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# Book Review of Counter-Terrorism: The Culture of Law and Justice after 9/11

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**Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11,** by Nicola McGarrity, Andrew Lynch and George Williams, (London & New York: Routledge, 2010), 244pp. + xii, hardback, £75.

In order to understand law, it is essential to understand culture. Like law, culture shapes human behaviour. Laws that run against a cultural grain can be difficult to enforce. Laws that run with a cultural grain may not need formal enforcement. Legal scholarship has neglected, to date, to pay much attention to the evolution of culture.

This book is not a formal study of culture. But, as its subtitle indicates, the analysis of cultural attitudes is essential to the purpose of the book. And consideration of culture provides an unexpectedly strong, though often understated, theme that binds together 12 chapters on otherwise disparate topics in the realm of counter-terrorism and the law. The editors' introductory chapter is titled "The emergence of a 'culture of control'". In it, the editors note the potential for the use of exceptional counter-terrorism measures to become "normalised" as part of the legal and political framework in two ways: as temporary measures become permanent; and as they become used in response to other, far less serious, threats. They state that the aim of the book lies in this second realm:

> "among other things, to consider the 'seepage' of extraordinary legal measures developed in the counter-terrorism context into other areas of law and policy." (p.4)

The editors' purpose is largely achieved, perhaps reflecting the volume's origins in what was clearly a relatively coherent two-day roundtable held in Australia in July 2009. The volume is attractively presented. My only minor cavil with presentation is the seemingly relatively small font size, but perhaps that is more an effect of the reviewer's eyesight. In addition to the editors' introduction, the chapters are divided into five parts that reflect different aspects of counter-terrorism law and different aspects of its relationship with culture. The focus of the substantive analysis in this book tends to be on Australian examples. But the lessons and implications are universal.

Part II treats "prevention and pre-emption, evidence and intelligence". Jude McCulloch and Sharon Pickering present a very interesting contrast of crime prevention with the sort of pre-crime pre-emption or disruption of operations that threaten national security. They argue persuasively that the shift to pre-emption in the counter-terrorism context represents a paradigmatic shift away from the usual standards of criminal justice due process. Claire Macken finds that the Australian preventive detention orders regime is inadequate in terms of (the human rights aspects of) a conventional criminal justice model but that such a model is, in any case, inconsistent with the purposes of an intelligence model. Bravely, and usefully, she suggests her own preferred adjustments to a criminal justice approach. Kent Roach's chapter contains a nice comparison between the use and implications of evidence in a criminal justice context in distinction to the use of intelligence in national security operations.

Collectively, the chapters in Pt II dwell on the implications of two different ways of viewing the world—the culture, or paradigm, of criminal justice policing and enforcement compared with the culture or paradigm of national security and intelligence. These two worlds are often seen as functionally different and they do have different objectives and purposes. But they also constitute two cultures, with different mindsets, different operating assumptions. Each exhibits a different "collective programming of the mind which distinguishes the members of one group or category of people from another". An important challenge for western counter-terrorism is in the clash of cultures that necessarily arises from the

deployment of both criminal justice and intelligence tools. Which will prevail? Or will we see more generally, as Macken proposes in relation to preventive detention orders, an evolution of both cultures to accommodate the other?

Part III treats the part of community surveillance in creating a "culture of suspicion". Charles Weisselberg conducts an impressionistic examination of US Supreme Court argument and decisions in ordinary criminal cases. He finds that references to terrorism occur in a wide variety of contexts and that rulings are at least consistent with an approach that minimises judicial review of executive decision-making in terror-related matters. John Ip examines the legal context of two cases, in the United States and the United Kingdom, concerning suspicionless searches in relation to counter-terrorism. He raises concerns about implications in ethnic profiling and argues that the value protected by foiling a terrorist attach makes balancing security against liberty a fait accompli. Ip also expresses concern about the normalisation of such searches into ordinary criminal contexts—pointing out that the mandatory screening of aircraft passengers implemented in the United States in the late 1960s halted a spate of aircraft hijackings (p.103). This practice, a "yardstick of suspicionless searches" is now accepted as normal. Susan Rimmer considers the ability of the Australian Minister for Foreign Affairs to cancel the passport of an Australian citizen on broad national security grounds. She suggests that particular cases demonstrate clear breaches of the principles of natural justice. She also suggests that the culture of the Australian Security and Intelligence Organisation's security assessment powers should change to recognise the human rights of citizens and non-citizens.

Collectively the chapters in Pt III focus on the effect of the salience of counter-terrorism: on the culture of a court in approaching issues of ordinary criminal law; on more general social norms of suspicionless searches; and a normative call for change in the culture of an intelligence organisation. These fragments of culture remind us of the ubiquitous impact of the phenomenon of terrorism and counter-terrorism—in affecting culture within specific, influential, organisations as well as across societies more generally.

Part IV treats the normalisation of extraordinary measures. Two of the editors, Nicola McGarrity and George Williams, focus on the use of pre-emption to demonstrate how the dividing line between laws directed at terrorism and at other criminal activities is breaking down. They identify examples of counter-terrorism laws providing a precedent, and even template, for the use of extraordinary powers in other criminal contexts in Australia. McGarrity's and Williams' policy prescription in response is that a "culture of restraint" should be fostered amongst legislators. Gabrielle Appelby and John Williams provide an interesting analysis of South Australia's "Bikie Bill" or the Serious and Organised Crime (Control) Act 2008. Mechanisms in the Act, such as a control order mechanism, criminalising organisations and the judicial use of criminal intelligence, are more redolent of the intelligence world rather than the criminal justice culture and illustrate "anti-terror creep".

Part IV provides a valuable examination of the detailed ways in which extraordinary measures passed in a counter-terrorism context have become part of the new normal. Why not then apply them to serious non-political organised crime? Conceptually there are good arguments that the policy problem is the same.

But, as McGarrity and Williams demonstrate, the justification for special counter-terrorism laws is usually put in terms of the extraordinary nature of the problem of terrorism. How, then, are responses to such an extraordinary problem logically applied to ordinary crime?

Part V treats the flow of information in liberal democracies. Lawrence McNamara compares the extent to which Australian and United Kingdom laws check state power to use media information in the prosecution and investigation of terrorism offences. He argues that Australian laws fall short of providing the legal protections that are necessary. McNamara also has a wider point, largely undeveloped, that these laws are part of a wider apparatus, seeping from counter-terrorism measures, that enable the state to control information in a way that affects the ability of citizens to speak freely and hear the voices of others. Mark Rix analyses Australia's counter-terrorism strategy through the lens of the arrest, detention, charging and visa cancellation of Dr Mohamed Haneef. He focuses on the role of the Australian Federal Police, the Commonwealth Director of Public Prosecutions, and the media, especially as illuminated by the independent Clarke inquiry. Rix concludes that the media scrutiny of executive government's exercise of power is indispensable for the protection of human and legal rights of detained persons.

The importance of Part V to the wider theme of the book lies in the importance of the mass media to the transmission of cultural norms. In transmitting, and presenting not only information but the attitudes of influential groups in society to current events, the media plays a crucial role in the formation and evolution of cultural attitudes to specific events—which in turn influence more general cultural norms at the margins. Both of these chapters could have benefited from greater consideration of the implications of the internet, and the rise of the blogosphere. No doubt the print and electronic media is still the primary means for a large part of western societies receiving information. But how easy is it, really, for the state to be confident that it can control access to information and views when access to the internet is unrestricted?

The single chapter in Pt VI concerns judicial review and the parliamentary process. Fergal Davis reflects on how best to secure the balance between liberty and security. He examines whether there is a flaw in the conventional constitutional reliance on the judiciary to check the powers of the executive—judicial subservience to the executive when faced with a security threat. He outlines historic failures of courts to restrain the executive during World War II in the United Kingdom, the United States and Ireland. He suggests that a significant factor in the success of Dr Haneef in Australia's courts of law was his media campaign in the court of public opinion.

Davis's concluding chapter ends with the sentence "Ultimately, the only effective means of upholding civil liberties will be through politics, not the courts". This is a fitting bookend to a theme that started with the editors' aim of considering the seepage of extraordinary counter-terrorism legal measures into other areas of law. The volume's enterprise is, implicitly and sometimes explicitly, concerned with the formation, clash, and evolution of cultures—across societies, within particular

nations, and within specific organisations. This theme holds its chapters together more coherently than most such edited collections—and its contribution to the international literatures concerning counter-terrorism and culture is to be welcomed.

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