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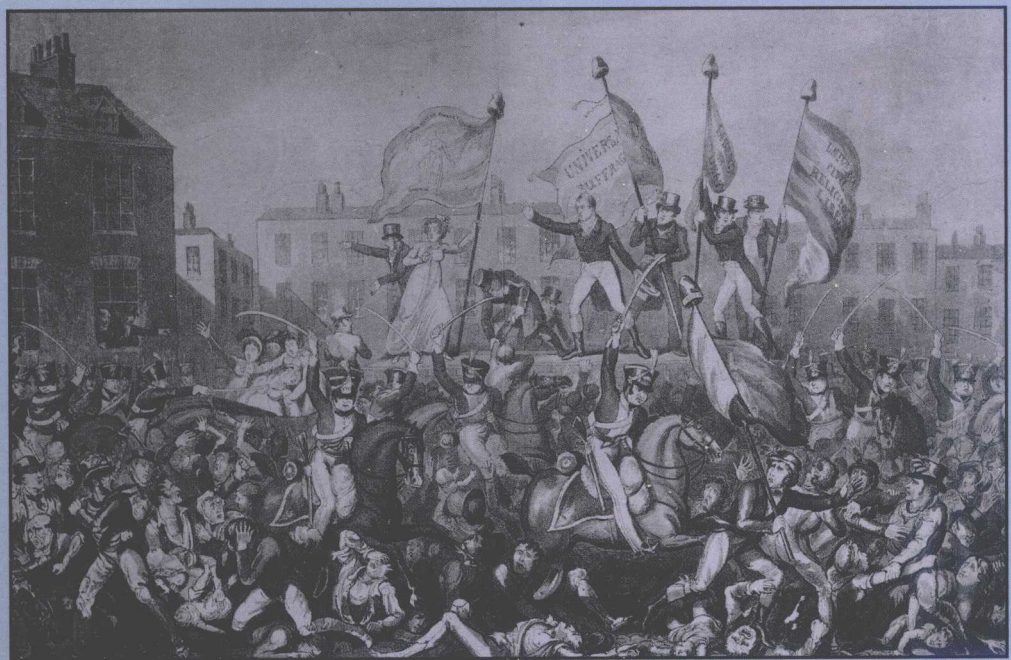
From Treason to Terrorism

Michael Head



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From Treason to Terrorism

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Preface: Completing an Unfinished Task

In 1979, as a young law lecturer at the Australian National University, I published an article on the inglorious history of the crime of sedition (Head 1979). The article described sedition as the quintessence of the fundamental role of the criminal law – the maintenance of the prevailing political order. Sedition, I wrote, took to the 'highest and clearest point' the punishment of perceived threats to the tranquillity of that order. My survey concluded that the law of sedition, despite falling from prominence for a number of decades, was in an unsatisfactory state. It was ripe for revival and manipulation by governments to utilise against political opponents in periods of turmoil. The article ended by drawing attention to the need for a wider inquiry:

> I have left undiscussed the wider range of statutory and common law provisions which can be used to stifle dissent. Sedition is, or should be, merely the 'pure' form in which the question is raised. In the light of the state of law presented it is important that a more complete picture be assembled. (Head 1979: 107)

This book, somewhat belatedly, attempts to address that unfinished business. It seeks to assemble and analyse the law devoted to the basic task of protecting the existing order from political dissent and destabilisation. Generally, I have approached the law historically and examined first the British provisions and then their American and Australian applications, with some references to other English-based legal systems. Not all aspects of the law are covered uniformly. There are differences in the degree of detail in the treatment of different offences, and various jurisdictions. The primary focus is on relevant historical experiences of how the most significant legal measures have been applied in practice.

Hopefully, the book makes an initial contribution toward a wider and more insightful understanding of the interaction between the law of crimes against the state and economic, social and political atmosphere in which it operates.

As will become apparent, the outcomes of many of the cases examined in this volume cannot be explained by a purely legal approach. In English-derived legal systems there is a supposed principle that the law is applied neutrally and independently by the appropriate police, intelligence and law enforcement agencies, without government interference. Frequently, however, decisions on whether to prosecute or not, and for which offences, were made for political reasons. In some instances, documentary evidence now exists of cabinet-level determinations to proceed, or not to proceed. In other cases, laws that had lain dormant for decades were revived to confront perceived political threats. Moreover, verdicts and

sentences were often shaped more by political considerations than the precise terms of the law.

Many events have intervened since my 1979 article on sedition. Nevertheless, the resumption of this work has been timely. The global economic breakdown that first began to erupt in 2007 and 2008 has again highlighted the problems, contradictions and underlying instability of the present socio-economic system. It has also heightened the likelihood of civil unrest and political opposition that will challenge governments and possibly call into question the capitalist structure of society itself. These are not idle speculations. There is clear evidence that such concerns have been felt within the security apparatuses.

Testifying before the United States Senate Committee on Intelligence in 2009, the American national intelligence director Dennis Blair warned that the deepening world crisis posed the paramount threat to US national security and warned that its continuation could trigger a return to the 'economic turmoil', 'instability' and 'violent extremism' of the 1920s and 1930s. Blair also referred to the damage that had been done to the global credibility of American capitalism, declaring that the 'widely held perception that excesses in US financial markets and inadequate regulation were responsible has increased criticism about free market policies, which may make it difficult to achieve long-time US objectives' (Blair 2009: 2–3). Likewise, Australian Federal Police Commissioner Mick Keelty delivered an address to a 2009 national security conference in which he noted that if the global financial crisis continued, 'it could create levels of social unrest and political instability that could undermine security in some parts of the world' (Keelty 2009).

The historical record reviewed in this book suggests that such a period of turmoil and discontent is likely to produce renewed resort by governments and prosecuting authorities to arrests for crimes against the state.

As always, my thanks go to my colleagues at the University of Western Sydney for the intellectual encouragement and nourishment, without which this research would not be possible. Above all, I am deeply grateful to my partner Mary and our four sons and daughter, Clayton, Lincoln, Tom, Daniel and Kathleen, for their love and forbearance during the long months of labour.

Contents

Introduction: What are 'Crimes against the State'?

Why this book? It aims to meet an unfilled need for a thorough and critical examination of the wide range and essential nature of the criminal offences created to protect the established economic, political and legal order. It examines who has been affected by these laws in the past and who might be prosecuted in the future. It does so in the post-2001 context of the 'war on terrorism' and rising international and domestic tensions.

This volume reviews in some detail what are generally classified as crimes against the state or against the nation – subversion, rebellion, treason, mutiny, espionage, sedition, terrorism, riot and unlawful assembly – in several comparable countries with English-derived legal systems, primarily the United Kingdom, the United States and Australia. It does not cover a broader variety of offences that affect government, but arguably not existentially, such as bribery and corruption, tax evasion, money-laundering and economic crimes, petty offences, perjury, interference with the judicial system, smuggling, 'people smuggling' and infringements of official sexual standards.

Rather than an abstract approach, the relevant laws are placed in their historical and political context. Leading cases, including some of the most controversial prosecutions in history, are critically probed. That is because the character and implications of these laws cannot be grasped in isolation, outside their application. Throughout modern history – from the summary trial and execution of Charles I in 1649 for 'high treason and other high crimes', and the summary trial and execution of his prosecutors in 1660 for treason for 'compassing and imagining' the King's death, through to the 'anti-terrorism' cases of the first decade of the twenty-first century – prosecutions of crimes against the state have been intimately bound up with the political agendas and requirements of those wielding power, both legal and socio-economic.

The major cases demonstrate that the precise words and concepts of the relevant statutes and common law rules, while important in some circumstances, are not usually decisive in determining arrests, prosecutions, convictions and sentences. Rather, the substantial calculations are political, not legal. The many complex and often interlocking legal provisions invariably offer considerable choices to the prosecuting authorities. Moreover, the historical record provides many examples of direct intervention in these decisions by the governments of the day.

To some extent, these factors have been acknowledged officially. In a 2006 report on the law of sedition, the Australian Law Reform Commission observed that 'the development and use of sedition laws have been influenced strongly by the changing political climate and the degree of citizen support for existing state

institutions; theories about the relationship between citizen and state, and evolving notions of the relationship between action, idea, association and responsibility' (ALRC 2006: 48). The same report also noted that 'the breadth of the law of treason has fluctuated throughout history' (ALRC 2006: 49 fn 11).

Such offences are at the heart of the criminal law of each country. Chapter 115 of Title 18 of the United States Code, entitled 'Treason, Sedition, and Subversive Activities' provides for penalties of up to execution for treason. In Australia, chapter five of the Criminal Code Act 1995 (Cth) is devoted to 'The security of the Commonwealth'. Part 5.1 covers treason and urging violence, part 5.2 covers espionage and similar activities and part 5.3 covers terrorism. Those offences regarded as the most serious – treason and some terrorist-related offences – are punishable by life imprisonment, the most severe penalty currently available under Australian law, a penalty that is otherwise reserved for murder. The other offences carry lengthy prison sentences, ranging from 7 to 25 years.

This volume will closely examine the laws themselves, their judicial interpretation and their political use and abuse. It will also trace the manner in which these measures have been used against political opponents, particularly during periods of economic and social convulsion (for instance, the 1792 sedition prosecution of Thomas Paine in England for publishing *Rights of Man*, in defence of the French Revolution).

These provisions essentially relate to political activities that are regarded as a threat to the established political system, public order or the existence of the nation-state itself. Some of the offences involve violence or plans for violence, but others not necessarily so (for example, treason and espionage). Ironically, in some instances, the proscribed activities could be regarded as laudable if conducted in support of the nation-state, rather than against it. Advocating support for an existing constitution, rather than urging its abolition, would not be seditious. Rather, it would be treated as praiseworthy. Sabotage or espionage conducted in the interests of one's country would be officially rewarded, not punished. It is the political or ideological content of the conduct that is generally of concern, not the nature of the activities per se.

Totalitarian governments are notorious for punishing their political opponents for 'crimes against the state', but history shows that governments regarded as democratic have also strenuously prosecuted these offences. These offences have become more prominent and frequently used under conditions of escalating economic and military tensions between rival nation-states, financial turmoil and growing social and political tensions domestically.

Although the most serious offences generally have been rarely used since World War II and the post-war 'Cold War' in the developed Western countries, prosecutions for insurrection and sedition have been launched in the twenty-first century by governments against their political opponents in numbers of countries, including Thailand and Malaysia. While in recent decades these kinds of cases have occurred primarily in less wealthy countries, there is reason to believe that similar trends could appear in the developed states as well in

the coming period, particularly under conditions of economic breakdown and popular discontent.

As an example of how apparently moribund laws can be brought forward, and put to fresh use, in late 2010, US Attorney General Eric Holder confirmed there was 'a very serious, active ongoing investigation that is criminal in nature' in relation to WikiLeaks' disclosure of classified State Department cables. Holder said the Justice Department was looking to prosecute WikiLeaks founder Julian Assange under the Espionage Act. Section (c) of the Espionage Act (18 USC § 793) makes it a felony when a person 'receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document' ... 'respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation'. Those found guilty of 'conspiring' to engage in any action found to violate the Act can also be convicted. It appeared that the government was planning to show that Assange induced someone in the government to provide him with secret information, making both Assange and his alleged partner guilty of a conspiracy of espionage.

According to a report by the Congressional Research Service (CRS), the nonpartisan research arm of the US Congress, it would be almost unprecedented to prosecute Assange for making classified information public. US criminal statutes covering such information, the report noted, 'have been used almost exclusively to prosecute individuals with access to classified information (and a corresponding obligation to protect it) who make it available to foreign agents, or to foreign agents who obtain classified information unlawfully while present in the United States'. No one other than government employees had been successfully prosecuted under the Espionage Act for receiving and passing on secret documents (Congressional Research Service 2010: ii).

Since the turn of the century, a number of governments, including those of the US, Britain and Australia, have increased their powers to deal with subversion, espionage and alleged threats of insurrection, as well as terrorism. Some of these measures have been controversially extended since 2001 under the banner of the 'war on terrorism'.

One of this book's main theses is that offences against the state have been used for all manner of political purposes in the past, and can be readily so used in the future. At the same time, these laws and their application reveal the ultimate character of the state itself, as a defender of the established order, behind the façades of freedom and democracy. Both the use and abuse of these laws is examined. By that is meant the following:

(1) Historically, these provisions have been exploited for purposes beyond, or even in defiance of, their stated functions. Measures purportedly directed against existential threats to society or the established order have been utilised to pursue a variety of agendas, notably to suppress dissent, intimidate political opponents, poison public opinion, prevent official embarrassment

and divert attention from government or systemic failures. Prosecutions for these offences, even if ultimately unsuccessful, have had wider impacts in chilling dissent. For example, they have given rise to intensive police raids, multiple arrests and property seizures that can seriously disrupt political organisations, damage reputations and shred basic democratic rights, such as freedom of expression.

(2) Even where these laws have been 'properly' used, that is, to arrest, prosecute and punish acts genuinely directed at de-stabilising, undermining or overturning the socio-political system, or at causing fundamental damage to society or members of the public, these offences are inherently anti-democratic and designed to uphold the interests of the economically and politically powerful.

These issues must be assessed in a definite contemporary context. It is widely acknowledged that the world economy has plunged into its deepest and most systemic breakdown since the Great Depression of the 1930s. As in the 1930s, this economic turmoil can be expected to generate not only serious social and class tensions, but also political discontent and challenges to the established order.

Under these conditions, there were also indications of a shift, with the advent of the Obama Administration in the United States in 2009, to broaden the concept of 'security'. Instead of terrorism, economic and political instability was becoming the primary focus of concern. In 2009, America's director of national intelligence, retired admiral Dennis Blair, told Congress that the financial crisis, rather than terrorism, was the foremost security threat to the US (Sevastopulo 2009). Commenting on this testimony in a 2009 address to a national security conference, Australian Federal Police Commissioner Mick Keelty noted:

> This is a major shift in thinking, especially after ten years in which it could be argued that the term 'National Security' was more often than not used as a synonym for 'counter-terrorism'...This approach means that 'national security' now encompasses a broad range of principles – which include economic stability and a peaceful international environment. (Keelty 2009)

If maintaining 'economic stability' and 'a peaceful international environment' are now regarded as essential to national security, and perhaps to the existence of the state itself, we could see considerably more use of 'crimes against the state' than we have since World War II.

This book seeks to fill a noticeable gap: no books cover this field in English-derived law and it is badly neglected in standard criminal law texts. Various books deal with more minor 'public order' offences or with terrorism, but none examine the range of crimes against the state. In the present climate of economic turmoil and political instability, it is important to subject this field to long overdue examination, and encourage informed debate.

Conceptualising Crimes Against the State

The most essential laws of any state are those relating to self-preservation, or to the upholding of the power and stability of the state itself. Beneath whatever appearance is given of liberty and democracy, there always exist those crimes – indeed often the 'highest' or most heavily punishable crimes – that are directed against any conduct deemed to threaten the state itself.

After tracing the history of the rise of the modern state, Frederick Engels concluded that, as a rule, it represented the interests of the most powerful, economically dominant class that 'through the medium of the state, becomes also the politically dominant class, and thus acquires new means of holding down and exploiting the oppressed class' (Engels 1977: 168). He described the emergence, at the heart of the state, of bodies of 'armed men' alongside 'material adjuncts, prisons and institutions of coercion of all kinds, of which gentile [clan] society knew nothing'. He noted that this apparatus of force grew stronger as class antagonisms within the state became more acute and as tensions grew between rival international powers (Engels 1977: 167).

In his work, *The Origin of the Family, Private Property, and the State,* Engels traced the disintegration of primitive communities and the emergence of class societies based on the accumulation of surpluses and, eventually, private property. He probed the essential origins of the state in rising labour productivity, the exploitation of the labour power of others and the consequent rise of class antagonisms. These fundamentally irreconcilable antagonisms led to the establishment of a state apparatus whose function was to simultaneously suppress the class conflict, in the interests of the ruling class, and to seemingly stand above the conflict, so as to legitimise the prevailing socio-economic order. This 'special, public power' no longer consisted of the population organising itself as an armed force, because 'a self-acting armed organisation of the population has become impossible since the split into classes'. Engels concluded:

> The state is, therefore, by no means a power forced on society from without; just as little is it 'the reality of the ethical idea', 'the image and reality of reason', as Hegel maintains. Rather, it is a product of society at a certain stage of development; it is the admission that this society has become entangled in an insoluble contradiction with itself, that it has split into irreconcilable antagonisms which it is powerless to dispel. But in order that these antagonisms, these classes with conflicting economic interests, might not consume themselves and society in fruitless struggle, it became necessary to have a power, seemingly standing above society, that would alleviate the conflict and keep it within the bounds of 'order'; and this power, arisen out of society but placing itself above it, and alienating itself more and more from it, is the state. (Engels 1977: 177–8)

Thus, according to Engels, the state apparatus is an organ of class rule, an organ for the oppression of one class by another; it is the creation of 'order' that legalises

and perpetuates this oppression by moderating the conflict between classes, while depriving the oppressed classes of definite means and methods of struggle to overthrow the oppressors.

Drawing on the work of Engels, Vladimir Lenin observed that behind the democratic façade of modern capitalist states, with their formal undertakings to uphold freedom of assembly, freedom of the press and 'equality of all citizens before the law', there existed provisions allowing for all these guarantees to be swept aside to suppress threats from below during periods of crisis:

> There is not a single state, however democratic, which has no loopholes or reservations in its constitution guaranteeing the bourgeois the possibility of dispatching troops against the workers, of proclaiming martial law, and so forth, in case of a 'violation of public order,' and actually in case the exploited class 'violates' its position of slavery and tries to behave in a non-slavish manner. (Tucker 1975: 468)

Lenin's colleague Leon Trotsky observed that in times of economic advancement, the capitalist class preferred, and could afford, to govern democratically, displaying tolerance toward political and industrial opposition in order to better stabilise and legitimise its rule. But in periods of economic stagnation or decline, such as the 1930s, the political safety valves of democracy gave way. In 1929, examining the breakdown of democratic institutions that was starting to unfold in Europe, giving way to fascism or dictatorship in major countries such as Italy, Germany and Spain, Trotsky explained that the move toward totalitarianism flowed from the fact that parliamentary democratic institutions could not stand the pressure of the class tensions internally, and the international political conflicts.

> By analogy with electrical engineering, democracy might be defined as a system of safety switches and circuit breakers for protection against currents overloaded by the national or social struggle. No period of human history has been – even remotely – so overcharged with antagonisms such as ours. The overloading of lines occurs more and more frequently at different points in the European power grid. Under the impact of class and international contradictions that are too highly charged, the safety switches of democracy either burn out or explode. That is what the short circuit of dictatorship represents. (Trotsky 1997: 53–4)

In 1936, Trotsky again drew attention to the use of 'detachments of armed men in defence of property':

> The bourgeoisie was able to tolerate the freedom of strikes, of assembly and of the press only so long as the productive forces were mounting upwards, so long as the sales markets were being extended, the welfare of the popular masses, even if only partially, was rising and the capitalist nations were able to live and let live. It is otherwise now. (Trotsky 1975: 15, 17)

Perhaps the best-known early Soviet jurist, Evgeny Pashukanis, contended that the capitalist state was bound up with the principle of commodity exchange, and hence the protection of dominant private interests (Head 2007b). These interests required, as far as possible, limits on the power of the state, and an avoidance of dictatorial methods that could threaten personal and property rights. Thus, the character of the state as a seemingly independent apparatus standing above society was not a purely ideological construct for duping ordinary people; the appearance was rooted in the reality of maintaining an *impersonal* guarantor of *personal* rights. To best achieve that end, the state could not be the plaything of this or that tycoon or even dictator. Pashukanis quoted Marx and Engels' famous characterisation of the bourgeois state as a 'committee for managing the common affairs of the whole bourgeoisie' (Pashukanis 1978: 149). However, in times of crisis, particularly when capitalist interests as a whole were threatened from below, the ideal of the constitutional state would be dispensed with:

> For the bourgeoisie has never, in favour of purity of theory, lost sight of the fact that class society is not only a market where autonomous owners of commodities meet, but is at the same time the battlefield of a bitter class war, where the machinery of state represents a very powerful weapon... The more the hegemony of the bourgeoisie was shattered, the more compromising these corrections became, the more quickly the 'constitutional state' was transformed into a disembodied shadow, until finally the extraordinary sharpening of the class struggle forced the bourgeoisie to discard the mask of the constitutional state altogether, revealing the nature of state power as the organised power of one class over the other. (Pashukanis 1978: 149–50)

Other scholars have pointed to the importance of the ideology of justice in camouflaging the essential character of the legal system. One example is Douglas Hay, in his study of eighteenth century English criminal justice, and the operation of the 'Bloody Code' under which an increasing number of offences were made felonies punishable by death. In his view, the ruling class manipulated the ideology of law, to use it as 'an instrument of authority and a breeder of values' in order to maintain the legitimacy of the existing social order. Since fear alone could not establish deference to the law, the structures of the law itself had to be used ideologically, to establish deference without force, to legitimate the class structure, and to maintain the domination of the holders of property. Elements of majesty, justice and mercy, embodied in the practices of the criminal law, served these ends (Hay 1975: 17).

Many scholars, and not only those influenced by Marxism, have observed that law is ultimately a reflection of the interests of the most powerful in society. In his work on political crime, Jeffrey Ian Ross observed: 'The ability to treat the other's actions as crime (whether street crime or political crime) begins with power. The ability to evade having the criminal label applied to oneself likewise depends on power' (Ross 2003: x). Ross referred to the example of terrorism,

which has been defined differently over time to cover certain organisations and countries, but not others.

Ross elaborated the concept of 'oppositional political crimes' as a subset of 'crimes against the administration of government'. The broader category included treason, misprision of treason, rebellion, espionage, sedition, suborning of perjury, false swearing, bribery, contempt, obstruction of justice, resisting arrest, escape and misconduct in office. Ross nominated treason, misprision of treason, criminal syndicalism, rebellion, espionage, sedition and bribery as traditionally considered to be political crimes (Ross 2003: 32).

Definitions of political crime have varied over time. The competing definitions highlight the difficulties involved in distinguishing crimes against the state from other forms of crime, some of which may also be politically-motivated.

Sagarin said a political crime is 'any violation of law which is motivated by political aims – by the intent, that is, of bringing about (or preventing) a change in the political system, in the distribution of political power or in the structure of the political-governmental bodies' (Sagarin 1973: viii). This definition is too broad for the current purpose; it could go beyond perceived existential threats to the state to cover acts of political dissent or civil disobedience that seek only to pressure or demand change from the occupants of political office.

Turk more narrowly defined political crime as 'whatever is recognised or anticipated by authorities to be resistance threatening the established structure of differential resources and opportunities' (Turk 1984: 120). This definition still includes offences, such as tax evasion, draft dodging and civil disobedience, that may have political overtones without being necessarily regarded as directed against the state itself.

Packer subdivided oppositional political crimes into 'conduct inimical to the very existence of government, and offenses which affect the orderly and just administration of public business' (Packer 1962: 77). Treason, sedition, advocacy of overthrow and espionage were examples of the former; while perjury, bribery, corruption and criminal libel belonged in the latter. This distinction comes closer to the concept of crimes against the state.

Most nation-states in the Anglo-American tradition have corresponding criminal law classifications.

In Canada, a 1986 Law Reform Commission report examined 'Crimes Against the State'. The principal categories were treason, intimidating Parliament, sedition and sabotage (then found in Part II of the Criminal Code), and espionage and leakage, which were then dealt with by the Official Secrets Act (Canada 1986). The report explained, in traditional terms, the particular importance attached to these offences:

> Though rarely committed and even more rarely charged, crimes against the State are some of the most serious offences in the whole Criminal Code. This is because such conduct jeopardizes the security and well-being of the whole nation and its inhabitants. (Canada 1986: 1)

The Law Reform Commission of Canada distinguished those offences from 'offences against society', such as riot and unlawful assembly, which 'generally threaten law and order' (Canada 1986: 1). That distinction, however, is not borne out by history. As will be seen, the development and use of the offences of riot, affray and unlawful assembly has been intimately bound up with, and frequently overlapping, the 'state' crimes. These serious 'law and order' offences are best understood as ancillary weapons in the hands of the authorities to deal with conduct deemed threatening to the existence of the state itself.

Recent times have seen additions to the range of offences that might be considered crimes against the state. Most notable are the anti-terrorism laws, considered in Chapter 7. Other provisions include US laws (18 USC 2332a) that impose penalties of up to life imprisonment for the use, threat or attempt or conspiracy to use a weapon of mass destruction. These measures have been applied to individuals who threatened anthrax attacks (see, for example, *United States v. Davila* 461 F.3d 298). However, these and other similar offences, such as damaging, derailing, setting fire to or disabling a mass transportation vehicle, require a detailed examination that is beyond the ambit of this book.

Confusion, Complexity and Arbitrariness

Although this book necessarily examines the main offences separately in turn, they must be viewed in their totality. They form a continuum of often overlapping categories, with the boundaries frequently blurred. The Canadian Law Reform Commission demonstrated that that country's provisions were marked by overlapping, inconsistency, excessive complexity and detail, and uncertainty as to scope and meaning, as well as out-of-date features, over-criminalisation and possible violations of the *Canadian Charter of Rights and Freedoms* (Canada 1986: 25). The Australian Law Reform Commission's 2006 report on sedition found significant overlaps between the offences of sedition, treason and treachery.

Considerable official and prosecutorial discretion exists in selecting which offence or offences to pursue. These decisions can be as much influenced by political calculations as legal distinctions. The historical record points to certain offences being elevated to prominence under various circumstances, usually related to the level and nature of popular discontent. Another observed phenomenon is the replacement over a period of time of prosecutions for one offence by arrests for another once legal or political impediments emerged to the initial prosecutions. Different centuries, and even decades, produced different responses by prosecuting authorities.

Furthermore, both the scope of all the offences and the arbitrariness of choosing which to prosecute are magnified by the extending mechanisms of incitement, conspiracy, attempt and complicity. Other measures, such as those outlawing 'providing material support', concealment or harbouring suspects, widen the field.

Historically, conspiracy laws, in the form of both legislative and common law provisions, have played a particularly significant role. As will be explored in more

detail in some of the cases examined in the following chapters, these provisions can permit prosecutions on the basis of little or no evidence of a specific criminal plan or plot. Instead, alleged vague agreements or understandings, or mere expressions of political or religious opinion, can suffice to convict. It may not even be necessary to prove that any proposed action by the alleged conspirators would have amounted to a specified offence; merely that something unlawful or potentially harmful was intended.

Justifications

'The Constitution is not a suicide pact' is a rhetorical phrase in American political and legal discourse. The phrase expresses the belief that constitutional restrictions on governmental power must give way to urgent practical needs. It is most often attributed to Abraham Lincoln, as a response to charges that he was violating the United States Constitution by suspending habeas corpus during the American Civil War. As will be discussed in Chapter 2, this attribution distorts Lincoln's stance. Despite the existence of battlefield conditions amid a civil war, rather than suspending the constitution, Lincoln temporarily suspended habeas corpus, insisting that this was consistent with the constitution, which provided for such a measure in cases of 'rebellion'. Although the phrase 'suicide pact' echoes statements made by Lincoln, and although the sentiment has been enunciated on several other occasions in American history, the precise phrase 'suicide pact' was first used by Justice Robert H. Jackson in his dissenting opinion in *Terminiello v. Chicago* (337 US 1), a 1949 free speech case decided by the US Supreme Court. The phrase also appears in the same context in *Kennedy v. Mendoza-Martinez* (372 US 144), a 1963 US Supreme Court decision written by Justice Arthur Goldberg.

In 2006, Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit and professor at the University of Chicago Law School, published *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Posner 2006). Posner argues that because of terrorism and the threat of weapons of mass destruction, the scope of constitutional rights must be adjusted. Using a so-called cost-benefit analysis to balance the harm that new security measures would inflict on personal liberty against the increased security those measures would provide, Posner came down, almost in every respect, on the side of increased government power. To this end, Posner argued that the United States should reinterpret the principle of habeas corpus to allow for the indefinite detention of suspected terrorists (Posner 2006: 56); reinterpret the Fourth Amendment to the US Constitution to deny its applicability to suspected terrorists (Posner 2006: 88–91); allow torture for purposes of intelligence-related information gathering (Posner 2006: 86–7); allow unlimited electronic surveillance (and perhaps physical searches) without warrants or probable cause (Posner 2006: 99–101); and reinterpret the First Amendment to allow for the censorship of 'hate speech' by and against Muslims (Posner 2006: 124).

The extraordinary scope of these proposals illustrates that the underlying logic of defending the status quo knows few, if any, bounds. The utilisation of alleged terrorist threats to overturn traditional civil liberties raises disturbing historical experiences. It should never be forgotten that Adolf Hitler cited the 1933 Reichstag Fire, which the Nazis falsely attributed to communists, as the reason for insisting that the parliament agree to rule by decree (Kershaw 1998: 456–60). The morning after the fire, Hitler's cabinet adopted the emergency decree, 'For the Protection of the People and State'. In the words of historian Ian Kershaw:

> With one brief paragraph, the personal liberties enshrined in the Weimar Constitution – including freedom of speech, of association and of the press, and privacy of postal and telephone communications – were suspended indefinitely... The hastily constructed emergency decree amounted to the charter of the Third Reich. (Kershaw 1998: 459)

A month later, on 23 March 1933, the Nazi-controlled Reichstag passed 'enabling' legislation declaring that the executive had the power to make laws. 'The Act to Relieve the Distress of the People and the Reich' cemented dictatorial power in Germany under Hitler. It essentially transformed into legislation legal opinions previously prepared by the leading Nazi jurist Carl Schmitt. These opinions authorised executive rule because of the 'state of exception' in Germany, namely its economic and political crisis and the alleged threat of revolution. Schmitt published a 'legal defence' of the enabling legislation, in which he opined that the executive prerogative was unlimited at a time of national crisis (Neumann 1942).

Some liberal critics of the arbitrary use of political offences have justified the ultimate power of the established order to defend itself, even at the expense of basic civil liberties such as freedom of expression and organisation. During 2009, for example, three Australian academics published a law review article advocating that the state should have the power to ban organisations deemed to be terrorist. Moreover, in the face of criticism of that power, they recommended that it be exercised by the executive, not the parliament or the courts. The authors contended that the federal Attorney-General, as the representative of the executive, should retain the power of proscription, first introduced by the post-2001 counter-terrorism legislation (Lynch, McGarrity and Williams 2009).

The authors argued that the state must have the right, for symbolic purposes, to impose criminal sanctions in a manner designed to 'send a message', even if there were no evidence that the measures have any practical effect:

> We believe that the State should be able to identify and condemn particular organisations on the basis of their activities while, at the same time, sending a message through the use of criminal sanctions to its citizens to avoid implicating themselves with these groups. The symbolic value of doing so may outweigh the practical, in light of what both research and experience appears to confirm