

2008

Terror Conflated?

Fionnuala Ní Aoláin

University of Minnesota Law School, niaol002@umn.edu

Follow this and additional works at: http://scholarship.law.umn.edu/faculty_articles



Part of the [Law Commons](#)

Recommended Citation

Fionnuala Ní Aoláin, *Terror Conflated?*, 25 CONST. COMMENT. 131 (2008), available at http://scholarship.law.umn.edu/faculty_articles/72.

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Book Reviews

TERROR CONFLATED?

TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS. By Eric A. Posner¹ & Adrian Vermeule.² New York, Oxford University Press. 2007. Pp. 328. \$29.95.

*Fionnuala Ni Aoláin*³

This review of Eric Posner & Adrian Vermeule's book *Terror in the Balance Security, Liberty and the Courts* is constructed in part as a response not only to this scholarly work but also to recent executive and policy directions which suggest that substantial deference should be given to the executive in times of crisis, that courts should defer competence and that any harms inflicted upon civil liberties by executive action are overstated by interests with little competence in the core arena of security.

Professors Posner and Vermeule open their book by pithily stating that “[w]hen national emergencies strike, the executive acts, Congress acquiesces, and courts defer” (p. 3). The book has a strikingly limited American reach, identifying six periods of emergency during American history,⁴ from which they set out two alternative assessment points. One assessment is a history of constitutional failure, marked by political panic, irrational policy-making, and an exaggerated emphasis on security—this they situate as the civil libertarian view (p. 4). Another is the view

1. Kirkland & Ellis Professor of Law, University of Chicago.

2. Professor of Law, Harvard Law School.

3. Dorsey and Whitney Chair in Law University of Minnesota Law School. My thanks to the participants of the conference, *Constitutional Rights and International Human Rights: Separate but Equal?*, held at the Hebrew University of Jerusalem (November 2007) for comments on some of the ideas presented in this review.

4. This is at odds with more comprehensive studies by scholars such as Jules Lobel, *Emergency Powers and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989).

(theirs) that emphasizes political and constitutional success. Congress/Parliaments and courts act rationally, civil liberties are appropriately compromised, premised on the rational view that they interfere with the effective elimination of threat. Policies make mistakes, but none are catastrophic, and when the emergency wanes the basic constitutional structure rebounds robustly back (p. 4). Posner and Vermeule hold that both assessment points have normative implications, and are convinced that their thesis holds true of a tradition of judicial and legislative deference that has served the United States, including by extension other democracies, and that “there is no reason to change it” (p. 5). Moreover, they go on to assert that the civil libertarian view “. . . rests on implausible premises and is too weak to over-come the presumptive validity of executive action during emergencies” (p. 5).

The core argument dovetails with the strident policy voices (as well as other academic voices),⁵ that affirm not just the need for a strong executive role in emergency but robustly assert that by corollary the role of the courts and other checking devices should be held back. This book review challenges both the “over-powerful” executive thesis, and further rejects the position that courts are inherently suspect or weak in times of emergency. The Posner and Vermeule’s position is provocative and attractive, if stridency is a virtue, but its foundations are weak empirically, theoretically and comparatively.

I. CIVIL LIBERTY ADVOCATES ‘SEE’ ONLY PANIC RESPONSES BY STATES

Terror in the Balance paints civil libertarians (broadly brushed), and academics that intellectually come out on the liberty side of the equation, as unflinching; grounding their rationale on a presumed panic response by states in times of crisis (pp. 59-86). Scholars such as Cass Sunstein and Bruce Ackerman stand among the accused.⁶ A particular claim is that civil libertarians assume governments do not act rationally when they choose to

5. See e.g. Curtis A. Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); see also Congressional testimony of Attorney-General Elect Mukasey concerning the reach of executive powers *Mukasey Wins Vote in Senate Despite Doubts*, <http://www.nytimes.com/2007/11/09/washington/09mukasey.html>.

6. E.g., Cass Sunstein, *National Security, Liberty and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693 (2005); BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2006).

aggrandize their crisis powers, and the counter-claim lies in the vaunted rationality of executive actors. This stylized position deserves significant critique. The view is particularly weak when any substantive comparative assessment is undertaken.⁷ It is generally accepted that a certain trade-off exists between liberty and security. Neither interest is absolute. A proper balance must be struck between these conflicting values and principles. But such balance is, in and of itself, flexible and floating. The relative importance of the competing values and interests shifts from time to time and with it so does the point of balancing. Of course, one major problem with conducting such acts of balancing in time of great upheaval is that under extreme circumstances, when panic, fear, hatred and similar emotions prevail, rational discourse and analysis are likely to be pushed aside in formulating the nation's response. When faced with serious terrorist threats or with extreme emergencies, the general public and its leaders are unlikely to be able to accurately assess the risks facing the nation. Balancing—taking into consideration the threats, dangers, and the risks that need to be met, the probability of their occurrence, and the costs for society and its members of meeting those risks in difference ways—may be heavily biased, even when applied with the best of intentions. Posner and Vermeule give little credence to and/or dismiss such risks in their assessment of the efficiency of emergency responses undertaken.

A particular problem which they do not confront head on is that emergencies present opportunities to legislate which may not easily arise again. I, among other scholars, have argued that times of emergency pose a significant opportunity for actors within the state, who have previously made a case for emergency powers, to rehearse and extend those arguments again. For example, it is not by co-incidence that we find massive legislative enactments being produced in a period of days or weeks (prime examples include the 1974 UK PTA,⁸ or the USA Patriot Act),⁹ when an extreme event puts pressure on the state to respond. I do not suggest that the pressure on the state is not entirely real.

7. See e.g., OREN GROSS & FIONNUALA NI AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* (2006); *THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL* (Ronald J. Daniels et al. eds., 2003); JAIME ORAÁ, *HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW* (1992); CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP—CRISIS GOVERNMENT IN MODERN DEMOCRACIES* (1948).

8. See GROSS & NI AOLÁIN, *supra* note 7, at 176–80.

9. *PATRIOT DEBATES: EXPERTS DEBATE THE USA PATRIOT ACT* (Stewart A. Baker & John Kavanagh eds., 2005).

Equally in response to the pressure there is substantial capacity for manipulation and opportunism. Posner and Vermeule essentially and unconvincingly dismiss that any such outcomes are likely or frequent.

II. GOVERNMENT ERROR IS NOT SYSTEMICALLY SKEWED

One of the many weaknesses of this book, is the premise (empirically unsupported) that while governments may err in times of crisis, such errors “will not be systematically skewed in any direction” (p. 4, see also pp. 87–129). Theorists such as Posner and Vermeule tell a success story in which the history of emergency powers is one of political and constitutional triumph. In a particularly American perspective, they profess that “Congress rationally acquiesces; courts rationally defer” (p. 4).

The preponderance of the evidence across jurisdictions is precisely the opposite.¹⁰ Posner and Vermeule suggest that civil libertarians over-emphasize the mistakes made by governments. To use their phrasing “policy during emergency can never be mistake free” (p. 4). I agree. But I beg to differ on the scale or consequences of mistakes. Without resorting to a treatise response, a number of general issues can be raised here. It remains very unclear in Posner and Vermeule’s world how we measure costs in this context. In particular, there is no evidence that broader and deeper system costs are built into their argumentation or understanding about the effects of emergency rule. That is, beyond the perceived efficiency of response to the “immediacy” of threat (or perception of threat) how the long-term and regularized usage of emergency powers affects legal systems and social structures within a state.¹¹ One consistent thread of all substantive research on emergency powers in the United States and elsewhere has been the uncompromising recognition that emergency powers persist. They are rarely, if ever, short term appearances on the legal landscape of states, and any genuine assessment of their efficiency or value must be premised on the actuality of their usage and not on the public relations statements by governments (on temporariness) that generally accompany their birth.

10. See GROSS & NÍ AOLÁIN, *supra* note 7.

11. Posner & Vermeule do not credit any long term effects from the use of emergency powers (pp. 131–56, discussing the ratchet effect).

Equally lacking is any sustained reflection or acknowledgment of the important relationship between repression and mobilization in the emergency law context.¹² This area is not one in which many legal scholars have forayed.¹³ Nonetheless, Posner and Vermeule make claims beyond the legal in their book, suggesting at least some engagement with the social sciences as they advance their arguments. If such forays are to have traction, they lose significant validity when they ignore substantial research schools that have systematically revealed the problematic relationship between repressive law and social movements or groups who are the primary recipients of such legal and political attention. Drawing on social movement theory, this research posits an interactive relationship model as between the state and violent political actors. The challenge of such research, which is grounded by significant empirical support (largely ignored by Posner and Vermeule), is to posit a more nuanced assessment of the confrontation between the state and violent challengers. More particularly, it allows us to enter into a more sophisticated conversation about how that relationship is enabled by law, and informs us about how law in the short, medium, and long-term impacts upon key aspects of the mobilization process. To discount or ignore this frame of reference when making broad claims about the impact of emergency laws is to present a very narrow vision of cause and effect.

Finally, in their assessment of the “ratchet” effect of emergency powers (defined as a long-term trend towards ever-greater security and ever-diminishing liberty), which they discount almost entirely, the authors choose to ignore the well-established policy and legal spill-over effect of emergency powers. There is a complete discount of the “learning” that occurs between normal and exceptional systems, thereby making it very difficult to “undo” the emergency (p. 4).¹⁴ One specific example of this

12. Posner & Vermeule address in chapter 4 the claim that offensive measures against terrorism are counterproductive in the long run. Their rather formulaic response is that the danger of not responding against terrorism creates “an impression of weakness, which can itself increase terrorist recruitment and delegitimize the deterring government.” Their concern seems to rest on the supposed dangers of authoritarian government rather than on the link between repressive law and greater terrorist threat (p. 132). The argument has a straw man quality, in that it is rarely if ever a choice of “do nothing” and “do too much.” Rather the question for most civil libertarians is a question of balance in the range of choices available on the security spectrum, with the least effect on liberty.

13. There are some notable exceptions notably Colm Campbell & Ita Connolly, *Making War on Terror? Global Lessons from Northern Ireland*, 69 MODERN L. REV. 935–57 (2006).

14. See generally GROSS & NI AOLÁIN, *supra* note 7, at 171–243.

weakness is the assertion that “the basic constitutional structure remains unaffected by the emergency” (p. 4). As historical experience shows us, we need only reflect on the resort to emergency powers in Britain during World War I, the activation of the *Defence of the Realm Act* (1914), its subsequent export to the colonies,¹⁵ and its imprint on the shape of modern executive powers and cabinet government, to grasp the capacity of emergency powers to transmute, persist and extend.

III. CIVIL LIBERTIES ‘INTERFERE’

One essential premise of Posner and Vermeule’s academic and policy position is that “civil liberties are compromised because civil liberties interfere with effective response to the threat” (p. 4). Built into the paradigm is the notion that security is a sterile category, more specifically a conceptual category in which a clear divide is set up between “security” and “liberty.” I want to suggest otherwise: namely, to refute the suggestion that security does not in its internal shape and contours include a dimension of liberty, and that this dichotomous approach is both disingenuous and conceptually faulty. In short, to fully understand and give meaning to a concept of security we need to see it as imbued with a meaningful concept of rights. These things do not stand apart; they are organically linked.

Since the events of September 11, 2001, a continuous stream of governmental rhetoric, fuelled by the unilateralist position of the United States, strengthened by political and legal positions of international organizations, suggests that in the new global climate human rights are incompatible with the security of peoples and nations. But its gains are diminishing fast, both domestically and internationally, as an old/new language comes back to centre stage. It is found in the foreign policy of key democratic states, in the highest levels of international and regional organizations, and is supported by key international figures, reminding us that this trade off between human rights and security is not real.¹⁶ So, for example, the former United Nations Secretary

15. See A. W. BRIAN SIMPSON, *HUMAN RIGHTS AT THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* (2001).

16. The dual negative consequences for liberty and security are confirmed by the research undertaken by the International Helsinki Federation which has usefully identified 8 key areas of rights protections that have been negatively affected by State responses to terrorism since the events of September 11. International Helsinki Federation, *Anti-Terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11* (April 2003), found at

General Kofi Annan stated while issuing the Report of the *UN High Level Panel on Threats, Challenges and Change* (2004) that

“... the United Nations must be able to articulate an effective and principled counter-terrorism strategy that is respectful of the rule of law and the universal observance of human rights.”

An important UN document which reflects an equally thoughtful approach to combating terrorism and protecting liberties is the 2002 *Report of the Policy Working Group of the United Nations and Terrorism*.¹⁷ Specifically, a link is made between the United Nations' role in addressing human rights violations and the resort to terrorist acts by disaffected individuals, groups, and minorities, because the Report clearly recognizes that such violations can create the conditions in which terrorism thrives. The Report argues that “the fight against terrorism must be respectful of international human rights obligations.” Echoing this sentiment of the artificiality of a perceived split between the interests of security and liberty, the European Council of Minister's Guidelines state that “it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights.”¹⁸ The impact of this thesis at either the international or the domestic level is dismissed by the authors of *Terror in the Balance*.¹⁹

IV. THE “EXECUTIVE DEFERENCE” PRINCIPLE

A significant aspect of this argument is that the Executive in times of crisis is “better” than the courts and Parliament, essentially that institutional performance by the Executive is substantially superior. My starting point is normative wariness of such claims, and, equally, skepticism of their empirical basis. This is not to suggest that some deference is inappropriate. It is appropriate that the degree of deference to the executive is premised on the proximity (in time) to the crisis in question, and the na-

<http://www.ihf-hr.org/booklet/hrt26.php>.

17. The Policy Working Group Report makes clear that the core strategies of the United Nations in opposing terrorism are (a) to dissuade those who are (or might be) involved in terrorism, (b) to deny support (material, financial, political and legal) to those involved in terrorism, and (c) to sustain co-operation between States to thwart the actions and aims of those engaged in terrorism.

18. In this context, it is useful to recall Recommendation 1550 (2002) of the Council of Europe's Guidelines on Human Rights and the Fight Against Terrorism, as adopted by the Council of Ministers in July 2002.

19. The Office of the UN High Commissioner for Human Rights Office has expressed concerns that measures taken to eliminate terrorism may be activated in such a way as to infringe on fundamental freedoms. The High Commissioner's Office has also carried out a preliminary review of State reports under U.N. Resolution 1372.

ture and extent of catastrophes. However, at the very least, a missing link in such argumentation is the tendency to lose sight of the relationship between duration and emergency. This simply means that the longer in time we move away from the specific exigency, the greater the scrutiny that ought to apply to executive action, as well as to the calibration of power, review, and decision-making between institutions. The staying power of emergencies seems not to over-concern Posner and Vermeule, and in tandem they consistently challenge the capacity of lawyers, judges, and academics to make any judgment on the harms caused by the resort to exceptional legal powers. This deferential executive position added to inconsistent normative criticism is one of the predominant weaknesses of this book.

CONCLUSION

Two concluding reflections: First, we should record the apparent robustness of American judicial responses to regulation by the state in the post 9/11 context.²⁰ Despite the appeals by Posner and Vermeule that courts “defer to government action so long as there is any rational basis for the government’s position,” there appears to be some resistance to such timidity (p. 12). This speaks to some instinctive sense of their own legitimacy and role by the courts, and an inbuilt sense of the importance of their contribution to institutional balance and their institutional expertise to the specific issues that have been litigated before them. This positioning reflects not only an inherent constitutional balancing in the American context, which is not ousted by the fact of emergency, but illustrates the limitations of the book even as applied to the United States.

Second, it remains important to reflect on the traction of legal norms generally and the need to defend the adequacy of core legal capacities to respond to terrorism. The work of Kent Roach, who has methodically assessed the Canadian response to the events of September 11th, is also usefully recalled here.²¹ Roach has persuasively argued that there is a new atrocity-driven tempo evident in the use of expanded criminal law regulating anti-terrorism. Rather than fully testing the capacity of existing criminal categories (for example murder, conspiracy) to

20. See *e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

21. See KENT ROACH, *SEPTEMBER 11: CONSEQUENCES FOR CANADA* 21–55 (2003).

process perpetrators, political pressure to “name” terrorist crime in a unique matter, both to demonstrate state response and inculcate security in target populations, actually serves to undermine the liberties that democracies hold dear.²² This patterns a more general phenomenon that he identifies, of the tendency to amend the criminal law to respond to well-publicized tragedies and to “govern through crime.”²³ Thus, post September 11 additions to the criminal law reflect an augmentation of a “narrative” and “memorial” style to the criminal law, based on the perceived impact of the harm suffered, and not on an assessment of the capacity of existing law to respond. It has had clear spill-over to the regulation of terrorism, as the urgency of being seen to respond instantaneously by states has become as necessary as any proven efficiency of the response methods. These broader trends and patterns are missed or not of interest to *Terror in the Balance*. It is easy to be provocative in the debates concerning the interface between law and terrorism. It is also not a requirement that American scholars interested in the interface between liberty and security familiarize themselves knowledgeably with the long interface between law and terrorism in other jurisdictions. But, it is some regret that this provocative book does not take as seriously as it might the lessons that have been learnt from other places.

22. He has argued: “Had the September 11 terrorists planned their crimes in Canada and had law enforcement officials been aware of their activities, the existing law would have allowed them to be charged and convicted of serious crimes before they boarded the aircraft. They would have been guilty of conspiracy to hijack the plane, conspiracy to murder, attempted hijacking, or attempted murder when they were still planning their suicide missions. Such offences already carry high maximum penalties, including life imprisonment. The failure of September 11 was one of law enforcement, not of the criminal law.” *Id.* at 23.

23. See ROACH, *supra* note 21, at 24; THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE (L. Friedman & G. Fisher eds., 1997).