

Terrorism and Human Rights in the New Millennium: In Search of Equilibrium

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The Cost of Counterterrorism: Power, Politics, and Liberty. By Laura K. Donohue. Cambridge: Cambridge University Press. 2008. ISBN 052160587. 500 pages, \$27.99 (paper).

Terrorism and Human Rights. Edited by Magnus Ranstorp and Paul Wilkinson. London and New York: Routledge. 2008. ISBN 0415414791. 283 pages, \$150 (cloth).

National Insecurity and Human Rights: Democracies Debate Counterterrorism. Edited by Alison Brysk and Gershon Shafir. Berkeley, Los Angeles, London: University of California Press. ISBN 0520098602. 245 pages \$26.00 (paper).

The aftermath of the 9/11 terrorist attacks has seen a resurgence of sociologically-informed writings on terrorism and the tension between counterterrorist measures and human rights policies. This study of the intersection of counterterrorism and human rights is not novel by any means. In *Leviathan* Thomas Hobbes argued that individuals in a state must give up some of their rights in order to gain security. Nicolo Machiavelli made a similar claim in *The Prince*, asserting that individuals are willing to surrender certain powers to the state in return for better personal security. More recently, at the end of the twentieth century, scholars such as Christopher Hewitt, Paul Wilkinson, Martha Crenshaw, and David Charters have written on the tradeoff of counterterrorist policies and rights, usually focusing on the fight of democracies against terrorism and on the prices of this fight. However, since 9/11 there has been an influx of new writings, largely focused on the fight against the “new terrorism” and juxtaposing it with what some call the “global human rights regime.”

These two terms (“new terrorism” and “the global human rights regime”) demand further elaboration. While there is no consensus over what “new terrorism” is and over how genuinely different it is from the “old terrorism,” there are a number of elements which appear to be more prevalent in the terrorism of the new millennium. These include acts that are increasingly motivated by cultural and religious (rather than national) justifications, a

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rejection of modern values, more amorphous goals and less willingness to compromise, less respect for human life (including those of the terrorists themselves), and the use of advanced technology (such as the Internet and cell phones), including the willingness to use unconventional weaponry and weapons of mass destruction.

As for the global human rights regime, this is the name given by scholars such as Jack Donnelly to the emergence and proliferation in the last few decades (and especially since the end of the Cold War) of universal human rights. This proliferation includes a substantial increase in the attention of the international community to human rights violations, an increasing number of domestic and global human rights organizations, the establishment of international human rights courts, a significant increase in human rights trials, and, according to some, also the decrease of actual human rights violations.

The current essay reviews three recent books (two edited volumes and a monograph) that focus on the balance between the new counterterrorism on the one hand and human and civil rights on the other hand. The three are Alison Brysk and Gershon Shafir's *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, Laura Donohue's *The Cost of Counterterrorism: Power, Politics, and Liberty*, and Magnus Ranstorp and Paul Wilkinson's *Terrorism and Human Rights*.

The first two books are guided by a critical liberal approach that focuses on the price of counterterrorist policies and the frequent inefficiency of policies that sacrifice human rights while citing security needs. This view is particularly evident in Brysk and Shafir's *National Insecurity and Human Rights*. Brysk, who writes the introductory first chapter, presents a useful framework that emphasizes two traditional competing academic positions on the trade-off between human rights and security. The first position, the *realist perspective*, holds that since terrorism threatens the mere existence of democratic societies, unilateral and preemptive actions are necessary to protect world order. According to this view, terrorists break the rules, and therefore become "enemies of mankind" who forfeit both national and humanitarian protection and merit universal prosecution by any means necessary. In contrast, the *civil libertarian* position emphasizes the supremacy of international rights over national interests. In this view, the breaching of universal human rights norms is both normatively wrong and ineffective, in that it undermines the moral authority of democracies, hurts international cooperation, and erodes public support.

In the post-9/11 world a new intermediate position has emerged, one that is supported by scholars such as Alan Dershowitz and Michael Ignatieff. This view struggles to reconcile the norms and processes of democracy with the selective derogation of core universal standards. In what Ignatieff calls *the lesser evil approach*, he adopts a utilitarian view and argues that in some cases democracies may be forced to stray from their own foundational principles to protect their citizens and their very existence. Brysk and the other authors in the edited volume are not convinced. Brysk raises the slippery slope imagery and argues that the selective rejection of some rights is bound to lead to the erosion and violation of core boundaries. She believes that the proponents of the lesser evil approach underestimate its dangers and are overconfident about the probity of governments and of democratic institutions to prevent deterioration. Her conclusion is that the minute increments in security cannot justify the serious sacrifice in terms of protection against bureaucratic errors or malice by the government.

The remaining chapters in the edited volume examine the counterterrorist policies of various countries and echo this uncompromising libertarian view. In Chapters 2 and 3, Richard Falk and David Forsythe write on the United States' policies following 9/11. Falk sees the War on Terror as a political cover for an American militant policy, based on grandiose neoconservative goals to reshape the Middle East. He further criticizes the US

Patriot Act and the erosion of the rule of law after 9/11, and warns against the dangers of the lesser evil approach. Forsythe continues this line, criticizing the Bush administration for choosing a line of action that opted for abusive interrogation practices over humane ones. He charges that the damages of the US War on Terror policies are far greater than its benefits, and include the decline in US reputation, damage to its sense of proper identity and honor, and above all an increase in antagonism and hostility of foreign populations toward the United States.

This critical approach is also held by the contributors who review British policies. Colm Campbell, who writes on the history of British policies in Northern Ireland in Chapter 4, focuses on the intersection of these policies with international law and the influence of the historical policies on British policy following 9/11. In Chapter 5 Todd Landman also finds continuity between pre- and post-9/11 policies. He acknowledges the balance between rights and security needs, but claims that the British government has simply gone too far in some of its measures. In Chapter 6, Gershon Shafir focuses on the practice of torture and the case of Israel. He concludes that there can be no moral or practical justification for adopting torture of any kind and criticizes US policy makers who sought to emulate Israeli practices and scholars such as Alan Dershowitz, who offer to regulate torture.

The next three chapters of the book examine three other Western democracies—Spain, Canada, and Germany. Salvador Marti, Pilar Domingo, and Pedro Ibarra, who write the chapter on Spain, do not really focus on the conflict of counterterrorism and human rights, but rather on counterterrorist legislation since 1978 and the discourse surrounding it. Howard Adelman, writing on Canada's policies since 9/11, offers an interesting view on the concept of balance between rights and security, which highlights three alternative meanings of this concept. He criticizes the Canadian government for failing to maintain balance and for breaching “absolute rights” in favor of security concerns, despite a very low level of risk. Wolfgang Heinz, who writes the chapter on Germany's policies over the years, concludes that over all they abided by the criminal law and emphasized international cooperation, with relatively little breaching of human and civil rights principles.

In the concluding chapter Shafir, Brisk, and Daniel Wehrenfennig reiterate the main theme of the book. They renounce once again Ignatieff's lesser evil approach, stating that democracy is not sufficient to protect human rights in hard times and universal human rights principles are a necessary basis for a legitimate response to terrorism. They argue that fighting terrorism with military campaigns is ultimately ineffective, because it diminishes the state's legitimacy and its external support.

Laura Donohue's *The Cost of Counterterrorism* takes a similar approach. In a comprehensive comparative analysis of counterterrorism law in the United Kingdom and the United States Donohue highlights the costs of counterterrorist policies. Her central claim is that the dichotomy between security and freedom ignores the damage of counterterrorist legislation, damage which is far greater than it first appears. Despite some important differences between the two countries, Donohue claims that both have gone too far, especially following the attacks of 9/11. She also believes that due to their political centrality they are setting counterterrorist norms that have a major detrimental spill-over effect on other liberal democracies.

Throughout the book Donohue claims that counterterrorist legislation tends to be counterproductive, largely because it alienates important ethnic or religious minority groups that are central to the state's fight against the terrorist threat. She argues that when talking about a tradeoff between security and human rights, the political and scholarly debate tends to ignore the fact that hurting human rights is often also detrimental to security. In addition, repressive legislation harms the legitimacy of the state, and hence its subsequent power to

act against threats. Finally, Donohue reminds us that protection against physical threats and terrorism is only one type of security. Our sense of safety also comes from other kinds of security such as security against state violence or environmental security, and these should not be neglected in the debate.

The main part of the book is a painstakingly detailed account of major legislation in the UK and the US, focusing on five main types of legislation and legal procedures: indefinite detention and coercive interrogation, financial counterterrorism, privacy and surveillance, speech and free expression, and auxiliary precautions. In each of these long sections, Donohue reviews the costs of the legislation throughout the twentieth century, and especially in the new millennium. She suggests that the damage caused to the US and the UK is significantly greater than it first appears. The costs she describes include the erosion in the power of the legislature, the alienation of minorities, and eventually also a polarization of world opinion which hurts the ability of both countries to fight terrorism. Donohue claims that even when some of the measures do in fact help in preventing future terrorist acts, their cost is too high and their long-term effects are destructive. Her main conclusion is that in both the UK and the US the role of the executive branch in the fight against terrorism is too wide and should be curtailed in favor of the other two branches. This is particularly true for the legislature, which she argues should be further empowered and should take a more active role in the fight against terrorism.

Ranstorp and Wilkinson's edited volume *Terrorism and Human Rights* presents a less unified position, as one might expect from a book that is based on a selection of papers from an international conference on terrorism and human rights. The diversity extends beyond content. The volume includes 17 essays and reports, some lengthy and others no more than expositions, which also vary substantially in how extensively they tackle the tradeoff between terrorism and rights. Indicative of this tendency are the first four contributions, which describe the international response to the terrorist threat, but do not really expand on the balance between this response and the respect for human rights principles.

Chapters 5 to 12, grouped under the rubric of "Balancing Security and Civil Liberties Since 9/11," are more relevant to the current debate. In Chapter 5 Laura Donohue repeats the main arguments she makes in her book, claiming that the fight against terrorism has more deleterious effects than first meets the eye. She calls to examine more seriously the long-term effects of restrictions on individual freedom and infringements of individual rights, charging that these increase the motivation for future terrorism. A similar approach is taken by Christopher Michaelsen in Chapter 9. Michaelsen surveys counterterrorist legislation in Britain and in Australia following 9/11 and claims that both countries have failed to maintain the right balance between rights and security needs, often giving up essential liberties without being able to obtain even temporary safety.

Berth Dunér presents a rival approach in Chapter 6. He criticizes the tendency of leading human rights NGOs to deemphasize the security threat of terrorism and their claim that the best way to fight terrorism is through the full observance of human rights. Dunér argues that if that was the case, relatively few democracies would have been plagued by terrorism. The libertarian approach ignores the real threats of terrorism and fails to suggest realistic alternative policies that may accommodate the real security needs of countries such as the US and the UK. Dunér accuses human rights NGOs of being somewhat arrogant in scolding governments for their policies. He suggests that there is a need for a more serious and empirically informed debate over the balance between security needs and human rights.

In chapter 13, Shri P. R. Chari joins the criticism on prominent human rights NGOs such as Amnesty International. He claims that their approach is too stringent and idealistic, and that they ignore real-world situations in which human rights violations occur. Focusing on

the Indian case, Chari defends the acts of the Indian central government and emphasizes the establishment of National Human Rights Committees for the protection of human rights. He concludes that there is a need for maximum state transparency regarding security operations, but also for human rights NGOs to maintain more balance and avoid the inclination to gloss over the misdeeds of militants while criticizing the security forces. Sergio Catignani, writing on the Israeli case in Chapter 15 also emphasizes the state's obligation to defend its own citizens, and criticizes international bodies that scrutinize Israel for its actions. He asserts that not many other countries could do such an effective job in fighting terrorism as Israel has and emphasizes that despite the state's efforts not to hurt the innocent, "the probabilities of human rights abuses when fighting terrorism are never-ending" (p. 244).

The remaining contributions to Ranstorp and Wilkinson's edited volume are less relevant to the debate over the balance of terrorism and human rights. Nevertheless, the importance of this volume is in bringing a different voice to the debate, one which is often missing from much of the academic human rights literature. Writers such as Dunér, Chari, and Catignani remind us of the state's necessity to confront terrorism and, in the process, make at least some compromises.

Brysk and Shafir suggest that there should be no middle way. Universal human rights should be respected without compromise and the selective rejection of some rights is a slippery slope that eventually leads to widespread violations. Miniscule security improvements, they charge, cannot justify the infringement of rights. Their point is well demonstrated in all three books. Indeed, all too often the infringement of rights when responding to terrorist attacks or threats is not only morally questionable, but also highly ineffective and counterproductive.

However, this absolute libertarian approach leaves important questions open. First, it is not clear what the authors see as comprising a full list of universal and absolute rights—rights which must not be breached under any condition. Human rights scholars have been debating over this question for many years, and have yet to reach a consensus (for example, regarding the status of economic rights and group rights). The conclusion that no rights must be breached when fighting terrorist threats seems overarching and somewhat vague.

A second problem with the conclusions suggested by Brysk and Shafir and by Donohue is their reliance on a narrow number of case studies, all of which are Western democracies. Based on these cases the authors assert that breaching human rights is ineffective in fighting terrorist threats and that it is in fact counterproductive, especially in the long run. They further charge that state's counterterrorist policies that involve the infringement of some rights provide only a minor contribution to security, and should therefore be abandoned. These assertions are overly-inclusive. Recent studies on the results of states' counterterrorist policies suggest that these are not uniform. For example, some repressive measures seem to be more effective in the developing world than in the developed world. In addition, even in developed democracies some measures are more effective than others. Shafir and others, for example, have rightfully denounced the inefficiency of torture in Israel and in the US. However, the effects of other measures taken by the Israeli government are more controversial. These include, for example, the erection of barriers and large-scale military operations, which were heavily criticized by human rights advocates, but nevertheless resulted in substantial decreased levels of terrorism. It seems that the interpretation of these policies and their effectiveness is often influenced by the point of view of those that make the assessment, rather than by a rigorous evaluation of the results. While the moral legitimacy of such measures should certainly be debated, their effectiveness is underestimated by those who oppose them.

These weaknesses of the absolute libertarian perspective suggest that the lesser evil approach, outlined by scholars such as Michael Ignatieff, deserves another look. This position emphasizes that human rights cannot give a complete guide for action in the face of terrorist threats. Ignatieff recognizes that human rights principles often cannot tell us what we are supposed to do and how we should respond when rights are denied by others. Democracies, he claims, are committed to both the security of the majority and the rights of the individuals, and neither a morality of consequences nor a morality of dignity can be allowed exclusive domain in public policy decisions. The danger of the slippery slope, according to Ignatieff, is solved by the democratic institutions. Brysk recognizes that this last point (the ability of democratic institutions to prevent gradual deterioration of rights) is the weakest link of the lesser evil approach. However, the idea that in the face of some terrorist threats breaching certain individual rights is simply the lesser of two evils is a considerable challenge to the libertarian approach.

Despite the significant contribution made by the three books reviewed here to the normative debate over the balance between terrorism and human rights, this debate seems to be largely driven by moral views. To further advance this debate and to make it more informed, there is a need for more rigorous empirical research on the policies of a wider set of countries (especially developing democracies), as well as on the results of these policies and their short- and long-term effectiveness in reducing terrorist levels.

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