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'Australia's Counter-Terrorism Laws and the Assault on Politics'

**Dr. David Wright-Neville
School of Political and Social Inquiry
Monash University**

Ph. 61-3-9905-2968

Email: david.wrightneville@arts.monash.edu.au

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'... the acts of September 11 were an assault on politics itself and that a citizen's most important response – to those attacks and to subsequent ones – is to defend politics.' (Peter Alexander Meyers 2002:255)

Introduction

When I was first invited by the Castan Centre to speak at this year's conference my initial response was scepticism – not at the nature of the conference itself but at the idea that a political scientist with no formal legal training would be in a position to contribute anything substantial to these worthy discussions. While I am still doubtful on my personal potential to say anything useful, the more I thought about how I might frame my remarks the more the common ground we share became clearer to me.

It seems to me that what unites all of us, community activists, legal practitioners, scholars, political scientists, journalists, is our shared interest in a vibrant public sphere within which freedom of speech, of thought, association and the right to express one's views in a peaceful manner are seen as critical to the health of our society. Indeed, it is a maxim of our civilisation enunciated most clearly by Kant that a relatively unfettered public sphere is integral to our intellectual and moral evolution as a species. It is in this sense that I believe the Howard government's response to the threat of terrorism has set a dangerous precedent that might over time prove deleterious to the future health of civil society and the public sphere.

More precisely, as the weeks and months have passed since the tragic events of 11 September 2001, I have become increasingly concerned by the apparent revival of ethnic and civilisational discourses that lend themselves to such intellectually obnoxious practices such as racial profiling. I have been alarmed at the ease with which a majority of Australians appear to have accepted the *de facto* imposition of religious and cultural prerequisites for processing under established refugee and asylum conventions. And I have been worried by the comfortable acceptance of an erroneous logic that holds that freedom and due process are in some way antithetical to national security.

Although it is this third theme – the assumption that rights and freedoms exist in a type of procedural tension with the objective of securing society from terrorist attack – that will inform much of what I will speak about today, the other two themes are woven throughout the presentation. This is because I believe that all three dynamics – national

security, subterranean racism, and ethnic exclusivity – exist in a symbiotic relationship. In the post 11 September environment these three pernicious discourses reinforce each other so that it is not really possible to understand Canberra's treatment of Middle Eastern and South Asian asylum seekers, for instance, without also understanding the impact on the collective Australian psyche of the terrorist attacks in New York and Washington and more recently in Bali.

Misdiagnosis and the Australian experience

Australia, like many other parts of the Western world, is guilty of both misdiagnosis and misguided counter-terrorism policies. There are a number of reasons for this, the most prominent of which is the speed with which the government felt it had to respond to the dramatic events of September 11, but also its clear determination to turn the terrorism issue to its domestic political advantage.

These two imperatives, security and political opportunism, emerged fairly quickly after the terrorist attacks in New York and Washington. Proposals to enhance ASIO's powers of investigation, detention and interrogation are especially instructive of the problems generated by the government's determination to be seen to be acting quickly and decisively to counter the threat of terrorism at home. The laws were proposed on the highly problematic assumption that attacks similar in nature to those of September 11 were possible within Australia. Noticeably absent was any request from the government for a security audit by the intelligence services prior to its drafting of the proposed changes.

The importance of such an audit lies in the role it could have played in allowing the government to better calibrate changes to security legislation with a view to minimising the impact of basic civil and political rights but also in terms of minimising negative consequences for those ethnic and religious communities most likely to be inconvenienced by proactive counter-terrorism investigations. Rather than this more cautious route, the government opted for a knee-jerk response based on unsubstantiated fears. Moreover, abetted by hysterically inclined elements of the media, the government turned on critics of the proposed legislative changes, charging them with being as unwitting stooges of the terrorists whose self-indulgent posturing was put at risk the lives of ordinary Australians.

The net effect of this discourse, which continues today, is to cast any defence of civil and human rights as a socially irresponsible act. In so doing, under the aegis of counter-terrorism the government has effectively shrunk the public sphere, suffocating debate under a blanket of fear and paranoia.

To brings me at this early stage to my main argument: that the prevailing orthodox view that identifies a tension between security and civil and political rights is based upon a misreading of the nature of contemporary terrorism, especially its susceptibility to stricter law and order regimes and enhanced intelligence and security powers.

In the history of modern terrorism – from the Stern Gang in the 1930s and 1940s to the Islamist fanaticism of al Qaeda today – there are very few examples of terrorist groups whose embrace of violence has been diluted successfully by enhanced state security powers. In fact it is the contrary that is often the case. History suggests that paring back rights and shrinking the public sphere through hostile discourses and racial stereotyping more often than not prove to be counter-productive. In cases where these strategies have been used in the past, the net result has usually been the further marginalisation of critical communities and the inadvertent fostering of more operationally friendly environments for the terrorists.

Some examples of these strategies from recent history will help highlight the point. The deleterious consequences that flow from enhanced security powers and a paring back of rights has been especially well documented in the case of the former Spanish government of Felipe Gonzalez, who throughout the 1980s and early 1990s used dramatically enhanced security powers to wage an aggressive campaign against the Basque separatist group ETA. As with a similar program pursued by the earlier Franco junta, the net effect was a series of poorly planned and targeted operations by an over-zealous security apparatus that marginalised moderate Basques and inclined some to look more favourably on violent factions within the separatist movement. (Jiminez 1992; Moxon-Browne 1990)

Similar approaches by the French in Algeria in the late 1950s, by the Italian government against the Red Brigades in the 1970s, and by the Fujimori government in Peru against

the Sendero Luminoso and Tupac Amaru Revolutionary Movement in the 1990s, all produced the same result: increased sympathy for the terrorists among key constituencies.

The second level misdiagnosis informing Canberra's domestic counter-terrorism initiatives rests in an exaggerated sense of the threat posed by terrorist networks within Australia. As mentioned earlier, the proposal to dramatically enhance the powers of state intelligence and police agencies to help combat the threat posed by terrorism was announced a matter of weeks after the 11 September attacks and without any security audit. The importance of such an audit - designed to assess the likelihood that similar teams of hijackers might have infiltrated themselves into Australian society - would have lay in its potential to allow the government to better calibrate its counter-terrorism laws and limit any reduction in existing freedoms and rights to those specific circumstances identified through the audit as potentially problematic.

Of course, there are those who claim that such an approach would have taken too much time and left too big a window of opportunity for terrorists to strike. However this is not necessarily the case. Indeed, just one year before the September 11 attacks Australian authorities had undertaken an exhaustive security audit within the context of Sydney's hosting of the 2000 Olympics. This audit did in fact turn up some very minor areas of concern, all of which were dealt with quietly and effectively by ASIO and the respective national police forces. Moreover, they did so without the aid of the new powers recently deemed so essential to ensuring our domestic safety. Up dating the security audit undertaken for the Sydney Olympics to take account of the unanticipated types of threats evinced by the attacks in New York and Washington would not have been a major task in view of the extensive work already completed.

Even so, the fact remains that two years after first mooted the stricter security regime Canberra has turned up no local equivalent of Mohamad Atta, Amrozi, Abu Nidal, Ramzi Yussof, or for that matter any other evidently capable terrorist operatives. Instead, what we *have* turned up is a small collection of self-appointed vigilantes and emotionally disturbed individuals whose status as 'terrorist masterminds' is entirely a government and media fiction.

Perhaps this explains the eagerness with which the Attorney General and Commissioner of the Federal Police were so quick to leap to conclusions about the seniority in al Qaeda ranks of the recently deported French national Willie Brigitte. Stories about Brigitte's alleged connections to al Qaeda circulated quickly in the weeks following his deportation. Most of these stories, such as the claim that he played a hand in the assassination in Afghanistan of Shah Masood, the military commander of the anti-Taliban Northern Alliance, have subsequently proven apocryphal. It is a pity that these inaccuracies have attracted a miniscule amount of media attention, especially when compared to the high profile factual gloss they were given when simply rumours. There appears to be little incentive to correct misrepresentations and as a result the damage has been done; without yet facing trial or being charged Willie Brigitte is, in the minds of most Australians, a senior al Qaeda operative planning atrocities here at home. Even more incredulous was the government's claim that the Brigitte episode revealed a need to further refine ASIO's new powers – even though these same new powers were not even used in the Brigitte case.

A third level misdiagnosis is evident mainly at a subterranean level of discourse that works subliminally on most Australians, except those who feel especially hurt by its core assumptions. It is a civilisational discourse that equates terrorism with Islam and presents an ill-defined notion of Islamist piety as the most immediate threat to Australia. The discourse is rooted firmly in the self-serving hysteria of a battalion of tabloid journalists but it is also more subtly encoded into the government's deliberate demonisation of asylum seekers as potential terrorists and in claims such as that by the Prime Minister that mass casualty terrorism is a phenomenon 'born of fundamentalist Islam.' (Howard 2003)

In fact the first modern era mass casualty terrorist strikes against civilian targets occurred in 1994 and were committed not by 'Islamic extremists' by the millenarian Buddhist cult of Aum Shinrikyo in the case of the sarin gas attacks on the Tokyo subway system (See Lipton 2000), and a few weeks later in the form of the bombing of the Alfred Murrah Building in Oklahoma City by Timothy McVeigh, a person inspired in part by his exposure to the anti-government conspiracy theories peddled by the US Christian Identity Movement (Juergensmeyer 2000:30-35).

Of course the threat posed by Islamic terrorist networks in Australia is a far cry from the full-blown insurgencies referred to above. It is also true that the beefed up intelligence and security powers conferred upon ASIO and the Federal Police are much more limited, as are the reductions in basic civil and political rights, than those in many other countries – including the United States, France, and North Korea, to name but a few. Finally, it is also the case that the marginalisation of Muslim Australians is no where near as severe as that suffered by Algerian Muslims at the hands of the French, the Basques at the hands of Franco, the or un-indentured labourers and landless peasants at the hands of the Peruvian elite. However, in terms of its impact on feelings of alienation and marginalisation, the general principle remains the same. Within an environment marked by widespread suspicion of Islam and Muslims more generally, the enhanced security and policing powers conferred upon ASIO and the Federal Police will do nothing to dissuade already committed terrorists whether they currently lurk among us or whether they are yet to arrive on our shores.

The erroneous reasoning that underpins this procedural approach to counter-terrorism, and informs suggestions such as that from the Commissioner of the Federal Police that Australia needs an Internal Security Act like those used in Malaysia and Singapore, rests on a failure to grasp the character of contemporary culturally motivated terrorism. It is an existential phenomenon in which a prolonged and intense feeling of alienation and anger evolves into dissociation from mainstream society and a deeply rooted psychological urge to violence. The late Israeli scholar of terrorism, Ehud Sprinzak, captured the essence of this phenomenon when he observed that the terrorist can be differentiated from the militant by the former's tendency to bifurcate 'the world into the sons of light and the sons of darkness ... [to] convince themselves they are soldiers in a just war and that their terrorism is bound to create revolutionary conditions in which thousands of people would later join.' (Sprinzak 1991:56-57) Rather than addressing this delusional state, the paring back of rights and the clumsy targeting of particular communities serves only to reinforce the sense of irreconcilable difference that forms a key trope to the terrorists' worldview. (See also Robins and Post 1997:103-104)

Dangerous Developments

This series of misdiagnoses also carries dangers at another important level. Not only is the government's strategy unlikely to dissuade existing terrorists, but in conjunction with

the vigilante like ‘Terrorist Hotline’ it also risks marginalizing critical constituencies within the Australian community and undermining the type of community trust and cooperation that in the past has allowed ASIO and the police to limit the Australian activities of groups like Hizbollah and the Jemaah Islamiyah.

There is a real risk that the current mix of community suspicion and enhanced surveillance and interrogation powers risks driving otherwise law-abiding citizens to seek protection by retreating into isolated cultural and religious enclaves. We know from the Western European experience that such a sense of cultural alienation from the wider community creates an ideal environment within which individual terrorist cell members can hide. Without fellow community members knowing or approving of their activities, individual terrorists often secrete themselves within such communities, using a general suspicion of the authorities as an extra level of security behind which they can go about their business, which is more often non-violent than violent activity: money laundering, equipment procurement, press monitoring, and occasionally talent spotting.

The assault on politics

The debate over the necessity or otherwise of trade off between security and freedom gives voice to a deeper social tension between the urge for self-protection and, on the other hand, the need to protect the integrity of the democratic public sphere. According to Peter Alexander Meyers, ‘Terrorism disorders the “system” by imposing at one, in a hundred different ways, and for thousands of different people, the question “what are we going to do today?” to be both safe and free. (Meyers 2002:268)

But as argued above, the axiomatic view in Canberra and many other official circles that must be a trade off between security and freedom is based on an incorrect set of assumptions about the nature of terrorism. Contrary to prevailing counter-terrorism wisdom, liberty and security are not antonyms – nor are they mutually exclusive. The logical flaws in the arguments of noted terrorism scholars who support this view are rarely picked up. Instead, claims that migration from Muslim countries constitutes a security risk, and by Bruce Hoffman (2003) that torture must be key ingredient in any successful counter-terrorism strategy, represent the next stage in the evolution of this nonsensical logic. In the 1990s, well before 9/11, scholars such as Hoffman were well

known as advocates of a *limited* trade off between rights and security in areas where terrorism posed a direct threat. The failure of this strategy to stem the surge of terrorist violence in places like Sri Lanka, the occupied territories, and the Middle East more generally has now pushed advocates of this position towards more belligerent positions. If this pattern continues to repeat itself, more and more rights and freedoms risk being traded away incrementally after each terrorist atrocity. Moreover, they will be sacrificed for negligible improvements in our security because, to reiterate the main point of my argument, terrorism as an existential phenomenon is impervious to stricter law and order regimes.

Persistent Delusions

As a political scientist I am curious as to why so many terrorism scholars and government officials – both in Australia and overseas – continue to adhere to counter-terrorism policies that have failed in the past and are likely to fail in the future.

There is a long history in Western societies of responding to the uncertainties of conflict by restricting the public sphere through a paring back of basic liberties such as freedom of speech, movement and association. Yet history also suggests that rarely has this strategy contributed to the successful prosecution of the conflicts concerned. As Aryeh Neier has observed,

As one looks back at the previous periods when rights were systematically violated, it is difficult to discern any resulting gain for national security. The prosecutions of World War I did nothing for the war effort and did not hasten Germany's defeat and agreement to an armistice. So far as we know, none of those responsible for the letter bombs or the other terrorist *attentats* of the post-World War I era was netted by the Palmer raids. America's victory in the war in the Pacific was not hastened by the internment of the Japanese Americans. The loyalty and security investigations and purges of the late 1940s and the 1950s in Hollywood, the universities, and other sectors of public life appear not to have an impact on the course of the Cold War. And, the efforts by the Johnson and Nixon administrations to curb dissent did nothing to stave off the ignominious end to the war in Vietnam. (Neier 2003:2)

Australian history also reveals a similar pattern. The targeting of Australians of German heritage (and Anglo-Celtic opponents of Australian participation in the conflict) during the First World War did nothing to accelerate an end to the conflict. Similarly, measures directed against German and Italian Australians during World War Two yielded no tangible benefits in terms of our war effort. And the use of intelligence and police

intimidation against the peace movement during the Cold War, but especially during the Vietnam War, served only to intensify its resolve and contributed nothing to the outcomes of these conflicts. Indeed, the costs to Australian society in terms of the polarising effects of these measures were almost invariably greater than their contribution to national security.

It is not impossible to understand how, in the immediate aftermath of the attacks of 11 September, as a society we were inclined to overlook the lessons of history and again translate our fears into an assault upon basic civil and political rights. The spectacular brutality of the attacks and their occurrence in a Western city synonymous with the confidence of late modernity had both a disorienting and frightening impact on the public psyche. Understandably some sought comfort in old certainties, and the recourse to conventional law and order policies was ready at hand. It provided comfort through a sense that at least something was being done to protect we in Australia from similar acts of barbarism.

What is harder to understand is how we have not used the time between that day in September 2001 and the present to reflect more deeply upon the challenges that confront us and look to the mistakes of the past as a guide to how we might better meet the challenges of the present. To be sure, as a community we knew relatively little about terrorism and al Qaeda in particular. Intriguingly, however, there seems to have been little effort by policy makers, academic experts, and the mainstream media to rectify our knowledge gap on the root causes of contemporary terrorism and to implement long-term strategies designed to better manage the terrorist threat without repeating the failed assaults committed against democracy and the rule of law in the past.

Following this analytical thread a little further, it becomes clear that the persistence of a state of nervous confusion and the ongoing dependence upon old but ineffective security measures has much to do with the manner in which discourses on terrorism within Australia have become politicised. In short, counter-terrorism and security have become leitmotifs for contemporary political discourse in which conservative voices have established a dominant position. Indeed, the idea that there is an innate tension between an expanded public sphere guaranteed by a wide range of civil and political rights and public order is a recurring theme in conservative philosophies. The intellectual *oeuvre* of

Harvard University's Samuel Huntington is an excellent contemporary example of this tradition. For many conservatives, including Huntington, the events of 11 September justified their long-standing suspicions about a public sphere that conceded too many liberties to too many people, especially foreigners. It is these conservative voices that continue to play a critical role in fanning public fears. For them, terrorism is an exemplar of the dangers that lurk in an undisciplined global world and they use it as a reference point in parallel agendas designed to attack elements of the modern world that they have never been comfortable with – the uppity Middle Eastern autocrats and United Nations in the case of the conservative elements in the Bush administration, unregulated immigration from non-White, non-Christian societies in the case of their Australian counterparts.

A Contagion

With specific reference to Australia, politicians of both sides appear to have been caught up in this discourse. Both sides have become temporarily dependent upon the public perceiving them as guardians against the dangers of unfettered globalisation, including terrorism (but not the deleterious consequences of free trade). Both the conservatives and the Labor Party are circling each other in the way that fighting cocks do – chests pushed out, plumage ablaze, and each trying to prove to a confused audience the superiority of their respective macho credentials. Few public officials are prepared to risk being tagged as irresponsible by suggesting that we might have over-estimated the extent of the terrorist threat within Australia. Similarly, few are likely to concede publicly that the rolling back of civil and political rights might not prove as effective a counter-terrorism strategy as the public seems to believe. After all, having extrapolated from the US experience and assumed an immediate parallel threat at home, enhancing the powers of intelligence and security services loomed as the only immediately obvious option open to government. Indeed, a failure to move on this front risked the charge that our political leaders were negligent in their obligation to act immediately and decisively to secure society from this assumed threat. Besides, in the grip of fear most Australians would have probably dismissed an alternative proposal to pause while we interrogated and addressed objectively the deeper causes of terrorism and how they might impact on Australia as a hopelessly utopian strategy that left at the mercy of the terrorists lurking among us. As my colleague Jenny Hocking has so put it, “both internationally and

domestically, counter-terrorism has become the new 'organising principle' for a resurgence in national security rhetoric and unfettered practice.' (Hocking 2003:355)

The Australian government's domestic response to September 11

In its self-described 'decisive response to the threat of terrorism' the Howard government eventually presented us with the *ASIO Act Amendment Bill 2002* and the *Security Legislation Amendment (Terrorism) Bill 2002*. It is not my purpose to explore in any detail the legal ramifications of these Acts, this has been done elsewhere. Rather, my intention is to elaborate on the impact these initiatives will have on the public sphere and to further interrogate the claim that these initiatives are unlikely to yield any tangible benefits to the nation in terms of improving our security from terrorist attack.

As a first step in this direction it is worth considering the wider social atmosphere within which these Acts have been presented. In particular, it is important to contextualise these initiatives in terms of an atmosphere marked by a heightened level of public anxiety fuelled by the events of 11 September and then the tragic events in Bali on 12 October 2002, but sustained over subsequent months by the government's own rhetoric, including its absurd 'Be Alert – Not Alarmed' campaign and vigilante-like 'Terrorist Hotline'. Rather than fostering a reflexive approach to the terrorist attacks in New York and Bali and stimulating a period of reflection on how we might, as a community, understand and seek to address the deeper causes of such atrocities, the government and media's response bordered on the hysterical.

Critiquing as 'hysterical' Canberra's ill-directed responses to terrorist threats at home is not the same as saying that terrorism does not pose a threat to the safety of Australians, either at home or abroad. Terrorism is a sad fact of modern life – as Colin Powell put it, 'the dark side of globalisation'. But it needs to be placed in perspective as a phenomenon inherently linked to other non-conventional threats to security such as organised crime. Yes, at this particular moment in time I believe there is a heightened risk of terrorist attacks against Australian targets – a risk that I believe has been elevated unnecessarily by Canberra's high profile support for the military belligerence of the Bush administration in Iraq. But, I also believe there is little evidence that the terrorists are as wide spread, or as well organised, as conservative harbingers of doom would have us believe. To suggest otherwise constitutes a critical concession to the terrorists. It does so because it

is a claim based on little or no evidence. It confers a disproportionate power upon an otherwise limited organisation. As such it is empowering to the terrorists and their supporters and simultaneously advances their longer-term strategic agenda of forcing their enemies to over-react and make fundamental errors of judgement. In the cases of al Qaeda and Jemaah Islamiyah, these errors include the opening of schisms between their adversaries and Muslim communities more generally.

Striking a balance: freedom and security

At the same time as society exaggerates the potency of the terrorists, it also tends to make an equally erroneous assumption that the threat is posed by short-sighted naïve zealots who are easily deterred by conferring upon the state enhanced security measures and punitive powers. But a close look at the evolution of the al Qaeda network's political strategy evinces among its leadership a sophisticated understanding of the enormity of the political struggle that confronts them. It also reveals a correspondingly sophisticated understanding that a mixture of carefully calibrated small and large-scale attacks will strengthen their hand by creating an illusion of presence and strength and thereby frighten their adversaries and embolden others to rally to their cause. More importantly, it reveals a fanaticism and murderous determination that is in no way reduced by stricter surveillance, detention and interrogation powers. In contrast, al Qaeda and other terrorist groups have proved highly vulnerable to reasoned and sustained public debates that reveal the inner contradictions that belie their rhetoric to as wide an audience as possible. Tolerance and acceptance from those whom the terrorists cast as enemies have also had an impact in reducing the power of terrorist rhetoric to promote the idea of class or religious warfare. In short, an inclusive public sphere with as few restrictions on public debate as possible has in the past provided a non-violent alternative to terrorism. Democratic politics and due legal processes are therefore, historically speaking, critical to any long-term counter terrorism strategy.

Conclusion

The nature of the Howard government's response to the threat of terrorism, coupled with support from the opposition, media and senior officials within the intelligence and police services, suggests 'the unquestioning acceptance in the aftermath of 11 September of the doctrine of inevitability and necessity of national security imperatives.' (Hocking 2003:356) The merging of these voices into a chorus of potential doom has fed an

unnecessary escalation of public fear based on the assumption that the enemy now lurks among us, that a shadowy network of murderous zealots is laying in wait ready to pounce at the slightest hint that we have dropped our vigilance.

To this end civil and political rights have been rolled back in the name of poorly understood threats at home. Because it is unlikely that terrorism can be defeated, and that further mass casualty attacks are unfortunately likely, unless we break the erroneous assumptions that underpin our current approach to counter terrorism then we are at risk of incrementally trading away our rights for an illusionary sense of security.

We know from experience that stricter and more draconian modes of counter-terrorism policing and law enforcement have little impact on the terrorists themselves. At best they are a palliative that might temporarily complicate terrorist networking and operations, but because initiatives such as greater police and intelligence powers do nothing to address the deep psycho-political drivers of terrorism they also do little to attenuate the terrorist's urge to violence. Indeed, the suspension of civil liberties and the paring back of rights and freedoms in the name of counter-terrorism are often viewed as evidence that the target population is panicked, and as such measures can inspire a continuation and even an escalation of the practices that fomented these fears.

In conclusion, I believe that without a better understanding of the nature of terrorism and better calibrated counter-terrorist responses, Australia and many of its allies face the risk of a cycle of terrorist and counter-terrorist violence that overtime will erode key elements of our civil society and public sphere. Once this cycle begins it will be extremely difficult to stop, hence the importance that I personally attach – not as a lawyer but as a political scientist whose career is the study of the dynamics of violence – to resisting the dangerous assumption that a slight paring back of rights now will generate greater security benefits in the future.

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