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### Normalization and Legislative Exceptionalism

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## **Normalization and legislative exceptionalism: counterterrorist lawmaking and the changing times of security emergencies**

During the ten years of security politics since 11 September 2001, there has been an intense debate on the question of exceptionalism (Agamben 2005; Doty 2007; Fitzpatrick 2003; Gross and Ní Aoláin 2006; Huysmans 2004; 2008; Johns 2005; Neal 2006; 2008a; 2008b; 2010; Prozorov 2005; Tierney 2005). This has considered or critiqued the arguments for suspending certain aspects of the law in order to deal with security threats. The contention is the old one that 'necessity has no law' (Agamben 2005: 1). The sometime Nazi jurist Carl Schmitt has been the specter at this feast, with his challenge that the exception always trumps the rule, and is indeed the vital, defining feature of sovereign power (Dyzenhaus 2006: 34-53; Scheuerman 2006: 61-62; Schmitt 1985). Schmitt's concern is for the exceptional suspension of the rights, liberties, democratic procedures and separation of powers purportedly guaranteed by liberal democratic and social democratic constitutions. His presence has shaped the debate on security politics in certain ways. For example, Bruce Ackerman's idea of the 'emergency constitution', a system of extra-constitutional legislative and judicial safeguards designed to operate during the emergency suspension of the regular constitution by the executive, apes Schmitt's revived Roman idea of constitutional dictatorship (Ackerman 2004; Dyzenhaus 2006: 40; Schmitt 1994).

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Today, with the passing of time, we are faced with a different set of questions, not concerned so much with 'exceptionalism' but with 'normalization'. Is the 'emergency' still with us? Will the exceptions created in the name of security be brought to an end? Or will they become a permanent feature of political life? Have they already? The British parliamentary joint committee on human rights expressed these concerns in a recent report by questioning 'whether we still face a "public emergency threatening the life of the nation"', more than eight years after the government first declared that there was such an emergency' (Joint Committee on Human Rights 2010: 39). The problem is no longer the binary distinction between normal times and exceptional times, but the political and legal process undergone by exceptions and emergency powers over time, blurring that distinction. This has become more pressing as the symbolic impact of major terrorist attacks has faded and the longer term political, legal and constitutional implications of 'exceptionalism' have begun to be considered.

In order to understand the issue of normalization, this paper argues that much can be learned by examining British counterterrorism, a political, legal and historical context where the normalization of the 'exceptional' has been an inherent and periodic occurrence. The Schmitt-influenced debate on exceptionalism, with its continental legal assumptions and its ruptures, binaries and singular understanding of sovereign power, has obscured the subtleties of an alternative model of security politics at work in the UK. This model is based on lawmaking rather than on sovereign exceptions. When security politics and the concern to tackle emergencies are pursued *through* the law, the norm/exception binary becomes blurred. Here, although security emergencies

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inevitably result in what could be called legislative exceptionalism (making new laws under the auspices of emergency), history shows that normalization becomes a feature of legislative security politics over time as the specter of emergency fades.

### **The lawmaking model of security**

The lawmaking model of security follows a long British tradition that can be traced to the Northern Ireland (Emergency Provisions) Act 1973 (EPA) and the Prevention of Terrorism (Temporary Provisions) Act 1974 (PTA), but arguably much further back (for histories of British counter-terrorism see Donohue 2000; Hewitt 2008). Typically of this model, despite the assurances of the ministers who introduced these laws and the names of the statutes themselves, the EPA and PTA were renewed annually and updated periodically until a grand act of normalization represented by the Terrorism Act 2000, when most of their 'temporary' and 'exceptional' powers were put on a permanent and normalized footing. Then, despite the intention of the 2000 act to provide 'a settled legislative framework' (Privy Counsellor Review Committee 2003) and be 'sufficiently flexible to respond to a changing threat' (UK Government 1998), the practice of lawmaking in response to terrorism promptly restarted after 9/11 and then the 7 July 2005 bombings in London. This period was followed by another act of normalization instigated by the new Conservative-Liberal Democrat coalition government on coming to power in 2010, this time in the form of a review of all counterterrorism laws and powers (HM Government 2011). Typically, this reduced some 'exceptional' executive powers but made others permanent.

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Although the notion of exceptionality is certainly present in the discourses surrounding the introduction, scrutiny and application of counterterrorism laws, they do not involve a sovereign suspension of the law or the constitution. Their purported 'exceptionality' is reflected in special police and executive powers, expedited legislative process, a discourse of exceptionality and in special scrutiny and oversight mechanisms such as sunset clauses and annual reviews. But in constitutional terms they are normal pieces of legislation. The UK does have a law governing the formal declaration of states of emergency in the form of the Civil Contingencies Act 2004 (which also updated and replaced previous laws), but no recent government has invoked this power.

The idea behind this model is that new counterterrorism laws are used to create additional police and executive powers for pursuing, apprehending and interfering with potential terrorists and their activities, but do not create new criminal offences of 'terrorism'. The 1972 Diplock Report established the principles of this approach, though it should be noted that the aim was to remove the distinction between political grievance and crime in order to remove political legitimacy from the IRA. Nevertheless, since then new 'terrorist' offences have indeed been created, largely for symbolic effect as they often relate to activity covered by offences in existing counterterrorism law or the regular criminal law (Donohue 2000: 197-98).

To make the executive powers created by counterterrorism laws compatible with the European convention on human rights (ECHR), successive British governments have had to invoke derogations under Article 15 (Hickman 2005; Marks 1995). Until 2000

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these derogations applied only to the province of Northern Ireland, but the Terrorism Act 2000 removed this long-standing territorial differentiation. The Anti-Terrorism, Crime and Security Act 2001 (ATCSA) invoked a new derogation for the detention without charge of foreign 'terrorist suspects'. In a sense these are permissible exceptions built into the terms of the convention and as such they are not extra legal but legal (see the Belmarsh ruling: House of Lords 2004).

In order to understand this kind of security politics and its inherent tendency towards normalization we need to look beyond the dramatic moment of (discursive) exception and sovereign decision. While it is true that new counterterrorism legislation is often a reaction to terrorist attacks, without a longer view this does not tell the whole story. Lawmaking is cumulative, with each law always in a relationship to others, adding to them, amending them, replacing them, or in the case of security laws, often escalating their provisions beyond what was regarded as 'exceptional' the last time around. In the UK, counterterrorism lawmaking takes place within a long historical context that is not captured by the 'ground zero', history erasing, temporal rupture logic of Schmittian exceptionalism and 9/11. Similarly, lawmaking does not involve the 'sovereign' executive branch of government alone and does not follow a clear binary logic of norm and exception.

We need three shifts in analytical focus away from the existing debate. First, instead of a concern with temporal rupture, we need a more complex understanding of temporality that considers unfolding historical context and the changing times of security emergencies. Second, instead of only considering sovereign or executive

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exceptionalism, if the problem is one of lawmaking we need a more complex understanding of politics that includes the other branches of government, particularly the legislature which has been almost completely neglected analytically. We should not assume that the legislature and judiciary are always supine rubberstamps for executive exceptionalism, even if at the moment of crisis they often appear to be. And third, instead of the binary logic of norm and exception, we need a more complex understanding of the unfurling relationship between the two.

This article therefore looks closely at the legislative arm of government as a changing site of lawmaking and security politics over time. Through three examples drawn from between 1996 and 2011, in a context going back to the early 1970s, it analyses the effects of spectacular terrorist attacks on legislative practice, but compares that to what happens when the perceived emergency has receded into memory and when there is no perceived emergency. These examples are, first, the ATCSA 2001, which was enacted in the wake of 9/11 and is typical of the familiar British practice of legislating in a perceived security emergency; second, the 2008 Counter-Terrorism Act, which was enacted with difficulty when the impact of 9/11 and 7/7 had faded; and third, the 2000 Terrorism Act, which was enacted in light of the Northern Ireland peace process. The first represents legislative exceptionalism, the third represents an act of normalization, while the second represents something in between.

The empirical aspect of the research is a discourse analysis of Hansard (the parliamentary record), understood through the context of the structural power relationships within and between the executive and legislature (for more see Neal

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forthcoming a)). Because of the conjoined relationship of the executive and legislature in the British system and the physical presence of the executive in the legislature, we can hear the contestation of new policies and laws played out in the debating chamber and committee rooms of parliament. In the debates, reports, inquiries, hearings and procedures of parliamentary politics, we find arguments, concerns, controversies, assurances and justifications that reflect not only immediate responses to security emergencies, but also lessons from decades of counterterrorism in Northern Ireland and concerns for the future consequences of legislative actions. In this way the article can compare the concerns and practices of parliamentary legislators in the aftermath of perceived emergencies with those brought into play at different legislative times.<sup>i</sup> In so doing, the article explores the legislative dynamics of security politics beyond the moment of emergency and sovereign decision. Before we do that, we need to consider the political status and significance of parliament.

### **Parliament (why it is interesting despite its weakness)**

If the legislative arm of government has been neglected in existing debates on security politics, this is because critical academic focus has been focused on sovereign or executive power following Schmitt, but also on the proliferation of technologies of security that reach far beyond the traditional institutions of government. (This neglect is also an effect of security studies being a sub-discipline of international relations, which has tended to refer 'domestic factors' to political science. For an extended version of this argument see (Neal forthcoming b)). Critical security scholars view surveillance, profiling, risk management, data mining, biometrics and information



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sharing between agencies as increasingly important (Amoore and de Goede 2008; Aradau and Van Munster 2007; Bigo 2002; 2008; Bonditti 2004; Lobo-Guerrero 2011; Muller 2008; Salter 2008). The logic of these technologies is captured well by the term 'governmentality' from Michel Foucault: a modality of government that can no longer be expressed under a singular logic of sovereign rule (2002). Compared to the extra-sovereign technologies of power expressed by Foucault and the existential vaunting of sovereign power expressed by Schmitt, parliament seems a weak and eclipsed part of government.

From another perspective, a constitutional mantra of the British system of government is that 'parliament is sovereign' (King 2007: 15-38), yet parliament is a weak institution that is in thrall to the executive and overshadowed by forms of governmentality. This is compounded in the field of security. Rarely willing or able to fundamentally alter the course of counterterrorism legislation, particularly in the wake of a terrorist attack, the legislature is a limited power that lacks resources in knowledge, security intelligence, innovative capacity and symbolic capital (Bourdieu 1992; Williams 2007: 31). Parliamentarians are yoked to the constitutional dominance of the executive with its control of timetabling and its demands for speed, to the constitutional traditions of cross party consensus (Donohue 2000: 296) and deference to the executive on security matters (Dyzenhaus 2005), and to the exceptionalism of the moment of crisis and the fear of not being seen to act to prevent future attacks.

The only real symbol of parliamentary 'sovereignty' is its legislative power. And while this is a residual, perhaps anachronistic, aspect of the somewhat organic

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constitutional arrangements of the United Kingdom (evolving from monarchy to executive-dominated constitutional monarchy), its ability to enact law is an august power, even though this usually amounts to giving assent to legislation introduced by the executive (Norton 2005: 7). Foucault highlights the contrast between legislative sovereign power and its eclipse very well. He argues that on the hand the power to make the law is an imposing statement of sovereign potency. As he puts it in *History of Sexuality*, 'power acts by laying down the rule... It speaks, and that is the rule. The pure form of power resides in the function of the legislator' (1990: 83). Further, in *Discipline and Punish* Foucault characterizes sovereign power as spectacular and ritualistic (1999). Thus we could consider that as a 'sovereign' power, parliament engages in the ritualistic spectacle of enacting controversial new security laws in a public display of power and intent. Yet also Foucault argues that this legislative power is a negative and limited power:

it is defined in a strangely restrictive way, in that, to begin with, this power is poor in resources, sparing of its methods, monotonous in the tactics it utilizes, incapable of invention, and seemingly doomed to repeat itself... it is a power whose model is essentially juridical, centered on nothing more than the statement of the law. (1990: 85)

As home secretary Jack Straw appropriately retorted in a critical parliamentary debate about the loose definitional terms of the bill that became the Terrorism Act 2000, 'We have to legislate with words because that is all we have'.<sup>ii</sup> Foucault's critique is an apt description of counterterrorist lawmaking, with its ritualistic, symbolic repetition of

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discourses of fear and reaction, and its re-use of previously discredited tactics such as stop and search and internment.

The content of counterterrorism law is not entirely without innovation, but that innovation resides in the novel executive powers that it creates, such as the 'control order', not the way it is handled by parliament. And the source of that innovation is not the legislature but the executive and behind it the civil service, with their policy units and bill teams (Page 2003). It is not this art of creative government that is monotonous, but the juridical, legislative functions of parliament (Golder and Fitzpatrick 2009: 35). Although governmental security powers are often enabled by legislation, they exceed legislative power in their expanse and in their use in ways unforeseen and unintended by parliament, such as for the apprehension of peaceful protesters. Foucault characterized this eclipse of legislative, juridical power by arguing that: 'We have been engaged for centuries in a type of society in which the juridical is increasingly incapable of coding power, of serving as its system of representation' (Foucault 1990: 89; cited in Golder and Fitzpatrick 2009: 22).

Yet although lawmaking represents a limited and archaic 'sovereign' power that has been superseded by governmentality and an ever-expanding range of executive powers, it is in its potential eclipse that parliament comes to express the most important tensions in the lawmaking model of security. Golder and Fitzpatrick argue that the established interpretation of Foucault on law is that he characterizes the power of the sovereign law as monotonous, limited, weak, repressive and negative, retreating in the face of ever more creative, productive, extensive and affective forms

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of governmental power such as discipline and biopower (for example Hunt and Wickham 1994). Yet through a Derridean re-reading of Foucault's thoughts on law, particularly in his lectures, Golder and Fitzpatrick argue that law presents an excess 'which is illimitable and always going beyond itself and those who would seek to instrumentalize it' (2009: 39). This reading is insightful of the position of parliament in legislative security politics and of the ineluctable normalization of the 'exceptional'. On the one hand parliament plays a central role in legitimating the symbolic and repressive legislation that is invariably enacted in the wake of spectacular terrorist attacks, but on the other hand parliament frequently expresses concerns about how the law may exceed its intentions, scrutiny and oversight. As we will see, parliamentary discourse raises concerns that include: past mistakes being repeated, new executive powers being misused, minority communities being alienated, non-terrorist groups being brought within the remit of the definition of terrorism, and deleterious effects on politics itself. Arguably, much of this has come to pass. This illimitable process of law going beyond itself is never more the case than with the normalization of counterterrorism law.

### **Lawmaking in an emergency (legislative exceptionalism): the Anti-terrorism, Crime and Security Act 2001 and others**

Speed is a characteristic feature of counterterrorist lawmaking in the wake of terrorist attacks. Normally in parliament, convention dictates that when proposed legislation is introduced in the form of a bill, there are several stages it must go through in the Commons and the Lords before it can become law, which include parliamentary

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debates over principle and detail, scrutiny in committees and the tabling of amendments. Most stages are separated by at least two weekends (Parliament 2011). When all the stages from 'first reading' to 'royal assent' are added up, the normal passage of a bill would take a minimum of eight to ten weeks. However, because the government controls legislative timetabling in the Commons it can override these conventions. It can also exhort the more independent House of Lords to follow suit, particularly when there is popular and symbolic pressure to act. This is overwhelmingly the experience of counterterrorist lawmaking in the wake of terrorist attacks, which is almost always rushed, reactive and repetitious.

Former Northern Ireland human rights commissioner Brice Dickson told a recent Lords inquiry into fast-track legislation: 'very often in the aftermath of a terrorist atrocity, politicians must be seen to be doing something, and there is a public mood often that demands that' (House of Lords Select Committee on the Constitution 2009: 18). This 'doing something' amounts to 'acting in haste and repenting at leisure' (16): quickly enacting laws which are then difficult to reverse. Hence the following prime examples. The PTA 1974, introduced as a temporary response to the IRA Birmingham pub bombings, completed most of its stages in a single day (House of Commons Library 1999: 7) and was renewed and re-enacted for 26 years before most of its powers were made permanent in the Terrorism Act 2000. The Criminal Justice (Terrorism and Security) Act 1998 was passed in response to the Omagh bombing in Northern Ireland in a 'remarkably short' two days during a parliamentary recall from the summer recess specifically for that purpose (House of Lords Select Committee on the Constitution 2009: 20). The Anti-Terrorism, Crime and Security Act 2001

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introduced as an emergency anti-terrorism bill<sup>iii</sup> in response to 9/11 was passed very quickly in the space of a month from introduction to enactment (House of Commons Library 2002: 1; House of Lords Select Committee on the Constitution 2009: 20).

Unlike some technical scenarios (for example responding to a court judgment), there is no *prima facie* reason why counterterrorism legislation should be fast-tracked, though the claim is normally that the police or other executive agencies urgently need new powers. And unlike other legislation that is 'fast-tracked' (a term chosen by the Lords inquiry as descriptive and neutral), ministers and parliamentarians explicitly discuss counterterrorism legislation as 'emergency' legislation. In some ways the political spectacle of pushing emergency legislation through parliament reflects the political spectacle of terrorism itself, in that one purpose is to transmit a symbolic message to a wider target audience over and above the material impact on the direct targets of the act (for a useful discussion of this aspect of definitions of terrorism see Walker 2009: 7).

The speedy element of the lawmaking model of security does correspond to some aspects of the Schmittian exceptionalism debate, with its emphasis on temporal rupture, emergency and urgent response. In parliament, claims about the need for expedited emergency legislation are indeed tied to claims about exceptional circumstances (although there is no necessary link between the two (Neal 2010: 70-76)). However, in contrast to the typical framing of the Schmittian model, the lawmaking model of security politics requires us to consider a longer time span beyond the moment of emergency because of its normalizing tendency. While

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dominant parliamentary discourses at the time imply and assume that such measures will be temporary, history shows this assumption to be largely false (Donohue 2000; 2008; House of Lords Select Committee on the Constitution 2009: 16; Neocleous 2008: 39-75).

Parliamentarians are not oblivious to the normalization problem of counterterrorism law, but in the heat of the moment the political pressure for quick symbolic action decreases the possibility of critical parliamentary debate on the necessity, proportionality and future consequences of the legislative response. Jef Huysmans argues with reference to the Frankfurt School jurist Franz Neumann that when public and political debate proceeds on the basis of fear there is little possibility of a measured deliberative response (2004: 321). Huysmans contends that slowness of decision-making is an important virtue of liberal-democratic constitutional systems because it institutionalizes the 'principle of fallibility of opinion' (2004: 332). Yet during security emergencies, parliament gives the executive the benefit of the doubt, accepts its assessments of the threat, accedes to its legislative demands and indeed participates in a discourse of fear. The legislature's position of constitutional weakness and its lack of access to government intelligence means it rarely has the means or symbolic authority to do otherwise. It is for all these reasons that counterterrorist lawmaking in the wake of an emergency follows its familiar pattern. In contrast, when counterterrorist lawmaking occurs away from the immediate influence of 'emergencies' it is much more consultative and deliberative, but this poses its own problems as we will discuss later.

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### **Parliamentary safeguards: 'Exceptional measures require exceptional scrutiny'**

Despite all this, the legislature is not completely supine, even in an emergency. The parliamentary record shows that although opposition parties and backbenchers always support new legislation at these times, they are still concerned about potential negative consequences in terms of lack of effectiveness, expansion of executive power and potential impact on rights, liberties and suspect communities. For example, when home secretary David Blunkett outlined his government's intentions for an emergency terrorism bill on October 15 2001, his opposite numbers pledged to support the new legislation as being 'necessary in the current emergency',<sup>iv</sup> but in the same breath warned that 'too often in the past, over-hasty legislation has proved inoperable in practice'.<sup>v</sup> Both insisted on the need for proper debate and scrutiny by parliament. At least some parliamentarians expressed concern about the uncertain and excessive future possibilities of new executive powers that would be difficult to limit, reign back in or prevent from becoming normalized. This is one of the recognized problems of legislative exceptionalism generally. As Brice Dickson explained in his evidence to the Lords inquiry:

unless the provisions are strictly time limited they may become a semi-permanent feature of the law and be resorted to in situations for which they were never designed... At the moment there is no legal mechanism to stop emergency legislation being used for purposes for which it was never intended (House of Lords Select Committee on the Constitution 2009: 16)



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Nevertheless, despite the symbolic weakness of parliament in relation to the executive and the moment of emergency, even these moments mobilize a strong parliamentary principle that has been completely missed in the exceptionalism debate. The abiding principle of the parliamentary response to proposed terrorism legislation is that, as Clive Walker puts it, 'extraordinary powers should be subjected to extraordinary scrutiny' (2009: 25). This principle is often expressed in the debates<sup>vi</sup> and can channel the limited scope for parliamentary influence on legislative proposals quite effectively.

Often this principle means that in its negotiations with the executive, parliament tries to insist on post-legislative safeguards. Walker explains that in UK counterterrorism legislation, these 'have painstakingly been fought over, conceded, and honed over a period of years' (2009: 22). They may include sunset clauses, through which certain powers, if not certain laws, are time limited and set to lapse on a particular date. This entails a requirement for renewal if the powers concerned are to continue in force. Similarly, annual review has been undertaken in various forms since the PTA 1974. With the Terrorism Act 2006 this was put on a statutory basis in the form of the Independent Reviewer of Terrorism Legislation. There may be other *ad hoc* arrangements depending on the politics at hand. For example, for the Anti-Terrorism, Crime and Security Act 2001 parliament secured provision for a one-off review by a government appointed privy council committee within two years.

However, provisions of this kind are no guarantee against normalization. They did not stop the PTA 1974 from being reviewed and renewed repeatedly for 26 years. This

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fact is footnoted with some irony on the first page the Lloyd report as follows:

'During the debate on the motion to renew the PTA in 1994 the Home Secretary, Mr. Michael Howard, described the Act as "just about the most reviewed legislation on the statute book"' (1996: 1 citing HC Debs Vol 239, 9 March 1994). One MP has even described this kind of parliamentary scrutiny as a 'sham'.<sup>vii</sup> In another example, the Privy Council's critical recommendation to reel in some of the powers of the 2001 Act was dismissed by the government (Privy Counsellor Review Committee 2003; Walker 2009: 28). A less tangible danger is that the limits won by parliament apply only to the more striking provisions of the legislation, perhaps due to the limitations in time and scope of the negotiating process, with the result that other less tangible or more complex provisions, for example those on terrorist financing, are allowed to slip through unchecked. Nevertheless, sunset clauses can cause counterterrorist powers to lapse if there is no executive will to prevent this from happening. One example is the January 2011 return of pre-charge police detention to 14 days from the 28 days provided by the Terrorism Act 2006.

### **Legislating under a fading emergency: the Counter-Terrorism Act 2008**

We have seen that perceived security emergencies have an appreciable effect on legislative practice. A question arises as to the length of time an emergency exists and can still have an effect. Not all of the counterterrorism laws enacted since 9/11 were in immediate response to spectacular attacks. For example, the legislative experience of the Counter-Terrorism Act 2008 was quite different to the 2001 act. There had been no terrorist attack since 7 July 2005 and the security environment had not

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substantially changed. Because of this, the whole tenor of the legislative process was different. Without an obvious emergency there was no impetus for expedited process. Instead the legislation took a notable 'seventeen months between proposal and assent' (Walker 2009: 31). Instead of the executive using its symbolic dominance and sovereign prerogative to declare legislative exceptionalism and push its proposals through parliament quickly, home secretary Jacqui Smith explained that 'from the outset we have tried to take a different approach to this legislation—to be open and consultative and to try to forge consensus where possible.'<sup>viii</sup> The explanatory notes attached to the bill state: 'Prior to the introduction of this Bill, the Government undertook an extensive consultation on possible measures for inclusion in the Bill and published documents to facilitate that consultation' (House of Commons 2008: 1). The legislation was published in draft ten weeks before its second reading, which although becoming a more common practice is still unusual for most legislation, let alone for counterterrorism legislation. This allowed time for evidence to be taken and reports to be published by various parliamentary committees.

Despite this slower and more open process, the government still tried to use exceptionalist reasoning in its justification of the bill in parliament. Without a recent terrorist attack this discursive strategy did not work well. At the second reading (the set piece Commons discussion on the principles of the bill) the familiar argument that exceptional circumstances require exceptional measures did not find good purchase because little had palpably changed in the security environment. Although in her presentation of the bill to the house the home secretary began with the statement that: 'The threat we face is serious and urgent... the new threats we face demand new

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responses from us', <sup>ix</sup> the crux of her argument was not about new threats or a recent crisis but about hypothetical future risks. As she said in her much interrupted speech:

The measures in the Bill are precautionary, proportionate and necessary if we are to have in place protections to deal with the exceptional circumstances that none of us wants to see happen, but which all of us have a duty to prepare for, in case they do. <sup>x</sup>

In circumstances without an obvious emergency, opposition from across the house was emboldened, in contrast to the usual cross-party consensus that ensues in perceived emergency situations. Hypothetical risks proved more open to contest than spectacular images of destruction still burned fresh on the collective memory.

Without the symbolic, informational and institutional advantages accorded to the executive by such 'exceptional' moments, and because of a consultation process that had been slow, broad and largely open, the executive found it much harder to assert authority over the arguments and evidence. A great deal of the expert evidence had been put into the public domain thanks to the hearings held by parliamentary committees, and it was thus much harder for the executive to make its interpretation of the security situation seem both unequivocal and urgent. When the home secretary cited one authoritative police source on the need for extended police powers of pre-charge detention, <sup>xi</sup> her shadow David Davis cited similarly authoritative sources that were much more equivocal:

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The head of MI5 has not even mentioned pre-charge detention when setting out the security challenges that we face, whether briefing in public or in private on Privy Council terms. The most that the Home Secretary can cite is Sir Ian Blair, who offers no evidence at all but merely draws a “pragmatic inference”—her words—that we might at some unspecified point in the future, faced with some unspecified threat, require an unspecified extension of detention without charge.<sup>xii</sup>

In the case of the 2008 act, despite a long consultation process, the government tried to pursue exceptional logic without the immediate presence of an emergency. Without the time-zeroing symbolic dominance of the spectacular moment of terrorist attack, it struggled to make its case and suffered humiliating defeats in both the Commons and the Lords. Its arguments about threat and necessity were less credible and less persuasive than they would have been in the wake of an attack. Ultimately the extensive bill was enacted in an amended form, with the notable result that parliament did have a significant influence: the government dropped its proposal to extend pre-charge detention from 28 days to 42 days (Walker 2009: 32).

By 2008, political opinion had begun to build against the seemingly relentless legislative urge of the government on counterterrorism. For example, by 2010 the joint committee on human rights was arguing that: ‘the Government’s approach means that in effect there is a permanent state of emergency, and... this inevitably has a deleterious effect on public debate about the justification for counter-terrorism measures’ (2010: 9). Former home secretary Charles Clarke, who introduced new

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counterterrorism laws between 2004-2006, wrote in favor of a new legal consolidation (2009). This groundswell of opinion culminated in the new coalition government announcing its review of counterterrorism laws and powers. The result was typical of the many reviews before it. It proposed that several executive powers be reduced, but those that remained would be put on a permanent, normalized footing (HM Government 2011). The changes will require new legislation, and at the time of writing the entire political, parliamentary and legislative process has yet to play out. History suggests that the parliamentary discourses and security rationalities accompanying this will be quite different to those in play under the auspices of emergency. In order to understand how these discourses work, we can analyze the last great act of normalization, the Terrorism Act 2000.

### **Legislating without an emergency, or acts of normalization: the Terrorism Act 2000**

The Terrorism Act 2000 was not 'emergency' or 'exceptional' legislation, and nor was it ever justified as such. Rather it was the opposite: an attempt to rationalize and normalize counterterrorism law in a considered, deliberative, consultative manner, away from the symbolic and political pressures brought about by terrorist attacks. The process by which the Terrorism Act 2000 was made was therefore markedly different to the usual experience of rushed, reactive and repetitious counterterrorism legislation that is enacted on an assumed 'temporary' basis but inevitably remains in force. In effect, between the 1996 Lloyd report and the publication of the Terrorism Bill in 1999, the legislation underwent an informal three-year consultation process.

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The whole process aimed to end the previously unsatisfactory way in which counterterrorism had been made.

Lloyd had been asked to consider whether there was a need for continuing counterterrorism laws in prospect of peace in Northern Ireland. After consulting with various security 'experts', in particular the academic Paul Wilkinson, he concluded that there was: 'Once lasting peace has been established in Northern Ireland, there will continue to be a need for permanent counter-terrorist legislation to deal with the threat of international and domestic terrorism' (1996: 12).<sup>xiii</sup> After coming to power in 1997, the Labour government stated that it accepted the authority of the report and its recommendations (UK Government 1998) and introduced a new draft terrorism bill to parliament in 1999. The government was quite clear about its aims: '[t]he whole purpose of the Bill is to avoid rush legislation and to move from a temporary situation to a permanent one.'<sup>xiv</sup>

The main effect of the act was to make permanent many of the 'temporary' and 'exceptional' powers contained in the PTA and EPA. Many of these powers had applied only to Northern Ireland, but those that were kept were now to apply to the entire UK. The new act removed the 'more extreme'<sup>xv</sup> powers of internment and exclusion orders (a form of internal exile that excluded individuals from either the territory of Northern Ireland or mainland Britain), though it should be noted that forms of these powers later came back in the Belmarsh detention regime and in certain aspects of control orders.

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A perverse effect of removing the notion of exceptionalism from the legislative discourse was that pressure from parliament for exceptional scrutiny also dissipated. Walker describes the level of scrutiny in the legislative process and the resultant review mechanisms as disappointing (2009: 25). Although concern was expressed in parliament that many of the review mechanisms that had made the PTA and EPA palatable were to go, this did not translate into strong opposition from the frontbenches of the other parties or a divisive fight over amendments. Indeed, the initial draft bill proposed no review mechanisms at all.<sup>xvi</sup>

Meeting this concern was the only area in which the government gave ground. The final arrangement, provided for in an amendment, was for an independent annual review of the use of the act, though not necessarily of its continuing need, to be presented to parliament every twelve months. There would be no requirement for annual renewal by parliament as there was with the previous legislation. Commenting on the contrast with the historical experience of counterterrorist lawmaking, home office minister Charles Clarke presented the amendment as:

an example of how the new Labour Government listens carefully to opinion from a wide range of sources. We have dropped any idea of steamrolling the legislation through Parliament and taken seriously the views of both official and the unofficial Opposition.<sup>xvii</sup>

Despite the professed magnanimity, this outcome amounted to weak scrutiny. Being a permanent piece of legislation there was now no mechanism to cause it lapse after a



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period of time. Lib Dem home affairs spokesperson Simon Hughes had tabled an amendment calling for five yearly renewals by parliament (in effect once a parliamentary term), but after not arguing his case well in the bill committee and being persuaded otherwise by Clarke, he withdrew his new clause.<sup>xviii</sup> Clarke's argument was that having reviews only every five years would constrain the freedom of the independent reviewer and was not frequent enough for the law to be adapted in response to changes in security circumstances or negative judicial rulings on its use. While this may have been true, it somewhat diverted the point. The provision for independent yearly review presented no opportunity for parliament to debate the findings without the agreement of the government to program time for it, and in any such event there would be no possibility for any amendment or parliamentary refusal to renew the legislation without the government deciding to reopen the legislative process. This took away the onus on the government to defend the use of, and ongoing need for, the legislation and placed such judgment firmly with the executive. This was in fact the intention of the government. As Clarke said:

It is important that the Secretary of State of the time makes a judgment as to how effectively or otherwise the legislation has operated. That is principally a matter for the Executive to consider, although of course the reviewer may comment on that.<sup>xix</sup>

So perversely, despite the long consultation process and the normalization of exceptional counterterrorism law represented by the bill, its effect was to reinforce the executive dominance over security issues characteristic of the 'emergency' legislation

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it was meant to end. Moreover, as the conservative David Liddington pointed out, the legislation did not close the door to the possibility of further knee-jerk legislative responses in the event of new terrorist atrocities, and nor would have Hughes's amendments.<sup>xx</sup>

Although the Lib Dems offered the most considered response to the bill, they did not entirely appreciate its implications. The normalization of counterterrorism law, which they supported in principle, undermined the rationale for the principle of exceptional scrutiny that had operated previously. Hughes outlined the position of his party as follows:

We believe that we should codify and simplify existing exceptional legislation on terrorism, repeal unnecessary measures, especially the sort of legislation that we passed last year in haste [the 1998 Criminal Justice (Terrorism and Conspiracy) Act], and ensure regular scrutiny of counter-terrorist legislation on a United Kingdom-wide basis. We approach the debate from that perspective. We support a United Kingdom-wide Bill. We also support reconsidering a series of existing temporary measures and bringing them together. However, we have fundamental anxieties about the Government's conclusion to that process... *We believe that exceptional measures require exceptional scrutiny.*<sup>xxi</sup> [my italics]

Their anxieties concerned the lack of scrutiny of 'exceptional' measures, but the contradiction in this position was that the measures concerned would no longer be

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exceptional. Consolidating temporary measures and applying the legislation to the whole of the UK amounted to normalization. The logic had changed, and so the rationale for exceptional scrutiny no longer applied.

Given the 'exceptional' counterterrorism laws that came after 9/11, the Terrorism Act 2000 is often viewed in hindsight as example of good sense and moderation. As Lord Lloyd put it later (despite leaving the door open for further emergency laws in his report):

the Terrorism Act of 2000...that came after about 30 years of Irish terrorism...was well thought out and it was comprehensive. And it was fair. That is the act we ought to be enforcing now instead of which, whenever a new terrorist event occurs, we start adding new things to that act. (2005)

This view obscures the fact that the 2000 Act was controversial at the time. On the day of the bill's second reading, Jack Straw ironically commented in an article in *The Guardian* newspaper: 'Given recent coverage, Guardian readers could be forgiven for believing that the new terrorism bill marks the end of liberal democracy as we know it' (1999). Concerns had been expressed by human rights lawyers Conor Gearty (1999) and director of Liberty John Wadham about the wide remit of the new definition of terrorism which could be used to ensnare protestors and other politically motivated groups (House of Commons Library 1999: 19-20).

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This concern was also present in parliamentary debate, though mostly expressed by backbenchers. Would the act be used to persecute suspect communities for no obvious security or intelligence gain?<sup>xxii</sup> Would the act 'turn direct action movements into potentially terrorist movements'?<sup>xxiii</sup> Would 'democratic activity [be] inhibited by the fear of the offence that is being created'?<sup>xxiv</sup> Would it allow terrorist organizations to be 'able to portray the state as oppressive and as suspending their human rights, and themselves as victims of an oppressive state'?<sup>xxv</sup> Some MPs also expressed concern at the wisdom of making the 'temporary' and 'exceptional' counterterrorism regime permanent because it would not only normalize executive powers, but also normalize terrorist violence as an expected part of the social fabric of the country.<sup>xxvi</sup> Arguably, many of these concerns have since been borne out.

Under a normalized counterterrorism regime, in the absence of powerful parliamentary review and renewal mechanisms mobilized by a sense of emergency, parliament would have to rely on much weaker and less formal limits, such as the judgment of the home secretary, the assurances of the government about how the law would be used, the assessment of the independent reviewer, and the discretion of the police, courts and crown prosecution service on how to apply and interpret the law. Some parliamentarians expressed doubt about the value of these assurances.<sup>xxvii</sup>

Although there is evidence that these counterterrorism powers have indeed been used in the ways that were feared (for example, the overly broad use of police stop and search powers (Lord Carlile of Berriew 2010: 80-83)), given the wide remit of the act it could have been much worse. Walker argues that the overbroad definition of

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terrorism presented an inherent possibility of excessive application, but in practice it is 'often moderated by police and prosecution restraint' (2009: 12).

The Terrorism Act 2000 formed a new baseline upon which subsequent legislation was built. Since then it is the 'exceptional' counterterrorism laws passed after 9/11 that have attracted criticism. Having multiple 'emergency' laws indefinitely in force offends parliamentary process and the principles of liberal law. Yet despite the illiberal nature of exceptional laws, it is their very exceptionality that has facilitated exceptional scrutiny. Sunset clauses have allowed parliament to return to them legislation to consider their continuing need. Reviews and reports by parliamentary committees have considered the legislation and its powers through the assumption of emergency and have thereby kept that assumption under question. And because when the time comes for renewal the government has to make the case anew for their 'exceptional' need, in some cases the government has declined to do so, allowing them to lapse. This is what happened with 28-day pre-charge detention (Travis 2011). In contrast, the normalized Terrorism Act 2000 has received much less critical attention since it was eclipsed by exceptional post-9/11 legislation.

**Conclusions: good legislative process does not mean good security policy, and legislative exceptionalism has its merits from the perspective of parliamentary scrutiny**

Legislative security politics operates in a different ways at different times. In the wake of spectacular terrorist attacks and times of perceived emergency, legislative

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exceptionalism comes into play. This does not make exceptions to the law, but rather enacts new laws in an exceptional way through a discourse of emergency, using expedited legislative process and creating special executive powers that are justified as exceptional. This phenomenon is profoundly presentist. Spectacular terrorist attacks have a ground-zeroing, amnesiac effect whereby the past is forgotten. As such it is repetitive. It reintroduces discredited measures that have well known negative consequences, such as detention without trial. Perceived emergencies create political consensus and quell critical debate. Discussion of the future is not a feature of legislative exceptionalism. It is not a case of warding off a feared future but responding to a calamitous present, reasserting the power of the government and the sovereignty of parliament through symbolic, spectacular legislation.

When the memory of the emergency fades, so does its legislative effect. Emergencies are entropic in this regard. As the last spectacular terrorist attack recedes from the immediate, traumatized collective consciousness and into memory, the pasts and futures that were suppressed come back into play. With this comes the opportunity for increased critical acumen and political opposition. Parliamentarians can invoke the mistakes of the past or threatened national traditions of liberty. They can warn of unintended futures consequences, such as repressive laws acting as a recruiting sergeant for terrorism. The symbolic advantages that accrue to the executive in the wake of the emergency become diluted, such as exclusive access to intelligence assessments and the recognition and deference that goes with it (Bourdieu 1990: 111). Without political consensus and a set of present circumstances that speak for themselves, it is harder for the government to justify its legislative proposals. In this

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situation, the government may instead try to couch its justifications in terms of hypothetical future risks. It is a common assumption of the critical literature on risk that arguments about hypothetical futures have potent effects, (Amoore and de Goede 2008; Aradau and Van Munster 2007; Lobo-Guerrero 2011) but surprisingly, in a legislative context, future risk is not a powerful argument compared to the immediacy of a calamitous present. Hypothetical futures are too difficult to assert symbolic authority over, too speculative and too easily contestable.

When there is no perceived emergency in play, legislative security politics exhibits different dynamics: not exceptionalism but normalization. There are two kinds of normalization at work in legislative security politics. First is an incremental normalization where the once exceptional becomes the new normal with the passing of time. This in itself undermines the assumption in much of the states of emergency literature that when the emergency has passed, everything will return to the *status quo ante*. Second are acts of legal normalization that aim to consolidate and make permanent all the 'temporary' and 'exceptional' laws passed in response to previous emergencies. Despite the habitual normality of passing illiberal, exceptional knee-jerk legislation in response to emergencies, liberal law and politics do not like provisionality, exceptionality and temporariness. They offend liberal principles of proper process, positive coherence and reasonableness. As such, proposals for legislative normalization are generally popular in parliament, at least among the frontbenches. From a liberal democratic perspective, the process of legislative normalization should be a good thing. It allows more critical parliamentary reflection and diverse political argument than when emergencies are strongly in play. As

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discussed above, Huysmas argues that slowness of decision making is a liberal democratic virtue (2004), as are consultation, deliberation and consensus building (Dryzek 2002; Habermas 1987). These features were certainly present in the period of normalization in the UK from 1996 to 2000. Unlike the presentism of exceptionalism, pasts and futures feature here to a great extent: reflections on the mistakes of the past and reflections on a future in which things will hopefully be done differently. Acts of normalization are often driven by new governments (the case in 2000 and 2010-11), who like to distance themselves from the actions of their predecessors and establish a legislative future that they have themselves defined. Their future, we hear, will be different.

However, legislative normalization presents a surprising research finding. While we know very well the argument that exceptional times require exceptional measures, there is also a powerful parliamentary principle that exceptional measures require exceptional scrutiny. Yet although acts of normalization tend to receive a great deal of critical debate, the parliamentary response ultimately tends to be weak because it is not galvanized by the discourse of exceptionalism. The principle of exceptional scrutiny that applies when emergencies are in play does not work with normalization. Hence normalization tends to result in weak post-legislative safeguards and an entrenchment of executive security prerogative, despite the fact that it appears to display several liberal democratic virtues.

During episodes of perceived emergency, the principle of exceptional scrutiny does not necessarily mean greater political opposition, but rather a discourse of consensus



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to tackle terrorism accompanied by an insistence on parliamentary safeguards to try to ensure that what is justified as exceptional stays exceptional. These safeguards are by no means perfect and often apply to only the more headline-grabbing measures, but they are something rather than nothing and they can cause contentious counterterrorist powers to lapse in time.

While acts of normalization do often roll back some of the more contentious executive powers, what remains gets put on a permanent footing with fewer parliamentary limitations than before. The normalized legislation then becomes a new baseline for future security laws. Normalization raises a question for critics of exceptionalism, liberal or otherwise: is it the abuse of liberal democratic process by emergency lawmaking that is objectionable, or the security policies themselves, even if put into place in a good liberal democratic way? This research points to a need to disaggregate the analysis of security in order to make finer distinctions between process and policy, the different institutions of government, and the different times of security politics. Finally, legislative history suggests that security politics has a cyclical quality that warrants further attention. Acts of normalization last only as far as the next emergency, when exceptionalism begins anew.

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<sup>i</sup> While the House of Lords has often played an important and interesting role in counter-terrorism legislation, due to lack of space we will only look at the Commons and the key parliamentary committees here.

<sup>ii</sup> Hansard HC vol 341, col 156 (14 December 1999), Jack Straw.

<sup>iii</sup> Hansard HC vol 372, col 923, (15 October 2001), David Blunkett.

<sup>iv</sup> Hansard HC vol 372, col 929, (15 October 2001), Simon Hughes.

<sup>v</sup> Hansard HC vol 372, cols 925-6, (15 October 2001), Oliver Letwin.

<sup>vi</sup> E.g. Hansard HC vol 341 col 183 (14 December 1999), Simon Hughes.

<sup>vii</sup> Hansard HC vol 474, col 661, (1 April 2008), Shailesh Vara.

<sup>viii</sup> Hansard HC vol 474, col 661, (1 April 2008), Jacqui Smith.

<sup>ix</sup> Hansard HC vol 474, col 647, (1 April 2008), Jacqui Smith.

<sup>x</sup> Hansard HC vol 474, col 661, (1 April 2008), Jacqui Smith.

<sup>xi</sup> Hansard HC vol 474, col 658, (1 April 2008), Jacqui Smith.

<sup>xii</sup> Hansard HC vol 474, col 665, (1 April 2008), David Davis.

<sup>xiii</sup> Conor Gearty argues that the evidence and reasoning used about potential future threats was remarkably scant considering Lloyd was a former Law Lord, raising questions about the interests and influence of these security 'experts' (1999).

<sup>xiv</sup> Hansard HC Standing Committee D pt 4 (8 February 2000), Charles Clarke. Note, however, that Lloyd himself did not advocate ending the practice of passing emergency legislation in the wake of a terrorist attack, rather aping Schmitt in his argument that the law 'should not attempt to cater in advance for emergencies, which

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may take a form which cannot now be foreseen' (1996: xvi; compare Schmitt 1985: 6).

<sup>xv</sup> Hansard HC Standing Committee D pt 4 (8 February 2000), Charles Clarke.

<sup>xvi</sup> Hansard HC vol 341 col 171 (14 December 1999), Anne Widdecombe.

<sup>xvii</sup> Hansard HC Standing Committee D pt 2 (8 February 2000), Charles Clarke.

<sup>xviii</sup> Hansard HC Standing Committee D pt 5 (8 February 2000), Charles Clarke.

<sup>xix</sup> Hansard HC Standing Committee D pt 3 (8 February 2000), Charles Clarke.

<sup>xx</sup> Hansard HC Standing Committee D pt 4 (8 February 2000), Charles Clarke.

<sup>xxi</sup> Hansard HC vol 341 col 183 (14 December 1999), Simon Hughes.

<sup>xxii</sup> Hansard HC vol 341 col 192 (14 December 1999), Jeremy Corbyn.

<sup>xxiii</sup> Hansard HC vol 341 col 200 (14 December 1999), Alan Simpson.

<sup>xxiv</sup> Hansard HC vol 341 col 201 (14 December 1999), Douglas Hogg.

<sup>xxv</sup> Hansard HC vol 341 col 181 (14 December 1999), Fiona Mactaggart.

<sup>xxvi</sup> Hansard HC vol 341 col 182 (14 December 1999), Fiona Mactaggart, Hansard HC vol 341 col 200 (14 December 1999), Alan Simpson.

<sup>xxvii</sup> Hansard HC vol 341 col 200 (14 December 1999), Alan Simpson.