
Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism

Kent Roach*

The author critically examines the challenges of the terrorist attacks on September 11, 2001 to Canadian law, courts, sovereignty, and democracy. He compares these challenges to Canada's acceptance of nuclear arms in the wake of the Cuban Missile Crisis of 1962, an event that caused George Grant in his *Lament for a Nation* to declare Canadian sovereignty and a distinctive Canadian democracy to be dead. The *Anti-terrorism Act* is examined in comparison to other expansions of the criminal law in response to tragic crimes, as well as against the increased emphasis in Canada and the United States on crime as a political issue. The author differentiates between respecting non-discrimination as a value in the criminal law and accepting victims' rights as a reason for limiting the rights of the accused. He also examines the dangers of relying on the criminal law to prevent terrorism and evaluates alternative administrative measures, including some contemplated in the proposed *Public Safety Act*.

The challenges of September 11 for Canadian courts are related to American-style debates over judicial activism. The author argues that the recent decisions of the Supreme Court in *Burns and Rafay* and *Suresh* suggest possible judicial reactions to future challenges of anti-terrorism measures. The author also argues that debate after September 11—while maintaining an appropriate degree of openness to dissent—did not pay sufficient attention to the importance of respecting international law in the treatment of detainees or anti-discrimination principles with respect to the possible profiling of particular minority groups. The struggle to maintain a distinctive and moderate Canadian approach to anti-terrorism measures can, in the author's view, be assisted by rejecting the idea that September 11 changed everything.

L'auteur pose un regard critique sur les défis qu'ont apportés les attaques terroristes du 11 septembre 2001 pour le droit, les cours, la souveraineté et la démocratie au Canada. Il compare ces défis avec l'acceptation du Canada de l'armement nucléaire lors de la crise des missiles de Cuba en 1962, un événement qui a poussé Georges Grant dans son *Lament for a Nation* à déclarer la mort de la souveraineté et de la démocratie canadienne. Il examine la *Loi antiterroriste* en la comparant avec d'autres réponses du droit pénal à des crimes tragiques ainsi que l'importance accrue qu'ont pris les débats politiques sur le crime au Canada et aux États-Unis. L'auteur distingue le respect de la non-discrimination en tant que valeur en droit pénal et l'acceptation des droits des victimes en tant que raison pour limiter les droits de l'accusé. De plus, il examine les dangers de se fier sur le droit pénal pour prévenir le terrorisme et évalue des mesures administratives alternatives, notamment certaines de celles proposées dans la *Loi sur la Sécurité Publique*.

Les défis du 11 septembre pour les cours du Canada sont reliés à un débat de type américain sur l'activisme judiciaire. L'auteur soutient que les récentes décisions de la Cour suprême dans *Burns et Rafay* et *Suresh* suggèrent des réactions judiciaires possibles aux futurs défis des mesures d'anti-terrorisme. Tout en gardant une certaine ouverture à la dissidence, l'auteur soutient également que le débat après le 11 septembre ne s'est pas suffisamment penché sur l'importance de respecter le droit international à l'égard du traitement des détenus ou des principes de non-discrimination quant au portrait de certains groupes minoritaires. La lutte pour maintenir une approche canadienne distincte et modérée vis-à-vis les mesures anti-terroristes peut, selon l'auteur, être assisté par le rejet de l'idée que le 11 septembre a tout changé.

* Professor of Law, University of Toronto. This is a revised version of the McGill Law Journal Annual Lecture given on 27 March 2002. I thank the editors of the *McGill Law Journal* for the invitation to give the lecture, as well as Jutta Brunnée, Sujit Choudhry, David Dzyzenhaus, Patrick Healy, Audrey Macklin, Patricia McMahon, Ziyaad Mia, Victor Ramraj, Jonathan Rudin, and David Schneiderman for valuable assistance in the writing of this paper.

© McGill Law Journal 2002

Revue de droit de McGill 2002

To be cited as: (2002) 47 McGill L.J. 893

Mode de référence : (2002) 47 R.D. McGill 893

Introduction**I. The Challenge of Democratic Crime Control**

- A. *The Criminalization of Motive*
- B. *The Distinct Challenges of Non-Discrimination and Victims' Rights*
- C. *Democratic Law Reform for a Democratic Criminal Code*
- D. *The Challenge of Preventing Terrorism*

II. The Challenge of Anti-terrorism to Independent Courts

- A. *The Supreme Court*
- B. *The Federal Court*
- C. *Trial Courts*

III. The Challenge of Preserving Canadian Sovereignty**IV. The Challenge of Preserving a Tolerant Democracy****V. The Challenge of Preserving a Multicultural Democracy****Conclusion**

Introduction

It has been suggested that “September 11 changes everything, for all of us.”¹ Canada was certainly not immune from the effects of the terrible terrorist attacks of that fateful day. Amid concerns about our own security and our relations with the Americans, we quickly enacted Bill C-36, the *Anti-terrorism Act*.² It introduced new and potentially dangerous legal concepts such as investigative hearings, preventive arrests, broad motive-based crimes based on participation in or contribution to terrorist groups at home or abroad, as well as new powers to list terrorist groups, take their property, and deprive suspected terrorists of sensitive security information in their trials and appeals. Chief Justice McLachlin has recognized that the “unique horror of Sept. 11” will place challenges on courts “to maintain our freedoms and our democracy and the rule of law, while maintaining security.”³ Former foreign affairs minister Lloyd Axworthy has expressed concerns that September 11 may have started a “slippery slope” that will erode “Canada’s ability to speak with an independent and considered voice.”⁴ The famous picture of Canadian troops rather roughly handing off detainees at Kandahar Airport to the Americans for possible detention in the open-air cages of Camp X-Ray in Guantanamo Bay, Cuba may symbolize the shift in matters such as civil liberties, respect for international law, and integration with the United States. The challenges presented by September 11 to Canadian law, courts, sovereignty, and democracy are great.

I will attempt to situate the challenges of September 11 into a larger picture of recent challenges for Canadian law, courts, sovereignty, and democracy. Although the challenges of September 11 are particularly dramatic and intense, I will argue that they are not fundamentally different from those we have faced in the recent past. The demand for criminal-law reform to respond to horrific crimes is a constant, of which the threat of mass terrorism post-September 11 is only a particularly intense example. The last decade has seen an expansion and toughening of Canadian criminal law as a more or less direct response to a number of well-publicized murders, including the

¹ S.R. Merl, “Internet Communication Standards for the 21st Century: International Terrorism Must Force the U.S. to Adopt ‘Carnivore’ and New Electronic Surveillance Standards” (2001) 27 *Brook. J. Int’l L.* 245 at 246.

² 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) [hereinafter Bill C-36].

³ C. Schmitz, “Security-Rights Conflict Lies Ahead: Chief Justice” *National Post* (7 January 2002) A2.

⁴ L. Axworthy, “Watch Your Step, Mr. Chrétien” *The Globe and Mail* (4 February 2002) A11.

massacre of fourteen women at the École Polytechnique in Montreal and murders in conflicts involving biker gangs. As in the United States, a number of interest groups representing women, crime victims, various minorities, and the police have successfully lobbied for changes to the criminal law. Some Canadian political parties have also attempted to make crime a top political issue as it has become in the United States.⁵ Before September 11, we were in the habit of expanding our criminal law in a symbolic attempt to recognize tragic crimes and in a desperate and frequently vain quest for safety, an increased sense of security, and an understandable desire to express concern for those victimized by crime.

Similarly, the difficult position that Canadian courts will find themselves in when making decisions in the anti-terrorism context is part of the larger phenomenon of Canadian courts' being put on trial over the last decade and held up to increased public and political scrutiny and at times impatience with their decisions. Concerns have been voiced that Canadian courts have caught the "American disease"⁶ of judicial activism and an American-style debate on judicial activism has been played out in Canada on both the right and the left.⁷ The increased pressure placed on our courts by

⁵ Willie Horton became a crucial issue in the 1988 presidential election, after he committed a burglary and a rape after being furloughed from his life sentence for murder in Massachusetts. The governor of that state, Michael Dukakis, was the unsuccessful Democratic candidate for president. See D.C. Anderson, *Crime and the Politics of Hysteria: How the Willie Horton Story Changed American Justice* (New York: Random House, 1995). One commentator has recently observed that "in the United States, far more than in other rich democracies, the making of criminal law often proceeds along a different, more populist, political track, spurred by interest groups and ambitious politicians reacting to highly publicized crimes." R. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, Mass.: Harvard University Press, 2001) at 69. On the political salience of crime and concerns about victims in the United States, see also S. Estrich, *Getting Away with Murder: How Politics Is Destroying the Criminal Justice System* (Cambridge, Mass.: Harvard University Press, 1998); G.P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (Reading, Mass.: Addison-Wesley, 1995). For comparable Canadian developments, see D.M. Paciocco, *Getting Away with Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law, 1999); K. Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) [hereinafter Roach, *Due Process*].

⁶ R. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Toronto: Vintage Canada, 2002) at 2. See also F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000); C.P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Don Mills, Ont.: Oxford University Press, 2001); A.C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational, 1994).

⁷ K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) c. 2, 5 [hereinafter Roach, *Supreme Court*].

governments and the public, the majority of which would apparently prefer that their Supreme Court be elected,⁸ makes it vitally important that courts exercise their role independently and fearlessly. At the same time, however, this increased pressure, as well as some recent deferential developments in jurisprudence on the *Canadian Charter of Rights and Freedoms*,⁹ should make us uneasy with the idea that legislation that is “Charter-proof”, in the sense that it will not be struck down by the courts, is necessarily wise, just, or required.

Well before September 11, we were being buffeted by the forces of globalization and continental integration. Canadian nationalists had long expressed fears about the preservation of Canadian sovereignty, but these increased in the wake of the 1988 *Free Trade Agreement*.¹⁰ There are real concerns that Canada has not done enough since September 11 to preserve a sovereign foreign policy with its traditional post-war commitments to peacekeeping and respect for international law.

Well before September 11, our democracy risked the challenge of a politics that was less tolerant of dissent and the rights of minorities, especially when they were linked with the emotive issues of crime and/or immigration. Ever since the protests against the World Trade Organization in Seattle, similar Canadian protests against globalization and poverty have been greeted with an intimidating police presence and other security measures.¹¹ Many expressed legitimate fears that Bill C-36 as first introduced could be used against illegal protests that disrupted essential public or private services. Concerns were also expressed that security powers would be used in a manner that targeted or profiled those who were perceived to be of the same race or religion as the September 11 terrorists. Concerns about systemic discrimination in the criminal justice system are not, however, new. There was evidence of the profiling and over-incarceration of Aboriginal people and African-Canadians long before September 11.¹² Combined with the linkages between immigration and crime that were made

⁸ C. Cobb, “Canadians Want to Elect Court” *National Post* (4 February 2002) A1. But see J.F. Fletcher & P. Howe, “Public Opinion and Canada’s Courts” in P. Howe & P.H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal & Kingston: McGill-Queen’s University Press for Institute for Research on Public Policy, 2001) 255, finding high levels of support for the Court, but less for the method of appointment.

⁹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

¹⁰ *Canada-United States Free Trade Agreement*, 22 December 1987, Can. T.S. 1989 No. 3, 27 I.L.M. 281.

¹¹ See e.g. W.W. Pue, ed., *Pepper in Our Eyes: The APEC Affair* (Vancouver: UBC Press, 2000).

¹² Ontario, Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen’s Printer, 1995) at 349-60; *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Abo-*

both before and after September 11,¹³ there is a danger of Americanized criminal justice policies in which underclasses and groups that are stereotyped as associated with crime are exposed to heightened state surveillance and incarceration.¹⁴ There are real concerns that we have not done enough to commit ourselves to non-discrimination in the administration of Bill C-36 and other legislation, and have not drawn on the multi-cultural nature of Canadian society as a source of strength rather than concern.

In my more pessimistic moments, I find myself thinking of George Grant's famous *Lament for a Nation*,¹⁵ in which he declares Canadian sovereignty and a distinctive Canadian democracy to be dead. That book was written in response to Canada's decision to accept nuclear arms in the wake of the Cuban Missile Crisis of 1962, an event that was more than the traumatic equal of September 11. My fear is that September 11 is driving us towards Americanized criminal justice and foreign policies that depart from Canadian values and traditions. In my more optimistic moments, however, I believe that it is too early, or perhaps just too futile, to lament a Canada that was lost on that surreal morning of September 11. We can and we must struggle to maintain a distinctive Canadian approach to the very real challenges posed by terrorism.

I. The Challenge of Democratic Crime Control

A number of commentators, and I am one of the culprits here,¹⁶ have pointed out that what the September 11 terrorists did was already a crime long before they

iginal People, vol. 1 (Winnipeg: Queen's Printer, 1991) at 595 (A.C. Hamilton & C.M. Sinclair, commissioners). The Manitoba inquiry also found that J.J. Harper was stopped by the police before his fatal shooting "simply because Harper was a male Aboriginal person." *Report of the Aboriginal Justice Inquiry of Manitoba: The Deaths of Helen Betty Osborne and John Joseph Harper*, vol. 2 (Winnipeg: Queen's Printer, 1991) at 32 (A.C. Hamilton & C.M. Sinclair, commissioners).

¹³ On the linkage between crimes such as the "Just Desserts" murder in Toronto and immigration law provisions relating to the deportation of permanent residents convicted of serious crimes, see J.A. Dent, "No Right of Appeal: Bill C-11, Criminality, and the Human Rights of Permanent Residents Facing Deportation" (2002) 27 *Queens L.J.* 749.

¹⁴ See M. Tonry, *Malign Neglect—Race, Crime, and Punishment in America* (New York: Oxford University Press, 1995); R. Kennedy, *Race, Crime, and the Law* (New York: Pantheon Books, 1997); D. Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New York: New Press, 1999).

¹⁵ G. Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Toronto: McClelland & Stewart, 1965) [hereinafter Grant, *Lament*].

¹⁶ See K. Roach, "The New Terrorism Offences and the Criminal Law" in R.J. Daniels, P. Macklem & K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001) 151 at 151-54.

stepped on the planes. Conspiracy to commit murder and attempted murder are serious crimes. Canadian laws against conspiracy, attempts, and participation in an offence are strong and broad. In my view then Minister of Justice Anne McLellan was wrong to suggest that current criminal laws are inadequate:

Perhaps the greatest gap in the current laws is created by the necessity of preventing terrorist acts. Our laws must reflect fully our intention to prevent terrorist activity and currently, they do not.

Under our current laws, we can convict terrorists who actually engage in acts of violence if we are able to identify and apprehend them after their acts have been committed...

The *Criminal Code* offences in C-36 will allow us to convict those who facilitate, participate in and direct terrorist activity and these must include preventive measures which are applicable whether or not the ultimate terrorist acts are carried out.¹⁷

A person unschooled in the criminal law might assume from these remarks that the existing criminal law was powerless to apprehend the September 11 terrorists until they were on the planes, when it was too late. But a moment's reflection should reveal the inaccuracy of such a belief. The so-called twentieth hijacker, Zacarias Moussaoui, was in custody before September 11 and stands charged with conspiring and attempting to commit a number of serious crimes including hijacking and murder. There is little reason to think that Canadian courts would not have sensibly interpreted existing Canadian criminal law to apply to apprehended acts of violent terrorism.¹⁸

¹⁷ A. McLellan, "Notes for the Minister of Justice's Appearance before the House of Commons Standing Committee on Justice and Human Rights" (20 November 2001), online: Canada, Department of Justice <http://canada.justice.gc.ca/en/news/sp/2001/doc_27900.html> (date accessed: 1 November 2002).

¹⁸ My point concerns the applicability of the law of attempts, conspiracy, counselling, and parties to acts of violent terrorism. See *e.g.* *R. v. Deutsch*, [1986] 2 S.C.R. 2 at 28, 27 C.C.C. (3d) 385 (attempted crime committed even though act not in itself criminal and "considerable period of time" would have to elapse before completed offence could be committed); *R. v. Cotroni*, [1979] 2 S.C.R. 256 at 276, 45 C.C.C. (2d) 1 (conspiracy applies even though "there may be changes of operation, personnel, or victims"); *R. v. Jackson*, [1993] 4 S.C.R. 573 at 583, 86 C.C.C. (3d) 385 (accused can be a party to manslaughter if reasonable person "would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken"). See also *Director of Public Prosecutions for Northern Ireland v. Maxwell*, [1978] 3 All E.R. 1140, [1978] 1 W.L.R. 1350 (H.L.) (accomplice liability in a terrorist operation when the accused did not know the exact means of the attack).

I acknowledge that some of the provisions of Bill C-36, especially those relating to the financing of terrorism, may provide new means to prevent terrorism. With regards to the new non-financing of-

Whatever the validity of my legal argument, it misses the point about why legislation in response to September 11 was “inevitable”¹⁹ and “should come as no surprise.”²⁰ Over the last decade, Parliament has each and every year added new crimes to what is already a thick to bursting *Criminal Code*. Crimes such as criminal harassment or stalking, child pornography, procuring an underage prostitute, and gang offences have been added to the *Criminal Code* not so much because of a legal or technical need to expand its ambit, but because of a political need to respond to and denounce such harms. This increased tendency of “governing through crime”²¹ follows American patterns of crime being a top political issue. It would likely have raised alarm bells with Canadian nationalists such as George Grant, who argued that Canadian democracy should take a different path from American democracy and that it was the possibilities of genuine conservatism and socialism that distinguished Canada from the United States.²² Our panicked politicization and constant bolstering of the *Criminal Code* does not display either a tory’s confident faith in the traditional criminal law as a secure bulwark against disorder, or a socialist’s sense that the criminal law has only a limited role in responding to the social, economic, and political injustices and grievances of the day.²³

fences in ss. 83.18 to 83.23 of the *Criminal Code*, R.S.C. 1985, c. C-46, however, the question is much less clear. Specifically, it is not clear how far these new crimes actually extend the existing law and to the extent that they do extend the existing law to acts of participation in terrorism that would not be caught by the ordinary criminal law, whether they come uncomfortably close to creating crimes based on status and association with those determined to be terrorists.

¹⁹ D. Paciocco, “Constitutional Casualties of September 11: Limiting the Legacy of the Anti-terrorism Act” (2002) 16 Supreme Court L.R. (2d) 185 at 186 [hereinafter Paciocco, “Constitutional Casualties”].

²⁰ D. Stuart, “The Dangers of Quick Fix Legislation in the Criminal Law: The Anti-terrorism Bill C-36 Should Be Withdrawn” in Daniels, Macklem & Roach, *supra* note 16, 205 at 206.

²¹ Writing in 1997, Jonathan Simon observed, “[E]very U.S. presidential campaign since Goldwater-Johnson in 1964 has been fought partly on the turf of crime. Since the reaction to the ‘Willie Horton’ ad on behalf of George Bush in 1988, the salience of crime and its interconnection with race have been taken as given features of American politics.” J. Simon, “Governing through Crime” in L.M. Friedman & G. Fisher, eds., *The Crime Conundrum: Essays on Criminal Justice* (New York: Westview Press, 1997) 171 at 174.

²² Grant argued both that Canadian “nationalism had to go hand in hand with some measure of socialism” and that “[t]he impossibility of conservatism in our era is the impossibility of Canada.” Grant, *Lament*, *supra* note 15 at 15, 68. The classic statement that the Canadian political tradition has tory and socialist touches that distinguish it from the American political tradition is found in G. Horowitz, *Canadian Labour in Politics* (Toronto: University of Toronto Press, 1968) c. 1.

²³ For an argument that the traditional Canadian reaction to political trials (from the rebellions of 1837 to the October crisis of 1970) demonstrated both a tory faith in order and a socialist inclination to leniency and response to the underlying grievances behind political crimes, see K. McNaught,

A strong case has been made by the former Law Reform Commission of Canada²⁴ and a number of legal academics led by Don Stuart²⁵ that there is an urgent need to re-codify the criminal law to make it clearer and simpler, involving less duplication. There is no shortage of draft criminal codes that are much clearer and more elegant than our present *Criminal Code*, which in its style of drafting and multiple subsections, looks more and more like the *Income Tax Act*²⁶ (and this may be an insult to that document!). Yet the political will to replace the existing *Criminal Code* has so far not been present. But imagine that we somehow got over that hurdle and a new and more concise code had been enacted on September 10. What then? Is it realistic to expect that there would not have been additions to this pristine new code after September 11? Or even after a lesser crisis such as a horrific crime that receives national media attention?

The answer is no. It is neither realistic nor particularly democratic to expect Parliament to abstain from amending, sometimes in dramatic fashion, the *Criminal Code* in response to the events of the day. The *Criminal Code* should aspire to clarity and a degree of conceptual coherence, but it will also read like a yearly calendar of the horrific crimes that we have experienced. The *Criminal Code* is becoming an even more important focal point of democracy and national sovereignty in our increasingly globalized world. It is relatively simple and cheap to amend as opposed to other strategies that may help prevent crime or repair its harms. The political and the democratic lure of adding to the *Criminal Code* has simply been irresistible.

To understand the pressures brought to bear on contemporary Canadian criminal law, one need only look at the law of first-degree murder. First-degree murder is our most serious crime, but its history is not particularly principled. Since the abolition of capital punishment in 1976, first-degree murder has been defined as planned and deliberate murder, the murder of a police officer or prison guard, and murder while committing a short list of very serious offences. This short list includes some of the heinous crimes committed by the September 11 terrorists—namely hijacking an airplane, kidnapping, forcible confinement, and hostage taking. The list also includes sexual assault, and the Supreme Court held in *R. v. Paré* in 1987 that the offenses listed were united by providing extra punishment for murders committed while illegally dominating the victim.²⁷ *Paré* recognized an increased concern in our criminal

“Political Trials and the Canadian Political Tradition” in M.L. Friedland, ed., *Courts and Trials: A Multidisciplinary Approach* (Toronto: University of Toronto Press, 1975) 137.

²⁴ Law Reform Commission of Canada, *Recodifying Criminal Law*, rev. ed. (Ottawa: Law Reform Commission of Canada, 1987) at 1-5 (A.M. Linden, President).

²⁵ D. Stuart, “A Case for a General Part” in D. Stuart, R.J. Delisle & A. Manson, eds., *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Scarborough, Ont.: Carswell, 1999) 95.

²⁶ R.S.C. 1985 (5th Supp.), c. 1.

²⁷ [1987] 2 S.C.R. 618 at 633, 38 C.C.C. (3d) 97 [hereinafter *Paré*].

law for protecting victims, as it held that a two-minute delay between the sexual assault of a seven-year-old boy and his murder by strangulation did not deprive this horrible murder of its character as a first-degree murder involving the illegal domination of the victim.

The law of first-degree murder has been toughened and expanded through piecemeal changes driven by media attention, advocacy by interest groups representing victims and the police, politics, and a genuine desire to denounce and prevent horrible acts of victimization. In response to a Supreme Court decision that victim impact statements were not generally relevant in faint hope hearings²⁸ and mass murderer Clifford Olson's failed faint hope hearing,²⁹ Parliament made it more difficult for first-degree murderers to be declared eligible for parole after serving fifteen years. The changes include provision for victim impact statements,³⁰ the denial of faint hope hearings to mass and repeat murderers,³¹ screening by provincial chief justices to determine whether there is a reasonable prospect for success at the faint hope hearing,³² and a new requirement that the jury be unanimous in any decision declaring the accused eligible for parole.³³ The traditional idea that only a unanimous jury could convict a person has been turned on its head to require unanimity for a decision to mitigate punishment, and the chief justices have been given the new and difficult task of determining, on the basis of written material, whether there should even be a faint hope hearing. Still, the very idea of faint hope hearings offends some victim advocacy groups and some political parties. Calls to abolish them and the "discount for mass murderers" were heard again in the immediate aftermath of September 11.³⁴

The short list of crimes that can result in a first-degree murder conviction has been getting longer. In 1997, two new offences were added in response to tragic and well-publicized crimes. The new offence of criminal harassment was added to the list after a number of high profile and tragic cases in which women were murdered by

²⁸ *R. v. Swietlinski*, [1994] 3 S.C.R. 481, 92 C.C.C. (3d) 449.

²⁹ See Roach, *Due Process*, *supra* note 5 at 292-96; A. Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 302-05.

³⁰ *Criminal Code*, *supra* note 18, s. 745.63(1)(d).

³¹ *Ibid.*, s. 745.6(2).

³² *Ibid.*, s. 745.61.

³³ *Ibid.*, s. 745.63(3).

³⁴ For example, the then leader of the opposition, Stockwell Day, asked the following in question period: "In the war on terrorism many things should be done but a few things must be done. Under the bill, a terrorist convicted of a mass murder would still be eligible for parole and would definitely be free to walk around in Canada after 25 years. Could the Prime Minister explain how this discount for mass murderers meets the test of reasonableness?" *House of Commons Debates* (16 October 2001) at 6195.

their former partners.³⁵ The second expansion of first-degree murder came in response to Parliament's first wave of organized crime amendments and the death of an eleven-year-old boy in a biker war bombing. The second wave of such amendments after the shooting of Michel Auger added intimidation of a justice system participant (including crime journalists such as Auger) to the list.³⁶ The new anti-terrorism law enacted in the months after September 11 continues this trend by providing that deaths caused while committing or attempting to commit any indictable offence that constitutes a terrorist activity will also be punished as first-degree murder.³⁷ My point is not to criticize or praise these additions to the law of first-degree murder,³⁸ but to note that they reflect a particular narrative, even memorial style in the criminal law based on a greater awareness of the harms suffered by victims of crimes. This ties in with a trend of legislation becoming more embedded in particularistic narratives and political aspirations.³⁹ The rationale for these *Criminal Code* amendments was the need to recognize real and very tragic cases, not the more abstract issues of coherence within the code or respect for fundamental principles of criminal law.

A. *The Criminalization of Motive*

This new narrative and memorial style in the criminal law may also help explain why Bill C-36 requires the prosecutor to prove beyond a reasonable doubt that a terrorist activity was committed "in whole or in part for a political, religious or ideological purpose, objective or cause."⁴⁰ In essence, this requires proof of motive as an essential element of a crime, something that is generally not necessary in criminal law.

³⁵ *Criminal Code*, *supra* note 18, s. 231(6). A similar combination of media and political pressure led to the creation of the criminal harassment or stalking offence itself in 1993. See R. Cairns Way, "The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportunism" (1994) 39 McGill L.J. 379.

³⁶ *Criminal Code*, *ibid.*, s. 231(6.1)(6.2). For further discussion of the media and political pressures that led to these *Criminal Code* amendments, see D. Stuart, "Politically Expedient But Potentially Unjust Legislation against Gangs" (1997) 2 Can. Crim. L. Rev. 207.

³⁷ *Criminal Code*, *ibid.*, s. 231(6.01), as amended by Bill C-36, *supra* note 2, s. 9.

³⁸ Note that the Law Reform Commission of Canada would have defined murders as first-degree murder if committed "for terrorist or political motives" and "by means which the accused knows will cause the death of more than one person." *Supra* note 24 at 58.

³⁹ See e.g. N. Kasirer, "Honour Bound" (2001) 47 McGill L.J. 237; R.A. Macdonald, "The Fridge-Door Statute" (2001) 47 McGill L.J. 11; P. Noreau, "Comment la législation est-elle possible? Objectivation et subjectivation du lien social" (2001) 47 McGill L.J. 195; K. Roach, "The Uses and Audiences of Preambles in Legislation" (2001) 47 McGill L.J. 129; L.B. Tremblay, "La justification de la législation comme jugement pratique" (2001) 47 McGill L.J. 59.

⁴⁰ *Criminal Code*, *supra* note 18, s. 83.01(1)(b)(i)(A).

Only a few years ago, the Supreme Court reminded us of the traditional principle that "it does not matter to society, in its efforts to secure social peace and order, what an accused's motive was, but only what the accused intended to do."⁴¹ But the accused's motive sometimes does matter to society. The irrelevance of motive as a matter of legal principle does not exclude it from being a politically salient factor. A democratic criminal code can criminalize motive.

This, however, does not mean that a democratic criminal code *should* criminalize motive (and in particular motive based on political or religious beliefs). Parliament resisted the temptation to criminalize motive in the past with respect to crimes against female genital mutilation, even though these crimes were often motivated by religious beliefs.⁴² The government's decision to include motive as an element of its many new terrorism offences was criticized by a number of groups who feared that the law would be used to target those who held political or religious views that were deemed to be "extreme" or "unusual".⁴³ The government responded to these criticisms with an amendment providing that "the expression of a political, religious or ideological thought, belief or opinion" would not constitute a terrorist activity unless it fell under one of the other broad definitions of terrorist activities.⁴⁴ Nevertheless, the government persisted with the criminalization of motive in a manner that will make the politics and religion of accused terrorists a fundamental issue in their trials.⁴⁵ This risks further

⁴¹ *United States v. Dynar*, [1997] 2 S.C.R. 462 at para. 81, 115 C.C.C. (3d) 481. See also Justice Dickson's statement that "[t]he mental element of a crime ordinarily involves no reference to motive." *R. v. Lewis*, [1979] 2 S.C.R. 821 at 831, 47 C.C.C. (2d) 24. In *R. v. Latimer*, [2001] 1 S.C.R. 3 at para. 82, 150 C.C.C. (3d) 129 [hereinafter *Latimer*], the Supreme Court even denied the relevance of motive to the issue of whether mandatory punishment was cruel and unusual. An international criminal law scholar has recently observed that "[a] motive is generally irrelevant in criminal law, except at the sentencing stage when it might be relevant to mitigation or aggravation of the sentence. That an accused committed a crime with 'purely personal motives or reasons' does not exonerate him from being guilty of a crime against humanity if his act fits into the pattern of crimes against humanity as described above." K. Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001) at 92.

⁴² In 1997, Parliament amended the existing crime of aggravated assault to provide that wounding or maiming includes female genital mutilation. The amendment makes no mention of political or religious motives for such acts. See *Criminal Code*, *supra* note 18, ss. 268(3)-(4).

⁴³ See *e.g.* testimony of the Coalition of Muslim Organizations and Urban Alliance on Race Relations before the Senate's special committee on Bill C-36, *infra* note 67.

⁴⁴ *Criminal Code*, *supra* note 18, s. 83.01(1.1). Note, however, that threats to commit terrorist acts would be excluded from this protection because they would themselves constitute terrorist activities.

⁴⁵ As Ziyaad Mía has argued, "The unseemly and inappropriate questions that could arise in the course of investigations, interrogations and prosecutions to establish a political or religious motive for

politicizing the trials of suspected terrorists and of blurring the line between investigation of crime and radical political or religious dissent. It also raises the risk of an acquittal if the prosecutor cannot prove the appropriate motive beyond a reasonable doubt.⁴⁶

Why would the government risk losing convictions and alienating minority communities by insisting on criminalizing religious or political motive?⁴⁷ A possible explanation is a desire to denounce not only the crimes of the September 11 terrorists, but also their apparent anti-Western political and religious motives. Although no manifesto explaining the rationale for the horrible events of September 11 has been issued, almost everyone believes that the terrorists acted out of hatred for the West and capitalism, and because of what is commonly called Islamic fanaticism. The motive section of the bill responds to these perceptions and denounces such political or religious beliefs as extreme and criminal. This comes uncomfortably close to criminalizing “stereotypes about Muslims [that are] all present in the back of many people’s minds.”⁴⁸ Indeed, the unfair equation of Islam with extremism or fanaticism, and with religious and political violence, may itself constitute one of the stereotypes that is implicitly invoked by the extraordinary inclusion of motive as an essential element of crimes of terrorism enacted as a direct and immediate response to September 11.

It is unfortunate that we did not have enough confidence to rely on the traditional criminal law principle that motives never justify crimes. Instead, we criminalized extremist motives by making them an essential part of the many new crimes of terrorism. Bill C-36 also criminalizes motive in the new hate crime of mischief to religious property “if the commission of the mischief is motivated by bias, prejudice or hate

‘terrorist activity’ can easily be imagined.” Z. Mia, “Terrorizing the Rule of Law: Implications of the *Anti-terrorism Act*” (2002) *National Journal of Constitutional Law* [forthcoming].

⁴⁶ Even requirements of high forms of subjective intent for war crimes in *R. v. Finta*, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417 and hate crimes in *R. v. Buzzanga and Durocher* (1979), 25 O.R. (2d) 705, 49 C.C.C. (2d) 369 (C.A.) have frequently been criticized for making prosecutions more difficult.

⁴⁷ The motive requirement is not necessary to restrict the new offences to the terrorism context because of the separate requirement of proof of an intent to intimidate the public with regard to its security or to compel actions. *Criminal Code*, *supra* note 18, s. 83.01(1)(b)(i)(B). The *American Patriot Act*, Pub. L. No. 107-56, 115 Stat. 272 (2001), relies on a similar requirement to distinguish crimes of terrorism from other crimes without requiring proof of religious or political motive (*ibid.*, §808).

⁴⁸ W. Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: Oxford University Press, 1998) at 69. It is only when debate matures over a period of time that was not available in the enactment of Bill C-36 that Canadians could learn “not to equate Islam with fundamentalism” and that “not all Muslims support keeping women locked up in the house; not all Muslims support talaq divorces and clitoridectomy; not all Muslims support killing authors who criticize Islam” (*ibid.*).

based on religion, race, colour or national or ethnic origin.”⁴⁹ It could perhaps be argued that this motive-based crime is justified because hate-motivated mischief to religious property is not adequately denounced by the existing crime of mischief, even when supplemented by the recognition of hate as an aggravating factor in sentencing.⁵⁰ At the same time, however, our most serious crime, murder, can adequately denounce murders committed with religious or political motivation. Murder is murder. Its blameworthiness is neither enhanced nor excused by political or religious motives.

The requirement of proof of political or religious motive for the new crimes of terrorism confirms that, as with the case of first-degree murder, we are changing our *Criminal Code* to recognize and respond to particular cases, and not on the basis of general principles. A criminal code that says that no motive can excuse crimes can be the basis for proscribing conduct that we all can agree is unacceptable, but one that denounces certain motives as extreme and criminal runs the risk of alienating our diverse and multicultural citizenry.

B. The Distinct Challenges of Non-Discrimination and Victims' Rights

Bill C-36, like many of the additions to first-degree murder, can be seen as part of an increasing use of the criminal law to respond to well-publicized acts of crime victimization. The awful tragedies of September 11 produced many moving stories of families who searched for loved ones who never returned home. I have argued elsewhere that increased concern about victims and their families has been one of the major recent changes in criminal justice. In my view, concerns about victims can either be channeled into greater attention to crime prevention, restorative justice, and response to the needs of crime victims, or towards symbolic and punitive amendments to the criminal law and assertion of the rights of crime victims to counter claims of rights by those accused of crimes.⁵¹ My preference is for the former strategy, although I understand the latter as a response to both the reality of victimization and a traditional neglect of victim interests in criminal prosecutions. The increased salience of victims in the criminal law, and their irrelevance under the traditional principles of criminal law, also helps to explain the new narrative and case-specific style of so many recent amendments to the *Criminal Code*.

⁴⁹ *Criminal Code*, *supra* note 18, s. 430(4.1).

⁵⁰ *Ibid.*, s. 718.2(a)(i).

⁵¹ See generally K. Roach, “Four Models of the Criminal Process” (1999) 89 J. Crim. L. & Criminology 671; Roach, *Due Process*, *supra* note 5.

In what way should the many victims of September 11 and other acts of terrorism be relevant to the crafting of anti-terrorism measures?⁵² The American *Patriot Act* has many provisions relating to compensation of the families of victims of September 11, while Bill C-36 contains only one provision contemplating that the proceeds of forfeited property of terrorists may be used to compensate victims of terrorist activities.⁵³ This does nothing for the families of the twenty-four Canadians who died in the attacks at the World Trade Centre. The government has so far refused to establish a memorial for the Canadian victims. It has even sent demand letters for back taxes and not given the families temporary tax relief as the Americans have done.⁵⁴ Victim compensation⁵⁵ fits into a non-punitive and restorative model of victims' rights. At the same time, most of the *Patriot Act* and Bill C-36 fits into a punitive model of victims' rights that offers new offences, enhanced penalties, and greater police powers as the main response to crime victimization. The tendency in a punitive model is to assert the rights of victims as a reason to limit the rights of the accused.

McGill law professor Irwin Cotler has called for a reconceptualization of anti-terrorism measures as not so much a contest between the state and the individual or of "national security versus civil liberties", but as one also involving the human rights of victims and potential victims of terrorism. Before September 11, Professor Cotler argued that terrorism was "the ultimate existential assault on human rights and human dignity and that the struggle against terrorism, therefore, must be seen as part of the longer struggle for human rights and human dignity."⁵⁶ After September 11, he took critics of Bill C-36, such as Alan Borovoy of the Canadian Civil Liberties Association, to task for exclusively examining the bill "from the juridical optic of the domestic criminal law/due process model"⁵⁷ and not also as part of an international effort to

⁵² On the role that the families of victims of terrorism have played in law reform in the United States, see M. Crenshaw, "Counterterrorism Policy and the Political Process" (2001) 24 *Studies in Conflict & Terrorism* 329 at 334.

⁵³ *Criminal Code*, *supra* note 18, s. 83.14(5.1); *Patriot Act*, *supra* note 47, §621-24.

⁵⁴ M. Friscolanti, "Ottawa Warns Sept. 11 Widow to Pay Back Taxes" *National Post* (5 September 2002) A3.

⁵⁵ The issue of victim compensation can, however, raise complex issues of distributive justice. The generosity of the *Patriot Act* to the families of the victims of September 11 may create inequities in the treatment of the families of other crime victims. A focus on victim compensation through fines and mandatory restitution may constitute a highly regressive tax that compensates for an inadequate social safety net that should catch not only the victims of crime, but the victims of other misfortunes.

⁵⁶ I. Cotler, "Towards a Counter-Terrorism Law and Policy" (1998) 10:2 *Terrorism & Pol. Violence* 1 at 1.

⁵⁷ I. Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy" in Daniels, Macklem & Roach, *supra* note 16, 111 at 112 [hereinafter Cotler, "Foundational Principles"].

achieve human rights and security. Professor Cotler's arguments follow important developments in both domestic and international law which have proclaimed the rights of crime victims and groups such as women and various minorities who are disproportionately vulnerable to certain crimes. In this thinking, rights are violated not only by the state, but also by crime committed by non-state actors. Professor Cotler is presently a Liberal Member of Parliament and his calls for "thinking outside the box" and a reconceptualization of anti-terrorism as a matter involving not only the state and the rights of the accused, but also the human rights of victims were influential in the government's drafting, redrafting, and defence of Bill C-36. As then Minister of Justice McLellan explained, Professor Cotler's arguments were used by her department in an attempt to distinguish Bill C-36 from a "law-and-order agenda".⁵⁸

I have found Professor Cotler's views about anti-terrorism measures challenging. I agree with some and disagree with others. Nevertheless, his strongly expressed views have helped clarify some of my own thinking about the respective roles of due process, non-discrimination, and the rights of victims. Professor Cotler has written eloquently of the need to ensure that jurors in war crime cases do not give vent to racial and religious prejudices that may infect the trial process.⁵⁹ I agree wholeheartedly that the non-discrimination principle has an important role to play in the administration of the criminal law and that it should be applied to protect victims of crime as well as the accused.⁶⁰ It is noteworthy in this respect that police in Montreal, Toronto, and elsewhere, as well as the Muslim and Jewish communities in Canada, have reported significant increases in hate crimes since September 11.⁶¹ Bill C-36 responds to concerns about hate crimes by providing for the deletion from the Internet of material established on a balance of probabilities to be hate propaganda,⁶² and providing a new offence of hate-based mischief to religious property.⁶³ Leaving aside the difficult questions of the efficacy of these new hate crimes and whether hate motives should be

⁵⁸ L. Chwialkowska, "Human Rights Lawyer Unlikely Ally of Terror Bill" *National Post* (25 October 2001) A6.

⁵⁹ I. Cotler, "War Crimes Law and the Finta Case" (1995) 6 Supreme Court L.R. 577 at 641-46.

⁶⁰ See K. Roach, "Using the *Williams* Question to Ensure Equal Protection for Aboriginal Crime Victims" (2001) 38 C.R. (5th) 335.

⁶¹ In Toronto, this increase was first directed "against anyone who was perceived to be of the Muslim (Islamic) religion," but "then evolved to include occurrences targeting U.S. and Canadian interests and the Jewish community." J. Quinn, "Spike in Hate Crimes Followed Sept. 11" *The Toronto Star* (26 February 2002) B3; P. Ray, "Arabs, Muslims Still Live in Fear of Attacks" *The Toronto Star* (23 March 2002) A20.

⁶² *Criminal Code*, *supra* note 18, s. 320.1.

⁶³ *Ibid.*, s. 430(4.1).

criminalized,⁶⁴ it is important that we do all we can to extend the equal and non-discriminatory protection of the criminal law to minorities victimized by hate crimes.

The anti-discrimination principle applies to both potential victims and potential suspects of crime. Professor Cotler has correctly and courageously recognized that “[t]here is a potential in the expansive powers of the Act for the possible singling out of visible minorities for differential treatment” and has proposed that a non-discrimination clause such as that found in paragraph 4(b) of the *Emergencies Act*⁶⁵ be added to Bill C-36.⁶⁶ I again wholeheartedly agree with this proposal. Along with my colleague Sujit Choudhry, I presented a brief to the Senate Special Committee calling for an explicit ban on racial and religious profiling in the administration of Bill C-36, as well as for more robust reporting requirements that would ensure that relevant statistics are collected to determine whether such discriminatory profiling was occurring.⁶⁷ Unfortunately, the government decided to ignore all of these proposals. One of the greatest dangers of September 11 is that it will result in the crude and discriminatory law enforcement technique of targeting people simply because of their race or religion.

Professor Cotler and I agree on the importance of the non-discrimination principle in criminal justice and that it applies to protect both those suspected of and those victimized by crime. Where we part company, however, is in thinking it is an outmoded example of being incapable of “thinking outside the box” to frame the issues in Bill C-36 as matters that fit the traditional due process or civil libertarian paradigm of the state versus the individual. To borrow a phrase from a leading criminal law scholar, Don Stuart, I am inclined to think within the box on this one, and that box is a prison cell or an open-air cage at Camp X-Ray.⁶⁸ In my view, there is a danger of thinking that every criminal justice issue should be resolved by balancing the rights of the accused against those of the victim. The accused has a right to fair treatment at the hands of the state while the victim can only claim a right to inherently imperfect pro-

⁶⁴ For further discussion, see text accompanying note 47.

⁶⁵ R.S.C. 1985 (4th Supp.), c. 22.

⁶⁶ Cotler, “Foundational Principles”, *supra* note 57 at 128.

⁶⁷ K. Roach & S. Choudhry, “Brief to the Special Senate Committee on Bill C-36” (December, 2001) [unpublished] [hereinafter Roach & Choudhry, “Brief”]. See also Coalition of Muslim Organizations, “Brief to Standing Committee on Justice and Human Rights on Bill C-36” (8 November 2001), online: Muslim Lawyers Association <<http://www.muslimlaw.org/MLA.c36.pdf>> (date accessed: 1 November 2002). The present reporting requirements only require collection of statistics on the “number” of times that the extraordinary powers of preventive arrests and investigative hearings are used. *Criminal Code*, *supra* note 18, s. 83.31.

⁶⁸ D. Stuart, “The Anti-terrorism Bill C-36: An Unnecessary Law and Order Quick Fix That Permanently Stains the Canadian Criminal Justice System” in D. Daubney *et al.*, *Terrorism, Law and Democracy: How is Canada Changing Following September 11?* (Montreal: Thémis, 2002) 173 at 185.

tection by the state from crime and other harms. In difficult cases, the rights of the accused and the victim cannot be reconciled without necessarily limiting the competing rights.⁶⁹ In the anti-terrorism context, it will often be better to ensure fair treatment of the accused rather than to sacrifice such treatment in the often vain hope that unfair treatment of the accused may actually prevent terrorism or respond to the needs of victims.

We do both victims and the criminal law a disservice when we use victims as a reason for not respecting the rights of the accused. Criminal justice must be more than a popularity contest between the accused and the victim, because the victim will win every time. Moreover, there is little evidence to think that a tougher criminal law will actually deter terrorists. A focus on ratcheting up the criminal law to deal with the real danger of the new "transnational super-terrorist" may blind us to the frequent failure of deterrence with ordinary criminals, let alone suicide bombers. It may also blind us to the value of less dramatic forms of crime and disaster prevention that may more effectively prevent terrorism. The danger is that we will abandon important principles of criminal law in the face of the incredible suffering of the victims of horrific crimes, and that we will focus our energies on the deterrence and punishment of crime when there may be more effective means both to prevent terrorism and to honour its victims. The two dozen Canadian victims of September 11 would in my view have been better honoured by appropriate memorials, victim compensation, and better airline security than by the rushed amendments that were made to the *Criminal Code*.

We also do the non-discrimination principle a disservice when we use it as a justification for all anti-terrorism measures. To be sure, many acts of terrorism are motivated by hatred on religious, racial, and other grounds, and we must ensure that racism and hatred do not taint the prosecution of such crimes. Nevertheless, we can affirm the equal value and humanity of every person by applying the regular criminal law in a resolute and non-discriminatory manner to each and every act of terrorism. Our existing criminal law is based on the proposition that all victims are equal and that political or religious motives never excuse crimes. We do not need a special motive-based criminal law to denounce and punish the crimes of terrorism. Murder is murder.

The thousands who were murdered on September 11 came from many countries and many religions. They were targeted because of where they worked. There is little reason to fear that a proper criminal trial of those accused of such crimes whether in a

⁶⁹ Note, however, that the Supreme Court has endorsed such a relational approach to competing rights in a number of cases, including *R. v. Mills*, [1999] 3 S.C.R. 668, 139 C.C.C. (3d) 321 and *R. v. Mentuck*, [2001] 3 S.C.R. 442, 205 D.L.R. (4th) 512, 2001 SCC 76.

domestic or international tribunal would be derailed by prejudice or discrimination against the victims of September 11. Indeed, the much greater threat of discrimination in this particular context is towards those of Arab origin or the Muslim religion who may be accused, perhaps falsely, of involvement in such heinous crimes. I agree with Professor Cotler that we must bring the anti-discrimination principle into the heart of our criminal law, but I disagree that anti-terrorism measures must be conceived as a balance between the rights of the accused and those of the victims and potential victims of terrorism. Such a balance will be at the inevitable expense of the rights of the accused.

C. Democratic Law Reform for a Democratic Criminal Code

The new narrative style of law reform, combined with the incredibly moving and powerful stories of those who are victimized by crime, has challenged the very nature of criminal law, which has traditionally been conceived as a matter between the accused and the state. We may have misgivings, but it is clear that we have entered into a new realm of criminal law reform that will be driven by increased concerns for victims and responses to horrific crimes. The question then becomes how those interested in the study and the administration of the law should respond to this new style of law-making and thinking “outside of the box”. The question for criminal lawyers is how do we respond to the reality that theoretically coherent recodification may not be a priority and that, even if it did occur, the criminal law would still be amended in response to well-publicized and horrific crimes, such as those of September 11.

One temptation that should be resisted is to conclude that criminal law has simply become politics and give up in despair. Such abdication will only ensure that traditional principles that many criminal lawyers value will be ignored. There is a need to hold up proposed criminal law reform to principles such as the requirement of a clearly defined and restrained criminal law, fault, and respect for rights such as freedom of expression, the right to silence, and the presumption of innocence. These principles were not entirely absent from Bill C-36 even as it was first introduced. The Department of Justice deserves credit for not following the British example of making frequent use of reverse burdens on the accused or of using September 11 as an excuse to introduce crime control measures that are not related to terrorism.⁷⁰ It also deserves credit for specifying subjective fault elements for most offences and not using objective standards of fault found in some offences in the American *Patriot Act*. The criminal law bar and academy no longer have the power they once did with respect to

⁷⁰ A. Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (London: Sweet & Maxwell, 2002) at 95.

criminal law reform, but they still provide an interpretative community that matters. These groups must, as they did in response to Bill C-36, mobilize quickly to place proposed legislation under the microscope, and they should attempt to engage the media in this process. Having said this, the human resources necessary for this endeavour are limited and a sense of exhaustion and/or futility are real enemies.

Another temptation that should be resisted is to give up on the legislative process and wait to challenge new criminal laws in the courts under the *Charter*. Once the law is enacted, it may be too late. The law will empower the police and provide precedents for other laws.⁷¹ Bill C-36 has been law since December 2001, but we are likely still years away from *Charter* challenges to it. Even if *Charter* challenges are brought, we cannot look to courts to enforce all the fundamental principles of criminal justice. The Supreme Court has indicated that “[i]t is important to distinguish between criminal law theory ... and the constitutional requirements of the *Charter* ... ‘The Constitution does not always guarantee the “ideal”.’”⁷² The Court will not likely strike down those parts of Bill C-36 that criminalize motive or incorporate unclear international law standards. They may recognize that investigative hearings and preventive arrests violate the right to silence and the right against arbitrary detention only to hold that they are justified under section 1 of the *Charter* because of the importance of national security. They may hold that executive as opposed to judicial determination of whom is a terrorist group violates the presumption of innocence, only to decide that this strikes a reasonable balance between the accused’s rights and the state’s interests. A case can even be made that the courts more zealously protected some traditional principles of the criminal law under the common law than they now do under a *Charter* that comes with section 1 and all the baggage of judicial review. Thus even if there were a consensus about criminal law theory—and increasingly there is not⁷³—we could not look

⁷¹ Bill C-24, *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts*, 1st Sess., 37th Parl., 2001 (assented to 18 December 2001, S.C. 2001, c. 32) served as a blueprint of sorts for some of the new offences in Bill C-36. Even temporary anti-terrorism legislation in Britain has served as a model for restrictions on the right to silence in that country. See O. Gross, “Cutting Down Trees: Law-Making under the Shadow of Great Calamities” in Daniels, Macklein & Roach, *supra* note 16, 39 at 49-50.

⁷² *R. v. Creighton*, [1993] 3 S.C.R. 3 at 53, 83 C.C.C. (3d) 346, McLachlin J., quoting Lamer C.J.C. Similarly, the Court has drawn a distinction between “the wisdom of employing minimum sentences from a criminal law policy or penological point of view” and the question of whether such penalties are unconstitutional. *Latimer*, *supra* note 41 at para. 88.

⁷³ For example, Christine Boyle has argued that recodification of the criminal law “runs the risk of entrenching principles which neglect the interests of groups which have not traditionally had a voice in the framing of the criminal law.” C. Boyle, “Commentary” in Stuart, Delisle & Manson, *supra* note 25, 146 at 148.

to the courts to enforce it as a matter of constitutional law. We cannot rely on the courts to save us from ourselves.

A new style of contextual and democratic engagement with law reform is necessary to match a new style of contextual and democratic law-making. Following the often successful example of feminist law reform,⁷⁴ academics and others need to form alliances and work with various groups in civil society that have an interest in proposed criminal law reforms. Thus it was important that elements of the anti-globalization, labour, and Aboriginal movements were mobilized to oppose Bill C-36 over concerns that as originally introduced it could designate some of their illegal protests as terrorist activities. Those who believe in fundamental principles of restraint in the criminal law should work with groups in civil society to demonstrate that such concepts are relevant in their lives. Civil liberties groups can reinvent themselves through engagement with new constituencies such as feminists and gays and lesbians, who are opposed to censorship, or anti-poverty or Aboriginal groups, who too often find themselves on the receiving end of state repression. The organized bar should exercise its independence and talents by reaching out to groups who find their rights threatened. This is especially important when the vulnerable are unpopular minorities.

A broad range of civil society groups were mobilized to oppose Bill C-36 as it was first introduced. The groups included Aboriginal groups who raised concerns that confrontations such as those seen at Oka and Ipperwash might result in Aboriginal protesters being treated as terrorists. They also included various unions who raised concerns that illegal strikes that disrupted essential services might be considered as terrorism. Concerns were also raised that anti-globalization protests and the financial support sent by immigrants to their homelands might also be considered as terrorism. The Coalition of Muslim Organizations warned of the danger that the effect of Bill C-36 would be disproportionately borne by the 600,000 Muslim Canadians. They gave a human face to traditional concerns about due process by eloquently arguing that

The adverse impacts of this Bill will not be remedied by judicial oversight and *post facto* vindication. Stern judicial sanctions of the State's violation of rights make great case law ... However, case law will not put together ruined families, regain lost livelihoods, or rebuild friendships and trust, which were fractured by the suspicion, innuendo and stigmatization sown by the overly zealous acts of the State.⁷⁵

⁷⁴ See e.g. S. McIntyre, "Redefining Reformism: The Consultations That Shaped Bill C-49" in J.V. Roberts & R.M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293.

⁷⁵ Coalition of Muslim Organizations, *supra* note 67 at 3.

In my view, this sort of narrative is necessary to respond to the dominant narrative of fear and victimization that emerged from September 11.

A contextual approach to law reform should pay more attention to how proposed laws will be enforced. Much of the debate in the media and in committee about Bill C-36 focused on legalistic discussions of the definition of terrorist activities as opposed to questions about whether either Bill C-36 or existing laws would be administered in a manner that unfairly targeted people for investigation because of their religion or national and ethnic origin.⁷⁶ Although some reporting requirements were added after second reading to record the “number” of times preventive arrests and investigative hearings are used, such quantitative data may not be sufficient to judge any allegations of racial profiling.⁷⁷ Much greater attention needs to be paid to ensuring that oversight bodies can inquire into and audit the exercise of the new police powers and provide effective remedies for any abuse of new and existing powers. Bill C-36 is dangerous in this respect because it gives all peace officers increased powers even though many are not subject to effective external oversight.⁷⁸ It remains to be seen whether requirements of consent from either the federal or provincial attorneys general for the use of many of the new police powers and criminal offences in Bill C-36 will provide sufficient safeguards. Attorneys general should use these powers in an independent manner to prevent their abuse, but much will depend on the information they receive from the police.

The comparative lack of attention to issues of law enforcement is also seen in the scant attention given to Bill C-35. Although it is buried between more mundane provisions concerning tax and liquor exemptions for foreign diplomats, it authorizes the

⁷⁶ S. Choudhry, “Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the *Charter*” in Daniels, Macklem & Roach, *supra* note 16 at 367 [hereinafter Choudhry, “Protecting Equality”].

⁷⁷ *Criminal Code*, *supra* note 18, s. 83.31.

⁷⁸ A case can be made that new powers should have been given not to every police officer but to the Canadian Security Intelligence Agency, which is subject to special forms of accountability. See M.L. Friedland, “Police Powers in Bill C-36” in Daniels, Macklem & Roach, *supra* note 16, 269 at 270-74. As Bob Rae, a former member of the Security Intelligence Review Commission, has suggested, a case can be made that Bill C-36 is a move back to the pre-McDonald Commission days in the 1970’s when the RCMP was the lead agency in security matters and often had trouble distinguishing strong dissent from terrorism. B. Rae, “Notes for an Address” in Daubney *et al.*, *supra* note 68, 405 at 407. On the rationale for placing security intelligence functions in the hands of a civilian agency subject to special civilian and parliamentary oversight, see Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Certain RCMP Activities and the Question of Governmental Knowledge* (Ottawa: Minister of Supply and Services Canada, 1981) [hereinafter *Certain RCMP Activities*].

RCMP to “take appropriate measures, including controlling, limiting or prohibiting access to any area to the extent and in a manner that is reasonable in the circumstances.”⁷⁹ This provision could cloak with the legitimacy of specific statutory authorization the 4.5 kilometer, 2 metre high fence used at the Summit of the Americas conference in Quebec City. This security measure was challenged under the *Charter*, but the judge denied a request for an interlocutory injunction and held that the barrier was a justified limit on freedom of expression in the public interest. Even this *Charter* review seemed driven by narratives, as the judge noted television coverage presented in evidence of the World Trade Organization demonstrations in Seattle.⁸⁰ The assumption seemed to be that without the imposing fence, similar violent demonstrations would occur in Quebec, with anti-globalization protestors in both venues being seen as extremist and potentially violent. Although this was technically a judgment that it was not in the public interest to grant an interlocutory injunction to tear down the barrier, it is now predictably being cited by the government as evidence that the new provision in Bill C-35 is consistent with the *Charter*.⁸¹ The willingness of courts under section 1 of the *Charter* to accept reasonable limits on expression may not provide sufficient protection to allow dissent and freedom to thrive. A democratic and contextual approach to law reform would not be limited by the question of whether the way the police responded to anti-globalization protests in Vancouver, Windsor, Quebec City, and Ottawa was “*Charter*-proof”.

Greater attention should be paid to empirical questions of the efficacy of proposed law reforms in a contextual approach to law reform. Formal reforms to the criminal law are often a cheaper and more visible substitute for more expensive preventive measures, and there is too much naïve optimism about what the criminal law can achieve in terms of human security. In the anti-terrorism context, we have to question whether Bill C-36 will actually make us safer. Can “peace bonds for terrorists”⁸² actually prevent terrorism? Are preventive arrests more effective than close surveillance? Will those with knowledge about terrorism tell the truth when compelled to testify before investigative hearings? Do rewards encouraging co-operation work better than

⁷⁹ Bill C-35, *An Act to amend the Foreign Missions and International Organizations Act*, 1st Sess., 37th Parl., 2001, cl. 10.1(2) (assented to 30 April 2002, S.C. 2002, c. 12).

⁸⁰ *Tremblay v. Quebec (P.G.)*, [2001] R.J.Q. 1293 at para. 92.

⁸¹ J. Bronskill, “Good Fences Make Good Summits: RCMP” *National Post* (25 February 2002) A6, citing Minister of Foreign Affairs Bill Graham.

⁸² G.T. Trotter, “The Anti-terrorism Bill and Preventative Restraints on Liberty” in Daniels, Mackle & Roach, *supra* note 16, 239 at 241.

punishing people for refusing to co-operate at an investigative hearing?⁸³ Can enhanced penalties deter suicide bombers? These are all practical and empirical questions that should have figured prominently in our debates about Bill C-36. This is not to say that criticisms of investigative hearings and preventive arrests as contrary to fundamental principles of our adversary system of criminal justice were wrong, but rather that they should have been supplemented by empirical critiques embedded in the context being regulated.

D. The Challenge of Preventing Terrorism

Bill C-36 has been justified on the basis that it aims to prevent terrorism before it occurs. Nevertheless, the preventive vision of the bill is impoverished. It is limited to police powers and criminal prosecutions and a few related administrative measures such as listing a group as a terrorist organization and depriving it of charitable status. Bill C-36 does not provide increased powers or resources to our security intelligence agencies which can, through a variety of means, gather the intelligence often necessary to prevent terrorism. Although Bill C-36 does recognize the Communication Security Establishment, it does not provide for increased co-ordination of Canada's multiple security intelligence agencies and it introduces Canada's many police forces as new players in the counter-terrorism field. Bill C-36's neglect of the issue of co-ordination is particularly unfortunate as it appears that a lack of co-ordination among American agencies contributed to the intelligence failure of September 11.

Greater attention also needs to be devoted to alternatives to the criminal sanction. It is unfortunate that Bill C-36 was introduced before Bill C-42,⁸⁴ which focuses on administrative and regulatory responses to terrorism. For example, many concerns

⁸³ See P.B. Heymann, "Dealing with Terrorism: An Overview" (2001-2002) 26:3 *International Security* 24 at 37, online: MIT Press <http://mitpress.mit.edu/journals/pdf/isec_26_03_24_0.pdf> (date accessed: 1 November 2002):

Ramzi Yousef, the mastermind of the first World Trade Center bombing in 1993 and the author of a plan to simultaneously attack a number of U.S. airliners crossing the Pacific, was caught by using offers of rewards on matchbooks. Alternatively, people arrested know that they can reduce their sentence or even obtain immunity by revealing information about far more serious past crimes or future dangers. ... Both of these systems of rewards need better advertising.

See also M.L. Friedland, "Controlling the Administrators of Criminal Justice" (1988-89) 31 *Crim. L.Q.* 280.

⁸⁴ 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 (1st reading 22 November 2001).

were expressed about that part of the definition of terrorist activities in Bill C-36 that applied to intentional and serious disruptions of essential public and private services. One of the government's justifications for this potentially repressive provision was that it was necessary to protect critical infrastructure such as pipelines and hydro towers. Bill C-42 takes a more creative approach to preventing such acts by authorizing the National Energy Board to require companies to take safety and security measures to protect pipelines.⁸⁵ This regulatory approach of requiring corporations to take responsibility for their own security measures—whether through private police, risk surveillance strategies, or environmental design⁸⁶—is more in line with contemporary security strategies than the older state-based deterrence and criminal law model of Bill C-36.⁸⁷ Indeed, many of the new administrative powers in Bill C-42 relating to the screening of airline passengers, refugee applicants, the establishment of better airport security, the import and export of potentially hazardous goods and technology such as explosives, and the regulation of biological agents may actually have a greater chance to prevent terrorism than the broad offences and enhanced punishments of Bill C-36. This is not to say that all of the powers in Bill C-42 are justified.⁸⁸ Nevertheless, the dangers of “thinking outside the box” and taking new and creative approaches to anti-terrorism are less when administrative measures are used that will not imprison people in boxes.

Administrative measures can integrate and prioritize the threat of terrorism with other threats to human security. The scary scenario of nuclear or biological terrorism should not blind us to the more likely threats of nuclear or biological accidents.⁸⁹

⁸⁵ *Ibid.*, cl. 94. See now cl. 84 of Bill C-55, *infra* note 88.

⁸⁶ Another example would be companies qualifying for fast tracking at customs if they comply with measures to keep their products secure. B. McKenna, “Companies Enlist in U.S. War against Terrorism” *The Globe and Mail* (16 April 2002) A11.

⁸⁷ D. Garland “The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society” (1996) 36 *British Journal of Criminology* 445.

⁸⁸ Concerns about the ability of the minister of defence to create broad military security zones that could prohibit protest without legislative or judicial approval led to the withdrawal of Bill C-42 and the introduction of an amended but largely similar bill, Bill C-55, *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., 2001-2002 (1st reading 29 April 2002). Concerns have been expressed that some of the surveillance powers in this bill extend beyond the terrorism context to other law enforcement purposes. The bill also frequently contemplates prosecutions and penalties as well as using more creative strategies such as licensing of hazardous goods.

⁸⁹ The dean of the Harvard School of Public Health, Barry Bloom, has commented that “[t]he threat of bioterrorism is an opportunity to protect ourselves against all infectious diseases,” and has observed that while five people have died in the United States from anthrax-laced letters, at least 20,000 people die there each year from influenza. Quoted in A. Picard, “Bioterrorists Prey on Public’s Anxiety” *The*

When the harms are truly catastrophic, we should not rely on attempts to change human behaviour, but instead engineer the environment to make it safer from both human error and malfeasance.⁹⁰ Indeed, the environmental approach to preventing terrorism can be expanded to a broader concern about the multiple risks faced in our complex society. The prestigious National Research Council in the United States has recently concluded that many environmental and engineering responses to the dangers of terrorism “will not only make the nation safer from terrorist attacks but also make it safer from natural disasters, infectious diseases, hackers disrupting the Internet, failure in electric power distribution and other complex public services, and human error causing failures in such systems.”⁹¹ The challenge will be to acknowledge the insecurity created by our reliance on risky technology such as nuclear power, computer systems, energy supplies, airplanes, imported energy, and high buildings, while not overcompensating by falling back on the heavy hand of a criminal law that may not be that effective and that can also undermine the social structures needed to counter the risky nature of modern life.⁹²

Globe and Mail (18 February 2002) A9. The best plans for responding to the very real danger of “loose nukes” in the former Soviet Union focuses not on deterring those who would obtain them for criminal ends, but on destroying nuclear materials and providing more secure and centralized environments for their storage. The recent G8 summit committed itself to a \$20 billion program over the next ten years “to address non-proliferation, disarmament, counter-terrorism and nuclear safety issues. Among our priority concerns are the destruction of chemical weapons, the dismantlement of decommissioned nuclear submarines, the disposition of fissile materials and the employment of former weapons scientists.” “Statement by G8 Leaders: The G8 Global Partnership against the Spread of Weapons and Materials of Mass Destruction” Kananaskis, Alberta, 27 June 2002, online: G8 Information Centre <<http://www.g8.utoronto.ca/g7/summit/2002kananaskis/arms.html>> (date accessed: 1 November 2002).

⁹⁰ An epidemiological or public health approach to harms is often based on skepticism about the ability to control human behaviour and focuses rather on regulation of both the physical and socio-cultural environment to prevent and reduce harms. See M. Friedland, M. Trebilcock & K. Roach, *Regulating Traffic Safety* (Toronto: University of Toronto Press, 1990) at 13-18. For example, a public health approach would not focus on deterring suicide bombers, but limiting their access to explosives through centralized controls and licensing systems. It would also explore the possibility of limiting the access of potential suicide bombers to populated areas in a variety of ways, including the use of barriers and sensors for explosives. It would also focus on issues such as fire and blast standards for buildings. Attempting to respond to some of the grievances that produced the terrorism could also be a response suggested by a public health approach, but only if it resulted in empirically verifiable benefits. See K. Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queens University Press) [forthcoming in 2003].

⁹¹ National Research Council, *Making the Nation Safer: The Role of Science and Technology in Countering Terrorism* (Washington: National Academies Press, 2002) at 23.

⁹² See e.g. D. Schneiderman, “Terrorism and the Risk Society” in Daniels, Macklem & Roach, *supra* note 16, 63; T. Homer-Dixon, *The Ingenuity Gap* (New York: Alfred A. Knopf, 2000).

Preventive re-engineering and surveillance of places may also produce fewer rights violations than a more punitive and reactive criminal justice approach that focuses on people. Ashton Carter of Harvard's Kennedy School of Government has recently argued that surveillance of means, such as crop dusters, germ culture, bomb ingredients, and pilot instruction,

raises far fewer civil liberties issues than does surveillance of persons, and it might be much more effective. A group that evades surveillance becomes subject to *prevention* by efforts to keep destructive means out of their hands. ...

Placing all Middle Eastern male noncitizens resident in the United States under surveillance, for example, is both objectionable and impractical. But inquiring after all those persons, of whatever nationality, who take flying lessons but are not interested in learning to take off or land, who rent crop dusters, or who seek information on the antibiotic resistance of anthrax strains or the layout of a nuclear power plant is feasible and might be extremely useful.⁹³

Professor Carter suggests that catastrophic terrorism should be treated as a disaster and that this will require a multidisciplinary and multi-agency approach without any one lead agency. In the Canadian context, the multi-departmental approach of Bill C-42 may be more effective in preventing terrorism than the criminal justice approach of the *Anti-terrorism Act*, which makes law enforcement the lead agency in combating terrorism. The prospect of deliberate poisoning of water and food supplies, added to the reality of accidental poisoning of water in Walkerton, Ontario and elsewhere, should convince governments to invest in better monitoring of our food and water supplies. Nevertheless, the immediate demand after September 11 was for the reassurance of expanding and toughening our criminal law.

Too much of the response to September 11 has been based on a criminal justice paradigm. Even the military response has often been justified on the basis of the criminal law concepts of catching and punishing the evil ones and their accomplices⁹⁴

⁹³ A.B. Carter, "The Architecture of Government in the Face of Terrorism" (2001-2002) 26:3 International Security 5 at 15, 19 [emphasis in original], online: MIT Press <http://mitpress.mit.edu/journals/pdf/isec_26_03_5_0.pdf> (date accessed: 1 November 2002).

⁹⁴ As one commentator has noted:

[T]he rhetoric of the current military action in Afghanistan draws largely on the rhetoric of the criminal law. The enunciated goal of the campaign is to disrupt terror networks and to "bring [their members] to justice." This goal is essentially identical to the primary goal of the criminal law: to prevent harm by punishing those who cause or would cause it. U.S. military action thus appears in this case to be an instrument of American criminal law: a continuation of criminal justice policy carried on by other means.

"Responding to Terrorism: Crime, Punishment, and War" Note (2002) 115 Harv. L. Rev. 1217 at 1224 [footnotes omitted].

as opposed to controlling weapons of mass destruction and building democracies.⁹⁵ Domestically⁹⁶ and now internationally, we are putting increasing emphasis on viewing harms through the lens of retributive criminal justice and of offering the criminal law as the primary response to well-documented harms and risks. It is not a coincidence that this increased emphasis on crime coincides with less emphasis and less consensus about the need for reforms to achieve greater social, political, and economic justice. One is much more likely today to hear discussions of the evil of crime as opposed to its "root causes". Indeed, there is a danger that discussion of the causes of terrorism will become a taboo subject because they are vulnerable to being portrayed as an attempt to excuse violence.⁹⁷ Domestic and foreign policy are being narrowed and made more harsh by the emphasis placed on punishing crime.

The antidote to a criminalization of politics and its narrow focus on issues of individualized intent and evil is to place crime in its larger political, economic, and social context. It is thus heartening that leaders of eleven countries, including Canada and the United Kingdom (but not the United States⁹⁸), recently agreed at the Progressive Summit that "[w]e must be resolute in fighting terrorism and equally resolute in tackling its causes. ... For the only lasting answers lie in justice, more effective inter-

⁹⁵ On the need for greater emphasis on these preventive and development aspects of American foreign policy, see S.M. Walt, "Beyond bin Laden: Reshaping U.S. Foreign Policy" (2001-2002) 26:3 *International Security* 56, online: MIT Press <http://mitpress.mit.edu/journals/pdf/isec_26_03_56_0.pdf>.

⁹⁶ For a discussion of the concept of the "criminalization of politics", see Roach, *Due Process*, *supra* note 5 at 312-13. On the related concept of "governing through crime", see Simon, *supra* note 21; M. Valverde, "Governing Security, Governing through Security" in Daniels, Macklem & Roach, *supra* note 16 at 83.

⁹⁷ Some attempts to link September 11 with Palestinian grievances have been resisted. New York Mayor Giuliani returned a \$10 million donation from a Saudi Prince who commented, "Our Palestinian brethren continue to be slaughtered at the hands of the Israelis while the world turns the other cheek." See K. Roach, "The Dangers of a Charter-Proof and Crime-Based Response to Terrorism" in Daniels, Macklem & Roach, *supra* note 16, 131 at 147, n. 41 [hereinafter Roach, "Dangers"]. Prime Minister Chrétien recently received strong criticism for comments that related September 11 to global disparities in wealth and power with former Prime Minister Mulroney denouncing Chrétien's remarks as "false, shocking, morally specious...essentially the case the terrorists have tried to make." Others, however, including former Prime Minister Joe Clark accepted the comments and argued that Canada should spend more on foreign development. S. McCarthy, "PM's Sept. 11 Remarks 'Disgraceful', Mulroney Says" *Globe and Mail* (13 September 2002) A1 at A4.

⁹⁸ President Bush did, however, subsequently announce a \$5 billion increase in development funding and stated, "We fight against poverty because hope is an answer to terror." G. Fraser, "Fight Poverty to Beat Terrorism: Bush" *The Toronto Star* (23 March 2002) A26.

national co-operation, peace and freedom, democracy and development.”⁹⁹ Although these are platitudes, they are platitudes that counterbalance the focus on the capture and punishment of evildoers that is promoted by the criminalization of politics at either the domestic or international level. My point is not that blame and punishment for criminals is not due, but that society also needs to respond in a more holistic and restorative manner to the commission of even the most serious crimes. Canada in particular should resist the urge to take an exclusively punishment-based approach to crime either domestically or internationally, and it should draw on its conservative and socialist traditions to integrate crimes into the larger context of social, economic, and political justice.¹⁰⁰ The dominance of crime on the American public agenda, as well as that country’s dramatic and harsh reliance on incarceration and the death penalty, may reflect the inability of the United States’ decentralized system of government to deliver social, economic, or political justice.

In summary, we should pay attention to alternatives to the criminal law that can help prevent terrorism. My point is not that the criminal law has no role to play, but that we should rely less on expanding and toughening it. We also need a more contextual and empirical approach to criminal law reform. We must address not only whether the criminal law as written complies with fundamental principles, but also whom it will benefit, whom it will harm, and what it is likely to accomplish. The political and democratic nature of the criminal law requires a political and democratic fight to maintain respect for its fundamental principles and restraint in its use. The organized bar and the academy need to make alliances with the groups that may be targeted under proposed laws and help provide practical and narrative, as well as principled, arguments about the harms of a tougher and broader criminal law. Expertise about the fundamental principles of the law and the often hollow threat of ultimate victory in court is not enough.

⁹⁹ S. McCarthy, “Antiterror Coalition’s Fissures Are Showing” *The Globe and Mail* (25 February 2002) A10.

¹⁰⁰ In his brilliant survey of Canadian political trials from the 1837 rebellions to the October Crisis of 1970, Kenneth McNaught observed that

few countries have witnessed the repentance of such a high proportion of political rebels. It is not impossible that a major reason for this has been the combination of firm action and succeeding lenience which seems to characterize our basically conservative political-judicial tradition. It seems unlikely, for example, that had Vallières been as closely implicated in a revolutionary movement in the American republican democracy as he was in Quebec he would today not only be free but the beneficiary of a federal grant to assist community organization.

Supra note 23 at 139.

II. The Challenge of Anti-terrorism to Independent Courts

Although the courts cannot be relied upon to enforce all of the fundamental principles of criminal law, it should not be assumed that they will not play an active role that may disrupt some elements of Canada's anti-terrorism strategy. The courts as bodies committed to precedent and reason have an important role to play in reminding us about our deepest and most lofty commitments in times of crisis. As Justice Abella has argued, it is because "the public is likely to be apprehensive and raw for a long time" in the wake of September 11, that judges "will have to be vigilant for a long time: ... vigilant in remembering that compliance with public opinion may jeopardize compliance with the public interest."¹⁰¹ And it should not be assumed that anti-majoritarian judicial activism is an "American disease"¹⁰² that Canadian nationalists such as George Grant should oppose.¹⁰³

Judicial activism has a long and honourable history in Canada. The Supreme Court opposed populist repression of free speech both in Aberhart's Alberta of the 1930's and Duplessis' Quebec of the 1950's.¹⁰⁴ During the era of McCarthyism, the Supreme Court—led by Justice Ivan Rand and assisted by McGill law professor F.R. Scott and other lawyers who worked on behalf of unpopular religious and political minorities—shone in its commitment to freedom of speech and freedom of religion. Perhaps because of the distance that Ottawa in the 1950's provided from the front lines of the Cold War against communism,¹⁰⁵ our Supreme Court had a much nobler record on issues of dissent during that decade than the United States Supreme Court.¹⁰⁶

¹⁰¹ R.S. Abella, "Judging in the 21st Century" (2002) 25 *Advocates' Q.* 131 at 138-39.

¹⁰² Bork, *supra* note 6 at 2.

¹⁰³ Grant was an opponent of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973), but more for its failure to recognize fetal rights than for its judicial creation. G. Grant, *Technology and Justice* (Toronto: Anansi, 1986) at 117-30.

¹⁰⁴ Roach, *Supreme Court, supra* note 7, c. 3.

¹⁰⁵ Many, however, trace the start of the Cold War to the Igor Gouzenko affair immediately after World War II, in which two justices of the Supreme Court acted as an inquisitorial commission who questioned suspected spies without counsel being present. Even Prime Minister King had private misgivings that "[t]he whole proceedings are far too much like Russia itself" See R. Whitaker & G. Marcuse, *Cold War Canada: The Making of a National Insecurity State, 1945-1957* (Toronto: University of Toronto Press, 1994) at 67.

¹⁰⁶ Compare *Dennis v. United States*, 341 U.S. 494, 71 S. Ct. 857 (1951) with *Boucher v. R.* (1950), [1951] S.C.R. 265, 99 C.C.C. 1 on freedom of speech and sedition; *American Communications Association v. Douds*, 339 U.S. 382, 70 S. Ct. 674 (1950) with *Smith & Rhuland Ltd. v. The Queen ex rel. Andrews*, [1953] 2 S.C.R. 95, 107 C.C.C. 43 on unions and communists; and *Adler v. Board of Education of the City of New York*, 342 U.S. 485, 72 S. Ct. 380 (1952) with *Switzman v. Elbling*, [1957] S.C.R. 285, 117 C.C.C. 129 on the treatment of subversive organizations. In each case, the Canadian

Time will tell whether future historians will be able to say the same about the respective courts' performance in the cold and sometimes hot war against terrorism.

Judicial vigilance in the protection of fundamental freedoms and equality rights can be defended as a necessary precondition to a modern and democratic Canadian nationalism that accepts liberal values while taking special care to preserve a free and open debate that is tolerant of all groups in our diverse and multicultural society. Canadian courts can also demonstrate a sensitivity to evolving international law standards that will distinguish their jurisprudence from the insularity of American jurisprudence and continue Canada's post-World War II leadership with respect to the development of international law and institutions. Canadian courts can do all this secure in the knowledge that the centralized nature of the Canadian parliamentary system and the ability of legislatures to limit and override rights under the *Charter* means that they need not have the last word on matters of anti-terrorism policy.

A. The Supreme Court

Although the Supreme Court will rarely hear cases involving terrorism, its decisions will set the tone for lower courts. Two of its recent decisions have particular relevance in the anti-terrorism context. They are *United States v. Burns and Rafay*¹⁰⁷ and *Suresh v. Canada (Minister of Citizenship and Immigration)*,¹⁰⁸ which hold respectively that extradition to face the death penalty and deportation to face torture will violate section 7 of the *Charter*. In both cases, the Court performed its anti-majoritarian role admirably by examining the fundamental principles of Canadian and international law to reach these conclusions. In *Burns and Rafay* the Court took note of the reality of wrongful convictions, including those of suspected terrorists in the United Kingdom.¹⁰⁹ In *Suresh*, the Court concluded that torture violates fundamental norms of Canadian and international law.¹¹⁰ In both cases, the Court resisted the temptation to minimize Canadian responsibility for what will happen to a fugitive removed from our shores. In both cases also, the Court was not blinded by the serious nature of the charges against the *Charter* applicant.¹¹¹ The Court reminded Canadians

court even without a constitutional bill of rights took an approach more accepting of freedom of speech.

¹⁰⁷ [2001] 1 S.C.R. 283, 151 C.C.C. (3d) 97, 2001 SCC 7 [hereinafter *Burns and Rafay*].

¹⁰⁸ 2002 SCC 1, 208 D.L.R. (4th) 1 [hereinafter *Suresh*].

¹⁰⁹ *Supra* note 107 at para. 112.

¹¹⁰ *Supra* note 108 at paras. 42-75.

¹¹¹ *Burns and Rafay* were charged with the gruesome and bloody murder of Rafay's parents and sister, while *Suresh* was claimed to be an important member of the Tamil Tigers, a group that has committed acts of terrorism in Sri Lanka.

in both cases of values that they were inclined to forget in the understandable urge to expel dangerous persons from our midst.

The public and its elected representatives may well be inclined to send notorious murderers or terrorists to face the death penalty or torture. It is thus not surprising that the Supreme Court received considerable criticism for its anti-majoritarian efforts in these cases. *Burns and Rafay* was greeted with angry op-eds in both *The Globe and Mail* and the *National Post* accusing the Court of judicial activism and the “imperial arrogance” of imposing the justices’ “personal beliefs” on Canadian and foreign governments.¹¹² The Canadian Alliance’s criticisms of the case were revived in the wake of September 11, and exploited the prospect that a suspected terrorist implicated in the attacks might only be extradited to face trial in the United States with assurances that the death penalty would not be applied. The Canadian Alliance also demanded that the Minister of Justice reopen argument in the *Suresh* case in order to stress to the Court that the issues had changed since September 11. The *National Post* criticized *Suresh* as a similar “piece of judicial activism” to *Burns and Rafay*, but even worse because it

was decided against the backdrop of a deadly threat to Canada and other nations. ...

Torture is always wrong. Yet it is inevitable that torture may sometimes occur in nations whose commitment to human rights has been understandably vitiated by regular encounters with suicide bombers. Whether we deport terror suspects to such nations is a difficult and often agonizing decision that must be made on a case-by-case basis. It is a decision that should be made by government officials, not judges.¹¹³

Conservative critics of judicial activism may be quick to exploit the scary and emotive context of terrorism after September 11 to advance their arguments that judicial review is the undemocratic and anti-majoritarian imposition of the world view of judicial elites.¹¹⁴

¹¹² T. Morton, “What Chrétien Once Believed” *National Post* (19 February 2001) A14; N. Seeman, “Who Do You Think You Are?” *The Globe and Mail* (20 February 2001) A17. As quoted in Roach, *Supreme Court*, *supra* note 7 at 94.

¹¹³ “Staying Terrorists”, Editorial, *National Post* (12 January 2002) A15.

¹¹⁴ Recently Robert Bork criticized the Israeli Supreme Court for taking away “important means to preserve national security.” Bork, *supra* note 6 at 126-29. To his credit, Judge Bork did recognize that the Court’s decision ruling against the use of physical force in interrogations was “correct” because the legislature had not explicitly authorized such force in legislation (*ibid.* at 127). The common law, like the *Charter*, can be used to promote dialogue about the desirability and necessity of security powers. The dangers of courts accepting arguments from the executive that repressive measures are

Suresh and *Burns and Rafay* are in fact ambivalent about what judges will do in cases of exceptional crisis that may be produced by mass terrorism. Although the Court has articulated a broad principle against Canadian participation in the death penalty or torture, it has in both cases explicitly left open the possibility of exceptions. Moreover, it did so without providing any indication of what might constitute an exceptional case. This approach could be defended as the Court's keeping itself open to the much discussed dialogue between courts and the elected branches of government. It could be argued that there may be unforeseen circumstances that could possibly justify exceptions and it would be judicial arrogance simply to state an absolute rule. The rights in the *Charter*, unlike those in the American Bill of Rights, are subject to explicit limitation and override. Both forms of dialogue, however, should require the passage of legislation and consequent democratic debate and accountability about the government's decision to limit or override rights.

One democratic problem with *Burns and Rafay* and *Suresh* is that any future exceptions are likely to be made not after considered debate in Parliament, but by the Court deferring to a minister's decision in an individual case by finding either that the *Charter* applicant's section 7 rights were not violated or that existing legislation governing extradition or deportation justifies extradition to the death penalty or deportation to torture in the specific case. My concern is that the courts may be overly influenced by a combination of ministerial and popular insistence that a notorious case is in law an exceptional case. This could amount to either judicial deference to a minister's interpretation of the *Charter* or to the Court holding itself accountable to the public outrage that would greet an unpopular decision not to allow a notorious terrorist to be extradited or deported to face death or torture.

My preference for dialogue is one in which the government is required to provide the court with both new information and new legislation justifying its actions, and not one in which the minister acts on and asserts his or her own interpretation of the constitution over that of the courts, or in which the independent judiciary is held accountable to the majoritarian branches of government.¹¹⁵ To be sure, the court deserves credit for not allowing the emotive aspects of both *Burns and Rafay* and *Suresh* to sway its judgments, but the permanent invitation to governments to justify exceptions from the principled rules in those cases will present a continued challenge for the courts. Even the independent judiciary will have to make a special effort to avoid the

need to combat terrorism without adequate democratic debate and accountability are discussed *infra* text accompanying notes 115-128.

¹¹⁵ On these different understandings of dialogue, see K. Roach, "Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481.

temptation of being just a little more deferential towards the government and of leaning towards the state and away from rights in the post-September 11 world.

If there are exceptions to the rules in *Burns and Rafay* or *Suresh*, they will be decided on a case by case basis. Some commentators defend this type of constitutional minimalism,¹¹⁶ and it seems to be increasingly attractive to the Supreme Court.¹¹⁷ It avoids striking down laws under subsection 52(1) of the *Constitution Act, 1982*,¹¹⁸ while generally allowing courts to provide relief in individual cases. Nevertheless, constitutional minimalism is an American doctrine that has been designed to mitigate the dangers of judicial supremacy under the American Bill of Rights. It can be criticized under the *Charter* and on democratic grounds as not allowing a full-blooded debate to evolve between the Court, the legislature, and society because of the Court's decision to fix defective legislation for itself or to uphold administrative acts as a justified limitation on *Charter* rights. Exceptions to *Burns and Rafay* or *Suresh* will be made by ministers in individual cases and not after a full legislative debate.

In holding out the possibilities of future exceptions to the general rules in *Burns and Rafay* and *Suresh*, the Court may also have thought it was involved in an exercise of the passive virtues, another judicial device that has been used to limit judicial supremacy in the United States.¹¹⁹ The idea of the passive virtues is that the Court should avoid deciding some tough issues that would unnecessarily embroil it in dangerous conflicts with the elected branches and society at large. *Burns and Rafay* and *Suresh* can be seen as a prudent means for the Court to avoid and delay deciding the toughest issues, for example whether Osama bin Laden or a close al Qaeda associate could be extradited or deported to face death or torture. Nevertheless, both constitutional minimalism and the passive virtues are a disguised form of judicial supremacy, which contemplates that when the difficult issues cannot be avoided, it is the Court, not the legislature, that will make the final decision. This may place the Court in the unenvi-

¹¹⁶ C.R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass.: Harvard University Press, 1999); P.J. Monahan, "The Supreme Court in the 21st Century" (2001) 80 Can. Bar Rev. 374 at 385ff.

¹¹⁷ For a description and criticism of some recent trends towards constitutional minimalism, see Roach, *Supreme Court*, *supra* note 7, c. 8.

¹¹⁸ Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹¹⁹ Alexander Bickel, the leading proponent of the passive virtues, was most concerned that the courts use the passive virtues to avoid making a final and unprincipled decision on the merits that would carry the weight of the court's moral authority and be very difficult for subsequent courts to undo. When it was no longer possible to avoid an issue, Bickel believed that the court must decide the case on the basis of principle, even if the decision would provoke a public outcry. A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2d ed. (New Haven: Yale University Press, 1986) c. 4.

able position of one day giving extradition or deportation to face death or torture its constitutional seal of approval when it would be more suited to the democratic structure of the *Charter* to require specific legislation to override the rights that would be violated in such a scenario. The British response is instructive. In response to both September 11 and previous court decisions declaring that people can never be deported to face torture,¹²⁰ the United Kingdom enacted legislation allowing for the indefinite detention of international terrorists who cannot otherwise be deported.¹²¹ This legislation was controversial and accompanied by an explicit and temporary derogation from fair trial rights. Nevertheless, the British approach allows the courts to maintain the legal and moral principle that torture is never acceptable while the legislature takes, if it must,¹²² democratic responsibility for temporarily overriding important rights.

The prospect under *Suresh* that Canadian courts may some time in the future find deportation of a particular terrorist to face torture to be “*Charter*-proof” is deeply disturbing. It raises the possibility that the Supreme Court may entertain Alan Dershowitz’s argument that torture should be judicially approved when necessary to prevent mass terrorism.¹²³ One common problem with Professor Dershowitz’s argument and the possibility of deportation to face torture under *Suresh* is that both suggest that the courts may actually declare torture to be legally justified and constitutional whereas even in the most dramatic of scenarios, torture could, at best, be a crime that is legally excused.¹²⁴ Torture is always legally, morally, and constitutionally wrong and the Supreme Court should have recognized this truth.

The *Suresh* decision sends out even more ambivalent signals than *Burns and Rafay* about the Court’s relation with government. Consistent with the new trend towards

¹²⁰ *Soering v. United Kingdom* (1989), 11 E.H.R.R. 439; *Chahal v. United Kingdom* (1996), 23 E.H.R.R. 413.

¹²¹ *Anti-terrorism, Crime and Security Act 2001* (U.K.), 2001, c. 24, part IV. The breadth of the legislation and the derogation have been the subject of critical commentary. The Special Immigration Appeals Tribunal has also ruled that the powers of indeterminate detention are discriminatory because they target non-British citizens. See A. Tomkins, “Legislating against Terror: The Anti-terrorism, Crime and Security Act 2001” [2002] Pub. L. 205; H. Fenwick, “The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?” (2002) 65 Mod. L. Rev. 724.

¹²² The British legislation providing for indefinite detention of international terrorists who cannot be deported may be unnecessary because in almost all cases, such persons will be liable for prosecution under broad domestic anti-terrorism legislation that apply to acts committed outside of the country and include acts such as financing or participation in a terrorist organization.

¹²³ A.M. Dershowitz, *Why Terrorism Works* (New Haven: Yale University Press, 2002), c. 4.

¹²⁴ On the distinction between justifications and excuses, see *R. v. Perka*, [1984] 2 S.C.R. 232, 14 C.C.C. (3d) 385.

saving possibly unconstitutional law through interpretation, the Court upholds the government's power to deport people because of legislatively undefined acts of "terrorism". With reference to the events of September 11, the Court also interpreted threats to the security of Canada in a broad fashion that can include "distant events that indirectly have a real possibility of harming Canadian security."¹²⁵ Perhaps most importantly, the Court indicated that the Minister of Immigration's discretion to deport and to decide whether a refugee faces a substantial risk of torture should only be reversed if exercised in a patently unreasonable manner. The deferential administrative side of *Suresh* is in tension with its bolder and anti-majoritarian *Charter* side. This is underlined by the Court's decision to endorse Lord Hoffmann's postscript to a decision in the immediate aftermath of September 11 in which he recognized not only the special information and expertise that the executive has in security matters, but the more troubling idea that security decisions "require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove."¹²⁶ Lord Hoffmann's remarks ignore that it is the imperfectly accountable executive and not the legislature that is making these security decisions. His implicit idea of the democratic illegitimacy of judicial action seems strange especially in the Canadian context in which the judiciary is clearly given an important democratic role in our constitution.

Rather than endorse Lord Hoffman's troubling dicta deferring to the executive as more democratically legitimate, the Supreme Court would have been better to endorse the approach taken by Chief Justice Roy McMurtry who, at the 2002 opening of the Ontario courts, cheerfully admitted that "courts are not necessarily democratic institutions as they are not bound by the majority of public opinion," but then argued "that when the majority takes away the rights of a minority that is not democracy."¹²⁷ Chief Justice McMurtry captures the anti-majoritarian spirit of the *Charter* much better than

¹²⁵ *Suresh*, *supra* note 108 at para. 88. The Court adds: "It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid" (*ibid.* at para. 87).

¹²⁶ *Ibid.* at para. 33, quoting *Secretary of State for the Home Department v. Rehman*, [2002] 1 All E.R. 122 at para. 62, [2001] 3 W.L.R. 877 (H.L.).

¹²⁷ Hon. R. McMurtry, "Report of the Chief Justice of Ontario upon the Opening of the Courts of Ontario for 2002", online: Court of Appeal for Ontario <http://www.ontariocourts.on.ca/court_of_appeal/opening_speeches/coareport_2002.htm> (date accessed: 1 November 2002).

Lord Hoffman.¹²⁸ The anti-majoritarian role of the courts is more necessary than ever after September 11. This is especially true in a security context where certain minorities may be subject to stereotyped assumptions of dangerousness. Unfortunately, it is unclear whether the judicial deference that characterized the administrative law parts of *Suresh* will not in some extreme cases also influence the Court to defer to the executive's decision to deport or extradite a terrorist to face death or torture.

B. The Federal Court

The Supreme Court will eventually find itself again in the hot seat in the anti-terrorism context, but it is the Federal Court that is now in the front lines. Even before Bill C-36, the Federal Court exercised jurisdiction over security-related immigration matters and the disclosure of sensitive information in court proceedings. Under Bill C-36, it is vested with extensive and at times exclusive duties of judicial review with respect to decisions such as the listing of an organization as a terrorist group, the deprivation of its charitable status, the forfeiture of its property, and the review of the federal attorney general's power to prohibit the disclosure of information in court proceedings. The Federal Court is primarily an administrative court and it may well approach its new duties through the lens of the deferential standard of patent unreasonableness in *Suresh* and other cases. The federal government is a formidable "repeat player" that is almost always a party to litigation in the Federal Court. Bill C-36 recognizes the increased responsibilities of the Federal Court by providing for the appointment of more judges to it.¹²⁹ This prospect raises the difficult issues of the lack of transparency of the federal judicial appointment process¹³⁰ and even "the possibility of court-packing."¹³¹ The ultimate guarantee will be the personal integrity of each judge, but the institutional position of the Federal Court cannot be ignored.

Some provisions in Bill C-36 place the judges of the Federal Court in a very difficult position. For example, the solicitor general is empowered to make *ex parte* motions to require the judge in a private hearing to consider information "obtained in

¹²⁸ See e.g. Justice Lamer's statement that "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority." *R. v. Collins*, [1987] 1 S.C.R. 265 at 282, 33 C.C.C. (3d) 1.

¹²⁹ Bill C-36, *supra* note 2, s. 95, amending the *Federal Court Act*, R.S.C. 1985, c. F-7.

¹³⁰ P.H. Russell & J.S. Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees" (1991) 41 U.T.L.J. 4.

¹³¹ D. Dyzenhaus, "The Permanence of the Temporary: Can Emergency Powers Be Normalized?" in Daniels, Macklem & Roach, *supra* note 16, 21 at 33.

confidence from a government, an institution or an agency of a foreign state"¹³² or from organizations of foreign states. The judge can use the information in determining the reasonableness of the Cabinet's decision to list a group as a terrorist group, but only if he or she decides not even to summarize the information for the listed entity seeking judicial review of the Cabinet's decision. If, however, the judge declines the invitation to make the hearing something of a Kafkaesque charade and insists that the information must at least be summarized for the listed entity, the solicitor general can simply pull the information, with the judge being instructed by the act not to consider the information. This procedure could not only result in a decision to uphold the listing without disclosing even a summary of the evidence to the listed entity, but it also requires the Federal Court to consider evidence conditionally offered by the government on an *ex parte* and secret basis. It should be remembered that *ex parte* communications between the federal government and the Federal Court in the Tobiass affair were held by the Supreme Court to violate judicial independence. The Court commented:

First, as a general rule of conduct, counsel for one party should not discuss a particular case with a judge except with the knowledge and preferably with the participation of counsel for the other parties to the case. ...

Second, and again as a general rule, a judge should not accede to the demands of one party without giving counsel for the other parties a chance to present their views.¹³³

In the interests of assuring that intelligence gathered by other nations can both remain secret and also influence a judge's decision to uphold the listing of an entity as a terrorist group, Bill C-36 transgresses these principles of judicial independence. In addition, it requires judges of the very court that was rightly criticized for entertaining *ex parte* communications from the federal government in the past to again consider similar communications. The only difference is that the communications are specifically authorized in the new anti-terrorism law.

¹³² *Criminal Code*, *supra* note 18, s. 83.06; *Charities Registration (Security Information) Act*, S.C. 2001, c. 41, Part 6, s. 8. This goes beyond the limits in the deportation case of *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at 746, 72 C.C.C. (3d) 214, in which the Court held: "It is not necessary, in order to comply with fundamental justice in this context, that the respondent also be given details of the criminal intelligence investigation techniques or police sources used to acquire that information." In that case, however, the individual was given "sufficient information to know the substance of the allegations against him, and to be able to respond."

¹³³ *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 at paras. 74-75, 118 C.C.C. (3d) 443.

Bill C-36 also contemplates a rather bizarre and tortuous dialogue between trial courts, the attorney general of Canada, and a single judge of the Federal Court of Appeal over access to sensitive information. Under the new section 38.13 of the *Canada Evidence Act*,¹³⁴ the attorney general of Canada is given the power effectively to override a trial judge's decision to require the disclosure of information on the basis that the information was obtained in confidence from or in relation to a foreign government or service or for the purpose of protecting national defence or national security. This provision has aptly been described as a "mini-notwithstanding clause",¹³⁵ except that a certificate lasts fifteen not five years, and there is no requirement of the transparency of legislation. The party adversely affected by the attorney general's certificate has a right to appeal to a single judge of the Federal Court of Appeal with any further appeal to the Supreme Court being specifically removed. This appeal provision was added after the second reading of Bill C-36, but it remains extremely anemic, with the judge only being able to overturn the attorney general's certificate to the extent that the information does not relate to information from or in relation to foreign sources or to national defence or security. The review provision does not require and may not even allow the Federal Court of Appeal judge to balance the need for disclosure against the harm of disclosure to international relations or national defence or security, as recommended by the Special Senate Committee on the Subject Matter of Bill C-36.¹³⁶

In most cases, the single judge of the Federal Court of Appeal can be expected to uphold the attorney general's certificate. But that does not end the dialogue. The matter may find itself back before the trial or other judge who originally ordered disclosure. That judge then has the power under section 38.14 of the *Canada Evidence Act* (and subsection 24(1) of the *Charter*) to "make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial."¹³⁷ If a fair trial is impossible without access to the information covered by the attorney general's certificate, this remedy should be a stay of proceedings.¹³⁸

¹³⁴ R.S.C. 1985, c. C-5, as am. by S.C. 2001, c. 41, s. 43.

¹³⁵ P. McMahon, "Amending the *Access to Information Act*: Does National Security Require the Proposed Amendments of Bill C-36?" (2002) 60 U.T. Fac. L. Rev. 89 at 95.

¹³⁶ Special Senate Committee on the Subject Matter of Bill C-36, First Report, *Journals of the Senate*, 1st Sess., 37th Parl. (1 November 2001) 930 at 933-34.

¹³⁷ *Supra* note 2, s.43 amending *Canada Evidence Act*, *supra* note 134, s.38.14.

¹³⁸ *R. v. Carosella*, [1997] 1 S.C.R. 80, 112 C.C.C. (3d) 289. But see *R. v. Regan*, 2002 SCC 12, for some suggestion that the seriousness of the offence and societal interests in hearing the case should be considered in borderline cases before the drastic remedy of a stay is ordered. *Regan*, however, did not involve trial fairness, but only the integrity of the justice system.

This type of dialogue over access to sensitive information is like a dangerous game of constitutional chicken, with trial judges being able to assert the last word only if they are prepared to order the drastic and blunt remedy of a stay of proceedings.¹³⁹ Parliament could have provided for a better and more direct dialogue to occur without the participation of the Federal Court. The attorney general could have been required to justify the case for non-disclosure directly to the trial court that had ordered disclosure. That court would be in the best position to strike the appropriate balance of interests between security and disclosure, and to this end could have devised less drastic remedies that involve editing or summarizing the information for the applicant, closing the court, or even appointing a lawyer with appropriate security clearances as *amicus curiae* who could be trusted with the sensitive information. As matters stand, there is now a right to appeal to the Federal Court that is so hollow as to be almost meaningless. The effect of this appeal will often be to place the trial judge in the difficult all or nothing position of allowing a trial to proceed with undisclosed information or stopping a trial of an accused terrorist.

C. Trial Courts

Bill C-36 places trial judges in a difficult position by vesting them with responsibility for administering the new concepts of preventive arrests and investigative hearings. In both cases, the trial judges will know that the attorney general has already consented to the use of these extraordinary powers. Under section 83.3 of the *Criminal Code*, provincial court judges are required to determine whether there are reasonable grounds to suspect that a recognizance with conditions or an arrest is necessary to prevent the carrying out of a terrorist activity. The judge is also given the discretion to adjourn hearings for up to forty-eight hours, thus possibly extending the period of preventive arrest on suspicion to a possible seventy-two hours. Bill C-36 provides no guidance for this crucial discretionary decision. It is also not clear whether the person will be detained in a detention centre or a police lock-up for the maximum of three days and nights of preventive arrest without a bail hearing.¹⁴⁰ In eventually determining whether the arrestee should be released, the judge is instructed to consider a variety of factors, including the likelihood that if released the person will carry out a terrorist activity and any other just cause including the strength of the peace officer's reasonable suspicion and the gravity of any terrorist activity that may be carried out. If satisfied that the police officer had reasonable grounds for the suspicion, the judge will next have to decide whether to impose a recognizance. A decision to impose such

¹³⁹ The Supreme Court has recognized societal interests in less drastic alternatives to stays of proceedings in *R. v. O'Connor*, [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1.

¹⁴⁰ Trotter, *supra* note 82 at 243.

a “peace bond for terrorists” will likely be widely publicized and stigmatize the person as a suspected terrorist.¹⁴¹ A person subject to such a peace bond may be shunned by financial institutions, landlords, and other service providers who may fear prosecutions for financing or facilitating terrorism. The judge will also have to decide what conditions to impose as part of the peace bond. Some conditions such as prohibitions on the possession of firearms and explosives may be uncontroversial, but others may affect the political, economic, or religious life of a person who, at the end of the day, has only been established to be a reasonable suspect to engage in terrorist activities. Finally, if the arrestee does not co-operate and refuses to enter into the peace bond, the judge may jail him or her for up to a year. It will be the provincial judiciary that has to administer the new concepts of arrests on suspicion and preventive arrests.

Under the investigative hearing provisions, provincial or superior court judges have to decide whether to order a person to disclose information about a terrorism offence. The judge is empowered to decide objections on the grounds of laws relating to non-disclosure of information or privilege, but otherwise must allow the attorney general of Canada to question a person and require the production of things even though the person objects on grounds of self-incrimination. If the person refuses to talk or co-operate at the investigative hearing, the judge must decide what to do. Again, Bill C-36 provides no guidance for this crucial discretionary decision. Options open to the judge include the use of contempt powers or subsequent prosecutions for disobeying a court order. Judges presiding at investigative hearings may find themselves echoing the words of Supreme Court Justice Robert Taschereau, who at the 1946 royal commission into the Gouzenko spy affair, warned reluctant witnesses who correctly feared they would subsequently face spying charges that “we have the power to compel you to speak. ... [W]e have the power to punish you if you do not answer.”¹⁴² David Paciocco has made an interesting argument that the new investigative hearing provisions offend written and unwritten principles of judicial independence because they place judges in an “unflattering” and “ill suited” role of having their judicial powers “conscripted by the government for coercive purposes.”¹⁴³ Given that the government will argue that most targets of investigative hearings are only witnesses as opposed to the accused, I am not confident about the success of *Charter* challenges. Nevertheless, I agree with Professor Paciocco that the image of criminal trial judges presiding at modern-day star chambers is not a happy one.

¹⁴¹ Nevertheless, this and the other new peace bond provision in s. 810.01 will likely be held to be consistent with the *Charter*. See *R. v. Budreo* (2000), 128 O.A.C. 105, 142 C.C.C. (3d) 225, upholding similar peace bond provisions under the *Charter*.

¹⁴² Whitaker & Marcuse, *supra* note 105 at 65.

¹⁴³ Paciocco, “Constitutional Casualties”, *supra* note 19 at 221.

The provisions in Bill C-36 for mandatory consecutive sentencing for terrorist offences and deeming the commission of terrorist activities to be an aggravating factor in sentencing follow recent trends in imposing more mandatory terms and statutory direction for judges at sentencing. In many ways, these developments are based on a mistrust of the judiciary and a desire to score political points by proclaiming as aggravating factors that which the courts already consider as aggravating. Well before Bill C-36, appeal courts held that terrorist objectives were an aggravating factor at sentencing and required a stiff sentence for reasons of both denunciation and deterrence.¹⁴⁴ Even in the terrorist context, however, courts were willing to show some mercy, for example reducing a sentence from twenty to fifteen years when the accused was eighteen years old, under the influence of the leaders of the organization, and had renounced terrorist methods.¹⁴⁵ This flexibility may be frustrated by the mandatory sentencing provisions of Bill C-36, especially when they are combined with more mandatory minimum sentences.¹⁴⁶ Although it was the September 11 terrorists who were in Parliament's sights when tougher sentences were prescribed, they may also apply to misguided young people that have participated on the periphery of terrorist activities without knowing the full import of their actions.

Judges from the Supreme Court to the provincial courts will feel the impact of the new anti-terrorism measures, as well as governmental and public expectations that the balance between security and freedom has shifted since September 11. The role of the independent judiciary becomes both more important and more unpopular in times of perceived crisis. The new responsibilities of administering and determining the constitutionality of Bill C-36 come at a time when Canadian courts are becoming more concerned with issues of judicial independence. All judges should take special care to demonstrate their independence from the governments that will approve the use of the many new powers and offences in Bill C-36. The challenges of September 11 also come on the heels of growing criticisms in some quarters that our courts are soft on crime and refugee applicants, captured by minority interests, and too eager to make decisions best left to the elected branches of government.¹⁴⁷ Challenges to new anti-terrorism measures could engage all elements of these critiques of judicial activism. Judges will have to defend the rights of persons accused of terrorism who may also be

¹⁴⁴ *R. v. Maltby* (1986), 17 O.A.C. 363, 30 C.C.C. (3d) 317; *R. v. Atwal* (1990), 57 C.C.C. (3d) 143 (B.C.C.A.); *R. v. Balian* (1988), 29 O.A.C. 387.

¹⁴⁵ *R. v. Belmas* (1986), 27 C.C.C. (3d) 142 at 156-58 (B.C.C.A.).

¹⁴⁶ On the limited chance that mandatory minimum sentences will be declared unconstitutional, see K. Roach, "Searching for Smith: The Constitutionality of Mandatory Minimum Sentences" (2001) 39 *Osgoode Hall L.J.* 367.

¹⁴⁷ Preston Manning's reply to the 1999 Throne Speech featured criticisms of the courts as being soft on crime and refugee applicants. See *House of Commons Debates* (13 October 1999) at 38-39.

members of unpopular minorities. They should do so with confidence that they have a legitimate and important role in Canadian democracy and that they need not have the last word on many of the matters that they consider. The challenges of September 11 for the judiciary are new, but also similar to those faced in the immediate past.

III. The Challenge of Preserving Canadian Sovereignty

Useful comparisons can be drawn between September 11 and the Cuban Missile Crisis of October 1962. Although directed at the United States, both events were traumatic for Canadians, discredited a Canadian nationalism that appeared anti-American, and led to a shift in Canadian policy towards closer co-operation with the Americans. The defeat of Prime Minister Diefenbaker in the 1963 federal election and the Liberals' acceptance of nuclear warheads for missiles in Canada led George Grant to write his famous *Lament for a Nation* declaring Canadian sovereignty and nationalism to be dead. Grant's pessimistic conclusion, penned thirty-seven years ago, makes interesting reading today:

Canada has ceased to be a nation, but its formal political existence will not end quickly. Our social and economic blending into empire will continue apace, but political union will probably be delayed. Some international catastrophe or great shift of power might speed up this process. ... The dominant forces in the Republic do not need to incorporate us. A branch-plant satellite, which has shown in the past that it will not insist on any difficulties in foreign or defence policy, is a pleasant arrangement for one's northern frontier.¹⁴⁸

The pleasant arrangement contemplated by Grant was not so pleasant after September 11. The television version of the West Wing worried about terrorists crossing into the United States from Canada while the real West Wing authorized the tripling of its personnel on the ominously named "northern border".¹⁴⁹ Given the increase in economic integration since Grant's time, this has placed enormous pressure on the Canadian government to co-operate with the Americans. And the irony has been that much of the Canadian co-operation and willingness to please the Americans has been directed not so much at the economic imperative of keeping the border open, but at issues of criminal justice and foreign policy.

¹⁴⁸ Grant, *Lament*, *supra* note 15 at 86-87. Grant added that Diefenbaker's tragic flaw was that he did not recognize "that a branch-plant society could not possibly show independence over an issue on which the American government was seriously determined" (*ibid.* at 31).

¹⁴⁹ *Patriot Act*, *supra* note 47, §401-02.

Strong arguments have been made that Canada has been too quick to say, as Wilfrid Laurier did at the start of World War I, "Ready, aye ready",¹⁵⁰ but this time to the American as opposed to the British empire. Stephen Clarkson has observed that by placing Canadian troops under American command in Afghanistan,

Ottawa chose deliberately not to exploit its strength in peace-building which focuses on reconstructing a civil society from the devastation of war. In offering to do Washington's dirty or, rather, deadly work in the mopping-up phase of its high-tech bombing war, the Chrétien government sent an unmistakable, if disconcerting, signal. Because this action runs counter to major traditions in Canadian foreign policy, we may infer that concern for Afghanistan was not the main story. Ottawa's main priority was building Washington's confidence in Canadian security at home. Integrating its troops in the U.S. military machine gave the message to the White House that Canada is fully on side.

... An acid test for their autonomy in the field will be whether Canadian troops observe the Geneva convention on prisoners of war, which Washington has decided to ignore by refusing to regard the captives it has taken as legitimate soldiers.¹⁵¹

And there are strong arguments that Canada failed that acid test as first the Canadian army and then the Canadian navy have delivered their captives to the Americans for detention and sustained interrogation at Guantanamo Bay.¹⁵²

Although it can be argued that members of al Qaeda do not qualify for prisoner of war status under the Geneva conventions,¹⁵³ this argument is much weaker with re-

¹⁵⁰ C.P. Stacey, *Canada and the Age of Conflict: A History of Canadian External Policies*, vol. 1 (Toronto: Macmillan of Canada, 1977) at 176.

¹⁵¹ S. Clarkson, *Lockstep in the Continental Ranks: Redrawing the American Perimeter after September 11th* (Ottawa: Canadian Centre for Policy Alternatives, 2002) at 9, 13, online: Canadian Centre for Policy Alternatives <<http://www.policyalternatives.ca/publications/clarkson.pdf>> (date accessed: 1 November 2002). See also Anthony Westell's arguments that September 11 made "brutally clear the extent of Canada's dependence on and subservience to the United States—and the ruthlessness of the U.S. in pursuing its own interests. It is painfully apparent that Canada escaped from being a colony of Britain only to become a colony of the U.S." Like Grant, Westell relates the failure of Canada to a failure of true conservatism or socialism. A. Westell, "How's Your Mindset?" *Literary Review of Canada* 10:2 (March 2002) 8 at 8.

¹⁵² Recent reports released by the American military suggest that the elite Canadian Joint Task Force 2 commandos "worked directly with FBI agents who decided which of the Taliban and al-Qaeda prisoners would be released and which would be held for further interrogation or sent to the U.S. base at Guantanamo Bay, Cuba." D. Pugliese "Details of JTF2 Missions Released by U.S. Military" *National Post* (28 September 2002).

¹⁵³ *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, T.I.A.S. No. 3364 [hereinafter *Geneva Convention on Prisoners of War*]. Compare *Geneva Con-*

spect to the Taliban and others who took up arms in Afghanistan against the American invasion. In any event, the *Geneva Convention on Prisoners of War*, consistent with the rule of law, contemplates that all captives should be accorded prisoner of war status until a competent tribunal has made its decision.¹⁵⁴ Even in the unlikely event that none of the detainees qualify for prisoner of war status, there are other rights that apply under different parts of the Geneva conventions, not to mention the fair trial obligations of the *International Covenant on Civil and Political Rights*¹⁵⁵ and the *Charter*. Arguments made by several Canadian ministers that the Geneva conventions are out of date when applied to terrorists are not an excuse for failing to ensure compliance with them as they exist now.

The treatment by American and Canadian authorities of detainees taken from Afghanistan raises the disturbing prospect that prisoners in the new war against terrorism will enjoy neither the protections afforded prisoners of war nor the protections afforded suspects of crime. They are interrogated like crime suspects, but there is no immediate prospect that they will face trial. If they ever face trial, it is likely to be before a military tribunal and not an independent court. Those who argue that the fight against terrorism requires a new paradigm that combines elements of crime and war should take note that the detainees in the war against terrorism at Guantanamo Bay appear to have slipped through the cracks of the existing laws of war and of crime and may not benefit from either the rights of prisoners of war or of the criminally accused.

Through the commitment of troops who will turn captives over to the Americans, Canada has also become complicit with President Bush's military order of 13 November 2001. This order declares "that an extraordinary emergency exists for national defense purposes" that makes it "not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."¹⁵⁶ Even if the military

vention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287, T.I.A.S. No. 3365.

¹⁵⁴ *Ibid.*, art. 5.

¹⁵⁵ 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368, arts. 9-14. See also J. Cerone, "Status of Detainees in International Armed Conflict, and Their Protection in the Course of Criminal Proceedings" [January 2002] A.S.I.L. Insights, online: American Society of International Law <<http://www.asil.org/insights/insigh81.htm>> (date accessed: 1 November 2002). For a decision in which the *Charter* was applied to Canadian police officers operating on foreign soil on the basis that Canadian law enforcement officials were bound by the *Charter* and its application would not interfere with the sovereignty of the foreign power, see *R. v. Cook*, [1998] 2 S.C.R. 597, 128 C.C.C. (3d) 1.

¹⁵⁶ U.S., Exec. Order, 66 Fed. Reg. 57,833 at 57,833-34 (13 November 2001) [hereinafter *Military Commissions Order*]. Subsequent regulations do provide for safeguards such as the right to counsel

commissions respect basic fair trial rights, the presidential order still has a chilling privative clause that purports to vest the commissions with "exclusive jurisdiction with respect to offenses by the individual." It asserts that detainees subject to it "shall not be privileged to seek any remedy or maintain any proceeding ... or to have any such remedy or proceeding sought on the individual's behalf in i) any court of the United States, or any State thereof, ii) any court of any foreign nation, or iii) any international tribunal."¹⁵⁷ This privative clause is offensive to the rule of law and was protested by a large number of American law professors, who noted that convictions of terrorists had in the past been secured in federal courts.¹⁵⁸ The military tribunal option may reflect a lack of confidence in the ability of American criminal courts to deliver justice and retribution for the victims of September 11.¹⁵⁹ From a Canadian perspective, the preclusion of international tribunals at a time when Canada has been an influential proponent of the International Criminal Court ("ICC") is especially troubling. President Bush's military order follows American opposition to the ICC, but sits uneasy with Canadian respect and interest in international law.

Canada's complicity with this order has unfortunately been overshadowed by the controversy over what then Minister of Defence Art Eggleton was told about Canadian delivery of captives to the Americans and whether he understood what he was told. Indeed, a skilled satirist could portray the Eggleton affair as a successful "wag the dog" diversion from the real issue of whether Canadian troops respected international and domestic law. In any event, the Canadian handover of captives to the Americans lends support to the warning of former Foreign Affairs Minister Lloyd Axworthy that "[w]e could be sliding down a very slippery slope, muting Canada's ability to speak with an independent and considered voice" on issues such as eliminating land mines, increased arms control, and the development of the ICC, "all measures opposed by Washington, especially its Defence Department."¹⁶⁰

On the issue of compliance with the Geneva Conventions, American officials are unlikely to complain that Canada has been acting as the "the Stern Daughter of the Voice of God", as they did when Canada repeatedly warned the United States not to use nuclear arms during the Korean War.¹⁶¹ It remains to be seen whether Canada's

and were greeted with bi-partisan support. For some remaining reservations, see R. Dworkin, "The Trouble with the Tribunals" *The New York Review of Books* 49:7 (25 April 2002) 10.

¹⁵⁷ Military Commissions Order, *ibid.* at 57,835-36.

¹⁵⁸ "In Letter, 300 Law Professors Oppose Tribunals Plan" *The New York Times* (8 December 2001) B7.

¹⁵⁹ *Supra* note 94 at 1237.

¹⁶⁰ Axworthy, *supra* note 4.

¹⁶¹ N. Hillmer & J.L. Granatstein, *Empire to Umpire: Canada and the World to the 1990s* (Toronto: Copp Clark Longman, 1994) at 217. The use of the phrase (taken from the William Wordsworth

future stance on expansions of the war against terrorism will cause the American President to complain, as President Johnson did after Prime Minister Pearson opposed escalation in Vietnam, that the Canadian Prime Minister was not sufficiently house-trained for American tastes.¹⁶² Pearson's opposition to the escalation of the Vietnam war also demonstrates that Grant's prediction of the eclipse of Canadian sovereignty in the wake of the Cuban Missile Crisis was premature and that tracts like *Lament for a Nation* were part of the perpetual Canadian push and pull between integration with and separation from the Americans.

The irony of the pressures placed on Canadian sovereignty post-September 11 is that legitimate concerns about maintaining open borders made necessary by our close economic integration have been translated into questionable criminal justice, foreign, refugee, and military policies. Increased integration—including perhaps even European Union-type economic integration—would almost be worth it, if it allowed Canada more confidence to craft domestic and foreign policies that were less punitive and more respectful of international law than the American policies.

IV. The Challenge of Preserving a Tolerant Democracy

September 11 also tested Canadian democracy and in particular its commitment to respecting full debate. One of George Grant's concerns about the collapse of a distinctive Canada was that it would produce a homogenous public debate dominated by American voices.¹⁶³ Yet the debate on Bill C-36 was in many respects both indigenous to Canada and more vigorous than the comparable American debate over the *Patriot Act*, which was enacted more quickly and with less opposition than Bill C-36.¹⁶⁴ It was

poem "Ode to Duty") in relation to Canada is attributed to Dean Acheson, who served as Secretary of State in the Truman Administration. See also D. Acheson, "Canada: 'Stern Daughter of the Voice of God'" in L.T. Merchant, ed., *Neighbors Taken For Granted: Canada and the United States* (Toronto: Burns & MacEachern, 1966) 134 at 144-47 for criticisms of Canada's emphasis on acting through the United Nations to achieve peace-keeping as inconsistent with American interests in containing communism.

¹⁶² President Johnson apparently clasped Prime Minister Pearson by the shirt collar and told him "You pissed on my rug!" in response to Pearson's 1965 call for a halt to the bombing of North Vietnam. L. Martin, "Thank You, Mr. Nixon: It Was a Good Time for Canada's Soul" *The Globe and Mail* (19 March 2002) A15. See also R. Bothwell, I. Drummond & J. English, *Canada since 1945: Power, Politics, and Provincialism* (Toronto: University of Toronto Press, 1981) at 277.

¹⁶³ Grant, *Lament*, *supra* note 15 at 57ff.

¹⁶⁴ Ronald Dworkin has observed that the American

government's dubious laws, practices, and proposals have provoked surprisingly little protest in America. Even some groups that traditionally champion civil rights have, with surprisingly few reservations, supported the government's hard line. ... True, it is

a sign of the strength of Canadian democracy that concern about and even opposition to various anti-terrorism measures was not seen as “un-Canadian” or as an act of support for terrorism. One regrettable exception occurred when Prime Minister Chrétien, in response to a question from Bloc Québécois leader Gilles Duceppe inquiring into the Canadian handover of prisoners without assurances of compliance with the *Geneva Convention on Prisoners of War*, stated that “[i]t was not imprudent on the part of the government, in the context of our fight against terrorism, to side with a nation that was attacked and not become the defenders of terrorists, as the Bloc Québécois has.”¹⁶⁵ Fortunately, this atypical act was widely criticized, with MP Bill Blaikie calling it “a form of parliamentary McCarthyism”.¹⁶⁶ It did not deter other MPs, including some from the Liberal backbench, from questioning Canada’s handover of the prisoners to American authorities. Those in power must set a democratic tone that does not attempt to tar critics with the deadly brushes of disloyalty or sympathy for terrorists. This is not the time to play the divisive card of telling critics that they must be “for us or against us”. Ministers privy to information that must for valid security reasons remain secret will also have to fight the temptation to play the trump card of “if you knew what I knew”. Civil and open debate about anti-terrorism measures should tolerate and even welcome dissent.

It was healthy for Canadians to debate recent anti-terrorism measures with an acute awareness of our failures in the past, whether these be the inquisitorial royal commission into the Gouzenko affair,¹⁶⁷ the wartime internment and deportation of

politically difficult for elected officials to criticize or oppose hugely popular government policies. John Ashcroft has already told us that those who oppose his policies are giving aid and comfort to the terrorists.

R. Dworkin, “The Threat to Patriotism” *The New York Review of Books* 49:3 (28 February 2002) 44 at 45, online: The New York Review of Books <<http://www.nybooks.com/articles/15145>> (date accessed: 1 November 2002) [hereinafter Dworkin, “Threat”].

¹⁶⁵ *Hansard*, 37th Parl., 1st Sess. (6 February 2002).

¹⁶⁶ D. Leblanc & J. Sallot, “PM Says Critics Are Defending Terrorists” *The Globe and Mail* (7 February 2002) A1 at A13.

¹⁶⁷ As under the investigative hearings of Bill C-36, the suspected spies were required to answer questions. “‘You must answer’, reluctant witnesses were told again and again. ... The suspects were trapped, anxious about self-incrimination, but told in no uncertain terms that they must testify or be punished for their refusal.” Whitaker & Marcuse, *supra* note 105 at 65. Unlike Bill C-36, the suspected spies were detained longer and without access to counsel. They also would only receive use immunity for their compelled statements if they requested such immunity, whereas s. 83.28(10) of the *Criminal Code*, *supra* note 18, provides use and derivative use immunity for all statements compelled at investigative hearings.

Japanese Canadians after Pearl Harbor,¹⁶⁸ the “none is too many” restrictive refugee policy towards Jewish refugees from Nazi Germany,¹⁶⁹ the invocation of the *War Measures Act*¹⁷⁰ during the October Crisis, or the illegal activities committed by the Royal Canadian Mounted Police (“RCMP”) in the name of national security in the wake of the murder of Pierre Laporte and the kidnapping of James Cross in October, 1970.¹⁷¹ Some were critical of the analogies because, as they accurately pointed out,

¹⁶⁸ “Within a week of Pearl Harbour [sic], as firings and acts of vandalism continued apace, irate writers of letters-to-the-editor were demanding that all Japanese be at once interned ...” After internment, Prime Minister King announced, “The government’s intention would be to have these disloyal persons deported to Japan as soon as that is physically possible. Prior to deportation, British subjects, falling within this class, would be deprived of their status as such.” As quoted in K. Adachi, *The Enemy That Never Was* (Toronto: McClelland & Stewart, 1976) at 201, 276. This policy of deporting even Canadian citizens was upheld by the courts in *Cooperative Committee on Japanese Canadians v. Canada* (A.G.), [1947] A.C. 87 (P.C.), aff’g (*sub nom. Reference Re the Validity of Orders in Council ... in Relation to Persons of the Japanese Race*), [1946] S.C.R. 248.

¹⁶⁹ I. Abella & H. Troper, *None is too Many: Canada and the Jews of Europe, 1933-1948* (Toronto: Key Porter, 2000). The safe country agreement initialled between Canada and the United States as part of the smart border agreement has been criticized by the Canadian Council of Refugees as “the none is too many” agreement because of its potential to eliminate claims by the large number of refugee applicants to Canada that first reach North America by way of the United States. This agreement may respond to American perceptions that Canada is a safe haven for terrorists, but it is blunt and overinclusive. It also adversely affects the ability of Canada to determine its own refugee policies and to apply its own laws to those who apply for refugee status in Canada. See K. Jacobs, “The Safe Third Country Agreement: Innovative Solution or Proven Problem?” *Policy Options*, September 2002, 36; J.C. Hathaway & R.A. Neve, “Fundamental Justice and the Deflection of Refugees from Canada” (1996) 34 Osgoode Hall L.J. 213.

¹⁷⁰ R.S.C. 1970, c. W-2. Under the *War Measures Act*, *Public Order Regulation*, S.O.R./70-444, it was illegal to be a member of the Front de Libération du Québec or any other association that advocates force or the commission of crime to achieve governmental change within Canada. It was also illegal to contribute or solicit contributions for an unlawful association or allow such an association to use one’s premises. Evidence that a person attended meetings or spoke publicly in advocacy of the association or on its behalf was, in the absence of evidence to the contrary, proof that he or she was a member of the association. Bill C-36 does not go as far as making membership in terrorist organizations illegal, but it does make illegal many forms of association with and participation in terrorist organizations. It also provides that frequent association with any of the persons who constitute a terrorist group or the use of a name, word, or symbol associated with a terrorist group is relevant evidence in determining whether a person has committed the new offence of participating in the activity of a terrorist group. See *Criminal Code*, *supra* note 18, s. 83.18.

¹⁷¹ These illegal activities included the theft of dynamite, the burning of a barn, and a break and enter to steal the membership lists of the Parti Québécois. See *Certain RCMP Activities*, *supra* note 78 at 207-08. Operation Ham, involving the theft of Parti Québécois membership lists, was conducted because of concerns about foreign and radical involvement in the party and the leaking of information to the party from federal civil servants. J. Sawatsky, *Men in the Shadows: The RCMP Security Service*

Bill C-36 does not contain provisions that authorize equivalent actions. Nevertheless, it is important that we be conscious of past overreactions in times of crisis. Historical analogies can help provide a sense of perspective in times of crisis and a counter-narrative to the powerful narrative of victimization and fear that resulted from September 11.

It was also healthy that the government's strategy of stressing that its legal experts had concluded that Bill C-36 was consistent with the *Charter* did not assuage many critics. Some drafters of Bill C-36 argued that it should be seen as a source of pride and not weakness that the law was drafted with the restraints of the *Charter* in mind.¹⁷² This is fair enough and Bill C-36 may have been more restrained because of *Charter* considerations. Nevertheless, such a defence misses the larger point about the dangers of selling laws as "*Charter*-proof". It is not healthy when criminal justice policy is defined by the minimum standards that the citizens can expect courts to impose on their governments. Consistency with the *Charter* should be seen more as a necessity than sold as a virtue. As Ronald Dworkin has pointed out, there is also an important moral difference between celebrating anti-terrorism measures by arguing "that the requirements of fairness are fully satisfied, in the case of suspected terrorists, by laxer standards of criminal justice which run an increased risk of convicting innocent people," and understanding such standards as unfair, but perhaps regrettably necessary "to protect ourselves from disaster."¹⁷³ The fact that investigative hearings could credibly be presented as "*Charter*-proof" did not take away from their acute challenge to our traditions of adversarial criminal justice.¹⁷⁴ Claims of consistency with the *Charter* generally only speak to whether the legislation itself will be struck down as an unjustified violation of the *Charter* and do not address the more subtle issues of whether the legislation can be applied in a manner that violates *Charter* or common law rights.

(Toronto: Doubleday Canada, 1980) at 239. Sections 25.1 to 25.4 of the *Criminal Code* now provide procedures and authorizations for police officers to commit certain acts that would otherwise be criminal offences.

¹⁷² Remarks of Stanley Colien in "Concluding Comments from the Department of Justice" in Daniels, Macklem & Roach, *supra* note 16, 435 at 440; R.G. Mosley, "Preventing Terrorism. Bill C-36: The Anti-terrorism Act 2001" in Daubney *et al.*, *supra* note 68, 145 at 150. Indeed, the *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4.1, requires the attorney general of Canada to examine legislation for consistency with the *Charter* and empowers the attorney general to report to Parliament that proposed legislation would be unconstitutional. On the failure of the federal attorney general to use this power in several recent cases of "in your face" Parliamentary replies to Supreme Court decisions, see K. Roach, "The Attorney General and the Charter Revisited" (2000) 50 U.T.L.J. 1 at 30-38.

¹⁷³ Dworkin, "Threat", *supra* note 164 at 47.

¹⁷⁴ Roach, "Dangers", *supra* note 97 at 135-38.

Most fundamentally, the defence of Bill C-36 as “Charter-proof” does not address whether the legislation is necessary, effective, or wise.¹⁷⁵

The *Charter*-proofing defence of Bill C-36 is also vulnerable on democratic grounds.¹⁷⁶ If the debate about anti-terrorism measures is to be accessible to the public it must go beyond the complex calculus of the section 1 test or the intricacies of use and derivative use immunity as a means to justify violating the right to silence in investigative hearings. In a democracy it is open for some groups to conclude that the *Charter* had not protected their vigorous forms of dissent in the past and to question the bill even though it has been carefully reviewed by many *Charter* experts and most of it would probably not be struck down by the courts under the *Charter*. Democratic debate has a tendency to be more concerned about whether legislation violates rights and not whether the violation of rights can be justified by the government as a reasonable limit on rights. The groups in our civil society, in Parliament, and in the media who expressed concerns about Bill C-36 were right not to be overawed by the idea that the legislation was “*Charter*-proof”.

The *Charter*-proofing defence of Bill C-36 also looked to the courts as opposed to the agencies of Parliament as the primary means to hold the state accountable for the exercise of its new powers. This is unfortunate, because the courts only provide limited after the fact remedies while the agencies of Parliament can provide prospective reform and ongoing review of the state’s powers. It is unfortunate that Parliament did not follow the recommendation of the Special Senate Committee on Bill C-36 and others and establish an independent officer of Parliament to oversee the implementation of the new legislation or provide additional resources and mandates to existing oversight bodies such as the Security Intelligence Review Committee, the RCMP Complaints Commission, or the Canadian Human Rights Commission.¹⁷⁷ Bill C-36 affirmed the potential of the committee process as committees in both the House of

¹⁷⁵ Bill C-36 falls into the pattern of “reactive and ad hoc” criminal law reform that Stanley Cohen previously recognized was often inspired by the *Charter*. His comments written in 1996 could be applied to Bill C-36: “Distressing events, especially well-publicized events, galvanize politicians and policy makers to legislative action. After the fact reform often implies that the law is, or at least has been powerless to prevent such occurrences—which is not correct—but ultimately there are limits to the ability of the formal law to deter or prevent crime.” S. Cohen, “Law Reform, the *Charter* and the Future of the Criminal Law” in J. Cameron, ed., *The Charter’s Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 345 at 347.

¹⁷⁶ For concerns that the *Charter* may inhibit democratic debate open to all, see generally Mandel, *supra* note 6; Hutchinson, *supra* note 6.

¹⁷⁷ Some concerns were raised on federalism grounds, but these only raise the larger issue of whether it was necessary to give these new anti-terrorism measures to every police officer in the country as opposed to federal agencies such as the RCMP or CSIS.

Commons and the Senate were able to hear from many witnesses representing a variety of perspectives and propose some significant amendments to the bill after it was first introduced. It also hinted at the power that stronger committees and an elected Senate less subject to tight party discipline might have in causing the Cabinet to re-think its initial policies. The criticisms of Bill C-36 that were voiced in the Commons, in the Senate, and even from the government's backbench were a sign of health in our democracy.

Parliament could play an important role in the three-year review of the legislation and its operation, but it must take the initiative both in ensuring that enough evidence has been collected to make the review meaningful and in carefully scrutinizing the costs and benefits of each measure. Parliament should allow the broad range of civil society groups that expressed concerns about Bill C-36 to testify as to their experience under the new law. Parliamentarians should not be overly influenced by unsuccessful *Charter* challenges to Bill C-36, and they should take a good hard look at whether the legislation is necessary and has been administered in a proper fashion. This process, if undertaken in a vigorous manner, should effectively pre-empt the five-year renewable sunsets that have only been attached to the investigative hearing and preventive arrests provisions. The Parliamentary review and sunset provisions in Bill C-36 should help ensure the continued relevance of Parliament in the ongoing debates about anti-terrorism policies.

Opposition in Parliament and civil society produced a more robust testing of Bill C-36 than the aptly named American *Patriot Act* faced as it quickly rolled through Congress by votes of 357 to 66 in the House of Representatives and 98 to 1 in the Senate.¹⁷⁸ The ease with which something can be seen as "un-American", while often a source of strength for our southern neighbours, can be a weakness in times of crisis. Conversely, the perennial difficulty of agreeing on what constitutes Canada can be a strength in times of crisis. I spoke at many public events and on many radio phone-in shows expressing my concerns about Bill C-36 and never once felt that I was being criticized as disloyal or sympathetic to the terrorists. Canadians should be proud of the civility and the openness of the debate about Bill C-36. Significant opposition to anti-terrorism measures is a sign of a vigilant democracy, not a disloyal citizenry.

V. The Challenge of Preserving a Multicultural Democracy

Although there was significant debate about the content of Bill C-36 and in particular its definition of terrorist activities and its effects on liberty, there was not

¹⁷⁸ 147 Cong. Rec. H 7,224 (daily ed.); 147 Cong. Rec. S11,059-60 (daily ed.).

enough debate about how its enforcement would affect certain groups in our multicultural society and its effects on equality. Bill C-36 and to a large extent the public debate that accompanied it remained ominously silent on the issue of the possible targeting or profiling of people as suspects because of their national, racial, or ethnic origins and their religion. This is unfortunate for many reasons, not the least of which is that an unwavering commitment to equality and multiculturalism and a sensitivity to the rights of groups can contribute to a distinctive Canadian democracy.¹⁷⁹ Canada should aspire to non-discrimination in its criminal justice policies so that race and crime do not become as deeply intertwined in Canada as in the United States. Thus the importance of both the government's¹⁸⁰ and the courts'¹⁸¹ commitments to end Aboriginal overrepresentation in our jails, as well as vigilance that no other group in Canadian society become an underclass that is presumptively suspect of crime.

It is unfortunate that the American *Patriot Act* expressed a greater concern about the dangers of profiling than the Canadian *Anti-terrorism Act*. The former condemned discrimination against Arab Americans, Muslim Americans, and Americans from South Asia and affirmed that "the concept of individual responsibility for wrongdoing is sacrosanct in American society and applies equally to all religious, racial, and ethnic groups."¹⁸² One will read Bill C-36's many pages in vain for an equivalent symbolic statement. The government decided not to follow the recommendations of its Special Senate Committee and its own MP Irwin Cotler that a non-discrimination

¹⁷⁹ As George Grant argued: "One distinction between Canada and the United States has been the belief that Canada was predicated on the rights of nations as well as on the rights of individuals." Grant, *Lament*, *supra* note 15 at 21-22.

¹⁸⁰ The government has committed itself to ending Aboriginal overrepresentation in jail within a generation. See *House of Commons Debates* (30 January 2001) at 14-15 (Speech from the Throne). It has also included provisions in s. 718.2(e) of the *Criminal Code* and s. 38(2)(d) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, requiring judges to pay particular attention to the circumstances of Aboriginal offenders when considering whether sanctions other than imprisonment are reasonable in the circumstances.

¹⁸¹ *R. v. Gladue*, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385 (need to consider Aboriginal overrepresentation in sentencing).

¹⁸² *Patriot Act*, *supra* note 47, §102(a)(3). Note that these are, however, unenforceable "findings of Congress" and widespread concerns about the profiling and detention of people of Arab origins and the Muslim religion have been raised. Amnesty International has said "that many of the 1,200 people swept up in the post-Sept. 11 investigation have been detained arbitrarily and deprived of basic human rights." E. Oziewicz, "Many Foreign Nationals Still Imprisoned in U.S." *The Globe and Mail* (18 March 2002) A8. Canadians should also not be complacent as there are reports of immigration centres also containing large numbers of detainees who fit specific ethnic and religious profiles since September 11. S.J. Toope, "Fallout from '9-11': Will a Security Culture Undermine Human Rights?" (2002) 65 Sask. L. Rev. 281 at 286.

clause, such as that contained in paragraph 4(b) of the *Emergencies Act*, be added to Bill C-36. A non-discrimination clause, like the American condemnation of discrimination, would have been a largely symbolic statement of opposition to discriminatory forms of enforcement of the many new powers provided in the legislation. In itself it would not provide effective oversight or remedies, but it would have countered some post-September 11 public support for racial and religious profiling.¹⁸³ A more robust approach would have prohibited profiling as a law enforcement technique on the grounds that it is both discriminatory and inefficient, and would have provided for the collection of statistics in order to determine whether the new powers of Bill C-36 are disproportionately being used against certain groups.¹⁸⁴ As it stands now, Bill C-36 provides no assurances to those in Canada who may feel they are targeted or suspected simply because they are perceived to be of the same race or religion as the September 11 terrorists. Unfortunately, the contextual approach to law reform that produced Bill C-36 was not accompanied by the same contextual recognition that Canadians will not bear the burdens and risks of Bill C-36 equally.¹⁸⁵ During its three-year review of the legislation, Parliament should consider whether racial and religious profiling has occurred with respect to anti-terrorism measures. It should revisit its regrettable decision not to include a non-discrimination provision in Bill C-36, and it should seriously consider more robust approaches to prevent and remedy racial or religious profiling in the administration of all anti-terrorism measures.

Conclusion

I do not deny that Canadian law, courts, sovereignty, and democracy all face difficult challenges in the wake of the awful crimes of September 11. But the idea that September 11 changed everything must be rejected. It must be rejected not only to preserve our Canadian values, but also to do justice to the world that existed before that awful day. Well before September 11, we had entered a realm in which it was clear that neither fundamental principles of the law, nor the courts, nor the border would save us from ourselves. The lack of guarantees does not mean that the struggle

¹⁸³ Some of this support is described and criticized in Choudhry, "Protecting Equality", *supra* note 76.

¹⁸⁴ Roach & Choudhry, "Brief", *supra* note 67.

¹⁸⁵ It is not enough to rely on after the fact litigation that may provide negligible remedies for innocent victims of profiling. Victims of discriminatory profiling will have few effective remedies. If incriminating evidence is found and a *Charter* violation is established, it may possibly be excluded under s. 24(2) of the *Charter*. The factually innocent victim of profiling, however, will probably receive only modest financial compensation. See S. Choudhry & K. Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2003) 41 *Osgoode Hall L.J.* [forthcoming].

to preserve fundamental legal principles, a healthy democracy, or Canadian sovereignty are futile; indeed it makes the struggle more pressing and vital. That we have seen and survived similar threats in the past also provides some grounds for cautious optimism.

The pessimistic conclusion that September 11 has set us on the fast road to assimilation with the United States should also be rejected. George Grant was wrong when he declared Canadian sovereignty to be dead in the wake of the Cuban Missile Crisis. At various times in our history, we have pulled closer to the United States, often to step back or find other means to differentiate ourselves. Since Grant's time, Canada has often taken a very different approach to many issues of foreign policy, criminal justice, and international law than the United States. Nevertheless, angry nationalists like Grant play an important role in both remembering and imagining a distinctive path for Canadian democracy. The struggle to differentiate ourselves from the Americans has become more difficult since September 11, but it must continue. Rather than lamenting a nation lost, we should struggle to preserve and recreate one.

Canadians should be heartened by the robust (albeit too rushed) process of public and legislative debate that accompanied the enactment of Bill C-36. Many groups in civil society, assisted by the media, the bar, and the academy, voiced their concerns about legislative overreaction. This sort of vigilant and critical democratic debate made some difference in the final product and compares favourably to the fevered process that resulted in the American *Patriot Act*. But we can and must do better. We should not have disparaged the strength of our existing criminal law—including its bedrock principle that no motive excuses violence—to respond to terrorism. We must be candid about the limited ability of the criminal law to prevent suicide bombings and other acts of terrorism, and we must be creative in searching for more effective but less intrusive means to prevent terrorism and to integrate the threat of terrorism to the many other threats and risks we face.

We must celebrate an overtly anti-majoritarian judicial role as not only consistent with but crucial to our democracy. Canadian foreign policy should maintain its traditional post-war commitments to peacekeeping, development, and the utmost respect for international law. Our democratic debate should avoid the temptation of blame, divisiveness, and an us versus them mentality. The multicultural nature of Canadian society should be a source of strength and pride, not alarm or division, and we should do all that we can to avoid making any group in Canadian society feel that they are presumptively associated with and suspected of any crime, including terrorism. We should have paid more attention to the anti-discrimination principle in the debates about Bill C-36 and more attention to international law in our post-September 11 foreign policies. Hopefully these principles, as well as practical considerations of the limited efficacy of both the criminal law and *Charter* challenges, will emerge as important contextual considerations when Bill C-36 is subject to Parliamentary review a few years from now.
