

Chapter Six

Lay Perceptions of Terrorist Acts and Counter-Terrorism Responses: Role of Motive, Offence Construal, Siege Mentality and Human Rights

Mark Nolan^{*}

Introduction

This chapter reports data from an empirical study of lay perceptions of terrorist acts and counter-terrorism initiatives in Australia. Relationships were measured between the following independent variables: perpetrator motive, offence construal (how an incident was described by a police spokesperson), siege mentality beliefs (the belief that you are alone in the world and under siege), and human rights beliefs. The measured dependent variables were: perceived blameworthiness of the perpetrator and perceived appropriateness of counter-terrorism initiatives. Measurement of human rights beliefs were also made, including whether participants agreed that violations of civil and political rights were justified in response to a food tampering incident due to an overarching 'right to human security' (derived from the right to life). A 'right to human security' had been asserted in Australia by the former Commonwealth Attorney-General in statements preceding data collection.¹

^{*} Senior Lecturer in Law, ANU College of Law, The Australian National University, Canberra, Australia <mark.nolan@anu.edu.au>. This research was funded by an Australian Research Council grant 'Terrorism and the Non-State Actor After September 11: The Role of Law in the Search for Security' (DP0451473 awarded for 2004-2007, <http://law.anu.edu.au/terrorismlaw/>). Thanks to Prita Jobling for her assistance in collecting and entering these data and conducting data analyses. Thanks to Dr Kristina Murphy and Professor Craig McGarty for allowing us to invite their psychology students to participate in this study as approved by the ANU Human Research Ethics Committee, Protocol Number 2005/219.

¹ For example, statements made by former Attorney-General Phillip Ruddock in the 2004 Deakin Law School Oration as published, P Ruddock, 'National Security and Human Rights' [2004] *Deakin Law Review* 14. See other statements by Ruddock such as in press interviews: <<http://www.abc.net.au/worldtoday/content/2005/s1497863.htm>>; G Carne, 'Reconstituting "Human Security" in a New Security Environment: One Australian, Two Canadians and Article 3 of the Universal Declaration of Human Rights' (2006) 25 *Australian Year Book of International Law* 1, note 11, citing P Ruddock, 'Recent Developments in National Security' (Press Release, 6 February 2004). In this press release, Ruddock supported the views of Irwin Cotler, then Attorney-General of Canada, stating: 'Cotler has been a prominent human rights advocate over time and he made in a number of addresses, an examination of this question about how you get the balance right between security and what are seen often as civil and political rights. But his starting point was to emphasise the importance of the civil and political

Participants in this sample were generally not in favour of increasing the police or state's ability to counter terrorism with unprecedented criminal processes. Participants were also not in favour of a 'right to human security' that would trump other civil and political rights. However, even in this sample, participants perceived the perpetrator to be *more blameworthy* if motivated by a jihadist cause *rather than by* an anti-corporate motive, *despite the fact that the remaining facts surrounding the terrorist act were identical in all four experimental conditions*. The implications of this effect are discussed for jurors' perception of blameworthiness in Australian terrorist cases that incorporate motive-like elements such as perpetrating an act or issuing a threat of action *with the intention of advancing a political, religious or ideological cause* in Australian counter-terrorism offences.²

The chapter begins by outlining the main reasons for conducting this empirical study: (i) the tendency to describe post-September 11 political violence as exceptional examples of criminality, and (ii) the concern over inclusion of motive elements in terrorist offence definition.

Exceptionalism and Siege Mentality

In this so called 'age of terror', much of the rhetoric used to justify changes to procedural and/or substantive criminal law suggests that the 'world has changed', sometimes 'forever'.³ As the rhetoric goes, the old ways of policing, prosecuting and imprisoning are simply inadequate. Much of the tradition and principle of criminal law and procedure is thought by some to be less relevant now and to create undue risks in the prevention or regulation of political violence. Such arguments proceed by suggesting that if we are to counter terrorism in this new age, investigative powers and criminal sanctions must be broadened if our efforts are to be effective in the face of new threats. This emphasis could be captured in the phrase 'exceptional law for exceptional times'. The use of this phrase, or arguments consistent with it, was a key motivation for conducting this empirical work measuring perceptions of politically-motivated violence *and* perceptions of the public responses to the use of such violence.

Insights into the social psychology of exceptionalism exist in research conducted before the attacks on America on 11 September 2001 (9/11). For example, the social psychological dynamics surrounding politically-motivated violence in the Middle East has been investigated by Israeli social psychologist Professor Daniel Bar-Tal from Tel Aviv University and colleagues. Bar-Tal has attempted to explain

right that citizens are entitled to expect in a civilised society and that is to be safe and secure, to be safe and secure from terrorist activities in which citizens are targeted.'

² See M Gani, Chapter 13 this volume, for a review of these offences.

³ For example, then Prime Minister John Howard stated in a radio interview, 'I want people to be more alert to understand the world has changed but I don't want them to stop living their normal lives': Radio 2UE, *Interview With John Laws*, 21 November 2002.

some of the social relationships in the Middle East in terms of the ongoing socialisation of Israeli Jews with a 'siege mentality'. A siege mentality is a socialised psychological belief orientation that shapes conceptions of the other, especially conceptions of those Palestinians perpetrating politically-motivated violence. Bar-Tal has described the orientation in the following terms:

A belief held by group members stating that the rest of the world has highly negative behavioural intentions toward them.⁴

Also,

a significant and influential part of the group believes that outsiders have intentions to do wrong to or inflict harm on their group ... this belief is usually accompanied with additional thoughts by group members such as that they are 'alone' in the world, that there is a threat to their existence, that the group must be united in the face of danger, that they cannot expect help from anyone in time of need, and that all means are justified for group defence.⁵

One striking aspect of this belief orientation is that it suggests more than simply feeling under threat by an outgroup and more than being motivated to promote your ingroup identity and to denigrate your opponent. In addition, those with a siege mentality believe that the rest of the world will not or cannot help them; those under siege perceive that they face this threat alone and in relative isolation from other potential allies and coalition members.

In light of this belief orientation, Bar-Tal lists four consequences of adopting siege mentality beliefs as being: (i) negative attitudes against 'the world', (ii) intergroup mistrust, (iii) pressure toward intragroup conformity, and (iv) self-protection and self-reliance. It is interesting to note that the perceived isolation consequent upon holding negative attitudes against 'the world' is likely to have a chilling effect on the perceived utility of international institutions and concepts such as international human rights norms. This retreat from rights is one measurable consequence of the adoption of siege mentality beliefs and that relationship was tested in this empirical study. Bar-Tal describes such a collective retreat from established norms in the face of siege in the following way:

[the group] may take drastic measures, even out of the range of the accepted norms for the intergroup behaviours, to prevent possible danger and avert the threat.⁶

⁴ D Bar-Tal and D Antebi, 'Siege Mentality in Israel' (1992) 16(3) *International Journal of Intercultural Relations* 251, 251.

⁵ D Bar-Tal and D Antebi, 'Beliefs about Negative Intentions of the World: A Study of the Israeli Siege Mentality' (1992) 13(4) *Political Psychology* 633, 634; D Bar-Tal, 'The Masada Syndrome: A Case of Central Belief' in N Milgram (ed), *Stress and Coping in Time of War* (New York: Brunner/Mazel, 1986) 32.

⁶ Bar-Tal and Antebi, 'Beliefs about Negative Intentions of the World: A Study of the Israeli Siege Mentality', above n 5, 643.

There is one further point to note about this perceived isolation and negative attitude against 'the world': that, in principle, it would appear to be a belief that could be held plausibly by the victims of politically-motivated violence just *as well as* by those using politically-motivated violence. However, in the present study the cognition and belief orientation of politically active 'terrorists' was not measured. Instead, the attitudinal response of members of hypothetical victim groups to a threat of politically-motivated violence was measured.

Bar-Tal and colleagues have made empirical, social psychological measurements of a 'siege mentality' orientation in Israel by asking participants to indicate their level of endorsement of the following statements presented as questionnaire items with Likert-scales (eg, 1 = strongly disagree to 7 = strongly agree):

- There is no place for internal criticism in times of danger.
- Anyone who opposes the majority opinion weakens the strength of the nation.
- In order to continue to exist we have to act according to the rule 'if anyone comes to kill you, kill him first'.
- We can't rely on advice from other nations, because they do not necessarily have our welfare at heart.
- There have always been countries which looked for closeness and friendship with us.
- Because of the persistent danger to our existence, we must end internal disagreements.
- Our existence is the end which justifies the means.
- The whole world is against us.
- Only demonstration of force will deter our enemies from attacking us.
- Only unity will save us from external enemies.
- When neighbouring countries get into conflicts, we will often be blamed for it.
- Most nations will conspire against us, if only they have the possibility to do so.⁷

This work by Bar-Tal and colleagues is an example both of social scientific work conducted well before 9/11 and of work that had begun to describe and even explain some of the dynamics of fearing terrorism and justifying counter-terrorism responses. Simple generalisation of psychological belief orientation across time and political context is neither simple nor desirable. However, even if some new dynamics are observed, measured and understood, it is interesting to test whether the contemporary social manifestation of exceptionalism and the more modern justifications of counter-terrorism responses can ever be said to be entirely new. For these reasons, it was considered timely

⁷ Ibid.

to manipulate and measure exceptionalism in Australia using questionnaire items akin to Bar-Tal's siege mentality scale.

Use of 'Motive' in the Definition of Australian Terrorist Act Offences

Even if the phenomenon of politically-motivated violence appeared new to some but not to others following 9/11, it is arguable that Australia's legislative response to terrorism to date has been exceptional. The Australian government avoided the urge to make amendments to Australia's substantive and procedural criminal law after the Hilton bombing on 13 February 1978,⁸ and, for example, following an attempted bombing of the Turkish Consulate in Melbourne in 1986.⁹ However, following 9/11, the federal Parliament made extensive amendments to both offence definition and criminal procedure. As a result of these amendments, terror suspects can be treated very differently to other types of offenders.

Perhaps the most controversial aspect of our domestic response has been the inclusion of political, religious or ideological motive, alongside an intention to coerce or influence by intimidation a government or the public, as a key part of the definition of a terrorist act in s 100.1(1) of the *Criminal Code Act 1995* (Cth) ('Criminal Code'). At first blush at least, this legislative decision seems exceptional according to common law criminal doctrine.¹⁰ The relevant drafting appears in the keystone definition of terrorist act in s 100.1 of the Criminal Code as follows:

s 100.1

(1)

...

terrorist act means an action or threat of action where:

...

(b) the action is done or the threat is made with the *intention of advancing a political, religious or ideological cause*; and

(c) the action is done or the threat is made with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

(ii) intimidating the public or a section of the public.

[Emphasis added.]

⁸ R M Hope, *Protective Security Review* (Canberra: Commonwealth of Australia, 1979).

⁹ *R v Demirian* [1989] VR 97.

¹⁰ B McSherry, 'The Introduction of Terrorism-Related Offences in Australia: Comfort or Concern' (2005) 12(2) *Psychiatry, Psychology and Law* 279, 282.

The *Hyam v DPP*¹¹ common law position on motive versus intention leads to concern over the drafting of the terrorist act definition. In that case a distinction was drawn between proof of intention and evidence of motive, insofar as motive is thought to be 'an emotion prompting an act that is quite separate from an intention'.¹² In this sense, motive, at best, may constitute some form of circumstantial evidence for proof beyond reasonable doubt of intention as the requisite *mens rea* element. The fault element as expressed in the s 100.1 definition of a terrorist act appears to require proof of the intentional advancement of a cause; perhaps dressing up proof of motive by using the more accepted *mens rea* language of intention. This drafting seems to require the fact finder to consider the perpetrator's emotional reasons prompting them to act (though see the conclusion to this chapter, and Gani, Chapter 13 this volume, where *Lodhi* is discussed).

Some may argue that the drafting defines a form of acceptable specific intent, as seen in aggravated assault with the intent to have sexual intercourse or even violence offences by those possessing higher order genocidal intent. On this view, the intention of advancing a political, religious or ideological cause appears more mainstream rather than it being an attempt to criminalise behaviour based on motive rather than intention. Taking this approach normalises the use of motive in s 100.1(1) and deems this intention to be a specific intent rather than a motivating emotion as described in *Hyam*. In that sense, the need to prove intention to advance a political, religious and ideological cause via terrorist acts would not be all that different from the way we have been criminalising specific intents as part of the definition of many (non-terrorism) offences predating 9/11. The case of *Hyam* does appear to legitimise the use of motive evidence as one way to prove intention indirectly in circumstantial cases. When this is allowed, then perhaps the distinction between motive and intention will be lost in the minds of the (lay) legal decision-maker, and, the conceptual integrity of 'intention' and 'motive' is blurred at the level of proof in any event.

Nonetheless, one possible conclusion is that s 100.1(1), as extracted above, is a significant departure from the relevant common law position on motive and consequently its use in the prosecution of offences is an example of exceptionalism.¹³ A realistic view, prompting empirical interest in the impact of motive on blameworthiness, would be that jurors may simply understand the proof required to be an invitation to judge blameworthiness based on motive rather than applying a more formal legal test of intention to the facts as condoned by *Hyam*.

¹¹ [1975] AC 55.

¹² Ibid 73 (Lord Hailsham).

¹³ McSherry, above n 10, 282-3, citing Bronitt, points out that status offences have criminalised characteristics possessed by some defendants and this may be conceptually close to the use of motive to criminalise physical acts.

Some criticism of the drafting in s 100.1(1) is made by Gani and Urbas who have commented on the inadequacy of the phrase ‘the intention of advancing a political, religious or ideological cause’.¹⁴ Gani and Urbas see technical problems making it difficult for a prosecutor to prove such an intention. Their arguments also suggest that the defendant’s motive will not always be used fairly, based on the current approach. The rather clumsy way of criminalising motive here, if that is what the legislature intended to criminalise, is illustrated by Gani and Urbas via reference to more difficult cases. For example, could a rather peripheral actor, such as an Australian medical worker in Sri Lanka, be charged with a terrorist offence. Gani and Urbas conclude their paper by noting that:

The focus on the technicalities of intention may, in the end, mean that legislation in the area of terrorism does not adequately deal with the problem at its core, the problem of motive. In the area of terrorism, we can never escape the question of the motives of the accused. In reality, it will be the touchstone to which juries will intuitively turn when reaching their decisions.¹⁵

The use of this ‘touchstone’ by juries is the main rationale for studying lay evaluations of criminal blameworthiness in this study. What level of perceived blameworthiness will be used if evidence suggests that perpetrators sought to advance *particular* political, religious or ideological causes? Will all such causes be considered equally blameworthy or are some causes perceived to be more heinous than others, *even if the action or threat of action is the same* and only the motives differ? If some motives will be considered more blameworthy than others, it is important to determine the extent to which that difference may impact on verdict decisions of lay jurors. In the context of the current ‘war on terror’, assertion of a religious motive, rather than other political or ideological motives, as the emotion prompting the alleged terrorist act may have more impact upon decision-makers.

The Empirical Research

Design

The study was designed to investigate the effect that *exceptionalism* has upon legal attitudes, and the reactions lay decision-makers have to the use of ‘*motive*’ in the definition of criminal offences. These two independent variables formed the basis for the design of this experimental study and four separate experimental conditions were created according to a 2 × 2 fully-factorial experimental design. This design can be described formally as a 2 (*offence construal by police spokesperson*: exceptional crime, standard crime) by 2 (*motive of the perpetrator*: jihadist, anti-corporate) between-participants design, where each independent

¹⁴ M Gani and G Urbas, ‘Alert or Alarmed? Recent Legislative Reforms Directed at Terrorist Organisations and Persons Supporting or Assisting Terrorist Acts’ (2004) 8(1) *Newcastle Law Review* 19.

¹⁵ *Ibid* 50.

variable has two levels. Each participant was randomly assigned to one of these resultant four conditions. The design and procedure are further described below and the labels for the conditions are set out in Table 1.

Four different sets of stimulus materials were designed and one set of stimulus material was given to each participant in each of the four experimental groups. The variables were manipulated by changing the information provided to participants in an incident report and in a police statement. The motive of the criminal (jihadist or anti-corporate) was varied between conditions as needed by changing the information in the incident report (see below in ‘Materials/Procedure’). The different types of offence construal (‘standard crime’ or ‘exceptional crime’) were created by providing different police statements to participants.

Table 1: Design of the study and explanation of the four experimental conditions

	Motive of the Perpetrator	
	<i>Jihadist</i>	<i>Anti-corporate</i>
Police Statement		
<i>Exceptional crime</i>	Jihadist/exceptional crime (j/e)	Anti-corporate/exceptional crime (a/e)
<i>Standard crime</i>	Jihadist/standard crime (j/s)	Anti-corporate/standard crime (a/s)

Other dependent variables measured in this study included: (i) the use of a siege mentality belief orientation when responding to the report of the incident, (ii) the perceived appropriateness of counter-terrorism powers, and (iii) the perceived appropriateness of human rights norms.

Adapting Bar-Tal’s Siege Mentality Scale

In discussion with Daniel Bar-Tal, the Israeli Siege Mentality Scale was adapted so that the focus of each item became Australian counter-terrorism policy. Such contextualisation of the siege mentality scale has not been attempted in past research, but it was hoped to create a sensitive measure of *terrorism siege mentality beliefs*. The siege mentality scale has not been administered to Australian participants to date, so this attempt was also a test of the generalisability of such belief items across cultures and across different political scenarios. The items used in the present study, in the order they were presented to participants, are as follows (the starred items were reverse-scored, meaning that higher ratings on those items mean *low* siege mentality rather than *high* siege mentality as per the other items):

- There is no place for internal criticism of Australia’s counter-terrorism policy.
- Anyone who opposes increasing Australia’s counter-terrorism powers weakens the strength of the nation.
- Most nations care about our security and welfare.*

- In order to maintain Australia's security from terrorism we have to act according to the rule 'if people come to kill you, kill them first'.
- Most nations are eager to cooperate with Australia and to achieve closer political and strategic relationships with us.*
- Many nations would be happy to see Australians suffer as the result of terrorist acts.
- Security from terrorism does not justify unprecedented and broad counter-terrorism powers as the means to that end.*
- Sometimes it feels as though large parts of the world are against us.
- Only the demonstration of force and harsh punishments for terrorists will deter them from attacking us.
- Only unity will save us from terrorist attacks.
- When other countries suffer terrorist attacks, Australia is usually not blamed.*
- Many terrorists will conspire against Australia if they have the possibility to do so.

Participants and Data Collection

Data were collected in the week of the Council of Australian Governments' (COAG) Special Meeting on Counter-Terrorism held on 27 September 2005. During that week, 124 undergraduate psychology students studying a psychology and criminology course at the Australian National University participated in the study.

Materials/Procedure

In the *jihadist conditions* (ie, both the jihadist/standard crime (j/s) condition and the jihadist/exceptional crime (j/e) condition) participants were asked to imagine that they had read the following report of a hypothetical incident set in Australia.

The Reported Incident: Police are investigating a possible food-tampering incident affecting supplies to a leading multinational hamburger chain established in Australia.

There has been no claim of responsibility as yet but police report that anonymous threats have been made to restaurant owners that state: 'Don't trust the safety of any of your food supplies today. Action has been taken so that infidels will be stopped in the name of Allah!'

The media reports detail that all unsold raw materials received from suppliers have been destroyed. Restaurants have closed. Customers who have consumed food from these restaurants today have been urged to have health checks immediately. This has resulted in high demand and long waiting times in hospital emergency departments and consulting rooms of doctors around the country. People are reporting a range of symptoms to hospitals and doctors including severe stomach cramps, nausea, and vomiting. A number of people have collapsed with, as yet, undiagnosed conditions. Emergency hotlines have been established to monitor the situation.

In the *anti-corporate conditions* (ie, both the anti-corporate/standard crime (a/s) condition and the anti-corporate/exceptional crime (a/e) condition) the incident report was as for the above except for the fact that the anonymous threat in the second paragraph was replaced with the following:

Don't trust the safety of any of your food supplies today. Action has been taken so that people will stop trusting the lies of multinational corporations who control our diets!

Participants were asked to express the 'apparent motive of the perpetrator(s)' in their own words after reading through the incident report. They then rated on a 7-point Likert rating scale (anchored by 1 = strongly disagree, 4 = no opinion, and 7 = strongly agree) 'the extent to which you agree that the motive you described above as held by the perpetrator(s) of the food-tampering incident is the most important factor in judging the blameworthiness of the act'.

In the *standard crime conditions* (ie, both the jihadist/standard crime (j/s) condition and the anti-corporate/standard crime (a/s) condition) the police report read as follows:

The Police Statement: ‘This is a clear example of how inappropriate political protest can endanger lives. From time to time we as a society have to manage such criminal acts in the best way we know how, according to long-standing norms of our criminal justice system. These actions are unjustified and deserve the full force of the criminal law in order to bring those responsible to justice. We will deploy the standard share of available resources proportionate to such events to swiftly identify the culprits. Our investigation of this incident and our willingness to prosecute these criminal acts must be evident to all.’

In the *exceptional crime conditions* (ie, *both* the jihadist/exceptional crime (j/e) condition *and* the anti-corporate/exceptional crime (a/e) condition) the police report read as follows:

The Police Statement: ‘This is a clear example of how the world has changed since 9/11. We must face this threat of terrorism head on and not bow to the terrorists responsible for these attacks. These actions are unjustified and deserve the full force of Australia’s counter-terrorism law and policies in order to bring those responsible to justice. We have diverted all available resources to the investigation of these incidents and are working with counter-terrorism agencies to swiftly identify the culprits. Our investigation of this incident and our willingness to prosecute these terrorist acts will be evident to all.’

After reading the police statement the participants rated (on the same 7-point scale as above) ‘the extent to which you agree with the police spokesperson’s statement’ and ‘the extent to which you think that the police spokesman’s statement was appropriate in the circumstances’ (scale anchors were: 1 = not at all appropriate, 4 = no opinion, and 7 = extremely appropriate). Those participants who thought that the spokesperson’s statement was inappropriate (having made a rating less than 4) were invited to suggest in their own words ‘the theme of a statement you think would have been more appropriate’. Participants were next asked the forced choice question ‘Would you describe the food-tampering incident described above as a terrorist act?’ (answer options = yes/no) and were invited to ‘explain the reason for your last answer’ in one sentence.

Participants then rated their agreement (on a 7-point Likert rating scale anchored by 1 = strongly disagree, 4 = no opinion, and 7 = strongly agree) with each of the 12 adapted siege mentality scale items as listed above.

In the next section of the questionnaire, participants were asked to make ratings (on a 7-point Likert rating scale anchored by 1 = not at all appropriate, 4 = no

opinion, and 7 = extremely appropriate) of 'how appropriate each of the following [16] measures would be to deal with people suspected of the food tampering incident described above and any threat their actions represent'. It should be noted that as a result of the 27 September 2005 COAG meeting, or otherwise, some of the measures indicated below as *not* being current practice in Australian states and territories at the time of data collection have been implemented subsequently (see footnotes to the items below for examples of such amendments but such citations were not provided to participants). Also, legislation passed after the COAG meeting introduced powers to make preventative detention orders and control orders,¹⁶ often broader than some of the items below relating to detention without charge and travel restrictions.

The list of powers and measures rated by the participants was as follows:

- Allow covert search warrants to be issued to investigating police officers whereby the owners of premises searched do not need to be told of execution of the search warrant until 90 days after the search takes place (*NB: These powers are given currently to some Australian state police*).¹⁷
- Allow police to conduct random bag searches in public places such as restaurants, on public transport, and in crowds at large sporting or recreational events (*NB: Such powers are currently not used much in Australia*).
- Demand that citizens carry a national identity card that includes a photo and biometric information (such as a fingerprint), and to produce the card when requested to do so by police under risk of arrest for not producing the card (*NB: This is not current practice in Australia*).
- Allow a default maximum of 4 hours detention for questioning before charging suspects with offences, this period being extendable any number of times up to a total of 20 hours maximum detention (*NB: This is current practice for police interviewing of terror suspects in Australia. Interviews of those not suspected of committing terrorist offences can only be extended once or twice up to 8 hours of total questioning*).¹⁸

¹⁶ See the regime of control orders and preventative detention orders in Division 104 and 105 respectively of the *Criminal Code Act 1995* (Cth); State and Territory legislation allowing for preventative detention without charge for up to 14 days has also been enacted: *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Emergency Powers) Act* (NT); *Terrorism (Police Powers) Act 2002* (NSW); *Terrorism (Community Protection) Act 2003* (Vic); *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Preventative Detention) Act 2005* (WA).

¹⁷ *Terrorism (Police Powers) Act 2002* (NSW), pt 3, especially s 27U regarding notice of execution of covert search warrant; at the time of writing, the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 (Cth) had not been enacted though it proposed to introduce a regime of covert search warrants ('delayed notification search warrants') into the *Crimes Act 1914* (Cth) for the investigation of federal offences.

¹⁸ Compare ss 23C and 23CA of the *Crimes Act 1914* (Cth). It is also worth noting that the detention of Mohamed Haneef in July 2007 demonstrated that the combination of s 23DA extensions of time to detain and question without charge, as well as 'dead time' provisions allowing time to stop running, such as s 23CB, did mean that detention for lengthy periods such as 12 days without charge was possible.

- Allow a default maximum of three months detention for questioning before charging suspects with offences (*NB: This is not current practice in Australia*).
- Allow the police to determine if a suspect can have their lawyer present during an investigative interview (*NB: This power is currently not available to police in Australia*).
- Allow the police to determine which particular lawyers can be present during investigative interviews (*NB: This power is currently given to some Australian Security Intelligence Organisation (ASIO) officers conducting intelligence-gathering interviews with people who have information relevant to terrorism*).¹⁹
- Allow the police to eject a lawyer from investigative interviews if the police believe the lawyer is being too disruptive of the questioning of the suspect (*NB: This power is currently given to some ASIO officers conducting intelligence-gathering interviews with people who have information relevant to terrorism*).²⁰
- Allow police to monitor private discussions between suspects and their lawyers (*NB: This power is currently given to some ASIO officers conducting intelligence-gathering interviews with people who have information relevant to terrorism*).²¹
- Automatically deny bail to any suspect charged with criminal offences relating to the food tampering as described above (*NB: This is a possible outcome under some Australian state and federal laws*).²²
- Place those suspects who are denied bail after being charged with criminal offences relating to the food tampering as described above into maximum security prisons whilst awaiting trial (*NB: This has occurred in some Australian states*).²³
- Place those suspects who are denied bail after being charged with criminal offences relating to the food tampering as described above into maximum security prisons where solitary confinement is used for most of the day (*NB: This has occurred in some Australian cases*).²⁴

¹⁹ See *Australian Security and Intelligence Organisation Act 1979* (Cth) (ASIO Act) ss 34ZO and ZP, governing questioning warrants.

²⁰ ASIO Act s 34ZQ(9), though note s 34ZQ(10) that directs the interviewer to explain that the interviewee may contact another lawyer.

²¹ ASIO Act s 34ZQ(2).

²² Eg, the presumption against bail for terrorism offences in s 8A of the *Bail Act 1978* (NSW) where the person charged with a terrorism offence must prove why bail should not be refused. Note that this presumption can be rebutted and was done so in *R v Khazal* [2004] NSWSC 548 where bail was granted following a charge under s 101.5 of the Criminal Code, an offence of collecting, or making a document connected with preparation for, or assistance in a terrorist act punishable by imprisonment for 15 years.

²³ There has been a new inmate classification introduced for remandees charged with terrorism offences or for prisoners convicted of terrorism offences, see *Crimes (Administration of Sentences) Regulation 2001* (NSW) cl 22, as also discussed in Gani, Chapter 13 this volume.

²⁴ *Crimes (Administration of Sentences) Regulation 2001* (NSW) cl 22 and Gani, Chapter 13 this volume.

- Automatically deny a non-parole period (ie, denying the possibility of early release) to anyone convicted of criminal offences relating to the food tampering as described above (NB: *This is not a normal sentencing outcome in Australia*).²⁵
- Imprison anyone convicted of criminal offences relating to the food tampering as described above in maximum security prisons (NB: *This has occurred in some Australian cases*).²⁶
- Strip Australian citizenship, Australian residency or visa status from anyone convicted of criminal offences relating to the food tampering described above (NB: *Not the standard result in Australia*).²⁷
- Deny prisoners access to special facilities and special diets consistent with religious obligations (NB: *There have been some complaints of such treatment made by some prisoners currently held in Australian prisons*).²⁸

In the final section of the questionnaire, participants answered some questions about human rights and standard criminal practice. First, they rated the appropriateness of the following two scenarios:

- To ensure security of the nation, allowing general treatment of suspects by the police and by the courts in ways inconsistent with international human rights law (NB: *Liability for human rights complaints made against Australia still exists*).
- To ensure security of the nation, allowing general treatment of suspects by the police and by the courts in ways inconsistent with standard criminal practice (NB: *Liability for human rights complaints made against Australia still exists*).

An open-ended question followed, asking participants to 'please describe what you think is the main purpose of human rights law when societies are faced with food-tampering incidents as described above'. These questions relate to previous measurement of the perceived purpose of human rights law in Australia as collected by me in 2003.²⁹ However, the current measures extend such inquiry

²⁵ Though subsequent to data collection, the non-parole period set for Faheem Lodhi was 75 per cent of his total sentence.

²⁶ *Crimes (Administration of Sentences) Regulation 2001* (NSW) cl 22 and Gani, Chapter 13 this volume.

²⁷ Though note the legal debate surrounding the cancellation of Mohamed Haneef's visa by the Minister of the Department of Immigration and Citizenship following his release from custody without charge: *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 (21 August 2007).

²⁸ Prisoner Jack Roche first made such allegations in 2004 relating to his incarceration in Hakea Prison in Western Australia and this claim was eventually settled out of court by the West Australian government in May 2006: 'Convicted Terrorist Settles Food Claim', *Sydney Morning Herald* (Sydney), 16 May 2006.

²⁹ M A Nolan, *Construals of Human Rights Law: Protecting Subgroups as well as Individual Humans* (unpublished doctoral thesis, the Australian National University, 2003)

<<http://thesis.anu.edu.au/public/adt-ANU20050324.155005/index.html>>; M A Nolan and P J Oakes, 'Human Rights Concepts in Australian Political Debate' in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford: Oxford University Press, 2003).

to whether there is any support for the notion of a right to human security (derived from the right to life) that can be asserted as a justification for other violations of human rights in the interest of counter-terrorism and security.³⁰

Participants then answered two further forced (yes/no) choice questions:

- Do you think a right to human security enjoyed by all Australians allows us to disregard any human rights complaints made against Australian police officers by those suspected of the food-tampering described above?
- Do you think a right to human security enjoyed by all Australians allows us to disregard any human rights complaints made against Australian correctional services officers by anyone convicted of and imprisoned for the food-tampering described above?

Finally, some demographic information was collected including: age, gender, whether the participant or a close relative or close personal friend had ever been a victim of a violent crime. Participants were invited to comment generally about the study and were fully debriefed as to the aims and design of the experiment.

Results

We had sought to test the following hypotheses:

- Those who agree that the incident should be described as a terrorist attack and agree with the exceptionalist rhetoric will be more likely to justify extended counter-terrorism powers and believe in a right to human security.
- These beliefs should also relate to high scores on the Terrorism Siege Mentality Scale.
- These relationships should be the strongest in the jihadist/exceptional crime condition but it was thought interesting to investigate whether the framing of an anti-corporate food-tampering incident as an exceptional crime in turn causes participants to justify broader criminal justice responses, even in the anti-corporate/exceptional crime condition.
- The standard crime description by police in the jihadist condition would lead people to think that this incident poses only a standard or normal level of criminal threat that would neither result in high siege mentality beliefs nor result in endorsement of exceptional criminal procedures.

In order to test these hypotheses, a range of relationships were investigated between participants' attitude ratings, and the themes emerging from their qualitative responses were also analysed. Relationships tested between quantitative measures included between: offence construal, perpetrator motive, siege mentality beliefs, perpetrator blameworthiness, perceived appropriateness

³⁰ Ruddock, above n 1. See a review of the asserted legal basis for a right to human security by Carne, above n 1.

of counter-terrorism initiatives, and beliefs about the importance of human rights.

Description of Motive and Importance of Motive for Blameworthiness

Participants' open-ended descriptions of perpetrator motive in each condition confirms that participants understood the motive to be jihadist or anti-corporate when the motive was described as such in the stimulus materials. However, an interesting unexpected result was that a few participants ($n = 4$) simply stated that the perpetrator(s) had 'terrorism' rather than jihad or an anti-corporate protest, as a motive. These motive descriptions, all made by participants in the jihadist conditions, were as follows:

- 'terrorism: strike fear and panic into a large segment of the population' (Participant 56, j/e condition);
- 'terrorism' (Participant 63, j/e condition);
- 'terrorism, selfish' (Participant 93, j/e condition);
- 'terrorism in the food industry: fanatics attempting to discourage the use/consumption of certain food' (Participant 105, j/s condition).

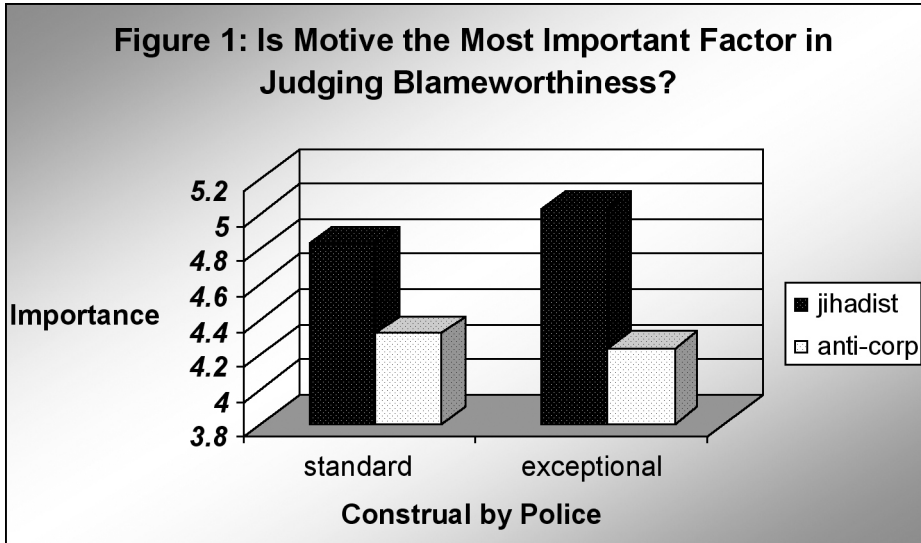
Other descriptions of motive by participants were couched in terms more consistent with one or more of the elements of the Australian definition of a terrorist act, notably the intention of intimidating the public or a section of the public in s 100.1(1)(c)(ii) of the Criminal Code. Examples of these motive descriptions as being the creation of chaos and collective fear in the minds of the public rather than simply as jihadist or anti-corporate motives were seen across all conditions, for example:

- 'to disrupt the everyday lives of citizens, create disorder and fear and get their message heard' (Participant 5, j/s condition);
- 'to injure as many people as possible to make a statement' (Participant 12, j/e condition);
- 'to scare the Australian public' (Participant 19, a/s condition);
- 'to put the Australian public in a state of fear for their own safety by eating at a well-known restaurant' (Participant 12, a/e condition).

An analysis of variance revealed a main effect for the motive of the criminal variable (see Figure 1).³¹ In other words when the food-tampering incident was associated with the anonymous threat made to restaurant owners stating 'don't trust the safety of any of your food supplies today, action has been taken so that infidels will be stopped in the name of Allah!', rather than as the anti-corporate threat, then participants believed that the jihadist motive was 'the most important

³¹ Mean importance of motive for blameworthiness by condition: j/s = 4.83 ($sd = 1.34$, $n = 29$), j/e = 5.03 ($sd = 1.22$, $n = 31$), a/s = 4.32 ($sd = 1.68$, $n = 31$), a/e = 4.23 ($sd = 1.59$, $n = 30$); $F(1, 117) = 5.94$, $p < .05$.

factor in judging the blameworthiness of the act'. This was significantly more than was the case when the motive of the food tamperer was an anti-corporate ideology.

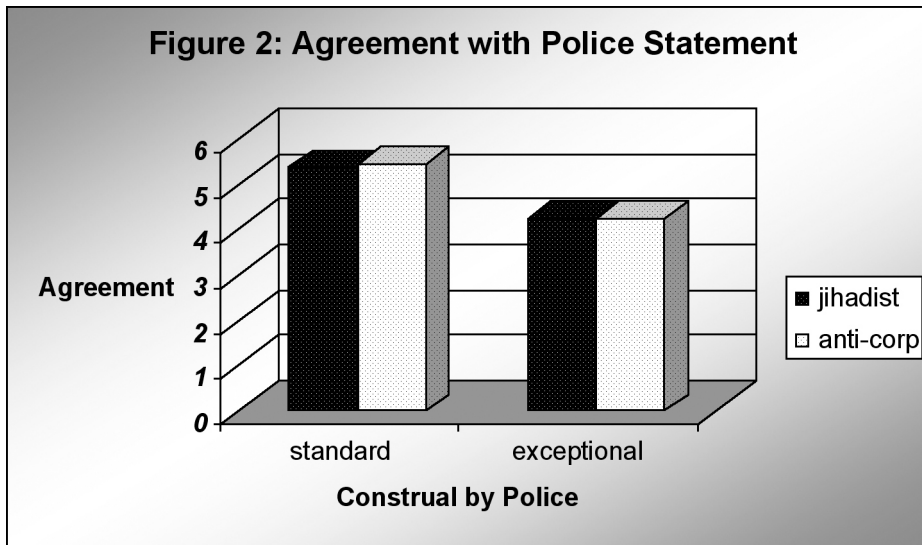


This finding is interesting in light of the fact that other results (discussed below) suggest that these participants as a group did not endorse broadening powers in order to counter terrorism. In other words, even people with low Terrorism Siege Mentality scores, who did not support the idea that civil and political rights could be weakened by asserting a right to human security, still believed that religious jihadist motives rendered the same physical food-tampering acts more blameworthy than food-tampering with anti-corporate political or ideological motives.

Agreement With and Perceived Appropriateness of the Police Statement

Analysis of variance revealed a main effect for the construal of the crime used in the police statement (Figure 2).³² In other words, participants agreed with the police statement significantly more when the standard crime description was used in contrast to when the food tampering incident was described as an exceptional crime indicative of how the world has changed since 9/11. This preference was the same irrespective of the motive of the perpetrator provided in the stimulus materials.

³² Mean agreement with the construal of crime by police by condition: j/s = 5.38 ($sd = .98$, $n = 29$), j/e = 4.26 ($sd = 1.59$, $n = 31$), a/s = 5.45 ($sd = 1.59$, $n = 31$), a/e = 4.27 ($sd = 1.51$, $n = 30$); $F(1, 117) = 10.25$, $p < .001$.



This effect was the same for the perceived appropriateness of the police statement.³³ Some alternative themes for the police statement as suggested by those perceiving the exceptional crime statement to be inappropriate included the following (from a total of 23 responses in the exceptional crime conditions and from a total of 33 open-ended responses across all conditions):³⁴

- 'that we must look at the larger picture and understand what it is these people are complaining about. That we won't engage with them but will seek to solve the problem' (Participant 29, j/e condition);
- 'that the police were diverting all resources to determine who the perpetrators is/are, rather than simply assuming that it was an act of terrorism' (Participant 34, j/e condition);
- '[that] this may be an example of a terrorist act and at present resources have been diverted so that definite conclusions can be drawn' (Participant 38, j/e condition);
- '[stating that] "These actions are unjustified" is an incorrect statement. Better to state the importance of solving the problem by identifying why they did it' (Participant 72, j/e condition);

³³ Mean level of perceived appropriateness of the police statement by condition: j/s = 5.07 ($sd = 1.07$, $n = 29$), j/e = 4.16 ($sd = 1.39$, $n = 31$), a/s = 5.35 ($sd = 1.60$, $n = 31$), a/e = 4.40 ($sd = 1.65$, $n = 30$); $F(1, 117) = 12.45$, $p < .01$.

³⁴ The number of participants suggesting an alternative theme for the police statement having thought the theme in the provided statement was inappropriate was as follows: j/s = 4; j/e = 12, a/s = 5, a/e = 11; meaning that from this sample more people had solutions to the poor choice of theme in the police statement in the exceptional crime conditions ($n = 23$) than participants had in reaction to the theme of the police statement in the standard crime conditions ($n = 9$).

- 'I don't think the acts were done for religious/terrorist reasons. [It] is unclear whether the acts were targeting a particular group of people or aimed to interfere with [the] everyday life for all. [The statement] should have been aimed at catching the people' (Participant 106, j/e condition);
- 'changing [the] world means changing society, terrorism is so extreme, would use something else. Aim of speech should be about freedom of people' (Participant 36, a/e condition);
- 'it is possible that terrorists are responsible for these attacks, as such, this avenue should and will be more deeply investigated by police and counter-terrorism agencies will be mobilised if need be' (Participant 40, a/e condition);
- 'I believe that the police should not have used the act to justify certain laws or policies, but simply assured the public that there would be an investigation' (Participant 87, a/e condition);
- 'perhaps just refer to the perpetrator, bringing in the subject of terrorism when there is no substantial evidence to suggest it is only provocative' (Participant 100, a/e condition);
- 'acknowledging this person/people are upset, but highlighting the means which they have chosen is inappropriate, and that is why efforts will be put into finding/prosecuting them' (Participant 104, a/e condition).

Should this Act be Called a Terrorist Act and Why?

Across the entire sample of 122 participants who responded to this question, 84 participants (68.9%) considered the food tampering incident to be a terrorist act and 38 participants (31.1%) did not. The frequency (and percentage) of participants in agreement that the incident was a terrorist act by condition is as follows: j/s = 21 (67%), j/e = 23 (79%), a/s = 21 (67.7%), a/e = 19 (61.3%); meaning that 43 (71.7%) of participants in the jihadist conditions and 40 (66.7%) of participants in the anti-corporate conditions agreed that the incident should be called a terrorist act.

Some examples of why the food-tampering incident *was not* considered a terrorist act in each condition were as follows:

- 'because it is aimed at everyone not a specific group: everyone eats' (Participant 42, j/s condition);
- 'it was criminal and wrong but not necessarily a terrorist act' (Participant 6, j/e condition);
- 'I view terrorism as actually killing people, not just harming them' (Participant 26, a/s condition);
- 'terrorism is an extreme act, would target the superpower — America — and not national Australian food companies' (Participant 36, a/e condition).

Perceived Appropriateness of Counter-Terrorism Powers

Participants' attitudes towards the appropriateness of the listed counter-terrorism powers did not vary according to whether the power was held by police (or others) at the time of administering the questionnaire or not.³⁵ All participants as a group believed that, on average, all of the powers presented were inappropriate for dealing with the perpetrators of the food incident.³⁶ Analysis of variance revealed no significant main effects for either the motive or the construal variables, and the interaction between motive and crime construal was not significant. In other words, neither the motive nor the police spokesperson's statement (or some combination of these variables) produced differences in the perceived inappropriateness of the rated counter-terrorism powers.

National Security as a Justification for Counter-Terrorism Responses

When thinking about dealing with the perpetrators of the food-tampering incident, all participants in all conditions rejected the suggestion that national security allows 'general treatment of suspects by the police and courts in ways inconsistent with international human rights law'.³⁷ This rejection of national security as a justification was replicated when participants were asked if national security could allow 'general treatment of suspects by the police and the courts in ways inconsistent with standard criminal practice'.³⁸

A Right to Human Security?

Only four of 123 participants who answered the question thought that 'a right to human security enjoyed by all Australians allows us to disregard any human rights complaints made against Australian police officers by those suspected of the food-tampering incident'. Similarly, only four of the 122 participants answering the question thought that a right to human security would excuse complaints of human rights violations made 'against Australian correctional services officers by anyone convicted of and imprisoned for the food-tampering described above'.

³⁵ Cronbach's $\alpha = .87$.

³⁶ Entire sample mean appropriateness of the 16 listed powers (as a combined measure) = 3.00 ($sd = .97$, $n = 124$); mean appropriateness by condition: j/s = 3.12 ($sd = .98$, $n = 29$), j/e = 2.88 ($sd = .87$, $n = 31$), a/s = 3.10 ($sd = 1.09$, $n = 31$), a/e = 2.90 ($sd = .96$, $n = 30$).

³⁷ Entire sample mean endorsement = 1.9 ($sd = .15$, $n = 124$); mean endorsement by condition: j/s = 1.77 ($sd = 1.45$, $n = 29$), j/e = 1.94 ($sd = 1.94$, $n = 31$), a/s = 2.13 ($sd = 1.69$, $n = 31$), a/e = 1.77 ($sd = 1.52$, $n = 30$).

³⁸ Entire sample mean endorsement = 2.02 ($sd = 1.5$, $n = 124$); mean endorsement by condition: j/s = 1.81 ($sd = 1.30$, $n = 29$), j/e = 2.19 ($sd = 1.51$, $n = 31$), a/s = 2.19 ($sd = 1.68$, $n = 31$), a/e = 1.87 ($sd = 1.48$, $n = 30$).

What is the Purpose of Human Rights Law when Faced with Terrorist Acts?

Some examples of the open-ended responses from participants in each condition of the study are as follows:

- 'to balance the power of the state with the rights of individuals' (Participant 1, j/s condition);
- 'to ensure that citizens are not abused by the authorities. Creating some sort of police state will only engender more anti-Australian [feeling] and lead to support for terrorists' (Participant 10, j/e condition);
- 'to ensure respect for dignity, personal freedoms, faith and human life when in police custody, jail or other types of confinement' (Participant 7 a/s condition);
- 'to ensure that, in the rush for the society to protect its own interests, the rights of the criminal party are not discarded' (Participant 4, a/e condition).

One reason given appeared to blend derision and respect for perpetrators:

- 'to make sure we don't mistreat the offender since they are humans too and have their own reasons for their stupid acts' (Participant 31, a/e condition).

One response obtained came close to the rhetoric used by those endorsing a right to human security:

- 'everybody should be able to have access to safe food and water, so if a group of people are responsible for the illness/death of others they should be held accountable' (Participant 106, j/e condition).

Can any of these Attitudinal Results be Explained by Siege Mentality Beliefs?

Participants' scores on the siege mentality scale did not vary by experimental condition, suggesting that the motive and crime construal variables used in this hypothetical scenario study alone were not enough to produce differences in measured siege mentality beliefs. An alternative explanation is that our participants were simply never disposed to adopt the terrorism siege mentality belief orientation as operationalised. In any event, endorsement of siege mentality

beliefs (as a single combined measure)³⁹ was low across all conditions and no significant effects were revealed by analysis of variance.⁴⁰

Correlational analysis reveals some significant relationships between these low scores on the siege mentality scale and other variables of interest. For example, significant correlational results based on the entire sample include those between:

- low Terrorism Siege Mentality scores (SM) and low levels of perceived appropriateness of the 16 rated counter-terrorism measures;⁴¹
- low Terrorism Siege Mentality scores and low endorsement of national security as a justification for treatment by the police and the courts that is inconsistent with human rights (incon HRs)⁴² or standard criminal procedure (incon SCP).⁴³

The size of these significant correlations is around the same magnitude when the analysis is done by condition.⁴⁴

Conclusions

In this study the motive of the perpetrator to advance *a particular cause*, jihadist rather than anti-corporate views, resulted in participants perceiving *greater* blameworthiness. This was the case *even* when the participants, on the whole, *neither* strongly endorsed terrorism siege mentality beliefs *nor* supported the expansion of counter-terrorism powers at the expense of violating human rights in the interest of ensuring human security. This result alone is intriguing. It is of particular interest in terms of the possible impact on juries of evidence of the intention to advance political, religious or ideological causes. These data suggest that judges may need to use jury instructions to combat such attitudinal biases against defendants alleged to be pursuing *particular* motives.

However, as discussed by Gani, Chapter 13 this volume, a decision in *Lodhi*⁴⁵ handed down after the data collection has clarified the legal test to be used when

³⁹ Use of combined Terrorism Siege Mentality Scores in this study should be treated with caution as Cronbach's $\alpha = .65$ and principle components analysis with varimax rotation revealed multiple factors that were difficult to interpret. A deeper problem is the lack of normality of responses to each of the Terrorism Siege Mentality scale items. These psychometric properties are in contrast to the more reliable one factor response solutions obtained by Bar-Tal and colleagues: Cronbach's $\alpha = .88$ in Bar-Tal and Antebi, above n 5.

⁴⁰ Mean combined siege mentality score by condition: j/s = 2.88 ($sd = .67$, $n = 29$), j/e = 2.82 ($sd = .69$, $n = 31$), a/s = 3.01 ($sd = .54$, $n = 31$), a/e = 2.97 ($sd = .66$, $n = 30$).

⁴¹ $r = .32$, $p < .01$.

⁴² $r = .29$, $p < .01$.

⁴³ $r = .31$, $p < .01$.

⁴⁴ Eg, in the anti-corporate motive condition ($n = 62$): r (SM, appropriateness of all CT powers) = .44, $p < .01$; r (SM, incon HRs) = .34, $p < .01$; r (SM, incon SCP) = .35, $p < .01$. When the offence was construed as a standard crime: r (SM, incon CP) = .26, $p < .05$. When the offence was construed as an exceptional crime: r (SM, incon HRs) = .33, $p < .01$; r (SM, incon SCP) = .36, $p < .01$; r (SM, appropriateness of all CT powers) = .41, $p < .01$.

⁴⁵ *Lodhi v R* (2006) 199 FLR 303 (Spigelman CJ, with McClellan CJ at CL and Sully J agreeing).

determining the requisite intention. It was held in that case that the advancement of the political, religious or ideological cause attaches to the terrorist act itself *and not to the state of mind of the accused as he or she was engaging in the conduct that constitutes the offence*.⁴⁶ This means that the blameworthiness bias result in this study is most relevant to what Gani describes as the ‘simple cases’: where the accused actually shares the intention to advance the cause via the use of the coercive violence. In Gani’s ‘difficult cases’ where the accused does not share the intention to advance the cause, the blameworthiness effect for motive demonstrated here is less relevant to juries’ liability decisions. However, in ‘simple cases’ the demonstrated bias (that jihadist motives are more blameworthy than anti-corporate protest motives) remains concerning in terms of its residual impact on liability judgments *despite* the decision in *Lodhi* and the use of judicial instructions about the relevant legal test. In other words, what will be the ‘touchstone to which juries will intuitively turn when reaching their decisions’⁴⁷ in those simple cases? Will it be the view that jihadist motives are more blameworthy intentions than other examples of politically-motivated violence?

It is perhaps unsurprising that the sample surveyed in this study rejected extension of counter-terrorism powers beyond those powers consistent with established principles of criminal justice for non-terrorism offences and those consistent with civil and political rights. It is also perhaps unsurprising that our first attempt to develop a Terrorism Siege Mentality Scale did not produce the same psychometric simplicity as the more general siege mentality scale developed with Israeli samples in the Middle East. However, perhaps a stronger test of the Terrorism Siege Mentality construct would occur with samples of participants *likely to endorse siege mentality beliefs to a high level*. Based on this sample at least, some Australian undergraduates do not feel alone in the world due to the terrorism threat. It remains to be seen whether the socialisation of siege in other samples at other times can be measured; including measurement of the socialisation of siege amongst political elites responsible for counter-terrorism policy post-9/11, and, perhaps, also amongst perpetrators themselves.

⁴⁶ *Lodhi v R* (2006) 199 FLR 303, Spigelman CJ (with McClellan CJ at CL and Sully J agreeing) quoted extensively at [80] and endorsed at [90] Whealy J’s judgment of 14 February 2006 (*R v Lodhi* [2006] NSWSC 584 (Unreported, Whealy J, 14 February 2006) [83] and [103] (see Gani, Chapter 13 this volume).

⁴⁷ Gani and Urbas, above n 14.