

The Superpatriotic Fervour of the Moment[†]

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1. *Introduction*

Bruce Ackerman's, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism* is a depressing example of quite how compliant to power liberal intellectuals can be even when they think they are being brave and radical. The last few years have seen a concerted attempt by a variety of forces within the Bush administration to reconfigure the power of the executive branch of the US federal government so as to achieve supremacy over both the legislature on Capitol Hill and (in its highest, most ambitious form) over the courts and the constitution itself. The rhetorical instrument for the achievement of these desired outcomes, the set of words that has legitimized the conduct of government servants that would otherwise be called criminal (assault; theft; false imprisonment/kidnapping; torture), has been the 'war on terror'. The attacks on New York and Washington on 11 September, 2001 have provided the *casus* for this phantom *belli* and repetition of the supposed fact of this war by senior officials in the Bush administration, including the President himself, has gradually—in true post-modernist style—made it true. Senior though they are, however, these large figures from the soon to be recent past (Cheney, Rumsfeld, Rice, Wolfowitz et al.) could not have pulled off quite as much as they have without assistance. The involvement of in-house lawyers within the administration is well-known: there are many articles on the blank cheques for executive power helpfully drawn up for the White House by the likes of John Yoo and Albert Gonzales. Less well-known is the role of lawyers outside government, the wider community of legal scholars, whose vital contribution has been to oppose many of the administration's specific proposals while accepting

[†] A review of B. Ackerman, *Before the Next Attack. Preserving Civil Liberties in an Age of Terrorism* (Yale University Press, New Haven and London, 2006).

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the underlying premises that have led to their emergence in the first place. This has turned the extremist, anti-law lurch of the Bush presidency into merely one way (wrong to some; right to others) of dealing with a crisis which all agree is unprecedented in its nature and demanding of an extraordinary response, the only discussion being about which one to deploy. Once a scholar has been manoeuvred—or has manoeuvred him—or herself—into this particular corner, however, government has such a person in exactly the desired position: how can the academic know better than the executive experts how best to deal with the crisis that all parties agree has engulfed the country?

There is no doubt that the author of this book, the Sterling Professor of Law and Political Science at Yale University Bruce Ackerman, is a critic of President George Bush, and that he opposes much that he and his Administration have done. He positions himself on the liberal end of the scholarly spectrum, and is right to do so. By comparison with some of the literature that has emerged from the US law schools after the attacks of 11 September, 2001 (on which more later), Ackerman is practically antiquarian in his apparent commitment to the values of liberal constitutionalism. But to use a comment of his own on two authors he criticises,¹ his book stands as ‘a cautionary tale, suggesting how easily bright legal scholars can lose their way in a maze of speculative possibilities’.² By opposing the ‘war on terror’ without critically deconstructing the supposed basis of it, he risks doing more damage to democratic freedom and the rule of law in the United States than anything that the ‘war on terror’ has so far managed. The danger lies first in the plausibility of the proposal for emergency powers that his anxiety about terrorism but rejection of the Bush response to it leads him to make, and secondly, in the vulnerability of his ideas to change if they were ever to be seriously considered by Congress. In challenging himself on neither the empirical basis for the ‘war on terror’ nor on the political feasibility of his proposed solution to the terrorist problems he has all too readily identified, Ackerman has written a book that is clever, smug and dangerous.

2. *An Emergency Constitution*

The central argument set out in detail in this volume had previously been rehearsed in a literary magazine,³ a distinguished law journal in the United States,⁴ and at various seminars and conferences at Oxford, Yale, Harvard and

¹ E. A. Posner and A. Vermeule, *Terror in the Balance. Security, Liberty, and the Courts* (Oxford: Oxford University Press, 2007).

² B. Ackerman, *Before the Next Attack. Preserving Civil Liberties in an Age of Terrorism* (New Haven and London: Yale University Press, 2006) [hereafter *Before the Next Attack*] at 175 n. 3.

³ B. Ackerman, ‘Don’t Panic’ *London Review of Books* 7 February 2002.

Cardozo law schools. Ackerman wants the United States to put in place a framework for an emergency constitution to which government can turn *in extremis*. His legislative proposal adapts the USA's 'inherited system to meet the distinctive challenges of the twenty-first century.'⁵ The intention is not to give the executive an easy ride, however:

First and foremost, [the plan] imposes strict limits on unilateral presidential power. Presidents will not be authorized to declare an emergency on their own authority, except for a week or two while Congress is considering the matter. Emergency powers should then lapse unless a majority of both houses votes to continue them – but even this vote has a temporal limit and is valid for only two months. The president must then return to Congress for reauthorization, and this time, a supermajority of 60 percent is required; after two months more, the majority will be set at 70 percent; and then 80 percent for every subsequent two-month extension. Except for the worst terrorist onslaughts, this 'supermajoritarian escalator' will terminate the use of emergency powers within a relatively short period. It will also force the president to think twice before requesting additional extensions unless he [or she] can make a truly compelling case to the broader public.⁶

We will come back to the ins and outs of this later, the 'serious and sensitive business'⁷ of defining the scope of the emergency power and the 'tricky business' of designing 'a limited state of emergency.'⁸ But why propose an emergency constitution at all? Where is the need for this? In what way does the current framework of US constitutional and criminal law fail to deal with the problem of terrorist violence? Critic though he is of the 'war on terror' model of responding to political violence (on which this book has an excellent, albeit from a liberal perspective rather orthodox, chapter), Ackerman shares with the Bush presidency the latter's near-apocalyptic assessment of the seriousness of the terrorist threat that the US currently faces. As its title indicates, the book is consumed with anxiety about 'the next attack'. Its first sentence is 'Imagine waking up the morning after the next terrorist attack'.⁹ What worries Ackerman is not merely a repeat of 11 September, which 'was merely a pinprick compared to the devastation of a suitcase A-bomb or an anthrax epidemic.'¹⁰ The risks posed by Al Qaida 'are grave but historically unique. Terrorist attacks may kill a hundred thousand at a single blow, generating overwhelming grief and rippling panic that may ultimately turn our government

⁴ B. Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029–91; responses by D. Cole, 'The Priority of Morality: The Emergency Constitution's Blind Spot' *ibid* 1753–1800 and L. H. Tribe and P. O. Gudridge, 'The Anti-Emergency Constitution' *ibid* 1801–1870, with a reply by Ackerman, 'This is Not a War' at *ibid* 1871–1907.

⁵ *Before the Next Attack* at 4.

⁶ *Ibid*.

⁷ *Ibid*.

⁸ *Ibid* at 3.

⁹ *Ibid* at 1.

¹⁰ *Ibid* at 2.

into an oppressive police state'.¹¹ It seems that we are 'in a race against time' with each 'major attack...breed[ing] further escalations of military force, police surveillance, and repressive legislation' with the further effect of this established 'cycle of terror, fear and repression...spin[ning] out of control long before a political consensus has formed behind a constitution for an emergency regime.'¹² Because the terrorists may succeed in 'decapitating the government, taking down the president and most of Congress and the Supreme Court in the blast,'¹³ Ackermann feels the need to devote two chapters, 'If Washington Blows Up?' and 'The Morning After' to what would happen next.¹⁴ Suitcase bombs and mass-murder stalk this book the way case citations do in other, more ordinary legal texts (with the exception of course that such cases have happened, whereas the empirical evidence here, the 'pin-prick' of 11 September apart, lies in the future).

Who these terrorists are that are threatening the United States on such a prodigious scale is not exhaustively analysed. Clearly Al Qaida is included: Ackerman sees this group as a highly organised operation which will survive the capture of its leader Osama bin Laden, in which circumstances '[a]t best, it will morph into other terrorist groups.'¹⁵ We are told that it is 'already...collaborating with Hezbollah, and how will anybody determine where one group ends and the other begins?'¹⁶ Presumably this means Hezbollah are also on the danger list. There is no definition, so speculation about who is in and who out is pretty futile: 'There are more than six billion people in the world—more than enough to supply terrorist networks with haters, even if the West does nothing to stir the pot.'¹⁷ The 'we' that is under threat in this book varies—usually it is Americans, but sometimes it is also 'the contemporary world of liberal democracy'¹⁸ and every so often, as in this quote, it is the West against the rest. Now and again Ackerman shows himself to be alive to the possibility that this might seem a tad—how should I put it—divisive, but his effort to allay anxiety on that score comes across as more comical than consolatory: 'The attack on September 11 came from the Islamic world, but the next strike may come from some very different place—perhaps Mexico, perhaps Montana.'¹⁹ The reader is not convinced that this 'downer of a book', this 'study in lesser evils, to borrow the title of Michael Ignatieff's thoughtful essay,'²⁰ is about a few survivalists from out west or a new gang of

¹¹ Ibid at 4.

¹² Ibid at 5.

¹³ Ibid at 9.

¹⁴ Chs 7 and 8, respectively.

¹⁵ *Before the Next Attack* at 6.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid at 77.

¹⁹ Ibid at 37.

²⁰ Ibid at 9. The reference is to M. Ignatieff, *The Lesser Evil. Political Ethics in an Age of Terror* (Edinburgh: Edinburgh University Press, 2004).

Hispanic fanatics. It is about us and how to protect ourselves from them, the millions and millions of people out there who are not us but who supply the haters of us who in turn are striving to do the dreadful things on the likely occurrence of which this book depends for its effect and its influence.

Given the seriousness of the problem Ackerman has convinced himself exists, it is not surprising that, while he rejects the war paradigm, he is also dismissive of the capabilities of the ordinary criminal law to deal effectively with the challenge of terrorism. This is where his horror at the future scale of the atrocities he anticipates becomes essential to his argument: he needs these blood-curdling scenarios to persuade the reader of the inadequacy of the current system of laws, something which, were he to stick to facts, would not be nearly so easy to establish. When 'legal traditionalists' insist 'that the tried-and-true principles of the criminal law suffice to deal with our problem,' then 'to a large extent, they are right'.²¹ Despite this, '[n]evertheless, the criminal law is fundamentally inadequate as a complete response to our present predicament.'²² His argument 'is based on principle, not expediency.'²³ Ackerman may not like talk of war but acceptance of it is at the core of his argument:

It is wrong . . . for legal traditionalists to treat the 'war on terror' as if it were merely a symptom of collective paranoia, which Americans will come to regret as they recover their sobriety. War talk makes a fundamental point that the legal tradition fails squarely to confront: the criminal law treats individual cases *as if the larger question of effective sovereignty has already been resolved*. But terrorist attacks represent a public assault on this premise, and the visible affront to effective sovereignty will be exploited again and again by the terror warriors to aggrandize their power.²⁴

The aim of a terrorist attack is 'to destabilize a foundational relationship between ordinary citizens and the modern state: the expectation of *effective sovereignty*.'²⁵ After the Al Qaida attacks on 11 September, 2001, '[f]or a while at least, it was perfectly reasonable for ordinary Americans to wonder whether the government really was in control of affairs within the nation's borders.'²⁶ To put the point 'in a single line: the normal operation of the criminal law *presupposes* the effective sovereignty of the state, but a major terrorist attack *challenges* it.'²⁷ And then, crucially, an extra line: 'Before it can operate a criminal justice system, the state must first assure its effective sovereignty.'²⁸ This is what makes the terrorists uniquely terrible for '[e]ven the most successful organized-crime operations lack the overweening pretensions of the most humble terrorist cell.'²⁹ The Mafia 'simply aim to control the "underworld" without making an open challenge to the

²¹ Ibid at 39.

²² Ibid.

²³ Ibid.

²⁴ Ibid at 44 (emphasis in the original).

²⁵ Ibid at 42 (emphasis in the original).

²⁶ Ibid.

²⁷ Ibid at 43 (emphasis in the original).

²⁸ Ibid.

²⁹ Ibid at 41.

surface legitimacy of the political order' with Mafiosi being generally 'content to let government officials flaunt their symbols of legitimacy so long as gangsters control the underworld.'³⁰ And the Communists too were small beer: 'For all the McCarthyite talk of the Red Menace, the danger remained abstract to ordinary people, and the government's effective sovereignty was never seriously questioned'.³¹

Ackerman needs to be relaxed about the Communists and the Mafia because (presumably) he does not want to give the impression that we should declare (or should have declared) states of emergency to deal (or have dealt) with them as well. But how legitimate is his distinction between the (in his words) 'terror warriors' and the rest? It is not likely that after, say, the murder by the Mafia of special investigating magistrate Giovanni Falcone (with his wife and three bodyguards) on his way out of Palermo airport in Sicily in 1992 that many Italians shared the upbeat perspective of Ackerman that '[w]hatever else is happening in Palermo, the mayor's office is occupied by the legally authorized representative of the Italian Republic.'³² Retrospective calmness is easy to achieve: when a threat has passed, the temptation is to say that it was never there. Ackerman can write off the Communists now but his predecessors at the Ivy League schools (among many others) were slower to do so when the 'challenge to effective sovereignty' presented by the Party took the form of a possible seizure of power that felt real enough to those in charge of the system at risk of being thus superseded. According to recently declassified papers, at the start of the Korean War, FBI director J Edgar Hoover agitated for the suspension of habeas corpus and the arrest of thousands of 'dangerous individuals' whose detention was necessary for the protection of the US.³³ In *Dennis v United States*,³⁴ the former Harvard law professor Felix Frankfurter joined a majority of his colleagues on the Supreme Court in an opinion which upheld the constitutionality of the anti-sedition Smith Act precisely on account of the terrible transformative consequences of Communist success, a set of outcomes which were so bad that they justified the restrictions on free speech to be found in the Act, even though the chances of such a revolution were slight. The majority were in no doubt that they were dealing with more than mere criminals.³⁵ Eventually of course, as we all know,

³⁰ Ibid.

³¹ Ibid at 42.

³² Ibid at 41.

³³ *Guardian* 24 December, 2007.

³⁴ 341 US 494 (1951).

³⁵ 'We reject any principle of governmental helplessness in the face of preparation for revolution...' (Vinson, C.J. at ibid 501). 'Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organise the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence' (Vinson, C.J. ibid at 516-7). 'The jury found that the Party advocates the theory that there is a duty and necessity to overthrow the Government by force and violence... We may take judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country' (Frankfurter, J. ibid at 546-7).

the anti-Communist rhetoric of McCarthy and his cronies was exposed, and when this hard work had been done (by a few brave public representatives, one or two scholars and the occasional journalist), then the professors and the judges were able safely to follow suit, agreeing there never really had been a threat and deploying their brain-power to justify the new orthodoxy.³⁶ I wonder what line Ackerman would have taken, not in the 1960s or 70s (much less today) but in the early and mid 1950s, when it mattered?³⁷

The binary division created by Ackerman as the route to his preferred option of an emergency constitution is a false one. There are no 'tried and true principles of our criminal law' beloved by our 'legal traditionalists' whose ahistorical and unchanging commitment to certain rules and legal rights renders the ordinary criminal law as ill-suited to coping with political violence (Ackerman's 'terror warriors') as Mr Bush's war paradigm. What does exist is a framework of criminal law which is informed by principle certainly and controlled to some degree (depending on which jurisdiction you are in) by a range of more or less embedded rights but which is nevertheless always on the move, the substance of the crimes themselves and the procedural framework for their detection and punishment being in a perpetual state of flux. The US federal government did not wring its hands in impotent rage when it persuaded itself of the Communist threat; it passed the Smith Act (and did much else besides). Title IX (Racketeer Influenced and Corrupt Organizations) of the Organised Crime Control Act (RICO) was enacted in the United States in 1970 precisely to deal with the criminal infiltration of legitimate businesses in a new and aggressive kind of way and after *United States v Turkette*³⁸ the law has come to be deployed far more widely than had first been anticipated. The Clinton administration made its own contribution, in particular with its post-Oklahoma bombing Anti-terrorism and Effective Death Penalty Act of 1996. Much of this legislation was controversial, all of it altered the substance or enforcement of the pre-existing law, some of it has since been repealed: but it combines with many other judicial and legislative interventions (not detailed here) to exemplify an 'ordinary law' that is far from the staid and magisterially detached status quo of Ackerman's imagination.

This straw man is useful though because without it we might not be persuaded to join him on the road to special emergency powers. There is a

³⁶ *Yates and Others v United States* 354 US 298 (1957) marks the beginning of the shift. The partial dissent by Black, J., with whom Douglas, J. joined, is especially powerful: both men had dissented in *Dennis*.

³⁷ This disguised *cri-de-coeur* at the end of a contemporary essay in the *Yale Law Journal* gives a flavour of the times: 'With sedition legislation on the statute books, the Dennis decision in the reports, and public opinion being what it now is, it is naively sanguine to expect the courts to employ such subsidiary doctrines as entrapment, the accomplice rule, and injunctive relief in circumvention. It is perhaps even out of tune with the times to suggest that the best protection against internal enemies lies in the free flow of discussion, in the absence of spies, and in the adoption of well-considered improvements of political and economic institutions' R. C. Donnelly, 'Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs' (1951) 60 *Yale Law Journal* 1091-1131 at 1130-1.

³⁸ 452 U.S. 576 (1981).

great deal in this book on how terrible the next terrorist attacks are likely to be, but next to nothing about why *exactly* the criminal law cannot cope with the challenge such violence poses, even if it indeed amounts to some kind of hitherto unseen attack on ‘the effective sovereignty of the state’. The ‘traditionalist case’ is in fact nothing more than a four paragraph discussion of why Al Qaida differs from the Communists and the Mafia, followed by nine paragraphs (‘The question of effective sovereignty’) asserting that ‘the partisans of the criminal law are tone-deaf when it comes to addressing the terrorist challenge to effective sovereignty’³⁹ because they fail to see quite how different the 11 September attacks were, particularly when compared to a ‘day of infamy’ like that of 7 December, 1941, when the Japanese bombed Pearl Harbour. There then follows a final paragraph in this section, restating the ‘fundamental point that the legal tradition fails squarely to confront: the criminal law treats individual cases *as if the larger question of effective sovereignty has already been resolved*.’⁴⁰ And then the next section opens with ‘So neither “war” nor “crime” is really adequate’⁴¹ and with this literary sigh of relief the author is off and away, into his favoured terrain of special laws, with all doubts and hard arguments about necessity fading into the background.

3. *Legislating for an Emergency*

Ackerman’s vision is of a state of emergency that is ‘a carefully limited regime, tolerated only as a regrettable necessity, and always on the path towards termination.’⁴² His three principles of ‘supermajorities, compensation [and] decency’ would ‘do more than provide substantial protection to the unlucky individuals caught in the net of suspicion,’⁴³ the first by making the emergency difficult to maintain, the second by guaranteeing those held cash payments for their detention (he reckons \$500 a day should do the trick), and the third by carefully instructing officials on how they should treat suspects under their control. So what powers would be involved in this decent, well-funded and temporary emergency?

Under my emergency constitution, the security services have the power (1) to arrest on ‘reasonable suspicion,’ which is a standard that is substantially lower than the ‘probable cause’ ordinarily required by the criminal law, and (2) to detain suspects for up to forty-five days before the prosecution is required to satisfy the traditional criminal law standards for arrest and conviction.⁴⁴

³⁹ *Before the Next Attack* at 43.

⁴⁰ *Ibid* at 44 (emphasis in the original).

⁴¹ *Ibid*.

⁴² *Ibid* at 119.

⁴³ *Ibid*.

⁴⁴ *Ibid* at 46.

This plan reveals the US-centred nature of the proposals since in many democratic countries it is perfectly possible to arrest on reasonable suspicion of a crime and also of terrorism. It is not clear from this extract, however, or from the book as a whole, what the security services would need to suspect somebody of in order to hold them: perhaps it is nothing much since the ‘functional point of emergency detention is to prevent another terrorist attack, and thereby sustain the expectation of effective sovereignty which serves as the premise of social order.’⁴⁵ Certainly there will be lots and lots of detainees, ‘perhaps thousands of them,’⁴⁶ with the security services allowed to ‘detain suspects on their “watch lists,” without concretely linking them to the particular terrorist conspiracy that has demonstrated its potency’, a sweeping policy of de facto internment which ‘will undoubtedly sweep many innocents into detention.’⁴⁷ Ackerman knows exactly how much harm all this will do:

Even if released after forty-five days, these men and women have been done irreparable harm. Six weeks may seem a short time, but it is long enough to disrupt a life, and to create enormous anguish for friends and family. It is also long enough to stigmatize detainees in the larger community: when they return to work, they will have great trouble convincing fellow employees that the government has made a mistake and that they really aren’t terrorists. And some won’t be given the chance to explain: they will be fired straight-off by employers who are swept up in the superpatriotic fervor of the moment.⁴⁸

But though a long time to those who are victims of it, and though he argues for the time period, Ackerman nevertheless goes on to concede that ‘[f]orty-five days isn’t a very long time to get enough evidence to satisfy the traditional test of probable cause.’⁴⁹ So maybe the jailors of these suspects will be under pressure to deliver results? Ackerman has thought of this too. In the ‘chaotic bureaucratic conditions in the aftermath of a major attack and its monumental stockpile of extra work’⁵⁰ (all those thousands of new detainees!), the security services (‘scrambling to create a coherent response to the larger threat’⁵¹) can surely be relied upon to remember and abide by Ackerman’s dictate, dramatically emphasized in the text, ‘*Do not torture the detainees.*’⁵² This ‘absolute’ rule which ‘judges should enforce...rigorously’⁵³ means that the ‘musings’ of a colleague at Harvard Law School Alan Dershowitz (who ‘has recently urged us to rethink this absolute prohibition’⁵⁴) can be dismissed as

⁴⁵ Ibid.

⁴⁶ Ibid at 45.

⁴⁷ Ibid at 47.

⁴⁸ Ibid at 49.

⁴⁹ Ibid at 106.

⁵⁰ Ibid.

⁵¹ Ibid at 108.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

irrelevant ‘to real-world emergency settings.’⁵⁵ But Professor Dershowitz is determined he is against torture. No one we think sounds as though they might be in favour of torture is ever really in favour of it at all, when you look very closely. Two pages on from Ackerman’s unequivocal prohibition, we read this:

But it is one thing to keep torture a taboo, another to define it. If judges are to intervene effectively to assure humane treatment, they should candidly recognise that ‘torture’ doesn’t define itself, and confront some tough line-drawing exercises. It is easy to condemn the extremely narrow definition of torture propounded by the Bush administration in its ‘war on terror,’ but any plausible definition will place some hard-driving interrogation tactics on the legal side of the line.⁵⁶

The international law definition, tucked away in an endnote⁵⁷ means that the term doesn’t have to define itself, but maybe Ackerman doesn’t want to be too explicit about what ruling out torture would really entail if the term were given its agreed international meaning. Much better to concoct a special Decency Commission to create ‘operational rules dividing torture from decent treatment’.⁵⁸ Ackerman’s plan is to ask the judicial and security people on this commission to tell the interrogators how far they can go, to authorise ‘hard-driving interrogation tactics’ as and when required. Why bother with the settled international learning on the matter when such an array of decency experts can be conjured out of the ethical air?

The arrest and detention plan, under which ‘a huge number of mistaken detentions is inevitable,’⁵⁹ is only a part of the Ackerman menu. He concedes, practically enjoys acknowledging (such good evidence of his high seriousness), that there will be a lot of other nasty stuff going on as well:

Here is a short list: curfews, evacuations, compulsory medical treatment, border controls; authority to search and seize suspicious materials and to engage in intensive surveillance and data compilation; freezing financial assets and closing otherwise lawful businesses; increasing federal control over state governments, expanding the domestic role of the military, and imposing special limitations on the right to bear arms – to name only some of the hot-button items.⁶⁰

Ackerman is alive to the dangers his scheme creates: ‘Without the effective constraint of the rule of law, it is far too easy for the emergency regime to degenerate into a full-blown police state.’⁶¹ Knowing this, Ackerman of course builds in a marvellous set of controls on the Leviathan he is unleashing, marvellous that is when viewed from the perspective of a faculty seminar, whether in Oxford, Yale or Harvard (or Cardozo). But, as he also knows,

⁵⁵ *Ibid.*

⁵⁶ *Ibid* at 110.

⁵⁷ *Ibid* at 193, n 8.

⁵⁸ *Ibid* at 112.

⁵⁹ *Ibid* at 84.

⁶⁰ *Ibid* at 96.

⁶¹ *Ibid* at 109.

‘[l]egislative innovation is a tricky business’ and his ‘shiny new solution might make matters worse’ since a ‘statutory framework for emergency powers may contain serious blunders that will be difficult to change once solemnly enacted into law.’⁶²

Blunders to some are legislative good sense to others: it depends on who holds the whip-hand in the legislative process, and whoever this will be, we know for sure that it will not be the learned professor. Any such political proponent of an emergency constitution would naturally cite Ackerman in support, and the effect of this book is that he will clearly be seen as broadly speaking in favour—after all he is the guy who came up with the idea in the first place. But how much of the fine-print (supposedly so essential to his plan if we are to avoid a police state) would survive the legislative process? A good place to start is the kind of event that would be required to get the emergency up and running. Ackerman is sure this repressive trigger must be reserved for truly ‘shattering events.’⁶³ He ‘would insist on an actual attack’⁶⁴ since anything pre-emptive can be made up while ‘a major terrorist attack is an indisputable reality.’⁶⁵ Is it though? How major is major? The 7 July, 2005 attacks on London would not qualify, it seems,⁶⁶ and even 11 September itself ‘represents the low end for the legitimate imposition of a state of emergency.’⁶⁷ We are clearly back in the world of Ackerman’s anxious imagination, in which the ‘pin-prick’ of 11 September was a ‘mere prologue to a new age of terrorist mass destruction.’⁶⁸ But supposing the politicians don’t see it this way, and impose a slighter threshold, or one that is preventive as well as reactive? What will Ackerman do then? Presumably all that will be left to him will be to criticise from the sidelines or (perhaps) to do a piece in the *Washington Post* disowning the whole legislative proposal under some clever literary heading like ‘That is not what I meant at all. That is not it at all’. But by then it will be too late: his job as under-pinner of extreme power done, he can be easily discarded. A Clinton or Obama presidency might, citing the learned Yale professor, present the new law (shed of all Ackerman’s constraining scruples of course) as liberal progress.

Similar vulnerabilities afflict all the ‘safeguards’ with which Ackerman seeks to protect his idea from becoming a recipe for a police state. Will the plan to pay every suspected terrorist \$500 a day (\$22,500 for forty-five days) survive legislative scrutiny even if it makes it into any draft bill? (Surely all the impoverished ordinary decent criminals will form an Al-Qaida friendship society in the hope of being picked up?) Will the special rule against a kind of ‘double jeopardy’ to block the ‘abuse’ of repeat arrests and detention for a

⁶² Ibid at 58.

⁶³ Ibid at 92.

⁶⁴ Ibid at 91.

⁶⁵ Ibid.

⁶⁶ See *ibid* at 92.

⁶⁷ Ibid.

⁶⁸ Ibid.

succession of forty-five periods actually get into the bill?⁶⁹ Will all the repeals of so many other statutes and the ‘comprehensive reappraisal’ of the currently ad hoc anti-terrorism legislation that Ackerman wants actually occur? Without substantial pruning of this sort, Ackerman acknowledges that ‘the emergency constitution will be a dead letter,’⁷⁰ but he never assesses the probability of their occurrence. Will the executive really agree to give the majority of seats in the legislative committees Ackerman concocts to oversee the operation of the legislation to opposition political parties and then equip these enemies ‘with complete and immediate access to all documents’?⁷¹ Supposing the emergency constitution is in place and an atrocity occurs, will government simply adopt it or, in the pressure of this particular moment, go for something even stronger, so as to be seen to be acting at such a critical time? Under such pressure of events, will the courts function as the ‘*guardians of the emergency constitution*’⁷² as Ackerman supposes? The questions need only to be posed for the probable answer to become clear: any proposal for democratic control that relies so heavily on the judicial branch for its effect is almost certainly fundamentally misconceived.

Ackerman’s acceptance of the likelihood of a terrifying future of suitcase bombs and mass terror, together with his rejection of the ordinary criminal law, means that he has given those who would jettison his preferred safeguards and controls all the rhetorical arguments they need to justify their cherry-picking. Why wait for horrors like this to occur when we can act to have all this in place before they happen? Why pay these junior members of the evil axis when ordinary decent American criminals languish in custody without charge? How can we risk our emergency constitution getting snarled up in Beltway politics, the future of our nation is at stake. And so on. As Ackerman notes, ‘once the president and Congress make emergency legislation a high priority, they might well make a mess of it—rather than coming up with a carefully controlled framework, they might transform the measure into a sweeping authorisation of all sorts of abominable practices.’⁷³ Exactly.

4. *Understanding Terrorism*

The overall effect of reading this book is to induce a feeling of despair about the quality of legal scholarship. Here is a man at the top of his profession, in one of the most prestigious positions in one of the greatest universities in the world. The book works well when he is engaged in some knotty discussion of habeas corpus or when he is criticizing this or that recent Supreme Court

⁶⁹ Ibid at 113.

⁷⁰ Ibid at 97.

⁷¹ Ibid at 85.

⁷² Ibid at 105 (emphasis in the original).

⁷³ Ibid at 65.

case—in other words when he is on home ground. But the rest of it reads like some noisy but important dinner guest whom you have invited around and are afraid now to shut up. There is no evidence of any sensitivity to political science in terms of the likely reception of the emergency proposals on Capitol Hill. The international relations dimension to the book, the importance of this impeccably *American* proposal as a potential precedent for counter-terrorist authoritarians like Musharraf of Pakistan or Mugabe of Zimbabwe, is simply entirely absent. The book shows zero awareness (much less understanding) of the huge (and sometimes good) literature on the meaning of terrorism and the importance of locating the term in its political context. Above all there is nothing on power and how power relations affect conduct, either generally (e.g. among legislators or members of his Decency Commission) or particularly, in the relationship between interrogator and terrorist suspect. It is as though Abu Ghraib has never occurred. The kindest thing to say would be that Ackerman also does not understand his own power, that he genuinely sees this book as a contribution to an interesting discussion that flows out of the seminar room, further evidence of his dazzlingly original mind, and not the ‘battering ram against liberal democracy’ that the state of emergency was in the hands of Carl Schmitt, the ‘one major thinker of the twentieth century [who] treated emergencies as a central theme—and he, alas, turned out to be a Nazi.’⁷⁴ (Ackerman is clearly no Nazi. But even devout liberals can accidentally create battery rams which eventually destroy their own beliefs).

Another kind remark would perhaps be that extreme though Ackerman appears to be, he is not out of place in the new genre of terrorism scholarship in US law schools that has been provoked by the attacks of 11 September. Eric Posner and Adrian Vermeule’s *Terror in the Balance. Security, Liberty, and the Courts* argues strongly and at proper academic length for a wide latitude to be given to the executive in the field of security: the authors are consciously anti-law, writing their book with the hope that it will help ‘clear the ground for government to react to emergencies, enabling it to adopt whatever policies survive review by national security experts and the political process.’⁷⁵ In *Law in Times of Crisis. Emergency Powers in Theory and Practice*, Oren Gross and Fionnuala Ní Aoláin discuss an ‘Extra-Legal Measures model [which] may be utilized to respond to the particular exigencies posed by terrorist threats’.⁷⁶ This is needed because ‘[f]undamental legal changes are taking place, and there is evident reordering of international legal institutions...’.⁷⁷ Harvard’s Alan Dershowitz has been a prolific contributor in the field, with his *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* being one of the

⁷⁴ Ibid at 56.

⁷⁵ n 1 above, at 275.

⁷⁶ Cambridge: Cambridge University Press, 2006, at 421.

⁷⁷ Ibid at 420.

⁷⁸ New Haven: Yale University Press, 2002.

early contributions that set the tone for much that followed.⁷⁸ Dershowitz has also been to the fore in stimulating the new debate about torture that has preoccupied so many legal academics, and surprised those who may have thought that its absolute prohibition was one of the few certainties that had survived into the post-modern age. It is important to repeat that the vogue is not for arguing for torture; rather it is to raise the issue and discuss ways of dealing with it. Sanford Levinson's well-known collection, the royalties of which go to 'The Torture Abolition and Survivors Support Coalition',⁷⁹ contains a section devoted to 'Reflections on the Post-September 11 Debate about Legalizing Torture' which is in effect a contribution from Dershowitz followed by various replies of a critical nature, including one from Richard A Posner (Chicago and currently also a federal judge). The point seems to be to have the discussion, to 'manage' the 'problem' of torture, rather than to restate principle in an uncompromising manner: as the final highly critical contributor to this part of the book put it, summarising the danger inherent in the project by evoking the collaboration of French lawyers in the racism of the Petain administration during World War Two, '[a]lthough the practice of torture violates all of our traditions, lawyers of impeccable liberal credentials are starting to "pull a Vichy" on their community.'⁸⁰

The engine of all of this has been the constant reiteration of the 'war on terror' trope, something Ackerman is rightly concerned to get way from. It seems now, however, to be embedded in legal discourse, losing its distancing quotation marks in R. H. Fallon and D. J. Meltzer's recent *Harvard Law Review* piece, 'Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror'⁸¹ and provoking the following apologetic from the impeccably liberal editors of the recent Australian volume *Law and Liberty in the War on Terror* (the latter phrase with no quotation marks):

We feel that some mention should be made of the inclusion of the phrase 'war on terror' in the book's title. This expression is widely contested and our use of it is not an endorsement of the adoption of a war paradigm in responding to terrorism. Nor does it indicate unqualified approval of the many political uses to which others have put that phrase Nevertheless, the expression – for good or ill – is arguably the defining one of our times and we decided that its use appropriately conveyed the context in which Australia's national security law has been rapidly developed.⁸²

What is depressing about this is how passive the role of the legal scholar is perceived to be, receiving news from the front-line of public affairs and shaping his or her scholarship accordingly. That an alternative to this kind of conscience-stricken fatalism is possible is immediately apparent from the

⁷⁹ S. Levinson (ed.), *Torture. A Collection* (Oxford: Oxford University Press, 2004) at 20.

⁸⁰ R. H. Weisberg, 'Loose Professionalism, or Why Lawyers Take the Lead on Torture' in *ibid* 299 at 303.

⁸¹ (2007) 120 *Harvard Law Review* 2031–2112.

⁸² A. Lynch, E. MacDonald and G. Williams (eds), *Law and Liberty in the War on Terror* (Sydney: The Federation Press, 2007) at xii.

opening paragraph of David Dyzenhaus and Rayner Thwaites's contribution to the same volume:

The title of this...book...is deeply, even dangerously misleading. Western legal orders are not living in a time of emergency or terror, despite the best efforts of our leaders to convince us otherwise. Additionally, the idea that the way to deal with the challenges to the West sharpened by the events of 9/11 is by waging a 'war on terror' was from the beginning, and is ever more, preposterous. There are, of course, many people in the world who face a daily situation of wartime emergency in which their lives are wrecked by fear of real terror. But it is important to keep in mind that among them are the peoples of Iraq and Afghanistan, whose present situation is directly attributable to the fact that foreign policy in much of the West since 9/11 has been based on this preposterous idea.⁸³

Rejecting the idea of a 'war on terror' does not necessarily lead one to emergency constitutions; as Dyzenhaus said of Ackerman's plans when they first appeared, in the *Yale Law Journal* essay (in time to be referred to in his *The Constitution of Law. Legality in a Time of Emergency*⁸⁴), '[t]hey appear to be vain attempts to find a role for law while at the same time they concede that law has no role'.⁸⁵ Dyzenhaus's book is a serious attempt to engage with the issues of terrorism while not sacrificing the scholar's capacity to stand above the headlines, to help make rather than merely to reflect the current intellectual weather. As Dyzenhaus's book demonstrates, it is useful to know one's stuff, to be immersed in the detail of the law and abreast of the history of one's subject: the safest inoculation against enslavement to prevailing (and power-driven) fashion is a little knowledge.

These are attributes that a scholar like David Bonner (University of Leicester) has in spades. His latest book, *Executive Measures, Terrorism and National Security. Have the Rules of the Game Changed?*⁸⁶ deserves more attention than all the interventions of the post 11 September experts put together. This is not least because of his 'career-long interest in the ways in which United Kingdom Governments, both at home and in Empire, have sought to manage terrorism and other national security threats by legal means other than those in the criminal process and the criminal law'.⁸⁷ This interest has produced a series of impeccably scholarly articles since the earlier 1980s⁸⁸ as well as a path-breaking book on

⁸³ 'Legality and Emergency – The Judiciary in a Time of Terror' in Lynch, MacDonald and Williams, *ibid* at 9. The authors are also critical of the title to their own chapter, while conceding that the 'topic is still useful', *ibid*.

⁸⁴ Cambridge: Cambridge University Press, 2006.

⁸⁵ *Ibid* at 42. It is true that law plays a more prominent role in the final set of ideas that appear in the book version of the essay but the point remains in substance valid.

⁸⁶ Aldershot: Ashgate Publishing, 2007.

⁸⁷ *Ibid* at ix.

⁸⁸ Ranging from 'Combating Terrorism in Great Britain: the Role of Exclusion Orders' [1982] *Public Law* 262–81 to his excellent study of the origins of the Prevention of Terrorism (Temporary Provisions) Act 1974, 'Responding to Crisis: Legislating against Terrorism' (2006) 122 *Law Quarterly Review* 602–31.

emergency law published some fifteen years before the 11 September, 2001 attacks.⁸⁹ The *Executive Measure, Terrorism and National Security* study grew out of an intensive three-month period of archival research at the National Archives in Kew, funded by the British Academy.⁹⁰ Bonner's perspective on the current terrorist threat does not fit with the prevailing political and journalistic orthodoxies: 'The view that the threat is the greatest since the Second World War is clearly contestable. It will rightly raise eyebrows among those who lived through or were victims of the IRA's bombing campaign in Northern Ireland and on mainland Great Britain from 1969 to 1999', not to mention those 'who lived through the nuclear threat during the Cold War'.⁹¹ The 'central argument' of Bonner's 353 page study is that 'as regards the executive measures [used to combat terrorism], the "rules of the game" have not changed. It is very much a case of "old wine in new bottles"'.⁹² His book concludes with remarks that might have been aimed directly at Ackerman:

Faced with grave danger, it is tempting to be 'better safe than sorry', to fall back on 'necessity', to be prepared to countenance illegality or tear down long-standing legal or constitutional safeguards blocking the way to 'effective action'. But if our response to any significant threat to our security or safety is without proof of a criminal offence to lock away or seriously disrupt the lives of those merely thought to be a threat, this represents a grave danger to the nature of our liberal society. A US Marine in Vietnam is said to have justified destruction of a village saying 'we had to destroy it in order to save it'. Are we, like that Marine, in danger of destroying our liberal 'village' in order to save it?⁹³

It is not necessary to leave the United States to discover similar levels of intelligent and historically well-informed analyses of the supposed challenge of terrorism. David Cole (Georgetown) and Jules Lobel (University of Pittsburgh) have shown in their *Less Safe Less Free: Why America is Losing the War on Terror*⁹⁴ that it is possible to engage with the general public in an accessible way from a coherent liberal perspective without being stampeded into terrorism-hysteria and the consequent loss of all sense of historical or political perspective. To Cole and Lobel, the right way to tackle the problems associated with terrorist violence is to engage in a variety of 'noncoercive strategies'⁹⁵ which on their analysis would include a sensible deployment of the mainstream criminal law certainly but also the restructuring of US foreign policy 'to address the root causes rather than merely the symptoms of terrorism',⁹⁶ and an end to unilateral assertions of US military power. Where coercion is, despite everything, inevitable, the authors

⁸⁹ *Emergency Powers in Peacetime* (London: Sweet and Maxwell, 1985).

⁹⁰ n 86 above, at xi.

⁹¹ *Ibid* at 8–9.

⁹² *Ibid* at 40.

⁹³ *Ibid* at 352–3.

⁹⁴ The Free Press, New York, 2007.

⁹⁵ *Ibid* at 207–59.

⁹⁶ *Ibid* at 207.

say that in using force, the US ‘should treat the rule of law as an asset rather than an obstacle.’⁹⁷ Cutting through all the supposed ethical dilemmas that are said to surround the ticking-bomb hypothetical beloved of terrorism-experts,⁹⁸ Cole and Lobel reassert the illegality of such conduct (in any event ‘extremely unlikely’⁹⁹) while acknowledging the obvious, namely that ‘[a]fter the fact, [such wrongdoers] may seek mercy from the prosecution, judge, or jury; indemnification from Congress; or even a pardon from the president.’¹⁰⁰ Or they may not, or even if they try, they may not get what they want. ‘By contrast, if one creates a legal regime that formally authorizes torture or “highly coercive interrogation” in specified emergency situations, the moral clarity of the prohibition will be muddled, officials will be likely to interpret “emergency situations” broadly, and emergency powers will be increasingly used in nonemergency situations’.¹⁰¹ It is to be hoped that Cole and Lobel and other similarly minded academics will be celebrated in decades to come rather as those who stood up to McCarthyism are today, but that they are in a minority at least among those who write on these topics in the US is clear: their section on torture is not a response to Dershowitz but rather to two of his colleagues at Harvard, Professors Philip B Heymann and Juliette Kayyem, whose book proposes yet another framework for the necessary restriction of freedom and occasional essential maltreatment, needless to say in a volume with a title applauding itself for its dedication to liberty.¹⁰²

Frank Furedi has written recently of the way in which our culture has begun to see itself as enduringly vulnerable, its members ‘at risk’ from rather than the masters of events.¹⁰³ This trend towards perpetual anxiety has now taken-off, powered ever-upwards by our irrational dread of terrorism. The worst hypothesis—not what actually happens—is what grabs our attention. Science no longer brings breakthroughs to make our life better, it unleashes forces that have the potential to destroy us. The success of the language of ‘the war on terror’ lies in the nature of the risk-obsessed society into which it has been introduced: ‘The intense sense of powerlessness which accompanies the consciousness of ignorance about the future works to empower terrorism.’¹⁰⁴ Furedi shows how our preoccupation with the unknown unknowns of a terrifying future leads us into bad policy decisions (‘worst-case scenarios have

⁹⁷ Ibid.

⁹⁸ The situation where a detained suspect is believed to have knowledge of a bomb the detonation of which, costing many lives, is imminent: are the authorities to be permitted to engage in torture in order to obtain the information which will save lives?

⁹⁹ n 94 above, at 256.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² *Protecting Liberty in an Age of Terror* (Cambridge, MA: MIT Press, 2005). Also quite predictable is the total prohibition on torture but the openness of the authors to the use of ‘highly coercive interrogation’ techniques. Ackerman thinks Heymann and Kayyem to be ‘two of our most thoughtful legal analysts’: *Before the Next Attack* at 175 n 2.

¹⁰³ F. Furedi, *Invitation to Terror. The Expanding Empire of the Unknown* (London: Continuum, 2007).

¹⁰⁴ Ibid at 66.

a habit of migrating from the realm of fantasy to the domain of policy deliberation'¹⁰⁵) while at the same time exposing us to yet more terrorist attacks: the worst of both worlds. Furedi's answer to all this is for our culture to show more resilience. The specialist work on disasters that has been done demonstrates that societies do not fall apart when they are attacked, even when this is with far more destructive capacity than an army of Al-Qaida operatives could ever muster. Cultures are far less vulnerable than their leaders suppose or their members have begun to assume them to be. Communities invariably muster high levels of solidarity when confronted with tragedy. The same can be said of the orthodox criminal law, far better able to deal with violent subversion than its ill-informed critics so often assume. Terrorists need their victims to be intimidated: if they refuse to give in, this weapon of the weak—the indiscriminate attack on civilians without other kinds of military action—shrivels up and dies for lack of the 'oxygen of publicity' as Mrs Thatcher once called it. Speaking on behalf of scholars everywhere, Furedi asserts that '[w]e can encourage such a [resilient] response by constantly questioning the belief that we live in an "age of terror"'.¹⁰⁶ This is another book that Professor Ackerman could read with profit before making any further contribution to a debate that has too many implications for too many people to be regarded as merely a playground for intellectual giants.

¹⁰⁵ *Ibid* at 114.

¹⁰⁶ *Ibid* at 172.