

Chapter Four

Protecting Constitutionalism in Treacherous Times: Why 'Rights' Don't Matter

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Introduction

The twenty-first century begins obsessed with matters of security and the supposed need to 'trade-off' security and liberty. So pervasive is this obsession that a recent Hollywood movie, known more for its state-of-the-art special effects and tortured plot lines than for its thought-provoking quality begins, dramatically, with the reading of an Emergency Proclamation.

The setting is Bermuda, a British overseas possession, in the eighteenth century. Its opening scene portrays a mass hanging, conducted with military efficiency. The victims are an array of hapless souls including men and women of all ages and a pre-pubescent boy. The first words spoken in *Pirates of the Caribbean: At World's End* are delivered in the crisply upper-class accent of a British officer:

In order to effect a timely halt to deteriorating conditions and to ensure the common good, a State of Emergency is declared for these Territories, by Decree of Lord Cutler Beckett, duly appointed Representative of His Majesty the King.

By Decree according to Martial Law, the following statutes are temporarily amended:

- Right to Assembly. Suspended.
- Right to *Habeas Corpus*. Suspended.
- Right to Legal Counsel. Suspended.
- Right to verdict by a jury of peers. Suspended.

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By Decree all persons found guilty of piracy or aiding a person convicted of piracy or associating with a person convicted of piracy shall be sentenced to hang by the neck until dead.

The words are punctuated with dramatic pauses at all the right places. On each utterance of the word 'suspended', the camera focuses beneath the gallows as the trap is released. Shackled feet appear, swinging, as each suspension of constitutional propriety is announced. Bodies pile high on crude carts, hauled off as the officer's last words are delivered. In Hollywood convention, his impeccable English accent marks him as a scoundrel, an evil-doer, of the worst sort.

One presumes that a United States (US) viewing audience is expected to derive a moral lesson of sorts from this. The King evokes, dimly perhaps, collective memory of the overseas monarch whose 'oppressions' provoked the American Revolution. The actions of the authorities are marked as utterly 'un-American'. Viewers are invited to identify with pirates, presented here as sympathetic and well-meaning sorts who struggle against unchecked power, undemocratic and unconstitutional assertions of authority, and the evils of Empire. The clipped British accent, the mechanical efficiency of the gallows permit no other association. Middle America, raised for half a century now on Disney-land rides such as that which inspired the 'Pirates of the Caribbean' series, consigns 'piracy' to a romantically amusing past. We are invited to focus on the excesses of duly constituted authority, personified in Lord Cutler Beckett and his officers. The bodies of the downtrodden accumulate too hastily to permit alternative interpretation. The camera lingers on a small boy, too short to reach the noose. His beefy executioners helpfully resolve the dilemma by hoisting him onto a barrel, fortuitously raising him to just the right height to reach his noose.

This set-up clearly marks the movie's antagonist as evil. Disappointingly, the fuller implications of this startling starting sequence are left unexplored. Nonetheless, it is hard to miss the resonances. President Bush, like the fictional British imperial authority of another time and place, has decreed that the common good requires long established constitutional principles to be set aside. *Habeas corpus*, the right to counsel, the right to a jury trial, and freedom of association are all threatened, qualified, constrained, or impeded during the 'War on Terror' just as in Disney's fictional past.

As in Lord Cutler Beckett's administration, the measures are temporary, limited to the duration of a 'war' on terror. Like the past empire of US fiction, contemporary America has created zones in which authority operates without constraint of law. Contemporary America, like the fictional eighteenth-century

colonial administration vilified in the Disney Corporation's movies, draws no distinction, in pursuit of enemies, between children and adults.¹

One should not make too much of popular culture, of course. Nonetheless, it is telling that a rather blunt critique of the 'War on Terror' has gained sufficient foothold to frame even an action movie. It is the brutality of the 'War on Pirates' and an authoritarian state administration's derogation of long-established 'rights' that serves to delineate 'good' from 'bad', 'hero' from 'villain', the virtuous from the 'evil-doer' for movie-viewers. Who, we wonder, can protect us from modern-day Lord Cutler Becketts?

Even highly manipulated, powerful, visual images such as those in *Pirates of the Caribbean: At World's End*, lack persuasive power, however, for those who take the threat of terrorism seriously. The killing of children at the gallows, like the killing of children by bomb, bullet, or bayonet, evokes one response if we presume the action to have been taken by a capricious, avaricious, and evil empire; quite another if common decency and, perhaps, civilisation itself, is viewed as utterly vulnerable to the threat represented by the particular children and those behind them. Though *World's End* does not pause to consider the violations of human dignity, property, livelihood, and life perpetrated by pirates, anyone seeking to 'read' the movie against contemporary circumstances cannot fail to register, powerfully, the real pain inflicted by terrorists. Images of airliners being flown into office towers, nightclub bombings in Bali, and attacks on railways, buses or subways in Spain, Mumbai, or London are seared into twenty-first-century Western consciousness. The fear that dirty nuclear devices, chemical or biological weapons might be unleashed on major cities in order to wreak damage and death on an unprecedented scale cannot be ignored. Such things *will* happen.

Confronted with the spectre of real terror, death, and destruction, and of real enemies quite unlike the playful pirates of fiction, most contemporaries are willing to trade a little freedom for a little security. In the world of realpolitik, terrorist threats must be taken seriously. Niceties such as the right to counsel, *habeas corpus*, privacy, or trial by jury, acquire an abstract character. Nice if you can have them, these lawyers' obsessions seem less important than life, property, or democracy: second order priorities, or luxuries perhaps.

But, is it lawyers' obsessions that are at issue?

So conceiving things seriously misconstrues the matter. The linguistic usages of lawyers have taken over much public discourse during the past half-century. Curiously, this has narrowed the range of consideration on immensely important

¹ See, eg, the case of Canadian Omar Khadr and his US *habeas corpus* proceedings: *OK, et al v George Bush, et al*, US District Court for the District of Columbia, Case 1:04-cv-01136-JDB <<http://www.nightslantern.ca/law/omarkhadr13june07.htm>>.

public matters and blunted critique of even draconian laws. In most liberal democracies, discussions of the virtues of this or that 'anti-terrorism' law have been cast in terms familiar to legalistic-minded civil libertarians. The analysis of anti-terrorism law has most often been championed by professionals whose detailed knowledge and focused critiques, as often as not, serve to confound. By focusing too much on particulars, larger shifts in the way power operates under the guise of the 'War on Terror' are obscured.

In this brief commentary, I hope to avoid confusing the trees for the wood, by taking the discussion of contemporary anti-terrorism law² to a level somewhat above the forest canopy, to a point from whence the full contours of the forest can be perceived, its breadth, depth, and height discerned. I hope to draw upon the perspective so attained in order to reveal a surprising truth. The violation of 'rights', at least as we now understand that notion, forms a surprisingly small portion of what is wrong with 'anti-terrorism' legislation in major Western countries. Consequently, the presence or absence of constitutionally entrenched 'rights' protections ('charters', 'bills', or 'human rights' legislation) determines only a small degree of the variance of outcomes when draconian state powers are subjected to judicial review. In substantiating this second point, it is necessary to attain a bird's-eye view of anti-terrorist law, but also to engage in some realism about constitutionally entrenched rights. One final point bears emphasis, though it cannot be developed in this essay: only the tiniest sliver of state action is ever subjected to judicial review. This gives any discussion of what happens in the courts a somewhat abstract, other-worldly character, grotesquely distanced from the quotidian routine in which subjects encounter state authority.

Bird's Eye View: Anti-Terrorism Law and the Principle of Legality

In his classic work, *The Morality of Law*,³ Lon Fuller offers a compelling account of the minimum conditions of legality. Much, it turns out, follows from the simple proposition that law serves to guide human conduct by means of rules. Fuller illustrates his understanding of law through an extended parable concerning a bumbling but well-meaning 'King Rex,' who makes a complete hash of governance because he is unable to appreciate the virtue and nature of law. 'Eight routes to disaster' emerge from Rex's failures:

² My central reference point throughout is Canada's anti-terrorism legislation, which I discuss at greater length in W W Pue, 'War on Terror: Constitutional Governance in a State of Permanent Warfare' (2002 Laskin Lecture in Public Law, Osgoode Hall Law School); (2003) 41 *Osgoode Hall Law Journal* (Special Issue on *Civil Disobedience, Civil Liberties, and Civil Resistance*, edited by H Glasbeek and J Fudge) 267, 267-92 (see also sources cited therein). Problematic aspects of Canada's legislation mirror features of similar statutes in the US, UK, and Australia, as contributions to this volume amply demonstrate.

³ L L Fuller, *The Morality of Law* (New Haven: Yale U P, revised ed, 1969).

1. a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis;
2. a failure to publicise, or at least to make available to the affected party, the rules he is expected to observe;
3. the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change;
4. a failure to make rules understandable;
5. the enactment of contradictory rules;
6. rules that require conduct beyond the powers of the affected party;
7. introducing such frequent changes in the rules that the subject cannot orient his action by them; and
8. a failure of congruence between the rules as announced and their actual administration.⁴

Fuller's *desiderata* are widely considered to embody the essence of the rule of law. Few could argue against the virtue of generality, promulgation, prospectivity, clarity, absence of contradictions, performability, constancy over time, or congruence of rules with actions.⁵

Casual observers of contemporary legal systems can be forgiven for thinking it unlikely that any of these 'routes to disaster' can be present in notoriously law-bounded modern democracies. Anyone who has ploughed through the mind-numbingly complex, elaborate, voluminous, legislation that emerged from Western legislatures in the aftermath of 11 September 2001 (9/11), would be forgiven for thinking it unlikely that failure to achieve rules — the first 'route to disaster' — could be at issue. Moreover, it seems entirely obvious that blowing up office buildings, trains, buses, and so on should be illegal. This, along with massive media attention on the 'War on Terror' makes it seem, at first glance, that none of routes two, four, six or seven (failure to publicise; incomprehensible rules; impossible-to-obey rules; unstable law) can be of concern. It would be logical to think that there can hardly be any question of one law authorising what another prohibits when it comes to terrorism. Hence, the fifth disaster route, 'contradictory rules', seems unlikely. Similarly, the third route to disaster, retroactivity, seems an unlikely reef on which anti-terrorism law might flounder. Indeed, it is commonly asserted that much anti-terrorism law only prohibits things that were previously illegal (killing civilians, conspiring to do so, etc). Finally, given the paramount importance of preventing terrorist attacks, one would think state authorities at all levels would be determined to ensure

⁴ Ibid 39.

⁵ See, eg, N E Simmond, 'Law as a Moral Idea' (2005) 55 *University of Toronto Law Journal* 61, 87. See also the remarkable book by M Ribeiro, *Limiting Arbitrary Power* (Vancouver: UBC Press, 2004).

congruence between anti-terrorism rules and state action: the eighth disaster route seems unlikely.

Closer inspection overturns each assumption. The very complexity of anti-terrorism statutes, which seemingly inoculates against failure to achieve rules (disaster route one), is our first clue. If we take Canada's anti-terrorism legislation⁶ as representative of the genus, surprising results begin to emerge. The deeper one probes the language, structure, and workings of anti-terrorism law, the clearer it becomes that *each and every one of Fuller's eight routes to disaster* is taken. As is commonly the case in human endeavour, the road to disaster is paved with good intent. Unfortunate consequences arise from the desire to 'name' global terrorism as a distinct category of criminal activity, from the intent to disrupt terrorist organisations (rather than merely prosecute criminal activities after the fact), and from the desire to draft legislation so as to ensure that no future terrorist can ever shelter in legal loopholes.

Anyone who has given the matter any thought knows the difficulty of giving a precise definition to 'terrorism'. The term is invoked for its rhetorical power and denunciatory effect rather than analytical coherence. 'Terrorist' actions are invariably prohibited under ordinary criminal prohibitions on violence, intimidation, or extortion. It is a crime to blow people up deliberately, with or without special 'anti-terrorism' laws. So too, conspiracies to do such things, aiding and abetting individuals doing them, and so on, are criminal under ordinary law. It may be that 'anti-terrorism' gives emphasis to the denunciation of all non-state violence, bolstering the moral power of law, perhaps. Nonetheless, the urge to denounce imports lack of clarity: how does one distinguish ordinary murder from terrorist murder? The issue is made murkier still when two additional elements are taken into account.

First, following Bush doctrine,⁷ Canadian legislators sought to prohibit not just terrorist acts against Canadians (a relatively straight-forward matter), or even against Canada and its allies (designated from time to time by delegated legislation, perhaps), but terrorism against *any* state authority *anywhere*.⁸ This, of course, is nonsense. No country that plays on the world stage wishes to forego the possibility of destabilising its enemies by aiding and abetting violent opposition ('terrorism') within their borders. The stated objective on the face of anti-terrorism law is, thus, one that no one seriously intends. Even countries (such as Canada?) who would be blameless bystanders in world affairs endorse

⁶ Although much law-making is somewhat affected by 'anti-terrorism' intent, the most prominent of Canada's 'anti-terrorism' statutes are the *Anti-Terrorism Act*, SC 2001, c 41 and the *Public Safety Act*, SC 2004, c 15.

⁷ A concise retrospective on the Bush administration's 'War on Terror' including a discussion of its key elements is provided in S Power, 'Our War on Terror', *New York Times* (New York), 29 July 2007.

⁸ This point is elaborated more fully in Pue, above n 2.

ally-sponsored terrorism through their silence.⁹ To be blunt, we have deliberately passed statutes that do not mean what they say. This is the legislator's equivalent of making promises with fingers crossed: the statute book is liberally peppered with discretionary powers in order to allow the law to mean whatever officials might, from time to time, wish it to mean. Discretion permeates anti-terrorism law's genetic code: the widest possible latitude is accorded to state authorities (senior police officers, Ministers of Justice, and the like) when it comes to intervening against 'terrorism'. This is specifically because no one wants vigorous prosecution of everyone and every group, association or institution that violates the letter of our law. We have, in short, a deliberate, structural 'failure of congruence between the rules as announced and their actual administration' (disaster route eight). It is as if the legislators who passed these laws had their fingers crossed behind their backs the whole time.

Second, anti-terrorism law seeks to disrupt the networks on which terrorists rely. So far, so good. Complexities intrude, however, when we move from targeting the generals and ground-troops who initiate terrorist violence, to reach into the wider networks of more or less passive supporters, financial backers, bankers, financial institutions, and agents. Cognisant of the cellular organisation of the 9/11 attackers and knowing that several of those individuals held imperfect knowledge of their mission, Canada introduced an extremely broadly defined offence of 'facilitating' terrorism.¹⁰ In another piece, I have summarised certain aspects of the facilitation offence this way:

Bizarrely, *knowing* facilitation can happen even though no terrorist activity was in fact carried out, where the 'facilitator' does not know "that a particular activity is facilitated", and where no particular terrorist activity was foreseen or planned at the time it was facilitated.¹¹

Though learned judges are capable of 'reading down' facilitation provisions so as to render them both intelligible and, perhaps, tolerable, the statutory language is extraordinarily, unnecessarily, imprecise. It is hard to know which of Fuller's requirements of legality is left inviolate in such statutory schemes. A system founded, at every critical juncture, on official discretion fails to achieve rules at all: the first and essential requirement of legality is absent. 'Umpire's Discretion' prevails.¹²

⁹ It is salutary to recall that the Taliban was much aided by the West in the days when their war was with Russia and that both Nelson Mandela and George Washington meet the Canadian definition of terrorists.

¹⁰ See *R v Khawaja* (2006), 214 CCC (3d) 399, WL 3031774 (Ont SCJ, Rutherford J); 2006 CarswellOnt 6551 [30]ff, for a summary of the immediate background at the time the *Anti-Terrorism Act* was drafted. Canadians had prior experience of cellular terrorist organisations in the Federation for the Liberation of Quebec (FLQ), however.

¹¹ Pue, above n 2, 278.

¹² S Arnold, 'Umpire's Discretion: States of Insecurity and Canada's Anti-Terrorism Legislation' (manuscript of summer, 2007).

Rights Don't Matter

This perspective is obtainable only from a bird's eye view. It is as hard to discern from 30,000 feet as it is from ground level. Too distanced a perspective dulls perception, leading to jingoistic, utterly illogical, defences of the statutory scheme. Prime examples of jingoism include the surprisingly common assumption that the Act passes muster either because 'Canada is a pretty decent country' or because it lacks one or more offensive provisions found in similar legislation elsewhere (the USA PATRIOT Act¹³ is a favourite whipping boy, here). Others, displaying stunning capacity for non sequitur, conclude that otherwise objectionable laws are acceptable because 'our political leaders are trustworthy' or 'our security personnel are well-meaning'.

Conversely, viewing the matter from a position too close to the ground of criminal law practice or 'constitutional' law doctrine obscures the larger story. The particular camouflages the general; the wood is lost for the trees. A sloppy habit of thought that common lawyers have fallen prey to during the past half-century compounds the problems of perceptions dimmed by complacency on the one hand or too intense a focus on detail on the other. We have become inured to a degree of imprecision in statutory drafting that routinely far exceeds the requirements of pragmatic governance, much less the requirements of the rule of law.

I do not wish to be understood as implying that the many *specific* objections to anti-terrorism law have no bite. An impressive line-up of eminent scholars has laboured since 2001 to identify profound problems with many particular aspects of Canada's *Anti-Terrorism Act*, for example.¹⁴ Some challenges have begun to find their way to court.¹⁵

When problems are identified in the scope or operations of anti-terrorism legislation, the hope is commonly expressed that the *Canadian Charter of Rights and Freedoms* (the '*Charter*')¹⁶ will knock off the roughest edges. Similarly, scholars, lawyers and rights activists in countries lacking an entrenched bill of rights often take the view that one or other bad outcome could be avoided 'if only' they enjoyed similar constitutional structure.¹⁷ Among the more

¹³ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)* Public Law No 107-56, 115 Stat 272 (2001).

¹⁴ A good amount of scholarship that has stood the test of time was published during the very short period of time in which Canada's *Anti-Terrorism Act* was before Parliament. See R J Daniels, P Macklem, and K Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).

¹⁵ See *R v Khawaja* (2006), 214 CCC (3d) 399, WL 3031774 (Ont SCJ, Rutherford J); 2006 CarswellOnt 6551; *O'Neill v Canada (Attorney-General)* (2006), OJ No 4189; *Charkaoui v Canada (Citizenship and Immigration)* [2007] SCC 9.

¹⁶ *The Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.

¹⁷ An enormously important and careful comparative study makes such arguments, though in a subtle and nuanced fashion in comparing rights protection in three areas (double jeopardy, same-sex

thoughtful scholars making this argument, Australia's George Williams, is unambiguous:

I should state clearly my position on a Bill of Rights. My view is that we do need better formal legal protection for human rights at the national level and in each of the States and Territories ... [I]t has become all too clear that Australia does have a range of serious human rights problems, such as the detention of young children seeking asylum, the indefinite detention of asylum seekers who cannot be deported and our overreaching terror laws (which in some respects like the new powers for ASIO [the Australian Security Intelligence Organisation] go beyond even the laws enacted in the United States). There are also problems in regard to the undermining of our most important political freedoms. A good example is the right to vote ... a so-called 'electoral integrity' measure, removes the vote from prisoners and also forces the closure of the electoral roll on the day that the election is issued, thereby denying thousands of Australians the chance to change their enrolment details and many young Australians the chance to vote for the first time.¹⁸

Similarly, Senator Trish Crossin is on record to the effect that entrenched rights protection would have ameliorated the worst effects of Australia's anti-terrorism legislation: 'A Bill of Rights would ensure that those fundamental freedoms are written down, and provide courts with the ability to examine and rule on instances where those rights may have been breached'.¹⁹ Again, when the High Court upheld Australia's use of 'interim control orders' under its anti-terrorist regime in the case of 'Jihad Jack',²⁰ one response was to call for an entrenched bill of rights. *The Age* reported:

Human rights lawyer Greg Barns ... [said] the ruling highlighted the need for Australia to have a bill of rights ... "This is the high point of the capital-C conservatism of the current High Court", Mr. Barns said ... [I]n the absence of a bill of human rights, the High Court in the past had been prepared to check

relationships, hate speech) in Australia, Canada, New Zealand, and the UK. See L McNamara, *Human Rights Controversies: The Impact of Legal Form* (Abingdon & New York: Routledge-Cavendish, 2007).
¹⁸ G Williams, 'Victoria's Charter of Human Rights and Responsibilities' (Speech delivered at the Senate Occasional Lecture, Parliament House of Australia, 7 July 2006). The fact that the Australian High Court has recently accepted that a blanket ban on prisoners' right to vote is unconstitutional qualifies, but does not fundamentally contradict Williams' more general point. George Williams has been a passionate advocate for entrenched rights protection in Australia. See, amongst his many publications, *A Charter of Rights for Australia* (Sydney: UNSW Press, 2007); *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (Sydney: UNSW Press, 2006) (with Andrew Lynch); *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (Sydney: UNSW Press, 2004); *A Bill of Rights for Australia* (Sydney: UNSW Press, 2000).

¹⁹ T Crossin, 'The Rights of the Human Rights Act' (Paper presented to the Darwin Launch of the Campaign by New Matilda for a Human Rights Act for Australia, 21 July 2006).

²⁰ *Thomas v Mowbray* [2007] HCA 33 (2 August 2007).

the power of Australian governments. "Today the High Court has abrogated that responsibility."²¹

It is hard to know what to make of such arguments in the abstract. Entrenched rights' codes undoubtedly set out a certain level of constitutional aspiration against which citizens, officials, and judges alike are asked to evaluate their actions. The standards can be taken as consensual and are, in any event, 'binding'. Here lies the rub, however.

The formal theory of the thing apart, the 'bindingness' of constitutionally entrenched rights is a good deal less certain than is often thought. This is not because we presume bad faith on the part of officials or judges. Nor is it only because some courts are, as Barns suggests, more inclined to 'capital-C conservatism' than others.

The inherent ambiguity of language intrudes powerfully, destabilising the content of even the most 'certain' rights. Section 2 of the *Charter*, for example, protects the 'fundamental freedoms' of 'thought, belief, opinion and expression', along with freedom of 'conscience and religion', 'peaceful assembly', and 'association' for 'everyone'.²² No weasel words are used. In practice, however, these seemingly unqualified 'fundamental freedoms' can be restricted in myriad ways without constitutional rupture. Free expression does not licence defamation or 'hate speech'; freedom of religion does not protect the use of prohibited narcotics in sacramental rites; and the freedom of peaceful assembly is violated by state authorities with surprising regularity.²³

Other rights are explicitly qualified even in their utterance. Thus, deprivation of 'life, liberty and security of the person' is entirely allowable under the terms of Canada's *Charter* provided it is done 'in accordance with the principles of fundamental justice' and it is only 'unreasonable search or seizure' and arbitrary detention and imprisonment that are prohibited (*Charter* ss 7, 8, and 9, respectively). The point is *neither* that these words are meaningless nor that judges, officials, and law-makers fail to take them earnestly to heart on a daily basis. They are not, however, unambiguous, not absolute and, as words on paper, can never be self-enacting. These conditions apply to all constitutionally entrenched rights, everywhere, even if no further words of explicit limitation are found.²⁴ It is naïve to hope for too much in the way of certainty merely

²¹ B Nicholson, 'Kirby Lashes Judges over Terror Case Ruling', *The Age* (Melbourne), 2 August 2007.

²² *The Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) 1982 c 11, s 2.

²³ On one side of this see, W W Pue, 'Trespass and Expressive Rights' (Paper prepared for the Ipperwash Inquiry) <http://ipperwashinquiry.ca/policy_part/research/pdf/Pue.pdf>.

²⁴ Canada's *Charter* contains a further qualification: '1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

because a statement of rights has been constitutionally entrenched. Lawyers love the ambiguity of language and, always, can make much of it.

All of this provides considerable grist for the lawyers' mill, of course. What effect it has on channelling anti-terrorism law along more, rather than less, desirable courses is less clear. The necessary imprecision of language leaves any marginally competent lawyer enormous room to manoeuvre, an effect accentuated in times of crisis or perceived crisis. As a result, the presence or absence of constitutionally entrenched 'rights' protections ('charters', 'bills', or 'human rights' legislation) determines only a small degree of the variance of outcomes when harsh or extraordinary state powers come to judicial review.²⁵

This does not dispose of the issue of the utility of formal rights protection however. A constitutional bill of rights has undoubted educational value. Bills of rights and charters are displayed as posters in schools and offices, 'charter values' are invoked in public discourse and rights issues enter into public consciousness in a different way than they do in countries without entrenched 'rights protection'. When all is said and done, it is not unreasonable to assert, modestly, that the constitutional entrenchment of 'rights' can do no harm, and might actually lead to the enhancement of rights.

The Canadian experience of living with both a *Charter of Rights and Freedoms* and an overreaching anti-terrorism regime, suggests otherwise, I think. There is, at a minimum, reason for caution in this regard. I wish to assert that the presence of a charter in Canada has distorted public discourse about civil liberties and rights. Recognising that it is notoriously hard to identify cause and effect in the realm of law and social change, I do not want to enter into the complexities of the wider field of enquiry that this opens up, nor to assert that the *Charter* is *primarily* to blame for any particular evils. My more modest claim is that the quality of rights protection in any given culture, its commitment to the principle of the rule of law, and the substantive outcomes are not 'determined' by the presence or absence of a charter. I do assert that the presence of a charter in Canada has co-existed with a diminution in the quality of public discourse and that specific, identifiable, features of charter politics and charter law tug in this direction. I would not wish for a moment, however, to suggest that other factors are not in play, nor that the *Charter* is the *causa causans* in any of this. Others, no doubt, would point to declining union membership or church participation, falling newspaper readership, television's narcotic effect, the decline of political

The quagmire of Constitutional interpretation that this opens up cannot be entered into here. Suffice it to say that with or without such an explicit statement, *all* entrenched rights in all countries are subject to 'reasonable limits', however established.

²⁵ Many seemingly dramatic outcomes in US courts have as much to do with the limits on the constitutional division of power between the federal executive on the one hand and the federal legislative branch or the state's powers on the other, rather than with 'rights' as such. See *Hamdi v Rumsfeld*, 542 US 507 (2004); *Rasul v Bush*, 542 US 466 (2004).

parties, a general dumbing down of politics, consumerism, the evils of public education, 'Americanisation' of Canadian culture, or the perfection of politics by polling consequent on the publication of Theodore White's *The Making of the President, 1960*.²⁶

Those qualifications noted, I wish to suggest three interrelated ways in which charters distract from the mission of attaining governance by the rule of law, much less 'rights protection'. In order to appreciate the ways in which this happens it is helpful to visualise 'entrenched' rights protections in three different, but compatible ways: as a Paper Tiger, a Trojan Horse, and a Narcotic Substance.

Paper Tiger

Entrenched rights are Paper Tigers because the inherently open texture of words combines with the obvious necessity of incorporating a large 'fudge factor' in any document purporting to crystallise *anything* for all time. These factors have been canvassed above. Their effect is compounded considerably in times of perceived crisis if only, as legal cliché has it, because the constitution cannot become a 'suicide pact'.²⁷ The ambiguity of language makes entrenched charters or bills of rights Paper Tigers that roar, like ventriloquists' puppets, only when people give them voice.²⁸ Despite much fuss about a purported leftward tilt of 'activist judges',²⁹ the Supreme Court of Canada has yet to strike down a statute that the federal government is earnestly determined to defend. The Paper Tiger has roared most loudly in modifying laws that the government has little interest in sustaining, but that are too 'hot' to touch politically (abortion regulation and the exclusively heterosexual definition of marriage, for example). No statute considered crucial and staunchly defended by a committed federal government of Canada has yet been struck down.³⁰

²⁶ T H White, *The Making of the President, 1960* (New York: Atheneum Publishers, 1961).

²⁷ This much-abused formulation was first articulated by US Supreme Court Justice Jackson, in dissent, in *Terminiello v City of Chicago*, 337 US 1, 37 (1949): 'This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.'

²⁸ This, in effect, is the critique of both left and right critics of judicial approaches to *Charter* 'rights' in Canada.

²⁹ See, eg, F L Morton and R Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ontario: Broadview Press, 2000); R I Martin, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (Montreal: McGill-Queen's University Press, 2005); H White, *Judge Who Gave Canada Homosexual 'Marriage' Had Conflict of Interest Says Women's Rights Group* (2006) LiveSiteNews <<http://www.lifesite.net/ldn/2006/jul/06071907.html>>.

³⁰ A similar point is made in Joel Bakan's groundbreaking work, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

Trojan Horse

The *Charter's* deployment as a Trojan Horse was strikingly apparent in the events leading up to the passage of Canada's *Anti-Terrorism Act*. Despite the hurried introduction and passage of the legislation immediately following the 2001 terrorist attacks on the US, substantial and sustained criticism of the legislation emerged before the Bill could be passed. Critics ranged from the Evangelical Fellowship of Canada (which prepared a stunning brief)³¹ to an elite group of legal experts mobilised by the University of Toronto Law Faculty.³² In response the *Charter* was dusted off by Ministers and their most senior advisors to provide cover for the *Anti-Terrorism Act*. The Attorney-General of the day defended the legislation on the basis that it had been carefully reviewed by legal experts in the government's employ, who declared it safe from *Charter* review. In Orwellian fashion, Ottawa's upper echelons spoke of the Bill as having been so cleverly drafted as to be '*Charter-proof*'. Politics, unlike law, is unconstrained by logic. This declaration was spun effectively to support an altogether different proposition: because the Bill could not be challenged under the *Charter* it had to be good law. With studied cynicism, the *Charter* was used to bat away any and all substantial questioning of the constitutional propriety or wisdom of the Bill. 'Politics' of the crassest sort, the bar was set very low, deflecting attention entirely from the wisdom of the statute.³³ A focus on *Charter* compliance as, in effect, the only relevant 'rights' concern, says nothing about the way in which police or security officials will use the Act, nothing about the likelihood of the Bill attaining its desired ends, and nothing about its consonance with Canadian standards of civil liberties, justice, constitutionalism or the rule of law.

The strategy worked. The vehicle used to import unwise legislation that does profound violence to civil liberties into Canada's statute books (legislation, by the way, that is remarkably similar to Australia's in key aspects) was the *Canadian Charter of Rights and Freedoms*.

³¹ Evangelical Fellowship of Canada, *Submission to the Standing Committee on Justice and Human Rights on Bill C-36, An Act in Order to Combat Terrorism*

<<http://files.efc-canada.net/si/Religious%20Freedom%20in%20Canada/EFC/Anti-Terrorism%20Bill%20C-36.pdf>>.

³² R J Daniels, P Macklem, and K Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 99.

³³ K Roach, *September 11: Consequences for Canada* (Montreal, Quebec & Kingston, Ontario:

McGill-Queen's University Press, 2003): 'Such a strategy may deceive a public who thinks that consistency with the Charter means that rights are not infringed ... Constitutionalism in Canada before the Charter was built on the notion that those in power should not exercise their legal powers to the fullest extent possible even in times of perceived crisis. It was fundamental to British constitutionalism that what was legal might nevertheless be improper and unconstitutional ... we are losing sight of this older sense that power must be restrained by decency, prudence, and tradition, not just the legal limits that lawyers and courts impose on us.'

Narcotic Effect

If a charter serves to camouflage the unpleasantness of certain laws, it also has a longer-term narcotic effect, numbing citizens to important matters of public governance. It does this over the long-term partly in the same way the 'Trojan Horse' strategy works in the short-term. Charters, bills of rights, and their ilk remove key issues from the domain of informed public debate, 'professionalise' rights-talk to an astonishing degree, and segregate matters of rights and liberties from the legitimate ambit of lay knowledge. Democratic governance is eviscerated under such conditions. This disempowering of the citizenry on issues related to liberty works in part because, through the stunning effectiveness of the Trojan trick, 'charter compliance' is offered as proof positive of legislative wisdom, obscuring issues of constitutional propriety lying below the charter threshold. The trick works only because charter talk professionalises, abstracts and removes from politics.³⁴ Citizens quickly become lost in discussions of section numbers, qualified rights, matters that are 'demonstrably justifiable in a free and democratic society', non obstante clauses, 'reading down', and multiple-stage tests. At each point in such discussions *the point* of particular issues gets lost in a sea of technicality. Even the simplest principles (you should not imprison someone in secret and indefinitely on executive command) is lost sight of.

A charter can serve to distract attention from what are in fact foundational constitutional questions: *who* should be able to do *what* to *whom*, *when*, and under *which* circumstances. These questions are the core of constitutionalism and working them out has been a constant struggle over centuries encompassing at least the period from the *Magna Carta* to the present. The 'working out' has not been exclusively or even principally a matter of the interpretation of written constitutions in any country derived from a Westminster model of governance (including the US).³⁵ Though much disparaged by scholars for a half-century or more, the 'rule of law' remains the *sine qua non* of constitutional governance. Bizarrely, the Canadian experience, with rare exception, has been to focus critique on this or that 'Charter' violation to such a degree as to miss entirely the massively undefined and largely secret powers vested in officials under the rubric of the 'War on Terror'. This is the 800-pound gorilla in the room. The violation of 'rights', at least as we now understand that notion, forms a surprisingly small portion of what is wrong with 'anti-terrorism' legislation.

³⁴ Such outcomes are often welcomed by elected officials, who can conveniently avoid their responsibilities by fobbing tough questions off to the courts. McNamara, above n 17, 255, aptly observes that: 'A feature of the Canadian model as it has taken shape, that may have been unanticipated in 1982, is the tendency for the Charter to be regarded as a tool of the judiciary, and for litigation to be seen as the default strategy of Charter engagement. As a result, governments have not always been proactive in fulfilling their own obligations to advance human rights goals.'

³⁵ The real 'activist judges' in both Canada and Australia were able to protect rights rather vigorously during the immediate post-Second World War years by drawing on British Constitutional tradition in articulating a sort of implied Bill of Rights appended to federalism in each country.

Space precludes a full exploration of these themes, but one recent case serves to illustrate the general point. In *R v Khawaja*³⁶ (*Khawaja*) the Ontario Superior Court of Justice heard an application questioning the constitutional validity of Canada's anti-terrorism scheme. Mohammad Momin Khawaja had been charged with various offences involving participation in a terrorist group and 'facilitating' terrorism. Counsel for the accused sought a declaration that various sections of the statutory scheme were:

of no force and effect pursuant to section 52(1) of the *Constitution Act, 1982*, on the basis that the provisions are vague and/or over-broad, they dilute the essential fault requirements of criminal law, and they infringe his rights to freedom of association, freedom of conscience and religion, and freedom of thought, belief, opinion, and expression pursuant to section 2 of the *Charter*.³⁷

Similar objectives might have been expressed without invoking the *Charter*, of course. Long-standing principles of statutory interpretation — each designed to protect freedom — such as that criminal statutes should be strictly construed, that ambiguity should be resolved in favour of the accused, that the legislature should be presumed to intend minimal infringement of liberty and, conversely, be explicit as to its liberty-infringing intent, and so on, apply. Such principles have been diminished in application in Canada during the period in which all attention has focused on the *Charter* as the most important vehicle for protecting rights.

The allegation of over-breadth in *Khawaja* provides a stunning illustration of how ineffective 'rights protections' can be in a charter regime. Mr Justice Rutherford concluded that the impugned provisions were neither overbroad nor void for vagueness because 'they can be read, construed and applied in conformity with the principles of fundamental justice'³⁸ (ie, in a fashion that rendered them constitutionally acceptable). His Lordship's ruling is carefully reasoned and seemingly in conformity with the law as established by the Supreme Court of Canada in these respects. What is interesting about the reasoning offered and the result reached in *Khawaja* is not any error on the part of the deciding judge, but the shocking possibility that he may be absolutely correct. Even the casual observer will note the glaring illogic of the approach taken: the fact that a Superior Court Judge, who has enjoyed both the luxury of time to reflect and the benefit of learned submissions of counsel, is capable of 'reading', 'construing' and 'applying' vague or broad words in a lawful fashion rather begs the more important question of how the law serves to guide citizens and state officials alike. Statutory language that is only rendered lawful after it is interpreted in court violates almost every principle of legality that frustrated the blundering

³⁶ *R v Khawaja* (2006), 214 CCC (3d) 399, WL 3031774 (Ont SCJ, Rutherford J); 2006 CarswellOnt 6551.

³⁷ *Ibid* [3].

³⁸ *Ibid* [6].

King Rex in Lon Fuller's fable: the police officer is likely to misconstrue the extent of her power; the citizen to suffer accordingly. A modicum of realism suggests that lawful state conduct requires clarity in statutory drafting, not the sort of *ex post facto* rationalisation that reading down permits.

On the vagueness arm of the ruling, his Lordship noted the rule of law rationale for proscribing vague laws, citing authority to the effect that '[a] citizen is not to be deprived of liberty under a law that is vague'.³⁹ The rub comes, however, not because of a failure to recognise the importance of principles relating to liberty, but because of how they have been translated into constitutional practice by the Canadian courts. The Supreme Court of Canada has fallen into habits of extreme 'deference' to the legislature, to such an extent that it requires almost nothing back in terms of clarity of statutory drafting. Its doctrines relating to 'void for vagueness' fatally compromise the principle: so much so that Peter Hogg, the 'dean' of Canadian constitutional law experts has said that 'almost any provision, no matter how vague' would pass the test.⁴⁰ The treatment of the Supreme Court of Canada's test in *Khawaja* confirms Hogg's insight and is worth quoting at length:

17. The degree of precision required in our laws is not, however, to lay out a prescription such that one can predict with certainty the outcome of all conceivable factual situations. There are not enough draftspersons to accomplish anything like that; and who could read the volumes that would be required? A framework delineating the area of risk is what is required. The standard was described in *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.) by Gonthier J. at 638-9 in these terms: "Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualised by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances."

"By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualisation. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens."

"Indeed, no higher requirement as to certainty can be imposed on law in our modern state. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may

³⁹ Ibid [16].

⁴⁰ Ribeiro, above n 5, 4.

think it is. *It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective.*" [Emphasis added by Mr Justice Rutherford]

18. I am not persuaded that the provisions in question are vague to the point of being unconstitutional. They describe conduct in a fashion that provides notice of what is prohibited and set an intelligible standard for both citizen and law enforcement officials. The fact that we were able to debate the potential boundaries of the provisions in court supports this conclusion. I shall return to the motivation clause later in another context, but the fact that the prohibited action may be motivated "in whole or in part" by a political, religious or ideological purpose, objective or cause does not, in my view, open the door to all kinds of actions. The prohibited actions are all spelled out with reasonable precision in terms of their intended harmful consequences in 83.01(1)(b)(ii) (A)-(E) of the definition. These intended, harmful consequences are all clearly undesirable, adequately comprehensible and not at all surprising objectives of criminal sanctions.

19. It is not sufficient in my view to conceive of hypothetical circumstances that test the periphery of a legislated prohibition. If a provision clearly identifies and applies to a core of misconduct but its application to peripheral conduct is uncertain, that does not mean that the provision is impermissibly vague. In such a case the law provides a basis for legal debate and the judiciary must determine the extent of its application.⁴¹

With respect, this mischaracterises the relevant issues considerably. To portray (paragraph 17) absolute linguistic certainty as the only alternative to utter imprecision is to proffer a *reductio ad absurdum* that could justify virtually any degree of drafting sloppiness or deliberate overreach. The dismissal of 'hypothetical circumstances that test the periphery of a legislated prohibition' sounds reasonable enough (there is, after all, danger in *reductio ad absurdum*) but is too dismissive by half. It is not, in fact, hard to imagine circumstances in which the wide discretion conferred on state officials by Canada's anti-terrorism legislation might be misused, and not all of them are fanciful.⁴² Such 'hypotheticals' are particularly likely to give cause for concern to people who engage in charitable work in conflict zones (such as the Evangelical Fellowship of Canada) or whose families and connections reside in such areas. Elementary realism about charity and conflict, about state officials and minority groups

⁴¹ *R v Khawaja* (2006), 214 CCC (3d) 399, WL 3031774 (Ont SCJ, Rutherford J); 2006 CarswellOnt 6551, [17], [18], [19].

⁴² I develop this point much further in Pue, above n 2.

would suggest a more careful approach to 'hypothetical circumstances that test the periphery of a legislated prohibition' than Mr Justice Rutherford undertakes in this judgment. Curiously, his Lordship 'read down' the motive provision of the terrorism offence in Canadian law for just such reasons, citing legal scholar and one-time Justice Minister Irwin Cotler to the effect that 'the criminalisation of motive runs the risk of politicising the investigative and trial processes, while chilling the expression of "identifiable groups," and marks a departure from the general principles of criminal law in this regard'.⁴³

The most unfortunate feature of Mr Justice Rutherford's approach in *Khawaja*, however, is not that he introduced errors of logic in his analysis, but that he was compelled to do so by the case law emanating from the Supreme Court of Canada. Stunningly, though accurately, he concludes that '[t]he fact that we were able to debate the potential boundaries of the provisions in court' renders them constitutionally valid. It is hard to imagine any form of wording, however vague, that well-paid lawyers could not 'debate'. The test of voidness for vagueness is exposed for what it is: a constitutional 'protection' that can mean nothing in practice.

And yet, if the courts cannot, *at a minimum*, insist that penal statutes (and penal-like statutes) be clear enough as to provide real-life guidance, first, to state officials as to who should and who should not come under their scrutiny and, second, to citizens, as to which overseas charities, causes, or liberation groups they are entitled to support, assist, or donate to, the protections of law are rather hollow. The *Charter* has not helped us to avoid this unfortunate outcome. It may have helped us to get here.

The *Charter* has not significantly affected the substance of Canada's anti-terrorism legislation. It may have diverted attention from the main play, sidelined concerned citizens from active participation in debate and mystified members of the public as to the issues raised by that legislative package. 'Rights' matter little if official discretion buttressed by overbroad legislation cast in the vaguest possible terms substitutes for governance in accordance with intelligible legal rules. Lord Cutler Beckett would be pleased.

⁴³ *R v Khawaja* (2006), 214 CCC (3d) 399, WL 3031774 (Ont SCJ, Rutherford J); 2006 CarswellOnt 6551, [62].