Press, 2007, 6.