

THE WAR ON TERROR: CONSTITUTIONAL GOVERNANCE IN A STATE OF PERMANENT WARFARE?[©]

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This article assesses Canada's principal legal responses to the challenge presented by terrorism in the aftermath of the September 11, 2001 attacks on the United States. A review of major federal "anti-terrorism" legislation reveals a legislative response that fundamentally violates core constitutional principles while failing to significantly enhance public safety.

Cet article analyse les principales réactions législatives anti-terroristes promulguées par le gouvernement canadien à la suite des attaques du 11 septembre 2001 contre les États-Unis. Une étude des principales lois fédérales anti-terroristes indique que ces dernières enfreignent les principes constitutionnels fondamentaux des Canadiens sans pour autant contribuer à accroître significativement la sécurité du public.

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It is widely assumed that the War on Terror requires re-balancing society's needs for liberty and security through mechanisms by which security can be bought only at the price of liberty.

Following September 11, 2001 (9/11), many are prepared to buy "security" without regard to cost. The urgency of taking steps to prevent violent attacks on civilians is obvious; remembrance of the thousands buried by an ocean of rubble cascading from the heavens demands action. Everyone who has flown in an airplane, visited office towers, or shared moments of life with bright, spirited people like those who work in places such as the World Trade Center, can identify with the horror. The recollection is dreadful, traumatizing, and horrific. However, thinking in terms of dichotomies such as these is both misleading and dangerous. Clear thinking is needed if we are to begin to properly assess the issues that face our society as it confronts the threat of international terrorism. Although Canada's War on Terror has involved both military deployment (in Afghanistan and at sea) and law-making at home, my immediate concern is with the implications of this new War for constitutionalism and the Rule of Law within Canada.

I. CANADIAN LEGISLATION

Canada responded quickly to 9/11 by introducing the *Anti-Terrorism Act*, and the *Public Safety Act*.¹ The former enacts the *Charities Registration (Security Information) Act*² and amends fully twenty other statutes while the most recent version of the *Public Safety Act* would amend twenty-three existing statutes and enact a new statute on biological and toxin weapons.³ A secondary

¹ Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, 1st Sess., 37th Parl., 2001 (assented to 18 December 2001), S.C. 2001, c. 41 [Anti-Terrorism Act]; Bill C-17, *An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention, in order to enhance public safety*, 2d Sess., 37th Parl., 2002 (as amended by the Legislative Committee on C-17, 7 May 2003) [Public Safety Act]. The current version of the proposed *Public Safety Act* replaced the earlier Bill C-55, *An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention*, 1st Sess., 37th Parl., 2002 (first reading 29 April 2002), in order to enhance public safety, which, in turn, replaced Bill C-42, *An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention, in order to enhance public safety*, 1st Sess., 37th Parl., 2001 (first reading 22 November 2001), abandoned in the face of criticism. Bill C-44, *An Act to amend the Aeronautics Act*, 1st Sess., 37th Parl., 2001 (assented to 18 December 2001), S.C. 2001, c. 38, amending the *Aeronautics Act*, R.S.C. 1985, c. A-2, on instructions from the United States, had originally been part of the *Public Safety Act*.

² *Anti-Terrorism Act*, *ibid.*, s. 113.

³ *Public Safety Act*, *ibid.*, s. 106.

package includes restrictions on public protest,⁴ plans for increased surveillance of private communications,⁵ monitoring of individual travel through a ‘big brother’ database,⁶ changes in provincial legislation,⁷ proposals to create a “National Identity Card,”⁸ and numerous changes in the law and practice of immigration and citizenship.⁹ Moreover, much law-making happens by stealth

⁴ In the innocuous sounding Bill C-35, *Act to amend the Foreign Missions and International Organizations Act*, 1st Sess., 37th Parl., 2001 (assented to 30 April 2002), S.C. 2002, c. 12, section 5 authorizes a kind of “police exclusion zone.” A number of international conferences have revealed the line between protection from terrorism and improper quelling of political dissent to be indistinct as police consistently create political cordon sanitaires around such events. See W. W. Pue, “The Prime Minister’s Police? Commissioner Hughes’ APEC report” (2001) 39(1) *Osgoode Hall L. J.* 165; W. Wesley Pue, ed., *Pepper in our eyes: The APEC Affair* (Vancouver: University of British Columbia Press, 2000); Kent Roach, *September 11: Consequences for Canada* (McGill-Queen’s University Press, 2003) at 69-70 [September 11]. *House of Commons Debates*, 117 (22 November 2001) at 1130 (Svend Robinson) online: Canada’s Parliament <http://www.parl.gc.ca/37/1/parlbus/chambus/house/debates/117_2001-11-22/han117_1130-E.htm> (date accessed: 18 May 2003); *House of Commons Debates*, 121 (29 November 2001) at 1210 (Francine Lalonde), online: Canada’s Parliament <http://www.parl.gc.ca/37/1/parlbus/chambus/house/debates/121_2001-11-29/han121_1210-E.htm> (date accessed: 18 May 2003).

⁵ A Department of Justice consultation paper proposes compelling Internet Service Providers (ISPs) to provide police with the names and addresses of customers, widening police search powers, requiring ISPs to retain customer web logs for up to six months, and outlawing possession of computer viruses. Canada, Department of Justice, *Lawful Access*, (Ottawa: 25 August 2002) online: <http://www.canada.justice.gc.ca/en/cons/la_al/> (date accessed: 17 June 2003). Such proposals threaten “the fundamental values and fabric of Canadian society” according to the Electronic Frontier Canada and Electronic Frontier Foundation, Memorandum from Electronic Frontier Canada and Electronic Frontier Foundation to Lawful Access Consultation (17 December 2002) online: Electronic Frontier Canada <<http://www.efc.ca/pages/surveillance/lawful.doc.cf>> (date accessed: 17 June 2003). See also, Memorandum from British Columbia Civil Liberties Association to Lawful Access Consultation (16 December 2002) online: <<http://www.bccla.org/othercontent/02lawfulaccess.html>> (date accessed: 17 June 2003).

⁶ Letter from George Radwanski, Privacy Commissioner of Canada, to the Hon. Elinor Caplan, Minister of National Revenue (26 September 2002) online: Privacy Commissioner of Canada <http://www.privcom.gc.ca/media/nr-c/02_05_b_020926_e.asp> (date accessed: 17 June 2003). See also, Letter from Ann Cavoukian, Information and Privacy Commissioner of Ontario to the Hon. Elinor Caplan, Minister of National Revenue (30 September 2002) online: Privacy Commissioner of Canada <http://www.privcom.gc.ca/media/ac_020930_e.asp> (date accessed 17 June 2003).

⁷ For example, see *Security Management Statutes Amendment Act*, S.A. 2002, c. 32.

⁸ See Standing Committee on Citizenship and Immigration, News Release, “A National Identity Card: Points on which the Committee Invites Comments” online: Canada’s Parliament <<http://www.parl.gc.ca/InfoComDoc/37/2/CIMM/PressReleases/CIMMpr5-e.htm>> (date accessed: 17 June 2003); Memorandum from British Columbia Civil Liberties Association to the Standing Committee on Citizenship and Immigration regarding a National ID Card (19 February 2003) online: <<http://www.bccla.org/positions/privacy/03nationalidcard.html>> (date accessed: 18 May 2003).

⁹ See Bill C-18, *An Act respecting Canadian citizenship*, 2d Sess., 37th Parl., 2002 (first reading 31 October 2002).

through virtually invisible changes in delegated legislation or state practice,¹⁰ precisely at the points where citizen and state connect most directly.¹¹

II. BY WHAT PRINCIPLES SHOULD SECURITY BE ORGANIZED?

Our traditions and constitutional “morality of aspiration” suggest that five principles should guide law-making:

1. All law should seek to attain minimal infringement of civil liberty.
2. There should be maximum clarity of definition regarding powers conferred, restrictions imposed, and offences created.
3. All exercise of governmental power should be accountable, visible, and reviewable by the ordinary courts in the ordinary ways. The *core* constitutional principle of responsible government requires clear and effective channels of political and legal accountability.
4. Secrecy should only be tolerated in the smallest possible zone, only as absolutely essential, and only for limited duration. Power exercised in secret is never accountable.
5. Where extraordinary powers are invoked in times of perceived crisis, they should be of limited duration, renewable only by full reconsideration and re-enactment by Parliament.

Such principles provide the motivating spirit of law. They find expression in legal writings, judicial decisions, parliamentary practice, and

¹⁰ The Government surreptitiously implemented much of the *Anti-Terrorism Act* by regulation while the Act was before Parliament: Canada, *United Nations Suppression of Terrorism Regulations*, SOR/2001-360. See also *The United States of America v. Liban M. Hussein*, [2001] O.J. No. 5812 (QL) (Factum of the Appellant) online: Edelson & Associates <<http://www.edelsonandassociates.com/articles/Applicant%27s%20Factum.pdf>> (date accessed: 27 June 2003).

¹¹ For example, racial profiling practices and non-legislated bilateral agreements. See *September 11*, *supra* note 4 at 68-74 (on racial profiling) and the Smart Border Declaration section in Canadian Bar Association, Report, “In The Shadow Of The Law: A Report by the International Civil Liberties Monitoring Group (ICLMG) in response to Justice Canada’s 1st annual report on the application of the *Anti-Terrorism Act* (Bill C-36)” (14 May 2003) online: <<http://www.cba.org/cba/news/pdf/shadow.pdf>> (date accessed: 27 June 2003). For additional information, see Reem Bahdi, “No Exit: Racial Profiling and Canada’s War Against Terrorism” (2003) 41 *Osgoode Hall L.J.* 293.

constitutional documents. They are the essence of the Rule of Law, “an unqualified human good.”¹²

Canadian anti-terrorism legislation fails on all counts.

This curtailment of constitutional principles would be serious enough if these were short-term measures. In ordinary wars, *temporary* state intrusion is tolerated precisely because hope remains for an eventual return to constitutional normalcy. The War on Terror, however, is not a real war. Its parameters are unclear, ranging from gunboat diplomacy to more or less gratuitous rights violations at home. Linguistic slippage threatens clarity of thought as the metaphor of war glosses over a great deal. Unlike the war against the Nazis, unlike even Vietnam, this war involves neither a fixed enemy nor an identifiable objective. There are no criteria by which to declare victory or recognize defeat. Closer to the War on Drugs than to “hot” warfare as such, we find ourselves confronting an endless state of emergency that ensures the “permanence of the temporary.”¹³ When the state intrudes on fundamental liberties, “temporary” tends to permanence as surely as night follows day.¹⁴

III. CANADA’S ANTI-TERRORISM REGIME: GYPSY MOTHS AND WORMS

The *Anti-Terrorist Act*’s provisions for preventive detention,¹⁵ compelled testimony before “investigative hearings,”¹⁶ and greatly enhanced powers of government provoked sustained criticism on the ground that these draconian measures violated Canadian values. A Senate committee cautioned that “Bill C-36 gives powers that if abused by the executive or security establishments of this country could have severe implications for democracy in

¹² The description of the rule of law as an “unqualified human good” is drawn from E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act*. (New York: Pantheon Books, 1975) at 266. David Neal’s work *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* remains an excellent survey of the various understandings of a concept that, at a minimum, stands for the idea of law holding power accountable (Sydney: Cambridge University Press, 1991). Recognition of the sobering gap between constitutional values and past state practice serves to remind us of the fragility of liberal democracy, but should never foster an immobilizing cynicism of the sort that would jettison constitutional aspiration along with naïveté.

¹³ David Dyzenhaus, “The Permanence of the Temporary: Can Emergency Powers be Normalized?” in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 21.

¹⁴ The *Anti-Terrorism Act* itself was passed as permanent law. “Sunset” is provided only for those portions of the *Act* allowing for preventive arrest and investigative hearings, representing only a tiny fragment of the whole.

¹⁵ *Criminal Code*, R.S.C. 1985, c. C-46, s. 83.3.

¹⁶ *Supra* note 15, s. 83.28.

Canada.”¹⁷ It is important to recall the salutary warning, uttered in a slightly different context, that “[i]t is an outstanding feature of every sedition act that the way it is enforced differs from the way it looks in print as much as a gypsy moth differs from the worm from which it has grown.”¹⁸

Canada’s definition of terrorism leaves much room for confusion of moths and worms. Section 83.01 of the *Criminal Code* defines both “terrorist activity” and “terrorist group.” The definition of terrorism is in two parts, incorporating a number of specific offences set out in various international conventions or protocols as well as providing a more general definition. The general definition of terrorism involves an act or omission motivated in whole or part by a “political, religious or ideological” purpose¹⁹ with the primary intention (“in whole or in part”) of *either* intimidating part of the public regarding security or economic security, or compelling any government, “person,” or organization inside or outside Canada to do or not do “any act.” This act must be accompanied by one of five secondary intentions: causing death or serious bodily harm to a person by the use of violence, endangering a person’s life, causing serious risk to public health or safety, causing substantial property damage of a sort likely to result in serious bodily harm, risk to life or public health or safety, *or* causing serious interference with any essential “service, facility or system” *other than* disruption resulting from advocacy, protest, dissent, or work stoppage that is not intended to result in harm or threat to life, body, health, or safety of the public.

Furthermore, the offence of terrorism includes conspiracy, attempt, threat, counseling,²⁰ and “accessory after the fact” in relation to the designated acts or omissions.²¹ At first glance, this appears complicated. More careful investigation reveals it to be nonsensical.

Take, for example, the protection of even unlawful “advocacy,” “protest,” “dissent,” and “work stoppage.” This protection sits uneasily with the inclusion of “political, religious or ideological”²² motivation in the definition

¹⁷ Canada, Special Senate Committee on the Subject Matter of Bill C-36, “Report of the Committee” (1 November 2001) at A(II) online: Canada’s Parliament <<http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/sm36-e/rep-e/rep01oct01-e.htm>> (date accessed: 29 June 2003).

¹⁸ Zechariah Chafee, *Free Speech in the United States* (Cambridge: Harvard University Press: 1941) 459 cited in L. W. Maher, “The Use and Abuse of Sedition” (1992) 14 *Sydney L. Rev.* 287 at 287.

¹⁹ *Supra* note 15, s. 83.01(1)(b)(i)(A).

²⁰ “Counsel,” under the *Criminal Code*, s. 22(3) includes procuring, soliciting or inciting (*supra* note 15). According to the *Canadian Encyclopaedic Digest* (Ontario) 3d ed., vol. 7A (Toronto: Carswell, 1996) at s. 729, “in order to qualify as ‘counselling’, the acts or words of the accused must be likely to push or incite, and be done or said with a view towards pushing or inciting, another to commit an offence.”

²¹ *Supra* note 15, s. 83.01(b).

²² *Ibid.*, s. 83.01(b)(i)(A).

of terrorism because advocacy, protest, dissent, and work stoppage are typically motivated in whole or in part by political, religious, or ideological commitment. The “saving” directly contradicts the “motivation” element.

Even the seemingly simple question of determining whether someone has the “intent” to threaten life, body, health, safety, or essential services is left unclear. If such an objective must be the sole objective or purpose in order to meet the intention required then only the most bloodthirsty of killers would be a terrorist. When the *Front de Libération du Québec* sought to destroy symbols of the Canadian state by placing bombs in mailboxes, they did not necessarily seek to kill postal workers. If, however, recklessness as to a mere possibility suffices, the terrorist net is cast very wide. All large demonstrations interfere with essential services by disrupting traffic flow. In such circumstances, it is entirely foreseeable that members of the public may suffer if fire fighters, ambulances, or police services are unable to do their work. If the intent required to be a terrorist is only *some* knowledge that *some* threat to safety *might* develop as *one possible* outcome of one’s actions, many demonstrators would become terrorists despite the “saving” clause.

The Government of Canada has offered assurances that we need not fear such possibilities, explaining that

... [P]rotest activity that intentionally causes serious disruption of essential services or infrastructure, even if it is unlawful, would not be characterized as a terrorist activity unless it also intentionally causes death or serious harm to people. ... Terrorist activity would not include acts of civil disobedience or labour actions, even if they were unlawful, such as acts that resulted in some property damage.²³

This assurance is disingenuous. A person cannot “intend” to seriously disrupt essential services without also “intending” to some extent the obvious natural consequence that members of the public who depend on those services might be seriously hurt. One hopes that the courts will find that there is a protected place of political dissent, but it is not created in the words of this appallingly drafted statute.

Just as the boundary between dissent and terrorism is unclear, so too the legislation confuses more or less ordinarily thuggish, violent behaviour with terrorism. As John Russell notes, violent protesters, eco-terrorists who spike trees with the intent of injuring loggers, and animal rights activists who poison Christmas turkeys all fall within the statutory definition of terrorists. They threaten “serious bodily harm in order to achieve political objectives.” Violent individuals deserve little sympathy, but counting them as “terrorists”

²³ Department of Justice, Background, “Amendments to the *Anti-Terrorism Act*” (20 November 2001) online: <http://canada.justice.gc.ca/en/news/nr/2001/doc_27904.html> (date accessed: 29 June 2003).

... needlessly multiplies the number of terrorists on the ground in Canada. Among other things, this would distract from our efforts to detect and bring to justice the real terrorists. It will inevitably place the activities of legitimate protest groups under extraordinary, close government scrutiny. This is bound to have a chilling effect on those groups' activities and raise questions about the legitimacy of the campaign against terror.²⁴

Here too we can see worms becoming confused with gypsy moths. The statute threatens to “chill” the activities of entirely legitimate protest groups²⁵ that are accepted as more or less natural parts of our political and cultural landscape and whose activities—however inconvenient—we cherish as the mark of our liberty. A section intended to alleviate concern about such matters does not help.

For greater certainty, the expression of a political, religious, or ideological thought, belief, or opinion does not come within paragraph (b) of the definition “terrorist activity” in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.²⁶ This transparently useless addition does nothing to atone for the pervasively poor drafting of the *Act*.

IV. EXTRA-JURISDICTIONAL REACH

Poor drafting or conceptual incoherence apart, relatively few problems would arise if terrorism were defined simply as the use of violence or threat of violence in an attempt to coerce the Canadian government. Similarly, long-standing Canadian allies such as the countries of the European Community or the United States, for example, might be presumed to enjoy a degree of legitimacy that precludes Canadian approval of the use of deadly force against them. A definition of terrorism that specifically prohibited the use of violence to coerce named countries or their citizens would be both clear and defensible.

The new terrorism offences are not so defined, purporting instead to prohibit all acts or omissions committed “in or outside Canada” with the intent of “compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act”²⁷ In the result,

²⁴ British Columbia Civil Liberties Association, News Release, “Distinguishing Terrorism from Other Types of Political Violence” (29 November 2001) online: <<http://www.bccla.org/othercontent/01terrordefbroad.html>> (date accessed: 29 June 2003).

²⁵ This has certainly been the pattern in the past. See, for example, Steve Hewitt, *Spying 101: the RCMP's Secret Activities at Canadian Universities, 1917-1997* (Toronto: University of Toronto Press, 2002).

²⁶ *Supra* note 15, s. 83.01(1.1).

²⁷ *Supra* note 15, s. 83.01(1)(b). Other provisions “deem” specified acts or omissions committed outside of the country to have been committed in Canada if either the act of terrorism is directed in some way against Canada, or if the perpetrator fits certain criteria of connection to Canada.

“counseling” someone to do (or not do) something that threatens the “economic security” of someone so as to compel “a government” is a terrorist offence. The only further required element is that there be some risk to health or safety to a portion of the public *outside* Canada. It would be no defence to show that the particular government really *is* reprehensible or that it ought to be compelled, intimidated, or overthrown for the benefit of either its own citizens or others who might fall victim to its power. Though some have argued that Canadians should “not be barred from subsidizing the use of force against dictatorships in other countries,”²⁸ the statute allows for no distinction between liberation armies and terrorists. On its face, it accords the most brutal of dictatorships the same “anti-terrorist” protection as Canada itself.

Matters become more complicated still when we recognize that Canada is not a pacifist country. Thus, use of arms in accordance with international law is excluded from the definition of terrorism.²⁹ Confusingly, however, a good deal of armed conflict and some state military activity takes place in ways that are not condoned by international law, and this includes acts of violence approved by Canada or its allies.³⁰ Canada rarely objects when our closest allies foment armed resistance (terrorism) in other places. Under the *Anti-Terrorism Act*, however, Canadians who supported dissidents within Iraq prior to the 2003 U.S. invasion, for example, would have been acting in contravention of our anti-terrorism laws, even if they did so by aiding U.S. officials. It is inconceivable, of course, that Canadian foreign policy would wish such a result.³¹

Because it fails to address such real world complexities, a fundamental dishonesty underlies the *Anti-Terrorism Act*. The law can never mean what it seems to say. We cannot indefinitely avoid distinguishing terrorists from freedom fighters and, having failed to do so explicitly in the legislation, the

²⁸ Canadian Civil Liberties Association, News Release, “Does the Anti-Terror Bill Go Too Far?” (December 2001) online: <http://www.ccla.org/news/01-12_anti-terror.shtml> (date accessed: 29 June 2003).

²⁹ *Supra* note 15, s. 83.01(1)(b).

³⁰ The status of the U.S.-led attack on Iraq under international law is unclear. See Ikechi Mgbeoji, “Prophylactic Use of Force in International Law: The Illegitimacy of Canada’s Participation in ‘Coalitions of the Willing’ Without UN Authorization and Parliamentary Sanction” (2003) 8(2) *Rev. Const. Stud.* [forthcoming] and Thomas Walkom, “Attack on Iraq could turn Bush into criminal” *The Toronto Star* (18 March 2003) A25 (quoting legal expert Ted McWhinney).

³¹ The parallel universe of refugee and immigration law illustrates the real world complexities in this area. Although Israel is a country with which Canada has long-standing cordial relations, the Refugee Protection Division of the Immigration and Refugee Board of Canada, on the urging of a Federal Government lawyer, ruled in *W.D.U. (Re)* [2002], R.P.D.D. No. 167 No. MA1-01203 (IRB) at para. 35, that a man who had worked for Israel’s secret intelligence agency was ineligible for refugee status because of being complicit “in crimes against humanity committed by Israel.” Conversely, in *Fuentes v. Canada (Minister of Citizenship and Immigration)*, [2003] FCT 379 at para. 47, Lemieux J. held that Rogelio Cuevas Fuentes was potentially eligible for refugee status, despite past violence against the Mexican government undertaken as a “guerilla” rather than as a “terrorist.”

same result must be achieved surreptitiously. A modern-day Norman Bethune, the Canadian hero of the Spanish Civil War and of the Chinese Revolution, appears through one lens as a great humanitarian, through another as a terrorist. He is in good company, as Member of Parliament Lorne Nystrom pointed out:

... [T]he British considered Menachem Begin to be a terrorist. He was a freedom fighter to many of the Israeli people. Nelson Mandela ... a tremendous freedom fighter in my opinion, was considered by some people ... to be a terrorist. ... The American revolution was an act of terrorism for some; an act of freedom and liberation for others.³²

Canada's one-size-fits-all definition of terrorist embraces anti-Castro activists in Cuba (or Florida), Kurdish resistance to Saddam Hussein, "groups fighting for democracy in Nicaragua, El Salvador, Guatemala, and Chile," Louis Riel, Mahatma Gandhi, the *Intifada*, and George Washington.³³

V. TERRORIST GROUPS

One poorly drafted definition piles atop others as definitions of "terrorist groups" are constructed on top of the definitions of terrorism. A "terrorist group" is an entity whose purposes or activities include carrying out or facilitating any terrorist activity or an entity "listed" by the Governor in Council on the advice of the Solicitor General.³⁴ Because the definition of a terrorist activity is imprecise, so too is the definition of a terrorist group. One definition is built upon the other.

The category of "terrorist group" is larger than it otherwise might be because of the inclusion of groups whose purpose, in part, is to facilitate, contribute to, or participate ("directly or indirectly") in a "terrorist" activity or a "terrorist group." "Facilitating," "participating in," or "contributing to" are, in turn, surprisingly broad concepts.³⁵ Under section 83.18(1) of the *Criminal Code*, "Every one who knowingly participates in or contributes to, directly or

³² *House of Commons Debates*, 058 (12 February 2003) at 1550 (Hon. Lorne Nystrom) online: Canada's Parliament <http://www.parl.gc.ca/37/2/parlbus/chambus/house/debates/058_2003-02-12/han058_1550-E.htm> (date accessed: 29 June 2003). Compare with Anne McLroy, "Citizen bane" *The Guardian* (11 June 2001) online: <<http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,505086,00.html>> (date accessed: 29 June 2003) (reporting Member of Parliament Rob Anders' objections to honouring Mandela because of his terrorist past).

³³ Compare with *September 11*, *supra* note 4 at 58-62.

³⁴ *Supra* note 15, ss. 83.01, 83.05.

³⁵ *Ibid.*, s. 83.01(1.1) specifies that facilitation is to be construed in accordance with s.83.19(2).

indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence”

This offence may be committed even where no terrorist activity is actually facilitated or carried out. It is irrelevant that the individual’s contribution or participation may not have actually enhanced the ability of the group in any way and, indeed, irrelevant that the accused may not have known of the specific nature of any terrorist activity the group may have been involved in. Participation or contribution may involve as little as “offering to provide a skill or an expertise,” “remaining in any country ... in association with a terrorist group,” or making oneself available to facilitate a terrorist offence. Evidence of involvement in terrorist groups can be found in association with persons involved in a terrorist group, receipt of “any benefit” from such persons, repeated engagement “in activities at the instruction of” members of a terrorist group, or use of “a name, word, symbol or other representation.”³⁶ Facilitation of a terrorist activity is prohibited by section 83.19 of the *Criminal Code*:

83.19 (1) Every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) For the purposes of this Part, a terrorist activity is facilitated whether or not

(a) the facilitator knows that a particular terrorist activity is facilitated;

(b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or

(c) any terrorist activity was actually carried out.

Bizarrely, *knowing* facilitation can happen even though no terrorist activity was in fact carried out, where the “facilitator” does not know “that a particular activity is facilitated,” and where no particular terrorist activity was foreseen or planned at the time it was facilitated.³⁷ This is grammatical, if not legal, nonsense inasmuch as there is no “it” capable of being “knowingly” facilitated if nothing is foreseen or planned. Nonsense or not, a very real fourteen-year sentence of imprisonment attaches to the offence.³⁸

³⁶ *Ibid.*, s. 83.18(2)(3)(4).

³⁷ *Ibid.*, s. 83.19(2).

³⁸ The Department of Justice’s Fact Sheet, “Strengthening the Safeguards With Amendments to the Proposed Anti-Terrorism Act” (20 November 2001) online: <http://canada.justice.gc.ca/en/news/nr/2001/doc_27906.html> (date accessed: 30 June 2003) [emphasis in original], papered over the difficulties: “The provisions concerning facilitation of a terrorist activity ... clearly state that, in order to be guilty of an offence, an individual must know or intend that his or her act would help

VI. THE HOUSE OF MIRRORS: AL QAEDA, ROTARIANS, AND CHRISTIAN AID

Like images in a House of Mirrors, “terrorists” appear in a series of reflections, each more distant than the one before. One section reflects another, continuing in infinite regression.

Imagine, for example, the precarious situation of a guest speaker from a human rights non-governmental organization (NGO) who encourages Rotarians to divest from “Mortland,” in the expectation that the resulting economic hardship will force that country’s repressive government to abandon long-standing human rights violations. Her organization might also support church groups providing humanitarian aid to rural villagers who, in turn, might sometimes support anti-government guerillas. Promotion of a “boycott” or “divestment” campaign amounts to “counselling” an act (divestment) for political purposes in the hope of disrupting “economic security” so as to compel “a government” to change its conduct. Such campaigns endanger health or safety and disrupt essential services in direct proportion to their success. The church group too is involved in activities that in part support terrorist activity. Canadian law forgives neither the church group nor the human rights organization simply because they disavow armed struggle. Both are tainted by “terrorist” activity. As image after image is reflected, the Rotary Club itself is caught because it facilitated the presentation. Participation in Rotary in turn becomes a crime. Terrorists, all.

This scenario, of course, is nonsense, *reductio ad absurdum* at its worst. It is hard to imagine Rotarians being prosecuted in such circumstances. If commenced, the prosecution could never succeed. It feels wrong. Though the question of where the police or the Canadian Security Intelligence Service (CSIS) will cast their net of surveillance is a different matter, one suspects that even here the Rotary Club at least might fare reasonably well. Somewhere on the slippery slope between Al Qaeda and Rotary there is an invisible line.

That such concerns are not *entirely* academic is shown by the response of a number of Canadian “civil society” groups representing Aboriginal groups, labour organizations, and ethnic communities, amongst others, who expressed their concerns during hearings on the *Anti-Terrorism Act*. Most feared the criminalization of entirely legitimate activities, and the exposure of their members to improper surveillance, questioning, harassment, or criminal charges.³⁹ The Evangelical Fellowship of Canada’s (EFC) brief to the Standing

a terrorist activity to occur, even if the details of the activity are not known by the individual.” The *Act* lacks the clarity of the explanation.

³⁹ *September 11*, *supra* note 4 at 58-64.

Committee on Justice and Human Rights provides a telling example. This umbrella group of “32 evangelical, Protestant denominations and over 100 Christian organizations” includes “churches and relief and development organizations that are involved in religious and humanitarian work around the world.”⁴⁰ The EFC feared that the Bill could “put a chill on Canadian charities providing assistance where it is most needed, in conflict-ridden situations.”⁴¹

Resources are one issue. The distinction between “good guys” and “bad guys” is not always clear, and charities lack the intelligence capabilities required to ensure that *none* of their “resources would assist someone who could be considered an insurgent or terrorist.” Consequently, the EFC worried about a number of matters: “Would providing humanitarian assistance to communities that contain or are associated with terrorists be caught within the scope of the legislation?” Might a Canadian charity providing “financing or resources to a group ... [subsequently] determined [by Government] to be a ‘terrorist group’ ... face sanctions even though the entity was not considered a ‘terrorist group’ at the time”?⁴²

Noting that foreign governments often dislike Christian charities and human rights groups, the EFC feared “false or misleading evidence” being provided secretly and used against it in Canada. The result would make the Canadian state the agent of “foreign governments” in pursuit of “religious, political and ideological purposes against Canadian people or organizations ...”⁴³

Although such situations could arise innocently, in the ordinary sense of that word, there have also been times when evangelical groups have deliberately provided aid knowing full well that doing so facilitated terrorism.

1) In the 1980s there was a UNHCR refugee camp in Thailand and on the border of Cambodia, the home of some 30,000 Khmer Rouge refugees. Some of the men from the refugee camp would, from time to time, clandestinely conduct raids into Cambodia. Two organizations, one religious the other not, were contracted to provide medical aid and food to the refugees.

2) Another Christian organization provides medical and dental care ... in a region controlled by outlawed militia groups. The clinics function with the permission of the militia who may from time

⁴⁰ Evangelical Fellowship of Canada, “Submission to the Standing Committee on Justice and Human Rights on Bill C-36, *An Act in Order to Combat Terrorism*” (8 November 2001) online: <<http://www.evangelicalfellowship.ca/pdf/Anti-Terrorism%20Bill%20C-36.pdf>> (date accessed: 30 June 2003) at 1.

⁴¹ *Ibid.* at 2.

⁴² *Ibid.* at 3.

⁴³ *Ibid.* at 4.

to time avail themselves of medical and dental services offered to anyone who asks for assistance.⁴⁴

In short, EFC-affiliated organizations have *deliberately* aided terrorists in the past.

It is apparent that the boundaries between humanitarian and terrorist activity are imprecise. We can presume that evangelicals do not generally support terrorism. It is their humanitarian urges that are the problem. Their example also serves to illustrate the dangers inherent in defining offences by reference to political, religious, or ideological motivations for the EFC explicitly acknowledges its colourable motivations: “Christians have Biblical instruction to love and care for their enemies, not just their friends (Matt. 5:44). This means that humanitarian assistance can be provided to those engaged in military conflict, terrorism or gross human rights violations.”⁴⁵

In short, EFC-affiliated organizations fully intend to aid terrorists in the future. They will do so because God orders it. Their religious motivation, rendered suspect under the *Criminal Code*, is a constitutionally protected value. But if freedom of religion might justify providing humanitarian aid to “our enemies,” so too the freedom of conscience for those who aid evildoers only because of secular humanitarian motivations must be respected.

VII. UMPIRE’S DISCRETION

The obvious objection to these concerns is that they are based on a statutory reading insufficiently leavened by pragmatism, that they rest too much on a literal, overly-legalistic approach to the statute. This is a valid objection.

Despite the plausibility of the argument presented by the EFC in its brief, neither it nor its affiliated organizations are likely to suffer penal consequence under these laws. It seems highly unlikely that any Canadian security official or Attorney General would wish to prosecute evangelicals for engaging in “good works.” CSIS will not wish to spy on them. Ministers will not wish to “list” them; financial institutions will not report their activities to the authorities; their assets will not be frozen, their members will not be imprisoned. If this intuition is correct, groups such as the Apostolic Church of the Pentecost and the Foursquare Gospel Church have little to fear from the anti-terrorism laws. Various evangelical educational organizations and

⁴⁴ *Ibid.* at 1.

⁴⁵ *Supra* note 40 at 1. In “Matthew 5:44 :: 21st Century King James Version (KJ21),” online: BibleGateway.com <<http://www.biblegateway.com/cgi-bin/bible?language=english&passage=Matthew+5%3A44&version=KJ21>> (date accessed: 31 July 2003), the Bible says to “. . . Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you.”

associated charities, including the likes of Arab World Ministries, Focus on the Family, and World Vision would also be “safe.” Such organizations will not be treated as terrorists despite the EFC’s admission that its member organizations have aided terrorists in the past, and its declared intent to do so in the future.

But the fact that we are confident that certain groups would not be considered to be terrorist, should not reassure us.

No invisible “bubble zone” protects other kinds of religious or charitable groups. On the contrary, some are rendered suspect *simply because of who they are*. Muslim, Sikh, or Hindu organizations cannot assume equal status before the law with evangelical groups. The *reductio ad absurdum* presented earlier makes this clear. Disconcertingly, we leave the realm of the absurd with astonishing ease if “Mortland” becomes Israel, “rural Mortland” becomes the occupied territories, “church groups” become Islamic organizations, and the human rights group is tied to either the anti-globalization or decolonization movements.

The difference is not legal, but sociological and political. The terrorist offences are defined so broadly as to encompass almost everyone and they are given meaning only in application. But in such a case, law has given way to expediency. The invitation to read a statute pragmatically amounts to an invitation to place unquestioning trust in the discretion (a polite term denoting biases, gut instincts, upbringing, and socialization) of officialdom. This approach is an affront both to the very idea of public governance by law and to the underpinnings of liberal democracy. It will be police and bureaucrats, not Supreme Court justices, who will give these laws concrete meaning.⁴⁶ The collateral damage done by misdirected anti-terrorist fire will register as irreparable harm to innocent people.

Disturbingly, *all* of Canada’s anti-terrorism law turns on official discretion. Despite many complex definitions, qualifications, subordinate clauses, nuance, and subtle layering, the *Anti-Terrorism Act* comes down to the conferral of massive, ill-defined powers on police officers and the executive branch of government. Prohibitions on dealing with terrorist assets can be waived by “the Solicitor General of Canada” or his or her designate,⁴⁷ while investigative hearings and preventive arrest require the “consent of the Attorney General.”⁴⁸ Similarly, prosecutions under the *Security of Information Act* require

⁴⁶ Letter from John Dixon, President, British Columbia Civil Liberties Association to Rt. Hon. Jean Chretien, Prime Minister of Canada, (22 November 2001) online: <<http://www.bccla.org/othercontent/01c36openletter.html>> (date accessed: 30 June 2003).

⁴⁷ *Supra* note 15, s. 83.09.

⁴⁸ *Ibid.*, ss. 83.28, 83.3.

the consent of the federal Attorney General,⁴⁹ while the Solicitor General (in concert with the Minister of National Revenue) may issue “certificates” effectively stripping organizations of their charitable status.⁵⁰ Capping it all, terrorist entities are so designated by the Governor in Council,⁵¹ while “[p]roceedings in respect of a terrorism offence or an offence under section 83.12” require the consent of the Attorney General.⁵²

The head of the Royal Canadian Mounted Police (RCMP), the federal Solicitor General, and the Attorney General of Canada have each acknowledged that the *Act* turns on official discretion. Asked by Senator Karen Fraser to explain the “reasonable grounds” that might justify the use of preventive detention, RCMP Commissioner Zaccardelli responded:

... Obviously, what you have just described is a lower threshold than what we are normally used to seeing in this country. ... *We are in active discussions about what this means because the devil is in the detail, as we know. It is easy to read, but it is how we apply and how we interpret this which will determine how this really works.*

We are in active discussions with our lawyers and with lawyers from the Department of Justice to determine what this means. ... [You] take [our] best information and [our] best intelligence and make that determination. That is how our system works. It puts into the hands of the police officer the authority to exercise that, but it has to be exercised on solid basis.⁵³

The *Act*, in other words, provides no useful guidance whatsoever. The RCMP Commissioner’s response amounts to an astonishing admission of the extent to which citizens’ rights rest on official discretion.

Moreover, the Solicitor General made a similar admission regarding the “listing” of terrorist entities:

⁴⁹ *Security of Information Act*, R.S.C., 1985, c. O-5, s. 24.

⁵⁰ *Charities Registration (Security Information) Act*, s. 4 being Part 6, s. 113 of the *Anti-Terrorism Act*, S.C. 2001, c. 41.

⁵¹ *Supra* note 15, s. 83.05

⁵² *Ibid.*, s. 83.24. Section 83.12 deals with the freezing of terrorist group property. Under section 2, a “terrorism offence” is defined as an offence under any of sections 83.02 (financing terrorism), 83.04 (using or possessing property for terrorist purposes), or 83.18-23 (participating, facilitating, instructing, or harbouring terrorist groups; facilitating terrorist activity; committing an indictable offence for or with a terrorist group; instructing someone to carry out an activity for a terrorist group, or to carry out a terrorist activity; harbouring, or concealing a person in relation to terrorism).

⁵³ Canada, Senate, The Special Committee on the Subject Matter of Bill C-36, “Issue 2—Evidence (afternoon sitting)” (23 October 2001) online: Canada’s Parliament <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/sm36-e/02evb-e.htm?Language=E&Parl=37&Ses=1&comm_id=90> (date accessed: 30 June 2003) [emphasis added].

Senator Lynch-Staunton: Reading the definition of terrorist activity, it certainly goes way beyond some of the activities, in particular the one climaxing on September 11. It can also be applied to strictly domestic activities.

.... What I am trying to get from you, minister, is how far in Canadian society does the net of the definition of terrorist activity extend? Right now, this proposed legislation is the result of a terrible event. However, the way it is written and drafted it goes way beyond those who cause that event or their sympathizers, to my mind. I should like to know whether you share that view or not.

Mr. MacAulay: Senator, I would like to say that in this situation it is not who you are, it is what you have done. If you have done something in order *that in my evaluation* you should be listed as a terrorist organization or individual, then an Order in Council approves that recommendation from me and then they are listed.⁵⁴

Curiously, the Minister's response when questioned about the legislation's indeterminate language was that *he* would decide its meaning: discretion substitutes for law. This admission might be dismissed as a minister's misstatement were it not for the fact that Attorney General Anne McLellan sang the same song in scolding *The Globe and Mail* for saying the Anti-Terrorism bill would "strip Canadians of civil liberties." Proudly, albeit illogically, she pointed to the requirement for "the consent of the Attorney General" before unpleasant things could happen.⁵⁵

Such statements are not very reassuring. The Rule of Law requires clarity in penal prohibitions for, without clarity, the rights of anyone to go about business unhindered by the state rests entirely on the discretion of police officers, prosecutors, bureaucrats, and politicians. Vague statutory language is rendered concrete only in police action backstopped by ministerial case-to-case political judgment. "The devil," as the RCMP Commissioner said, "is in the detail." The only decisions *that matter* will be made behind closed doors, without announced standards (this the Solicitor General made clear), secretly, politically, and without realistic possibility of either judicial review or public accountability.

We should not, however, confer powers on individuals because we trust them. This is *not* because we have reason to distrust the *particular individuals* who hold office, but because experience shows that power corrupts and absolute

⁵⁴ Canada, Senate, The Special Committee on the Subject Matter of Bill C-36, "Issue 1—Evidence (afternoon sitting)" (22 October 2001) online: Canada's Parliament <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/sm36-e/01evc-e.htm?Language=E&Parl=37&Ses=1&comm_id=90> (date accessed: 30 June 2003) [emphasis added].

⁵⁵ Anne McLellan, Minister of Justice "Antiterrorism act" *The Globe and Mail* (25 October 2001) A18. See also the testimony of Justice Minister Anne McLellan with respect to the Attorney General's discretion regarding preventive arrest and investigative hearings, Canada, Senate, The Special Committee on the Subject Matter of Bill C-36, "Issue 1 - Evidence (morning sitting)" (22 October 2001) online: Canada's Parliament <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/sm36-e/01evb-e.htm?Language=E&Parl=37&Ses=1&comm_id=90> (date accessed: 30 June 2003).

power (the kind “trust” seeks) corrupts absolutely. When a sort of “umpire’s discretion” takes the place of rules, the Rule of Law is lost entirely.⁵⁶ Any statutory scheme constructed on such principles should fail judicial review as both overbroad and unconstitutionally vague.⁵⁷

Neither Parliament nor the court can ameliorate the effects of bad legislation once it is on the books. Parliament is a paper tiger⁵⁸ while judicial review comes too rarely, too little, too late, and in contexts in which habits of judicial deference to executive power are strongly ingrained. Courtroom victory in any event is pyrrhic because it cannot “put together ruined families, regain lost livelihoods, or rebuild friendship and trust, which were fractured by the suspicion, innuendo and stigmatization sown by the overly zealous acts of the State.”⁵⁹

VIII. THE *PUBLIC SAFETY ACT*

Although strongly praised by a leading expert on anti-terrorism law, the *Public Safety Act*, too is fundamentally flawed. Kent Roach praises the Bill for offering practical responses to the threat of terrorism. It seeks to establish a “multi-department approach to regulating materials that can be used for terrorism and sites that are vulnerable to terrorist attacks... .”⁶⁰ Roach believes that, unlike the *Anti-Terrorism Act*, such measures are likely to reduce opportunities for terrorism while “providing less of a threat to liberty, privacy, and equality than the criminal law.”⁶¹

This depiction is too sanguine. The Bill operates by giving ministers huge, unchecked, powers. Discretion and secret decisions permeate the entire legislation. Parliament is shunted aside as “[i]nterim orders, emergency measures and security measures across a wide area of federal jurisdiction are to be implemented on Ministerial discretion, largely without review and largely without consultation. Most of these measures can be delegated to officials ...

⁵⁶ See: Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

⁵⁷ See: Marc Ribeiro, *Limiting Arbitrary Power: The Vagueness Principle in Canadian Constitutional Law* (Vancouver: University of British Columbia Press, 2004) [forthcoming in 2004].

⁵⁸ The Canadian system of government is notoriously closely directed by the Prime Minister: Donald J. Savoie, *Governing from the Centre: the Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999).

⁵⁹ Muslim Lawyer’s Association, “Statement of the Coalition of Muslim Organizations on Bill C-36 (*Anti-Terrorism Act*)” (Remarks to the Standing Committee on Justice and Human Rights, 8 November 2001) cited in *September 11*, *supra* note 4 at 63.

⁶⁰ *Ibid.* at 176.

⁶¹ *Ibid.*

further reducing accountability for what is being done.”⁶² Such a scheme weakens the chain of shared cabinet responsibility, which is a cornerstone of responsible government. *The Globe and Mail’s* assessment of the *Act’s* first incarnation remains accurate:

The government refers to its proposed *Public Safety Act* as legislation, but it might as easily call it a blank cheque. Whenever their inspiration flags, the authors leave it to individual ministers to do whatever they feel is necessary whenever they feel they must. ... [T]he bill reads as though someone had peppered the draft text with Post-It notes: Insert greater ministerial powers here.⁶³

Despite laudable objectives, the approach of the *Public Safety Act* is profoundly misguided.⁶⁴

IX. ARE OFFENSIVE MEASURES JUSTIFIABLE?

It is obvious that the legislative response to 9/11 has the potential to profoundly encroach upon civil liberties. Despite this, it is possible to support this legislation. People who do so claim that no harm will be done to the innocent, that extraordinary measures are called for in extraordinary times, or that overweening police powers are acceptable because they are lesser than the evil of terrorism.

During debate on the *Anti-Terrorism Act*, the concept of “human security” was massaged first into a human right and then into a political trump card. Liberal Member of Parliament Irwin Cotler described Canada’s *Anti-Terrorism Act* as

... human security legislation, which seeks to protect both national security ... and civil liberties. As the United Nations puts it, terrorism constitutes a fundamental assault on human rights ... while counter-terrorism law involves a protection of the most fundamental of rights, the right to life, liberty, and the security of the person, as well as the collective right of peace.⁶⁵

So viewed, “security” could be “balanced” in the mix of other human rights. But security always wins.

⁶² British Columbia Civil Liberties Association, News Release, “Written Submissions To The House Of Commons Legislative Committee On Bill C-17” (30 January 2003) online: <<http://www.bccla.org/othercontent/03publicsafety.html>> (date accessed: 30 June 2003) (Recommendation #2).

⁶³ “The Public Safety Act seeks too much power...” Editorial, *The Globe and Mail* (24 November 2001) A24.

⁶⁴ See also Canadian Bar Association, “Submission on Bill C-17: *Public Safety Act, 2002*” (January 2003) online: <<http://www.cba.org/cba/pdf/c%2D17%2Deng.pdf>> (date accessed: 30 June 2003).

⁶⁵ Irwin Cotler, “Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy” in *supra* note 13, 111 at 112-13.

Though security from bombers and hijackers is certainly a good thing, it is curious to treat domestic spies, privacy invasion, and the unilateral exercise of state power as human rights measures. No responsible person suggests that terrorist acts are to be tolerated, and the relevant points of contention concern only the best means by which to ensure security consistently with the overriding goal of preserving liberal democracy. The “human security” rationale, bandied about loosely, served to cut off discussion at precisely the point where reflection was most necessary.

In Canadian political discourse, seemingly offensive measures are rendered more widely acceptable than might otherwise be the case if they are credibly said to be consistent with the *Canadian Charter of Rights and Freedoms*.⁶⁶ During debate on the *Anti-Terrorism Act*, the *Charter* was used effectively, though misleadingly, as a pivot point for ministerial media spin. “*Charter*-proofing,” however, is a minimal attainment.⁶⁷ It confuses one piece of evidence regarding fundamental constitutional principles (the *Charter*) for the whole⁶⁸ and mistakes formal constitutional compliance with legislative wisdom. To predict a bill will survive *Charter* scrutiny implies nothing about the ways police officers will use it, nothing about the effectiveness of the bill in relation to its desired ends, and little about its consonance with larger principles of constitutionalism. Focus on “*Charter*-proofing” is a shell game which keeps public attention well away from “the action.”⁶⁹

A more honest defence for apparently draconian laws is found in the assumptions that innocent people have nothing to fear, that only criminals seek privacy, that such legislation does not hurt anyone, and that the authorities can be trusted. A peculiar Canadian twist on this theme, uttered *sotto voce*, is the assumption that Canadian authorities are less inclined to overreaction, gross violations of human rights, and racially discriminatory law enforcement than

⁶⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11. [*Charter*].

⁶⁷ Compare with Philip Thomas, “September 11th and Good Governance” (2002) 53 N. Ir. Legal Q. 366 [“Good Governance”], and Kent Roach, “The Dangers of a Charter-Proof and Crime-Based Response to Terrorism” in *The Security of Freedom*, *supra* note 13, 131; *September 11*, *supra* note 4.

⁶⁸ In a particularly cynical move, the preamble to Canada, Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, 1st Sess., 37th Parl., 2001, Preamble (assented to 18 December 2001) online: Canada’s Parliament <http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-36/C-36_3/90168bE.html> (date accessed: 30 June 2003) stated that Canada “is committed to taking comprehensive measures against terrorist activity while continuing to respect and promote the values reflected in ... the *Canadian Charter of Rights and Freedoms*.” Unlike the *Emergencies Act*, R.S.C. 1985 (4th Supp.), c. 22, there is no mention of the *Canadian Bill of Rights* (the *Anti-Terrorism Act* operates through massive interference with property rights, which are protected under the *Bill of Rights* but not the *Charter*).

⁶⁹ *September 11*, *supra* note 4 at 99.

their U.S. counterparts. This too is unhelpful and, ultimately, highly misleading. There is little cause for smugness on the grounds that others behave worse than we do. Moreover, to say that laws have not *in fact* been abused says nothing about their *potential* for misuse. It amounts only to a restatement of the “trust me” rationale. Acts conferring unprecedented powers lurk dangerously. Like hidden mines, they are set to explode whenever wrong-headed individuals exercise power. Bad laws can be used against us “in 10, 20 or even 50 years time . . . by an unscrupulous government.”⁷⁰ They also inevitably establish a new baseline from which increasingly draconian legislation will be launched when the next terrible event occurs.⁷¹ And terrible events are inevitable.

In any event, it is not true that “no harm” has been done. In one case, a Canadian businessman was “listed” as a “terrorist entity” and arrested in the autumn of 2001. Liban Hussein’s assets were frozen, and he was subjected to extradition proceedings. Though it was subsequently admitted that there was no evidence linking him to terrorism, Hussein was ruined, losing “his business, his income, his job, and his prospects.” In another, CSIS “facilitated the transfer” of a Canadian citizen, Mansour Jabarah, to the United States,⁷² and in still another, the home of an animal rights activist was raided on the theory that his activities amounted to terrorism.⁷³ More broadly, privacy experts warn that the War on Terror threatens a fundamental transformation of state-citizen relations in Canada. A report on the first year of the *Anti-Terrorist Act* found “a serious erosion of civil rights, especially with regards to due process and the right to privacy.”⁷⁴ The inventory of abusive state action includes criminalization of

⁷⁰ George Williams, “Australian Values and the War Against Terrorism” (National Press Club Telstra Australia Day Address, 29 January 2003) online: University of New South Wales Faculty of Law <<http://www.law.unsw.edu.au/events/AustraliaDayAddress-Terrorism.html>> (date accessed: 23 June 2003).

⁷¹ Timothy Lynch, “Breaking the Vicious Cycle: Preserving Our Liberties While Fighting Terrorism” (2002) 443 Pol’y Analysis online: CATO Institute <<http://www.cato.org/pubs/pas/pa443.pdf>> (date accessed: 30 June 2003); “Good Governance,” *supra* note 67.

⁷² Alan Borovoy “Security’s Serpentine Coils” *The Globe and Mail* (1 August 2002) A21.

⁷³ Thomas Walkom “War on terror being used as fig leaf” *The Toronto Star* (20 August 2001) A19.

⁷⁴ See Canadian Bar Association, *supra* note 11, 3; Canadian Bar Association, News Release, “CBA Calls Federal Government First Anniversary Report on *Anti-Terrorism Act* Inadequate” (14 May 2003) online: <http://www.cba.org/CBA/News/2003_Releases/PrintHtml.asp?DocId=52473> (date accessed: 30 June 2003).

political dissent,⁷⁵ racial profiling,⁷⁶ unnecessarily harsh treatment of refugees,⁷⁷ a chilling of humanitarian work,⁷⁸ and violations of privacy rights.⁷⁹

Even in light of all this, however, it remains possible that there may be no alternative. Canada must join with other countries in the struggle against terrorism. Unfortunately, there is little reason for confidence that the measures taken to date will be effective in relation to the ends sought. The success of the 9/11 attackers resulted more from failure of intelligence capacity than inadequacy in law.⁸⁰ Canada's law-based response through "the *Anti-Terrorism Act* largely made criminal, conduct that was already criminal before September 11, and most of its new investigative powers and offences were not even used during the first year of the law's existence."⁸¹ Disturbingly too, the new

⁷⁵ Canadian Bar Association, *ibid.* at 6-7. Examples included a raid on Native activists at Port Alberni, British Columbia; an article in the *RCMP Gazette*, identifying environmental activists, amongst others, as potential terrorists; a CSIS report identifying the anti-globalization movement as a threat to security; and the seizure of U.S. anti-war videotapes by the Canada Customs and Revenue Agency.

⁷⁶ Canadian Bar Association, *ibid.* at 7-9. Issues noted included police failures to respond to hate crimes against Muslims; "hundreds" of cases where Arab and/or Muslim community leaders were threatened with "preventive detention" if they failed to provide "voluntary" interviews; Canada's failure to protest "the disappearance, secret detention and deportation by American authorities of Maher Arar and a half dozen other Canadian citizens of Arab or Islamic origin"; CSIS harassment of Arab university students including threats of "deportation and revocation of their citizenship if they did not provide information about community members"; the failure of the Department of Foreign Affairs and International Trade to warn Arab or Muslim Canadians against travel to the United States (where serious rights violations are commonly suffered by members of this community); the Deputy Minister of Justice, Morris Rosenberg's, refusal to disavow racial profiling.

⁷⁷ Canadian Bar Association, *ibid.* at 9-10. Refugee claimants are now routinely detained upon arrival at Pearson International Airport; those appearing at the Canada-U.S. border are turned back even in circumstances where there is no guarantee they will be permitted to return for assessment of their refugee claim.

⁷⁸ Canadian Bar Association, *ibid.* at 10-11. NGOs are increasingly concerned that humanitarian assistance is compromised in areas of conflict where it may be "impossible to avoid relating to all involved combatants..."; "southern partners" find it increasingly difficult to obtain visas needed to attend meetings in Canada; "programs in countries such as Lebanon or Colombia ... could be jeopardized by fear of potential 'proximity' with 'listed entities,' like Hezbollah or [the Revolutionary Armed Forces of Columbia]"; "One mainstream church-based NGO reported ... that its financial institution refused on two occasions to transfer funds earmarked for humanitarian relief and reconstruction projects in Iraq."

⁷⁹ Canadian Bar Association, *ibid.* at 11-12. This includes moves toward transferring personal information about Canadians to U.S. "security agencies unaccountable to [the] Canadian Parliament and the Canadian public"; massive expansions of the Canadian Customs and Revenue Agency's "Big Brother" database; proposed Lawful Access legislation; and the proposal for a national identity card.

⁸⁰ George Williams, "Why the ASIO bill is rotten to the core" *The Age* (27 August 2002) online: <<http://www.theage.com.au/articles/2002/08/26/1030053032903.html>> (date accessed: 30 June 2003).

⁸¹ *September 11*, *supra* note 4 at 175. The most significant exception to this point is in the area of financing terrorism. The Department of Justice Backgrounder on "Amendments to the *Anti-Terrorism Act*," *supra* note 23, as much as admits the legislation to be largely symbolic: "Removing the notion of political, religious or ideological motivation would transform the definition from one that is designed to recognize and

legislation reveals little concern to balance strong powers with civil rights protections despite the model provided in the *Emergencies Act*, for example.⁸²

Worse, while there have been violations of essential liberties there has been no obvious gain in security. Complete safety from terrorists is impossible as no amount of security can absolutely prevent a determined individual from attacking an airplane or parking a fertilizer bomb outside a daycare. Random, horrific acts of violence, their destructiveness limited only by the ingenuity, evil, or derangement of the perpetrators, cannot be stopped. Just four months after a terrorist bomb killed and injured hundreds of people in Bali, Indonesia on October 12, 2002, a massive fire ripped through a subway train in Taegu, South Korea, killing well over two hundred people. The subway fire, however, was not terrorism, but merely the actions of a deranged man armed with a lighter and accelerant. The chilling ease with which acts of gross violence can be perpetrated by urban snipers, hijackers, suicide bombers, ex-soldiers with fertilizer bombs, or madmen with milk cartons of gasoline is clear. Little knowledge, ingenuity, foresight, planning, intelligence, money, or support infrastructure is required to achieve mass murder.

Disturbingly, terrorism on a much bigger scale is possible. Mass destruction is no longer the exclusive privilege of states. A “dirty bomb,” for example, “made with a single foot-long pencil of cobalt from a food irradiation plant and just 10 pounds of TNT” would render much of Manhattan “as contaminated as the permanently closed area around the Chernobyl nuclear plant”⁸³ The degree of difficulty involved in achieving these results is scarcely more than that involved in filling a rental truck with fertilizer or a milk carton with gasoline. A visit to any university laboratory or hospital combined with a side trip to a mining camp or army reserve base is all that is needed to obtain the raw materials. Well-organized terrorists could aspire to much more, much aided by the continuing insecurity of both nuclear materials and of the world’s nuclear arsenal. A one kiloton nuclear explosion (“a junk bomb, hardly worthy of respect, a fifteenth the power of the bomb over Hiroshima”) detonated in central New York would produce:

... 20,000 dead in a matter of seconds. Beyond this, to a distance of more than a quarter mile, anyone directly exposed to the fireball would die a gruesome death from radiation sickness within a day ... This larger circle would be populated by about a quarter million people on a workday. Half a mile from the explosion ... unshielded onlookers would expect a slower death from

deal strongly with terrorism to one that is not distinguishable from a general law enforcement provision in the *Criminal Code*.”

⁸² *Supra* note 68.

⁸³ Bill Keller “Nuclear Nightmares” *New York Times Magazine* (26 May 2002) online: <<http://www.nytimes.com/2002/05/26/magazine/26NUKES.html?ex=1023640203&ei=1&en=dc0fb9fac851dd13>> (date accessed: 30 June 2003).

radiation. A mushroom cloud of irradiated debris would blossom more than two miles into the air, and then, ... highly lethal fallout would begin drifting back to earth, showering injured survivors and dooming rescue workers. The poison would ride for 5 or 10 miles on the prevailing winds ...

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The massive incursions in civil liberties since 9/11 have done little to protect us from such possibilities. Indeed, U.S. nuclear expert Eugene Harbiger considers it impossible to protect against such possibilities, stating, "It's not a matter of if; it's a matter of when."⁸⁵

We are left, then, with the unfortunate conclusion that Canada's new laws violate the very constitutional values that render our society "civil," while simultaneously failing to protect us from terrorism. The misleading freedom versus security dichotomy distorts dangerously, reinforcing our cultural obsession with the notoriously blunt instruments of coercive law, while distracting attention entirely from potentially more useful measures. The uni-dimensional focus on coercive law has led us to overlook a wide range of "security-enhancing measures we could take that would have no effect on freedom." Recognition "that virtually none of our computer systems, utilities, and urban infrastructure had been designed from the ground up with security in mind" would allow us to begin to engage in "a massive redesign of infrastructure ... that could do wonders for security while not affecting freedom in the least."⁸⁶ Though it is probably impossible to prevent deranged people from fire-bombing subways or nightclubs, it is possible to improve design standards, so as to make subways, nightclubs, and cities safer. It is also possible, given the political will, to develop better systems of emergency response and to more effectively regulate both international arms proliferation and the highly dangerous materials that are in common industrial use.

The regulatory state has much to offer where the police state lets us down. Disturbingly, little attention has been focused on such matters to date.

X. CONCLUSION

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ A. Potter, "How much freedom should we trade for our security?" [unpublished, archived with the author], referencing Philip Agre, "Some notes on War in a World Without Boundaries," online: <<http://dlis.gseis.ucla.edu/people/pagre/notes-on-war.html>> (date accessed: 31 July 2003).

Soon after 9/11, Paul Krugman warned of “hitchhikers” hijacking “the patriotic bandwagon” and using it “as a vehicle for their favorite policy proposals.”⁸⁷

Canada’s response to the challenges of international terrorism has been, through entirely conventional means, reflecting the interests of established state agencies. The knee-jerk reaction of security bureaucrats has been to move further in the preferred directions of concentrating power, constraining liberties, and enhancing both criminal justice and security bureaucracies. It does not augur well that, so far, equivalent efforts in the direction of controlling dangerous materials, improving urban and systems design, or enhancing emergency response capabilities, have sadly been lacking in our new state of permanent war.

It is a real possibility that security establishment “hitchhikers,” empowered by widely shared, though misleading, notions of crime and safety, have dangerously distorted Canada’s constitutional balance, while simultaneously diverting attention from the difficult challenges involved in enhancing public safety.

⁸⁷ Paul Krugman “Reckonings; The Hitchhiker Syndrome” *The New York Times* (30 September 2001) online: <http://query.nytimes.com/gst/abstract.html?res=FA0613F93C590C738FDDA_00894D9404482> (date accessed: 30 June 2003).