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Transplantation

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1. Introduction

In the first edition of this volume, I suggested that in liberal–democratic states, it is a spiral, not a pendulum, that best describes the evolution of counter-terrorist law.[1] Introduced in the wake of the latest attack, new measures seek to expand executive authority. Legislators tend to capitulate to the executive's demands, often under expedited circumstances and without careful analysis of how the attack occurred. The most onerous provisions may be subject to sunset clauses, but thereafter repeal becomes extremely difficult. To allow such measures to lapse, legislators must demonstrate that the threat no longer exists, that by repealing the provisions violence will not ensue or that some level of violence is acceptable. The first two are impossible to prove and the third politically untenable. Such provisions thus not only remain, but then become a baseline on which further authorities are built, expanding the power of the executive and restricting rights.[2]

In this edition, I would like to raise concerns about an intersecting phenomenon: transplantation. It contributes to the evolution of the counter-terrorist spiral by both driving the introduction of new measures and ensuring, in the transfer of rules to other areas, the entrenchment of counter-terrorist law.

I divide transplantation into two categories. By substantive transplantation I mean the method by which counter-terrorist measures are applied

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[1] Laura K. Donohue, 'Terrorism and the counter-terrorist discourse', in Victor V. Ramraj, Michael Hor and Kent Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2005). For further development of the theory and further exposition of many of the examples used in this chapter, see Laura K. Donohue, *The Cost of Counterterrorism: Power, Politics, and Liberty* (Cambridge University Press, 2008).

[2] See Donohue, 'Terrorism and the counter-terrorist discourse', pp. 2–4, 14–20.

to other areas of the law and, in turn, provisions developed in other substantive realms, such as military, criminal or civil law, are applied to counter-terrorism. Geographic transplantation, in turn, deals with the regional transfer of legal rules, which occurs either through parallel adoption of provisions, or through directed implementation from international organisations.[3] While transplantation may be consistent with the arguments from analogy that permeate legal analysis, in a world of counter-terrorism, where the types of threats faced by the state may be *sui generis*, the powers thereby introduced may be substantial and the movement of parallel provisions may result in a broad range of unintended effects, such transfers carry considerable costs.

The transplantation from counter-terrorism to criminal law, for instance, embeds counter-terrorist authorities in the broader legal code. Three effects follow: first, the ratcheting effect identified in the counter-terrorist spiral, above, expands beyond counter-terrorism. Once such measures proliferate, their repeal becomes extremely difficult, and they thus become a baseline on which further measures are built. Second, the effect is felt in the further transfer of powers to the executive realm, raising questions about power distribution between the legislative, judicial and executive functions of government. Third, the effect is felt in the further restriction of rights within the state, shifting the relationship between the individual and the government. What makes this remarkable is that the reason counter-terrorist measures are often allowed in the first place is precisely because of the level of threat faced by the state. But on what grounds are the erosion of ordinary protections – such as probable cause as an antecedent for arrest, the presumption of innocence and the right to fair trial – lifted, when the extraordinary challenge is absent?

This chapter begins with a typology of transplantation. It then turns to examples of how transplantation can go wrong. The chapter considers

[3] For a narrower conception of transplantation, as 'the moving of a rule…from one country to another, or from one people to another', see Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Georgia University Press, 2nd edn, 1993), p. 21. I use the term in a broader sense, incorporating both substantive transfer between areas of the law, as well as geographic transfer through borrowing and design. I am sympathetic to Legrand's critique of Watson's effort to isolate the rules from their social and cultural context; indeed, part of the problem in the counter-terrorist realm is the shifting meaning of such rules when geographically transplanted into different jurisdictions. See Pierre Legrand, 'The impossibility of "legal transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

substantive transfer between criminal law and counter-terrorism, with particular emphasis on the use of financial mechanisms. It next turns to transplantation within national security, highlighting the unique situation of speech restrictions in the nuclear realm and comparing it to similar efforts to restrict microbiologists in an effort to counter the threat posed by biological weapons. The chapter concludes with thoughts about ways in which some of the negative effects of transplantation could be mitigated through *ex ante* considerations.

2. Typology of transplantation

Two modes of transplantation mark the counter-terrorist realm. Substantive transplantation centres on the movement of legal mechanisms between different areas of the law – e.g. from counter-terrorism to criminal or civil law, and from other legal regimes to counter-terrorism. It is aided by (1) normalisation, (2) a lack of specificity in the original instruments, (3) the manner of implementation and (4) the occurrence of reverse transplantation. Geographic transplantation, in turn, focuses on the international or domestic transfer of provisions between legal regimes. Four mechanisms appear to be at work: (1) transplantation between culturally, legally or linguistically related countries or regions, (2) transplantation between developed and developing regions, (3) a mirroring of, or piggybacking on, other regional initiatives, and (4) transplantation as a result of concerted efforts by multinational organisations to standardise rules.

A. Substantive transplantation

Transplantation from counter-terrorist law to criminal or civil law occurs by way of four mechanisms.[4] The first I refer to as normalisation, which operates in a straightforward way: initially, legislation may try to limit the new authorities to fighting terrorism. The idea is that such measures are so extraordinary, that they can only be justified by the unique kind of threat presented by the extremist organisations that the state is facing. Once such measures enter into the law, however, they are no longer extraordinary. They become accepted and, indeed, part of the ordinary legal code.

[4] For a discussion of transfer between criminal law and counter-terrorist law, see Laura K. Donohue, 'The perilous dialogue' (2009) 97 *California Law Review* 357, 373–9.

Myriad examples – from search and seizure authorities to property forfeiture – present themselves.[5] Consider, for instance, the House of Lords' 2005 effort to counter the adoption of control orders. In the end, the Lords' capitulation turned on the guarantee that the issue would return for debate the following year. But by the time the debate was to be held, the urgency and exceptionalism represented by the introduction of the provisions no longer applied. The debate never transpired. Such patterns are common: in the United Kingdom from 1973 to 2000, the intense scrutiny applied to new authorities repeatedly fell away upon renewal considerations, with often not more than a handful of legislators even bothering to show up at subsequent debates.[6]

Normalisation may be considerably aided by the apparent effectiveness of such measures. Counter-terrorist provisions often lack the same level of protection that marks other areas of the law. By relaxing restrictions that might otherwise apply, officials may pursue their ends with greater latitude.

Once the idea of using such powers is no longer exceptional, subsequent statutes may isolate and drop counter-terrorist provisions into different areas of the law. The Flags and Emblems (Display) Act (Northen Ireland) 1954, for instance, drew directly from statutory instruments introduced under the 1922–43 Civil Authorities (Special Powers) Acts.[7] Juryless trial in Northern Ireland, implemented despite considerable objection in 1973, later became applied to complex fraud and organised crime cases throughout the United Kingdom.[8] Even the control orders – which earned such enmity from the House of Lords – were swiftly echoed in proposals to restrict those suspected of involvement in drug-related activity, despite any conviction for criminal offences. In the United States, as I discuss below, further examples could be found in anti-terrorist finance measures.

The second way in which counter-terrorist provisions transfer to other areas of the law – and criminal law, in particular – stems from a lack of

[5] Ibid., 374–7.

[6] See Laura K. Donohue, *Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922–2000* (Dublin: Irish Academic Press, 2008).

[7] Flags and Emblems (Display) Act (Northern Ireland) 1954 (UK), repealed under Direct Rule by Public Order (Northern Ireland) Order 1987.

[8] Northern Ireland (Emergency Provisions) Act, 1973, c. 53 and Criminal Justice Act, 2003, c. 44, s. 43(2), (5). For discussion of the evolution of the Diplock courts, see Laura K. Donohue, 'Terrorism and trial by jury: the vices and virtues of British and American criminal law' (2007) 59 *Stanford Law Review* 1321.

specificity in the initial statutory authorities.[9] It can be difficult, if not impossible, to limit the scope of provisions seeking to prevent terrorism – a term itself amorphous and subject to scores of definitions.[10] To address this concern, legislators often craft statutes to apply to a series of criminal acts, which may – or may not – be carried out by individuals committed to political violence. At other times, the wording of the statute is broad, thus allowing the new authorities to be applied to both terrorist and non-terrorist crimes. The emphasis here is on the implementation of the statute, although the absence of controls in the primary legal instrument is equally important.

In the United Kingdom, for instance, the first counter-terrorist statute to be introduced by Westminster following the proroguement of the Northern Ireland Parliament created the juryless courts mentioned above. The legislation included a schedule of offences, the prosecution of which would automatically be assigned to the single-judge courts. The scheduled offences included murder, manslaughter, arson, riot, offences under the Malicious Damage Act of 1861, violations of the Offences against the Person Act 1861, violations of the Firearms Act 1969, offences under the Theft Act (Northern Ireland) 1969, offences against the Protection of the Person and Property Act (Northern Ireland) 1969 and a range of inchoate and related offences.[11] Despite subsequent efforts to certify out non-terrorist-related cases, by the mid-1980s, some 40 per cent of the cases coming before the juryless trials had nothing to do with terrorism.[12]

The United Kingdom is not alone in this regard. The habeas corpus provisions of the US Antiterrorism and Effective Death Penalty Act 1996 now figure largely in criminal law. Government reports have, in turn, repeatedly found the Patriot Act powers applied to non-terrorist crimes.[13] Perhaps the most egregious example is the use of National Security Letters (NSLs). The Patriot Act, enacted to respond to the terrorist attacks of 9/11, 2001, eliminated the requirement that the record information obtained

[9] Donohue, 'The perilous dialogue', 377–8.

[10] See, e.g., Alex Schmid and A. J. Jongman, *Political Terrorism* (New Brunswick, NJ: Transaction, 1988) and Walter Laqueur, 'Terrorism: A Brief History' (2007), pp. 20–3 available at www.america.gov/st/peacesec-english/2007/May/20080522172730SrenoD0.6634027.html.

[11] Northern Ireland (Emergency Provisions) Act 1973, c. 53, Sch. 4.

[12] Dermot Walsh, *Ten Years on in Northern Ireland* (Belfast: Cobden Trust Study, 1980).

[13] See, e.g., US Department of Justice Office of the Inspector General, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006* (March 2006), p. 110; Eric Lichtblau, 'US uses terror law to pursue crimes from drugs to swindling', *New York Times*, 28 September 2003, A1.

in an NSL itself be pertinent to a foreign power or an agent of a foreign power.[14] Instead, it need only be relevant to an investigation to protect against international terrorism or foreign spying (along with the caveat that where US citizens were involved, such investigation could not be predicated solely on the basis of First Amendment protected activities).[15] The FBI's use of the measures dramatically increased, expanding from 8,500 requests in 2000 to 47,000 by 2005.[16] A subsequent report by the US Department of Justice Office of the Inspector General found that the bureau did not keep adequate records linking the NSLs to ongoing counter-terrorism or counter-espionage investigations, that NSLs had been issued without the appropriate authorisation and that they had become a routine tool in preliminary investigations.

The manner in which counter-terrorist provisions are implemented provides yet a third way in which counter-terrorist authorities are transplanted. Secondary and tertiary instruments may be implemented in a manner that departs from the original intent. In 2002, for instance, as part of its counter-terrorist regime, the FBI issued guidelines allowing it to monitor Internet sites, libraries and religious institutions – with no requirement that evidence exist of potential criminal activity, much less terrorism.[17] Even where an effort is made at the administrative level to limit the broad use of powers to counter-terrorism – but not, as a statutory matter, specifically restricted to terrorist cases – memoranda and guidelines appear unable to stem the flow.[18]

[14] USA PATRIOT Act, §505, amending the Electronic Communications Privacy Act (18 USC 2709), the Right to Financial Privacy Act (12 USC 3414(a)(5)), and the Fair Credit Reporting Act (15 USC 1681u).

[15] Ibid.

[16] Office of the Inspector General, *A Review of the FBI's Use of National Security Letters*, p. 120. But note that, according to the OIG, because of the failure of the FBI to adequately record and report the use of NSLs, the total number is estimated to be approximately 22 per cent higher: ibid.

[17] See The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, 30 May 2002, available at www.usdoj.gov/olp/generalcrimes2.pdf; The Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations, 30 May 2002, available at www.usdoj.gov/olp/fbiundercover.pdf; The Attorney General's Guidelines Regarding the Use of Confidential Informants, 30 May 2002, available at www.usdoj.gov/olp/dojguidelines.pdf; and Memorandum for the Heads and Inspectors General of Executive Departments and Agencies, From the Attorney General, 30 May 2002, Regarding Procedures for Lawful, Warrantless Monitoring of Verbal Communications, available at www.usdoj.gov/olp/lawful.pdf.

[18] See, e.g., Memorandum from General Counsel, National Security Law Unit, Federal Bureau of Investigation, to All Field Offices National Security Letter Matters, Ref: 66F-HQ-A1255972 Serial 15, 28 November 2001, available at sccounty01.co.santa-cruz.ca.us/bds/govstream/BDSvData/non_legacy/Minutes/2003/20030429/PDF/084.pdf.

While the above examples focus on the transplantation from counter-terrorist law to criminal law, such transfers mark civil law as well. Anti-terrorist finance provisions in the United Kingdom, for instance, quickly became applied to civil forfeiture in regard to money laundering.[19]

Transplantation, moreover, does not just take place in the transfer of counter-terrorism to criminal or civil law. And here we have the fourth manner in which transplantation takes place. The reverse also occurs, whereby measures employed in a different context are simply picked up and dropped into a terrorism context. This raises significant concerns about efficacy and appropriateness.

In the criminal law realm, the assumption is that what may useful for countering crime, presents a sort of minimum – such that its application to counter-terrorism is unquestioned. The problem is that the terrorist threat may be entirely different from criminal enterprise. This is not to say that it is always the case that the two represent separate phenomena. Terrorist organisations may engage in a significant amount of criminal activity. But before simply assuming that criminal devices should be used, prior thinking that takes values in other spheres and compels careful consideration is necessary.

In the national security realm, a similar assumption applies: i.e., that the type of threat for which the initial provisions were appropriate are commensurate with the terrorist threat – and that such provisions will be appropriate for counter-terrorism. Such assumptions, however, may be both inaccurate and dangerous in their failure to consider the unique challenges posed by the threat. Section 3 of this chapter provides further examples of substantive transplantation and the attendant negative effects, in the case of the counter-terrorism–criminal law transfer, on both areas, as well as, in the national security domain, the unintended consequences that may ensue.

B. Geographic transplantation

In addition to substantive transplantation, a growing body of law suggests greater movement towards geographic transplantation of counter-terrorist measures. Much of the focus has been across country borders; however, such transfer works at both an international and a domestic level.[20]

[19] See Donohue, 'Terrorism and the counter-terrorist discourse'.

[20] See Laura K. Donohue and Juliette Kayyem, 'Federalism and the battle over counter-terrorist law: state sovereignty, criminal law enforcement, and national security' (2002) 25 *Studies in Conflict and Terrorism* 1 (discussing the various state measures introduced in the United States prior to 9/11).

Traditionally, international comparative law has focused on three devices at work in regard to both statutory and constitutional transplantation: the tendency of related countries to adopt similar measures, the influence of countries with more sophisticated legal systems on developing countries and the tendency of some countries to simply mirror, in their own legal code, laws observed in other states.[21] Transplantation via each of these devices occurs with some regularity in counter-terrorist law.

For example, as Roach notes elsewhere, the UK's Terrorism Act 2000 influenced the evolution of anti-terrorism legislation in Australia, Canada, Hong Kong, Indonesia, South Africa and elsewhere.[22] The Commonwealth countries that altered their legal regimes to reflect Britain's legislation share a common history, language and, in many respects, legal structure. Other initiatives reflect the device framed by legal sophistication: the UK's national security strategy addresses this directly, proposing, as a means of countering terrorism, developing laws in fragile states, as a form of early engagement.[23] The US Department of State similarly has convened numerous international conferences to encourage newly developing states to adopt stronger counter-terrorist regimes. Yet further instances of states mirroring other country's initiatives abound.

The concerns raised such by convergences are significant. As Ramraj points out, such legal norms are realised in profoundly asymmetrical ways.[24] The exercise of Russian counter-terrorist law in Chechnya provides a salient example. New legislation introduced in the wake of 9/11,

[21] See Kim Lane Scheppele, 'The international standardization of national security law' (2010) 4(2) *Journal of National Security Law and Policy* 438, citing Alan Watson, *Legal Transplants*; Michele Graziadei, 'Comparative law as the study of transplants and receptions', in Mathias Reimann and Reinhard Zimmermann (eds.) *Oxford Handbook of Comparative Law* (Oxford University Press, 2006), p. 441; 'Symposium: Constitutional Borrowing' (2003) 1(2) *International Journal of Constitutional Law* 177; Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006). For a sceptical view of 'the reality of "legal transplants"' see Legrand, 'The impossibility of "legal transplants"', 113, 116 (writing, 'there could only occur a meaningful "legal transplant" when both the propositional statement as such and its invested meaning – which jointly constitute the rule are transported from one culture to another. Given that the meaning invested into the rule is itself culture-specific, it is difficult to conceive, however, how this could ever happen.')

[22] Kent Roach, 'The post-9/11 migration of Britain's Terrorism Act 2000', in Choudhry, *The Migration of Constitutional Ideas*, p. 374.

[23] United Kingdom Government, *The National Security Strategy of the United Kingdom: Security in an Interdependent World* (Cm 7291, March 2008), pp. 2, 7, available at interactive.cabinetoffice.gov.uk/documents/security/national_security_strategy.pdf.

[24] Victor V. Ramraj, Chapter 3, this volume.

On Countering Extremist Activities, was soon followed by a Federal Law, On Counteraction to Terrorism. These measures legalised the application of armed force for counter-terrorism operations in the North Caucasus and suspended a broad range of individual rights – which quickly earned for Russia the enmity of human rights organisations.[25] Although the counter-terrorism campaign ended in 2009, following further terrorist attacks, Russian President Dmitry Medvedev announced in 2010 that additional counter-terrorist laws were needed. The Russian Foreign Minister quickly linked the recent attacks to a global counter-terrorist threat, while the chairman of the G8 foreign ministers, Canadian Foreign Minister Lawrence Cannon, vowed in solidarity that the G8 'would continue to collaborate to thwart and constrain terrorists'.[26] He reiterated the G8 foreign ministers' 'commitment to further enhance the central role of the United Nations and to adhere to its Global Counter-terrorism Strategy and relevant United Nations Security Council resolutions'.[27]

Cannon's remarks point to a fourth device by which geographic transplantation occurs and which has received less notice: the (increasingly) coercive role of international organisations in *requiring* countries to adopt certain types of provisions. Scheppele highlights this shift specifically in regard to the UN Security Council Resolution 1373.[28] This measure, discussed also in detail by Powell requires states to address terrorist finance by creating new anti-terrorist finance criminal provisions, freezing the assets of individuals or entities engaged in terrorism and preventing contributions to terrorist organisations.[29] States themselves must refrain from supporting terrorism and take affirmative steps to prosecute any individuals suspected of terrorism found within domestic bounds.[30]

[25] See, e.g., Human Rights First, 'Russia's new direction', available at www.humanrightsfirst.org/wp-content/uploads/pdf/06622-hrd-russia-update-web.pdf; Mariya Y. Omelicheva, 'Russia's counterterrorism policy: variations on an imperial theme' (2009) 3(1) *Perspectives on Terrorism* 3.

[26] 'Suppression of terrorism in Russia will continue – Medvedev', *RT*, 30 March 2010, available at rt.com/news/moscow-blast-emergency-meeting/; 'G8 stands with Russia in fight against terrorism', *The Economic Times*, 30 March 2010, available at economictimes.indiatimes.com/news/politics/nation/G8-stands-with-Russia-in-fight-against-terrorism/articleshow/5741325.cms.

[27] 'G8 Stands with Russia in fight Against Terrorism'.

[28] S/RES/1373(2001); Scheppele, 'The international standardization of national security law', 439–43; Powell, Chapter 2, this volume. See also Victor V. Ramraj, Chapter 3, this volume.

[29] C. H. Powell, Chapter 2, this volume. See also Victor V. Ramraj, Chapter 3, this volume. UN Security Council Resolution 1373, art. 1.

[30] SCR 1373, art. 2.

The United Nations is not the only body to engage in coercive action to ensure geographic transplantation of counter-terrorist law. The Financial Action Task Force (FATF), for instance, is 'an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing.'[31] Established in 1989 by the G7 Summit, the mission of the organisation is to monitor members' progress in implementing necessary measures and to promote the adoption of anti-terrorist finance measures globally.[32] Thirty-four countries and two regional organisations, representing most major financial centers in the world, are members.[33]

The FATF has adopted specific standards to address money laundering and terrorist finance. For the latter, the organisation recommends (and monitors), the ratification and implementation of UN instruments, criminalising the financing of terrorism, freezing and confiscating terrorist assets, reporting suspicious transactions related to terrorism, engaging in international co-operation, restricting alternative remittance systems, monitoring wire transfers, scrutinising non-profit organisations and placing restrictions on cash couriers. The organisation creates obligations on member states to comply with the recommendations.[34] FATF Special Recommendation III, for instance, on the freezing and confiscation of terrorist assets, 'requires jurisdictions to implement measures that will freeze or, if appropriate, seize terrorist-related funds or other assets without delay in accordance with relevant United Nations Resolutions'.[35]

As Ramraj discusses, despite strong coercive mechanisms, the result of such devices is far from coherent. Part of the difficulty derives from formal distinctions between legal systems, part from the unique histories and cultural and socio-economic conditions of each region, and part

[31] FATF-GAFI, available at www.fatf-gafi.org/pages/0,3417,en_32250379_32236836_1_1_1_1_1,00.html.

[32] Ibid.

[33] Membership includes: Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, the European Commission, Finland, France, Germany, Greece, the Gulf Co-operation Council, Hong Kong (China), Iceland, India, Ireland, Italy, Japan, the Netherlands, Luxembourg, Mexico, New Zealand, Norway, Portugal, South Korea, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States: ibid.

[34] For detailed discussion of FATF recommendations, see Kevin E. Davis, Chapter 8, this volume.

[35] Interpretative Note to Special Recommendation III: Freezing and Confiscating Terrorist Assets, Financial Action Task Force, available at www.fatf-gafi.org/document/44/0,3746,en_32250379_32236920_43751788_1_1_1_1,00.html.

from the vagueness inherent in the concept of terrorism.[36] The types of devices adopted, moreover, may be ripe for abuse. Here, Powell's discussion of the 1267 Committee, and the problems with listing, is particularly valuable.[37]

This particular type of geographic transplantation – i.e. that promoted by coercive international organisations – raises concerns about exactly what is being forced on other countries in the first place. There is significant evidence to suggest that many of the measures driven through international organisations by the United States and the United Kingdom in particular carry enormous costs and themselves have a checkered history in terms of their domestic use prior to their entry on the international stage.[38]

In light of the careful consideration given to UN Security Council Resolutions 1373 and 1540 by Powell, as well as the careful analysis of Resolution 1373 by Ramraj, I focus in the next section on examples of substantive domestic transplantation, both between counter-terrorist law and criminal law, and within the national security realm, as a way of illustrating the considerable difficulties that accompany the transplantation of such authorities.

3. Substantive transplantation: between criminal law and counter-terrorism

Anti-terrorist finance in the United States and the United Kingdom provides a good example of how transplantation between counter-terrorist, criminal and civil law proves concerning.[39] I will here focus more narrowly on the United States and the interplay between the counter-terrorist and criminal law realms, where a considerable amount of activity has occurred.

Executive Order 13224, for instance, introduced by President Bush just after 9/11, established a Specially Designated Global Terrorists list, blocking 'all property and interests in property' of those providing material support to terrorism. Any business that interacts with targets can itself

[36] Victory V. Ramraj, Chapter 3, this volume.
[37] C. H. Powell, Chapter 2, this volume.
[38] See generally Donohue, 'Terrorism and the counter-terrorist discourse'.
[39] The following discussion draws heavily from Donohue, *The Cost of Counterterrorism*, Chapter 6. See also Kent Roach, Chapter 5, this volume (discussing the use of criminal law in the counter-terrorism realm and over-broad definitions of terrorism that expand counter-terrorism into the criminal law realm).

be listed and have its assets frozen. Under the Patriot Act, assets can be blocked pending an investigation – allowing the Treasury to indefinitely freeze the assets of those not yet listed but under review.

The state can also pursue criminal conviction through the courts for providing material support to terrorism.[40] The Secretary of State designates groups considered Foreign Terrorist Organizations (FTOs), thereby blocking financial institutions from handling any of their assets.[41] The number of designated foreign terrorist organisations has nearly doubled since 9/11 – there are currently nearly four dozen FTOs, and scores of terrorism cases post-9/11 have included charges related to the provision of material support.[42]

To identify potential targets, the state relies on both private sector information and intelligence. As a result, the law has expanded in two areas: reporting requirements and surveillance authorities. Title III of the Patriot Act, for instance, expanded the number of institutions required to file suspicious activity reports (SARs). It also significantly broadened due diligence provisions, which had previously been *rejected* for the criminal realm, requiring that a broader range of financial institutions collect more customer information, quite independent of whether the concern was criminal or terrorist in nature.

Surveillance authorities embedded in the Patriot Act were soon broadly applied to the financial industry, further blurring the distinction between anti-terrorist finance and anti-money laundering investigations. Just after 9/11, for instance, the Administration served a National Security Letter on a Belgian banking co-operative called Swift, which routes approximately $6 trillion per day between thousands of financial institutions worldwide. The programme collected information on international transactions, including those entering and leaving the United States.

Looked at solely in regard to counter-terrorism, it could be argued that the use of criminal measures in the counter-terrorism realm carried a number of advantages. The aim was to tighten the regulated sector, to make it more difficult to move terrorist money through conventional

[40] 18 USC §2339.

[41] 18 USC §2339B(a)(1); see also 8 USC §1189 and Immigration and Nationality Act, §219 (as amended).

[42] Foreign Terrorist Organizations, Office of the Coordinator for Counterterrorism, 24 November 2010, available at www.state.gov/s/ct/rls/other/des/123085.htm. See also 'Supreme Court upholds PATRIOT Act's "material support" provision', *Examiner.com*, 21 June 2010, (stating approximately 150 prosecutions under the material support provisions of the Patriot Act since 2001).

means. There is some evidence that this occurred. The approach also discouraged contributions to suspect individuals, charities and regions. It was international in reach – and terrorist organisations operate in the global environment. And it adapted existing institutions, suggesting less of a start-up cost to go after terrorist funds. At the same time, it could be argued that the due diligence requirements and the loosened controls on surveillance went some way towards bolstering the state's ability to identify criminal activity more broadly.

However, the transplantation of financial measures carried substantial drawbacks. Significant constitutional and legal concerns presented themselves, such as the weak standard of judicial review under the Administrative Procedure Act, equal protection claims, procedural due process violations and the possibility that some of the measures (e.g. in regard to the IEEPA and Executive Order 13224) were *ultra vires* the governing law. Perhaps most concerning, however, was the extent to which important policy goals were undermined by the wholesale transplantation of criminal provisions: i.e. anti-money laundering devices, in many ways, prove particularly ill-suited to anti-terrorist finance.

There are important structural differences between the underlying behaviour of each.[43] As discussed in *The Cost of Counterterrorism*, money laundering depends upon an underlying crime.[44] Terrorist finance does not. Put somewhat crudely, the former takes dirty money and tries to make it clean, whereas the latter often takes clean money (e.g. a contribution to a charitable organisation) and tries to make it dirty – that is, use it to fund violent attacks. This means that victims who otherwise might alert law enforcement to criminal activity are unlikely to come forward. They may not know where their money is going, or they may know and be afraid of the terrorists – or of the state prosecuting them.

There are no good algorithms to determine who is a terrorist. Unlike those involved in organised crime, terrorists tend not to have previous criminal convictions. They avoid living conspicuous lifestyles, and identifying terrorists through transaction patterns proves extremely difficult: thus New York Clearinghouse, an organisation of the largest money-centre banks, concluded, after a post-9/11 two-year study, that it cannot be done.[45] The Financial Actions Task Force, despite significant efforts to develop an appropriate typology, reached a similar conclusion.[46]

[43] See Donohue, 'Terrorism and the counter-terrorist discourse'.
[44] The following discussion comes directly from *The Cost of Counterterrorism*, Chapter 6.
[45] Staff Report, 9/11 Commission; Donohue, *The Cost of Counterterrorism*, Chapter 6.
[46] 2003 Financial Action Task Force Report, p. 4, [10]. See also Financial Action Task Force on Money Laundering, *Report on Money Laundering Typologies: 2001–2002* (2002), p. 6.

As for the volume of money involved, the International Monetary Fund puts the total money laundered globally each year at around US $600 billion. In contrast, terrorists require significantly less money – suggesting that devices aimed at intercepting major transfers will miss the movement of terrorist funds.

Stopping money from flowing through the regulated sector by freezing it or by introducing sweeping regulations, moreover, undermines an important national security aim: obtaining information about the threat. Indeed, because of post-9/11 measures, while the initial aim of tightening the regulated sector may have succeeded, unintended consequences followed. Terrorist networks began turning to alternative remittance systems, such as *hawaladars* and couriers, as well as harder-to-trace commodities, to move their wealth.[47] These avenues made it harder for the government to trace funds and find those responsible for terrorist violence.

Even the manner in which success is determined radically differs between the different emphases. Despite the fundamental difference in the nature of the threat, accounting measures in the anti-terrorist finance realm rely on traditional money-laundering metrics to gauge success, such as the number of states with blocking orders in force, the number of entities with seized assets and the value of money frozen. These standards, though, are out of synch with what may be the most effective indicators of success for counter-terrorism – e.g. the conviction rate of those responsible for supplying money, the level within the terrorist network of those apprehended or the number of operations thereby aborted.

Structural differences also play out in bureaucratic gridlock. Consider SARs – a standard anti-money laundering device now used for anti-terrorist finance. SARs did not discover – nor should they have discovered, nor would they now discover – any of the financial activity in which the 9/11 hijackers engaged.[48] Title III of the Patriot Act, however, as

[47] See, e.g., *Underground Finance Mechanisms: Hearing Before the Subcommittee on Banking, Housing and Urban Affairs, Subcommittee on International Trade and Finance of the Subcommittee on Banking, Housing and Urban Affairs*, 107th Congress 1. See also 'Moving Target', *The Economist* (US), 14 September 2002; 'Still Flush', *The Economist*, 7 September 2002.

[48] Donohue, *The Cost of Counterterrorism*, Chapter 6. Al-Qaeda moved the money to fund the 9/11 attacks in three ways: US $130,000 was wired to hijackers in the United States from the United Arab Emirates and Germany; members physically carried cash/traveller's cheques to the United States; and some established overseas accounts, which they drew on via ATM or credit cards in the United States. When they arrived in the United States, they opened bank accounts under their real names in both large national banks and smaller regional ones. While they lived in the United States, they made wire transfers

previously mentioned, expanded the number of organisations required to file SARs, increasing the number of annual filing in the United States from approximately 163,000 in 2000 to nearly 920,000 by 2005. This made it difficult not just to find terrorists, but to go after ordinary money launderers. Accordingly, across the Atlantic, where the same pattern played out, an independent audit of SARs by KPMG International raised concern about the low signal-to-noise ratio and the tendency of entities to over-report.[49]

The filing of SARs, moreover, appeared to be tied to the political environment. States, which are privy to classified intelligence material, are more likely than banks to know the identity of terrorist suspects. Without this information, and lacking a reliable algorithm, financial institutions began reverting to racial profiling.

A final, and important, point to make in respect to the application of money laundering devices to anti-terrorist finance is that, as a result of the new regulatory environment and its associated costs, we have seen a drying up of remittances – money flowing from charities and expat communities – to Islamic regions. The United States, however, has a strong interest in ensuring that many of these regions remain economically viable and tied to US influence as a way to prevent the creation of a vacuum into which extremist movements can move.

While this example demonstrates the difficulties that characterise domestic substantive transplantation, it is worth noting that it is precisely the domestic measures considered above that form the framework for US efforts to drive global provisions through international organisations. UN Security Council Resolution 1373 sought to make many of the anti-terrorist finance measures universal. This simply adds another layer of complexity – and concern – to the issues that accompany the geographic transplantation of counter-terrorist law.

of between US $5,000 and US $70,000, making the transactions virtually invisible in comparison to the billions of dollars moving daily through the international financial system. Their banking pattern – depositing a significant amount of money and then making smaller withdrawals – fit their student profiles. They did not use false social security numbers and their grasp of the US banking system was not particularly sophisticated. Staff Report, 9/11 Commission, p. 53. See also Michael Peel and John Willman, 'The dirty money that is hardest to clean up: financial institutions are keen to eradicate money-laundering by terrorists and to freeze assets', *Financial Times*, (London), 20 November 2001, p. 16. See also discussion in Donohue, 'Terrorism and the counter-terrorist discourse'.

[49] Privy Counsellor Review Committee, *Anti-Terrorism, Crime and Security Act 2001 Review: Report Presented to Parliament Pursuant to s. 122(5) of the Anti-terrorism, Crime and Security Act 2002* (18 December 2003), HC 100.

4. Substantive transplantation: from nuclear to biological security

It could be argued that one of the reasons criminal law measures prove so ill-fitting in the counter-terrorist realm is because the threat posed by terrorism is closer to national security than to criminal law. This argument is not without its opponents – particularly in regard to extended detention or coercive interrogation. But let us consider a stronger and even narrower parallel: the potential terrorist use of weapons of mass destruction. The threats posed by nuclear or biological terrorism may be seen as similar. Both clearly fall within a national security realm, both depend upon constantly evolving technologies, both have been sought by terrorist organisations and use of either could result in the massive loss of human life. Yet even here, the tranplantation of specific devices proves concerning.

Speech restrictions serve to illustrate the point. In the United States, the Atomic Energy Act of 1946 controls nuclear information. Under this legislation, all atomic discoveries, even if funded and discovered by private citizens – without any government funding or information – are classified from birth. Restricted data includes all information concerning the design, manufacture or utilisation of atomic weapons, the production of nuclear material, or the use of nuclear material in the production of energy.[50]

Efforts to transplant similar restrictions to microbiology have begun. The pressure to do so derives from the threat perceived in relation to biological weapons. Since the end of the Cold War, concern has increased about the potential for materials and knowledge to proliferate beyond industrialised states' control, and for 'rogue states' or non-state actors to acquire and use biological weapons.[51] The broad concern about

[50] Atomic Energy Act of 1954, §11(y).

[51] See, e.g., The National Security Strategy of the United States of America (September 2002), available at www.whitehouse.gov/nsc/nss.pdf (stating, 'With the collapse of the Soviet Union and the end of the Cold War, our security environment has undergone profound transformation. […] [N]ew deadly challenges have emerged from rogue states and terrorists. … [T]he nature and motivations of these new adversaries, their determination to obtain destructive powers hitherto available only to the world's strongest states, and the greater likelihood that they will use weapons of mass destruction against us, make today's security environment more complex and dangerous.') Accordingly, in 1993 Senators Samuel Nunn (D-GA), Richard Lugar (R-IN), and Pete Dominici (R-NM) expanded the Cooperative Threat Reduction Program to assist the former Soviet republics in securing not just fissile material, but biological agents and weapons knowledge.

the biological weapons threat has been punctuated by actual terrorist acquisition and use of non-conventional weapons.[52]

From previously a dozen or so investigations per year, in 1997 the FBI opened seventy-four investigations relating to the possible acquisition and use of chemical, biological, radiologic and nuclear materials; and in 1998, 181. Eighty per cent of the cases turned out to be hoaxes, but a significant number were unsuccessful attacks.[53] By 31 January 1999, Monterey Institute for International Studies had compiled an open-source database of 415 incidents – most of which occurred towards the end of the twentieth century – where terrorists had sought to acquire or use weapons of mass destruction. These developments pre-dated the attacks of 9/11 and al Qaeda's stated intent to use biological weapons in the future, backed by actual efforts to obtain biological agents.[54] The anthrax attacks in autumn 2001 further underscored the threat, killing five people and infecting eighteen others.[55]

In the midst of growing concern about biological weapons, attention was drawn to an experiment conducted in Australia and published in the United States – and the question arose as to whether the censorship

The Defense Against Weapons of Mass Destruction Act gave the Pentagon lead agency responsibility for biological matters: Title XIV, National Defense Authorization Act for FY 1997.

[52] E.g., in 1994 Aum Shinrikyo released sarin gas in Nagano and, in 1995, on the Tokyo subway, killing twelve people and causing an estimated 6,000 people to seek medical attention. When the police raided the cult's shrines, they found that the cult also cultured and experimented with botulinum toxin, anthrax, cholera and Q fever: Jonathan B. Tucker, 'Historical trends related to bio-terrorism: an empirical analysis', *Emerging Infectious Diseases*, available at www.cdc.gov/ncidod/eid/vol5no4/tucker.htm. See also Mark Fenwick, Chapter 16, this volume. In February 1998, Larry Wayne Harris boasted to an informant that he had enough military-grade anthrax to wipe out Las Vegas. Eight bags marked 'biological' had been found in the back of a car he had been driving: Tucker, 'Historical trends related to bio-terrorism', Table 1.

[53] J. Parker-Tursman, 'FBI briefed on district's terror curbs', *Pittsburgh Post-Gazette*, 5 May 1999; and 'Weiner T. Reno says U.S. may stockpile medicine for terrorist attacks', *New York Times*, 23 April 1998, A:12.

[54] Remarks by Homeland Security Secretary Michael Chertoff at the Stanford Constitutional Law Center's Germ Warfare, Contagious Disease, and the constitution Conference, Washington, DC, 11 April 2008, available at www.dhs.gov/xnews/speeches/sp_1208283625146.shtm (stating 'We know, for example, in the late 1990s, al-Qaeda became focused on developing a biological weapons program. After the invasion of Afghanistan, we determined that there was a low-tech facility in Kandahar, which was actually aimed at producing anthrax and the purpose obviously was to create a weapon.'

[55] American Association for the Advancement of Science, 'Science and security in the post-9/11 environment: bioterrorism', available at www.aaas.org/spp/post911/agents/.

laws surrounding nuclear material should be transplanted to a biological realm.

The Australian case stemmed from a non-terrorist, indeed, an economic concern: on a cyclical basis, Australia suffers from a rodent infestation, which devastates the crops and takes a considerable toll on the gross domestic product of the country. In 1998 some Australian scientists decided to try to engineer a biological disease – they did not want to kill the rodents, because this would have created a problem with disease. Instead, they chose Mousepox, a highly virulent disease, and attached a secondary disease to make it impossible for the rodents to reproduce. After extensive experiments, the scientists found, much to their surprise, that in making the disease effective even against rats with immune systems that rejected Mousepox, they ended up with a disease that was 100 per cent virulent – and fatal. What made their findings particularly salient in the counter-terrorism realm is that Mousepox is closely linked to Smallpox – one of the most devastating diseases in the history of humankind, responsible for killing some 500 million people in the twentieth century alone.[56]

The researchers were faced with a difficult decision: publish the information and risk transferring potentially deadly information to individuals bent on destruction, or keep the information private and risk not finding a way to respond to the vulnerability. The researchers initially decided to bring the risk to the attention of the authorities privately. After the Australian military dragged its heels, however, the researchers published a paper in the *Journal of Virology*, an American journal of the American Society for Microbiology (ASM).[57] Initially the publication attracted little attention, but following the anthrax mailings in autumn 2001, the incident attracted the attention of the President and members of Congress. The fact that the experiment, which had achieved a devastating lethality, required just three feet of countertop and basic knowledge of microbiology to perform heightened concern about terrorist acquisition of scientific information.

In the face of increasing pressure, Dr Ronald Atlas, the President of the American Society of Microbiology, contacted the Chair of the ASM publishing board and reported that the Bush Administration was concerned

[56] 147 *Congressional Record*, S. 12378 (statement of Senator Joseph Lieberman regarding S. 1764).

[57] Ronald J. Jackson *et al.*, 'Expression of a Mouse Interleukin-4 by a Recombinant Ectromelia Virus Suppresses Cytolytic Lymphocyte Responses and Overcomes Genetic Resistance to Mousepox' (2001) 75 *Journal of Virology* 1205.

about ASM's decision to publish the Mousepox article. ASM convened a meeting of its publishing board and changed its internal review policies to focus on the national security implications of future articles. While ASM's decision headed off any formal legislation, there may be little, as a constitutional matter, to prevent Congress from passing stringent laws limiting microbiologists from being able to publish information that would be particularly helpful to terrorists.[58]

As a policy matter, however, the decision to transplant such restrictions from the nuclear realm to the biological realm would be fraught with danger. Microbiology is not a field amenable to compartmentalisation. Incremental discoveries, which require public airing, may yield a series of unintended insights into a wide range of threats to public health. Extremely valuable information, moreover, might be obtained from studying particularly virulent diseases – and then allowing such discoveries to be subjected to broader scrutiny. Many of the diseases that have been weaponised by state biological weapons programmes stem from natural sources – suggesting that (with the exception of Smallpox), their occurrence in nature may present an equally grave threat. By restricting research in microbiology, the government may end up damaging its ability to respond to naturally occurring outbreaks of disease.

Efforts to isolate the 'purpose of research' as a trigger for speech restrictions, moreover, would prove difficult. Information that finds how a disease works could be used to find a treatment – or cure – for a disease. Similarly, efforts to narrow restrictions to the 'type of research' engaged in fails: how can it be ascertained at the outset of a scientific experiment which approach is more or less likely to yield bad results? It may be, for instance, that genetic manipulation may be unlikely to occur naturally; however, preventing scientists from engaging in research in this area because of national security considerations may prevent a government from being able to ensure the general health of the population.

Initiatives restricting speech, moreover, may negate other efforts to improve national security. If it is in the country's best interests to encourage microbiologists to look at the threats posed by disease, acting to classify such discoveries immediately upon recognition discourages such research. Further, such restrictions may force scientists out of the country and encourage them to go to regions where fewer restrictions will be placed on their ability to perform basic science. In sum, the costs could be

[58] See Donohue, 'Terrorism and the counter-terrorist discourse'.

considerable, with a significantly different impact than the introduction of similar measures in the nuclear realm.

5. Conclusion

In both substantive and geographic transplantation, prudence dictates not that such transplantation never occur, but that such measures be considered in their original constitutional, legal, political and instrumental context and, equally carefully, in the context of the particular realm to which they are being transferred. I thus conclude by suggesting a tripartite *ex ante* inspection, based on the concerns raised above (in both the typology and the examples provided), as a way to identify potential pitfalls. The aim is to take account of the values and the impact of the provisions in the realm whence the provisions derive as well as the area to which they are transplanted.

The first step would be to consider the values applied in the parallel sphere. The inquiry here takes three forms: what is the underlying rationale of the previous regime? If the aim, for instance, is to ensure due process of law while preventing the use of funds for nefarious means – or, to the contrary – to relax due process to allow for greater flexibility, then such a value needs to be identified. The question then becomes, what distortion may result to the pre-existing legal regime to which such measures are being transferred? The purpose of such an inquiry is to head off the potential weakening of values that may occur. Next, one could consider how the terrorist threat itself may have altered the underlying values. By directly addressing this question, the tendency to put off such considerations, prevalent in the counter-terrorist spiral identified at the outset of this piece – e.g. through the imposition of temporary provisions – may be avoided. This discussion would force a difficult conversation to the fore. Such an audit may help to preserve the values of the systems themselves – for instance, by identifying points of discrepancy and considering how the new measures fit in to the overall values of the legal regime, as well as what shifts may be occurring.

The second step would be to employ a sort of Kantian condition of publicity.[59] This step takes account of the tendency of counter-terrorist

[59] Immanuel Kant, *Perpetual Peace: A Philosopical Essay* (1795), Translated with Introduction and Notes by M. Campbell Smith (London: Swan Sonnenschein & Co, 1903) p. 381; David Luban, 'The principle of publicity', in Robert E. Goodin (ed.), *The Theory of Institutional Design*, (Cambridge University Press, 1996), p. 155 ('All actions relating to the right of other human beings are wrong if their maxim is incompatible with publicity').

law to have a direct impact on individual rights. In the transplantation of the measures, is their use and implementation sufficiently transparent to ensure accountability? This proves equally important for measures developed within counter-terrorist law and transferred to other areas and vice versa, as well as for geographic transplantation. It recognises the disparate implementation of measures that cross international borders – either through the first three devices considered above (common ancestry, sophisticated to developing legal systems and mirroring), as well as through the coercive international instruments that are increasingly marking this realm. What makes this condition particularly important is the isolation of rules from their original context. The constitutional, judicial and legislative constraints that might be at play in the original context may shift. Absent the transplantation of the legal culture, distortions occur.

The third inquiry would turn on the effectiveness of the new measures. This divides into three concerns: do the measures themselves actually do any good against the threat towards which they are directed? With the concerns posed by the anti-terrorist finance example in mind, does using them in the new realm interfere with the state's effectiveness in the previous regime? And does their application in the new context have detrimental effects well beyond any of the two spheres considered? Posing such questions *ex ante* may go some way towards illuminating the potential concerns that accompany the transplantation of counter-terrorist law.